

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

DECISION ON JURISDICTION

ICSID CASE No. ARB/01/12

AZURIX CORP.

Claimant

v.

THE ARGENTINE REPUBLIC

Respondent

Before the Arbitral Tribunal composed by:

Dr. Andrés Rigo Sureda (President)

Sir Elihu Lauterpacht, C.B.E. Q.C. (Arbitrator)

Dr. Daniel H. Martins (Arbitrator)

Secretary of the Tribunal

Claudia Frutos-Peterson

Washington, D.C., December 8, 2003

TABLE OF CONTENTS

I.	PROCEDURAL BACKGROUND	4
II.	THE FACTS.....	10
III.	POSITIONS OF THE PARTIES	11
1.	First objection to jurisdiction - agreement to the jurisdiction of the courts of La Plata and waiver of all other fora.....	12
2.	Second objection to jurisdiction – the dispute submitted by Azurix has already been submitted to the courts of Argentina under Article VII of the BIT (“fork-in-the-road” argument)	19
3.	Azurix does not have <i>ius standi</i>	22
4.	Additional consequences alleged by Argentina	23
5.	Additional request	24
IV.	APPLICABLE LAW.....	25
V.	CONSIDERATIONS	26
1.	Preliminary Considerations.....	26
a)	Attempt at amicable settlement.....	29
b)	Consent by the parties to the jurisdiction of ICSID	30
c)	National of another Contracting Party	30
d)	Legal dispute	31
e)	Dispute arising directly out of an investment.....	31
2.	<i>Ius standi</i>	36
3.	First objection to jurisdiction - agreement to the jurisdiction of the courts of La Plata and waiver of all other fora.....	40
4.	Second objection to jurisdiction – the dispute has already been submitted to the courts of Argentina under Article VII of the BIT (“fork-in-the-road” argument)	45
5.	Alleged additional consequences	49

a) <i>Forum non conveniens</i>	49
b) Determination of the scope of rights under the Concession Agreement and performance of regulatory functions.....	50
c) Abuse of process	50
d) Economic impact.....	51
e) <i>Alter ego</i> issue	51
f) Double recovery	52
VI. DECISION	52

DECISION ON JURISDICTION

I. PROCEDURAL BACKGROUND

1. On September 19, 2001, the Claimant, Azurix Corp., a corporation incorporated in the State of Delaware of the United States of America (hereinafter “Azurix” or “the Claimant”), filed a request for arbitration against the Respondent, the Argentina Republic (hereinafter “Argentina” or “the Respondent”), with the International Centre for Settlement of Investment Disputes (hereinafter the “Centre”). Azurix claims that Argentina has violated obligations owed to Azurix under the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America (hereinafter “the BIT”; bilateral investment treaties in general will be referred to as BITs), international law and Argentine law in respect of Azurix’s investment in a utility which distributes drinking water and treats and disposes of sewerage water in the Argentine Province of Buenos Aires. Azurix alleges such breaches were made by Argentina both directly through its own omissions and through the actions and omissions of its political subdivisions and instrumentalities.

2. The Secretary-General of the Centre registered Azurix’s request for arbitration on October 23, 2001. On November 12, 2001, the parties agreed the Tribunal would consist of three arbitrators, one to be appointed by each party and the third arbitrator and President of the Tribunal to be appointed by the Chairman of the Administrative Council of the Centre. Accordingly, Sir Elihu Lauterpacht, C.B.E. Q.C. and Dr. Daniel H. Martins were appointed arbitrators by the parties and Dr. Andrés Rigo Sureda was appointed President after consultation

with the parties. On April 8, 2002, the Tribunal was deemed to have been constituted and the proceedings to have commenced. On the same date, in accordance with ICSID Administrative and Financial Regulation 25, the parties were notified that Ms. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal. The Tribunal held its first session in Washington D.C. on May 16, 2002.

3. Mr. R. Doak Bishop of King & Spalding and Mr. Guido Santiago Tawil of M & M Bomchil represent the Claimant, and Mr. Bishop represented the Claimant at the first session. Dr. Horacio Daniel Rosatti, Procurador del Tesoro de la Nación Argentina, represents the Respondent, and Mr. Hernán Cruchaga and Ms. Andrea G. Gualde of the Procuración del Tesoro de la Nación, Buenos Aires, acting on instruction from the then Procurador del Tesoro de la Nación, Dr. Ruben Miguel Citara, represented the Respondent at the first session.

4. At the first session, the parties agreed that the Tribunal had been properly constituted and that they had no objection to any of the members of the Tribunal, and it was noted that the proceedings would be conducted under the ICSID Arbitration Rules in force since September 26, 1984 (hereinafter “the Arbitration Rules”). In respect of the pleadings to be filed by the parties, their number, sequence and timing, it was announced after consultation with the parties that the Claimant would file its Memorial within 150 days of the date of the first session, the Respondent would file its Counter-Memorial within 150 days of the date of receipt of the Memorial, the Claimant’s Reply would be filed within 60 days of the date of receipt of the Counter-Memorial, and the Respondent’s Rejoinder would be filed within a further 60 days of its receipt of the Reply. It was further noted by the Tribunal that, in accordance with the Arbitration Rules, the Respondent had the right to raise any objections it might have to jurisdiction no later

than the expiration of the time limit fixed for filing its Counter-Memorial. If such objection to jurisdiction were made by the Respondent, it was agreed that the above timetable would be resumed following the resumption of any proceedings on the merits.

5. Azurix filed its Memorial on October 15, 2002, claiming that Argentina had breached the BIT by expropriating its investment by measures tantamount to expropriation without prompt, adequate and effective compensation (Article IV(1)), by failing to accord to it fair and equitable treatment, full protection and security, and treatment required by international law (Article II(2)(a)), by taking arbitrary measures that impaired Azurix's use and enjoyment of its investment (Article II(2)(b)), by failing to observe obligations Argentina entered into with regard to Azurix's investment (Article II(2)(c)), and by failing to provide transparency concerning the regulations, administrative practices and procedures and adjudicatory decisions that affect Azurix's investment (Article II(7)). In addition, Azurix requested orders for the payment of compensation for all damages suffered and the adoption by Argentina of all necessary measures to avoid further damages to Azurix's investment. Azurix expressly reserved its right to request the decision of provisional measures under Article 47 of the ICSID Convention and Arbitration Rule 39.

6. On March 7, 2003, Argentina filed a Memorial on jurisdiction raising two objections to the Tribunal's jurisdiction. The first was that Azurix agreed to submit this dispute to the courts of the city of La Plata and waived any other jurisdiction and forum; the second was that Azurix had already made a forum selection under Article VII of the BIT by submitting the dispute to Argentine courts.

7. In accordance with Arbitration Rule 41(3), the Tribunal suspended the proceeding on the merits on March 12, 2002, and set dates for filing pleadings on jurisdiction: Azurix to file a Counter-Memorial on jurisdiction within 60 days of receipt of Argentina's Memorial on jurisdiction; Argentina to file a Reply with 30 days of receipt of the Counter-Memorial, and Azurix to file its Rejoinder within a further 30 days of receipt of Argentina's Reply.

8. By letter dated March 12, 2003, Azurix requested the Tribunal to join the jurisdictional issue to the merits. On March 21, 2003, the Tribunal invited Argentina to comment on this request. The Tribunal received Argentina's observations on March 27, 2003. Azurix replied to Argentina's observations on April 2, 2003, and the Tribunal confirmed, on April 4, 2003, that the proceedings on the merits would remain suspended until the jurisdictional issue had been addressed.

9. Azurix filed its Counter-Memorial on jurisdiction on May 13, 2003.

10. On June 10, 2003, Argentina requested an extension for filing its Reply on jurisdiction until August 4, 2003 because of the institutional succession in the Argentine government. Taking into account the circumstances, and after having given the Claimant an opportunity to comment on the request, the Tribunal granted it on June 16, 2003, and informed the parties that the Claimant would be entitled to an equivalent extension if requested.

11. Dr. Horacio Daniel Rosatti informed the Tribunal, on July 1, 2003, that he had been appointed Procurador del Tesoro de la Nación.

12. Azurix filed a request for provisional measures on July 15, 2003 (dated July 14, 2003), subsequently supplemented by two letters dated July 21 and 28, 2003. The request sought a provisional measure recommending that Argentina refrain from incurring by itself or through any of its political subdivisions in any action or omission capable of aggravating or extending the dispute, taking into account especially the reorganization of Azurix's Argentine subsidiary, Azurix Buenos Aires S.A. (hereinafter "ABA"), or any other measure having the same effect.

13. At the request of the Tribunal, Argentina filed observations on Azurix's request for provisional measures on July 24, 2003, seeking dismissal of the request for provisional measures together with costs and requesting that the Tribunal request the Claimant to produce an original copy of the Decision of the Appeals Chamber of the Province of Buenos Aires.

14. The Tribunal, in a decision of August 6, 2003, rejected Azurix's request for provisional measures, considering that, in the circumstances of the case and at that stage of proceedings, it was not in a position to recommend the specific measure requested or to propose others with the same objective. The Tribunal did, however, invite the parties to abstain from adopting measures of any character which could aggravate or extend the controversy submitted to arbitration, and took note of statements made by Argentina affirming that the Province of Buenos Aires (hereinafter "the Province") recognizes that the receivables for services rendered by ABA before March 7, 2002 belong to ABA, and that those collected or to be collected in the future have been or will be deposited in a special banking account, and that the situation described in Azurix's request would not affect the enforceability or execution of any award rendered on the merits. The Tribunal postponed its decision on costs in respect of the

provisional measures request to a later stage of the proceedings and considered it unnecessary to request the Claimant to furnish the Tribunal with the Decision of the Appeals Chamber.

15. Argentina filed its Reply on jurisdiction on August 4, 2003. Azurix filed a Rejoinder on jurisdiction on August 29, 2003.

16. The hearing on jurisdiction took place in London on September 9 and 10, 2003. The parties were represented by Messrs. R. Doak Bishop, Guido Santiago Tawil, Ignacio Minorini Lima and Craig S. Miles, on behalf of the Claimant. Messrs. Carlos Ignacio Suárez Anzorena, and Jorge Barraguirre, and Ms. Beatriz Pallarés, from the Procuración del Tesoro de la Nación, and Mr. Osvaldo Siseles, from the Secretaría Legal y Administrativa del Ministerio de Economía y Producción, represented the Respondent.

17. At the hearing, the Respondent requested that the Tribunal, should it decide that it has jurisdiction, increase to 90 days the deadline for the Respondent to file its Counter-Memorial on the merits. The President of the Tribunal invited the representatives of the Claimant to comment on the request. They opposed the request, having regard to the extensions already granted to the time periods agreed for the submission of memorials at the first session. During the hearing the Tribunal informed the parties that it took note of the request of the Respondent and the observations made by the Claimant and that it would decide this matter at a later date.

18. On October 14, 2003, the Tribunal followed up on the petition of Argentina under Article 1 of the Protocol of the BIT that the Claimant produce evidence of ownership or control of the investment consistent with Article I(1)(a) of the BIT. On October 21, 2003, the Claimant complied with the Tribunal's request.

II. THE FACTS

19. In 1996 the Province commenced the privatization of the services of Administración General de Obras Sanitarias de la Provincia de Buenos Aires (hereinafter “AGOSBA”), the Province owned and operated company which provided potable water and sewerage services in the Province. The Province passed Law 11.820 to create the regulatory framework for privatization of AGOSBA’s water services. The future operator of the water services would be granted a concession which would be overseen and regulated by a new regulatory authority established for the purpose, Organismo Regulador de Aguas Bonaerense (hereinafter “ORAB”). The concessionaire was required to be a company incorporated in Argentina.

20. The privatization process was conducted by the Privatization Commission, which tendered the concession on the international market on the basis of Law 11.820 and of a set of contract documents prepared in accordance with the same law by ORAB, including the Bidding Terms and Conditions and a draft Concession Agreement.

21. The bid offer was made by two companies of the Azurix group of companies established for this specific purpose, Azurix AGOSBA S.R.L. (hereinafter “AAS”) and Operadora de Buenos Aires S.R.L. (hereinafter “OBA”). AAS and OBA are indirect subsidiary companies of Azurix. AAS is registered in Argentina and is 0.1% owned by Azurix and 99.9% owned by Azurix Argentina Holdings Inc. (a company incorporated in Delaware), which in turn is 100% owned by Azurix. OBA, also registered in Argentina, is 100% owned by Azurix Agosba Limited which is registered in the Cayman Islands, and which is in turn 100% owned by

Azurix Agosba Holdings Limited, also registered in the Cayman Islands. Azurix owns 100% of the shares in Azurix Agosba Holdings Limited.

22. Having successfully won their bid, AAS and OBA incorporated ABA in Argentina to act as concessionaire. On June 30, 1999, ABA paid a “canon payment” of 438,555,554 Argentinean pesos (hereinafter the “Canon”) to the Province.¹ On payment of the Canon, ABA, AGOSBA and the Province executed the Concession Agreement which granted ABA a 30 year concession for the distribution of potable water and the treatment and disposal of sewerage in the Province. Handover of the service took place on July 1, 1999.

III. POSITIONS OF THE PARTIES

23. The Respondent makes two principal objections to jurisdiction:

-Azurix agreed to the jurisdiction of the courts of La Plata over all disputes and waived all other fora: - all the contractual documentation relevant to the investment provides for the jurisdiction of the administrative courts of La Plata (provincial courts) and waives the jurisdiction of any other forum or jurisdiction, including that of an ICSID tribunal; and

-“fork-in-the-road” argument under Article VII of the BIT: - by its *alter ego* ABA, Azurix has made an election under Article VII of the BIT to submit the dispute to the jurisdiction of the local courts of the Argentine Republic by pursuing judicial review and legal proceedings in those fora.

¹ At the time the Canon was paid the Argentine Peso was fixed in a one to one ratio with the United States dollar. The Argentine Peso was pegged to the US dollar until December 31, 2001, when “pesification” was implemented by Argentina in response to its economic crisis.

24. The Respondent also claims that the Claimant has no *ius standi* to bring this dispute before the Tribunal since it is an indirect shareholder of ABA.

25. In the course of arguing the two principal objections, the Respondent raises a number of incidental points, primarily in respect of assumed consequences if the Tribunal finds it has jurisdiction. These points appear to raise distinct issues not necessarily related to the objection headings under which they are made and therefore the Tribunal will address them separately.

1. First objection to jurisdiction - agreement to the jurisdiction of the courts of La Plata and waiver of all other fora

26. Each of the forum selection clauses in the contractual documentation relating to the investment provides for all disputes under or relating to the Concession Agreement to be submitted to the courts for contentious-administrative matters of the city of La Plata:

-Clause 1.5.5 of the Bidding Terms and Conditions (hereinafter “the Bidding Terms”), “Commitments”, provides for the exclusive jurisdiction of the courts for contentious-administrative matters of the city of La Plata “for all disputes that may arise out of the Bidding, waiving any other forum, jurisdiction or immunity that may correspond.”²

-Clause 2.16 of the Bidding Terms, “Jurisdiction”, provides that the “court for contentious-administrative matters of the city of La Plata shall have

² Argentina’s Memorial on Jurisdiction, para. 34. (Emphasis in the original).

jurisdiction over all matters arising out of the Bidding, waiving any other forum, jurisdiction or immunity that may correspond.”³

-Clause 16.7 of the Concession Agreement provides that “In the event of any dispute regarding the construction and execution of the Agreement, the Grantor [the Executive Authorities of the Province of Buenos Aires] and the Concessionaire [ABA] submit to the court for contentious-administrative matters of the city of La Plata, expressly waiving any other forum or jurisdiction that may correspond due to any reason.”⁴

-The Claimant itself agreed in the commitment letters titled “Commitment and Guarantee of the Operator’s Controlling Company” and the “Commitment Letter and Guarantee of the Group’s Controlling Company” (hereinafter “the Commitment Letters”) that “we submit to the jurisdiction of the courts ... of the city of La Plata ... in the event of any dispute arising out of the application or interpretation of these presents and expressly waive any other forum or jurisdiction.”⁵

-The Privatization Commission stated in Clarifying Circular 11(A) that the jurisdiction of any disputes between the parties is the courts of the city of La Plata, and clarified that the Bidding Terms expressly provide a waiver of any other forum or jurisdiction. The statement was made in response to the question of one bidder which, noting the jurisdiction clause in the Bidding Terms, requested clarification that Argentina would keep its

³ Ibid., para. 35. (Emphasis in the original).

⁴ Ibid., para. 38. (Emphasis in the original).

⁵ Ibid., paras. 39-45. (Emphasis in the original).

commitments under BITs to which it is a party and which provide for international arbitration.⁶

27. (The Bidding Terms, the Concession Agreement, the Commitment Letters and the Clarifying Circular 11(A) will hereinafter be referred to as the “Contract Documents”).

28. The Respondent disagrees with recent arbitral precedents⁷ which have held that contractual jurisdiction clauses do not preclude the jurisdiction of international tribunals under an international treaty on the grounds that they fail to recognize the *pacta sunt servanda* principle, and ignore the contract terms the parties have agreed to as well as Article 26 of the ICSID Convention “which allows the agreement to the contrary regarding the presumption that all local remedies must not be exhausted.”⁸

29. The Respondent further argues that, in any event, this case is distinguishable from the recent case law cited because of the express waiver of any forum other than the courts of the city of La Plata for issues related to the Concession Agreement, and such waiver includes the possibility of reference to international arbitration of a dispute under the Concession

⁶ Ibid., paras. 46-48.

⁷ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, (ICSID Case No. ARB/97/3) 16 *ICSID Rev.-FILJ* 641 (2001), *Salini Costruttori S.p.A. et Italstrade S.p.A v. Kingdom of Morocco*, (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001, 129 *Journal de Droit International* (2002), and *Lanco International Inc. v. Argentine Republic*, Preliminary Decision on Jurisdiction, 8 December 1998, 5 *ICSID Rep.* 367 (hereinafter *Vivendi I*, *Salini* and *Lanco*, respectively), paras. 53 and ff of Argentina’s Memorial on Jurisdiction.

⁸ Argentina’s Memorial on Jurisdiction, paras. 58-59. Article 26 of the ICSID Convention provides that “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention”.

Agreement.⁹ The Claimant was aware of the scope of the agreed waiver.¹⁰ The Respondent refers to the Calvo Clause and argues, citing the late Judge Jessup, that rights under international law that pertain to an individual can be waived by the individual, that is, Azurix can and did waive its rights under the BIT. Argentina cites *Woodruff v. Venezuela* (hereinafter *Woodruff*)¹¹ and *North American Dredging Company of Texas v. United Mexican States* (hereinafter *North American Dredging*)¹² as authority supporting its argument that a specific waiver of jurisdiction in a contract overrides the jurisdiction of an international tribunal under a treaty, and that an individual can waive such rights, other than those relating to diplomatic protection and denial of justice.¹³

30. The Respondent also contends that the Claimant is bound by the terms of the Bidding Terms and Conditions and the Concession Agreement through its owned subsidiaries, AAS and OBA, which took part in the bidding because: (a) the companies “were simply instrumentalities and constituted a simple *alter ego*”; (b) Azurix itself made written representations during the bidding process in the form of the Commitment Letters; and (c) Azurix acknowledged the “direct connection” by the wording it used in its Memorial.¹⁴

⁹ Ibid., para. 60.

¹⁰ Ibid., para. 61.

¹¹ *Woodruff v. Venezuela*, *RIAA*, volume IX, Hague ICJ Register, p. 213.

¹² *North American Dredging Company of Texas v. United Mexican States*, *RIAA*, volume IV, Hague ICJ Register, p. 26.

¹³ Argentina’s Memorial on Jurisdiction, paras. 62-73.

¹⁴ Ibid., paras. 55-57.

31. In its Counter-Memorial on jurisdiction the Claimant rejected Argentina's allegations. To summarize the Claimant's arguments, the jurisdiction and waiver provisions of the Contract Documents are limited to normal breach of contract claims and do not require submission of a BIT claim to local courts, and Argentina ignores the distinction between the host State party's obligations under a BIT in respect of an investment in that State and the obligations contained in the contract documentation underlying the investment.

32. The Claimant continues: the terms of the jurisdiction clause in the Bidding Terms limit the jurisdiction clause to "disputes arising under the Bidding Terms", and "Bidding" is defined as the "selection procedure that is governed by the Bidding Terms until the Concession Agreement is signed", so the Terms no longer applied once the Concession Agreement entered into force.¹⁵ Similarly, the jurisdiction clause of the Concession Agreement applies to disputes regarding "the construction and execution of the [Concession] Agreement", that is, it does not apply to claims arising under the BIT.¹⁶ The Commitment Letters' jurisdiction provisions relate only to "these presents", i.e., the undertakings required to ensure that OBA had the requisite technical knowledge or access to it and that Azurix would abstain from changing the ownership structure of ABA for six years and keep the Province reasonably informed of changes in common control for a period of twelve years from the date of the Concession Agreement. The Commitment Letters did not bind Azurix to the Bidding Terms or the Concession Agreement.¹⁷

¹⁵ Claimant's Counter-Memorial on Jurisdiction, paras. 34-38.

¹⁶ Ibid., paras. 40-41.

¹⁷ Ibid., paras. 45-50.

33. Moreover, there is no mutuality between the ABA's current claims before the local courts and Azurix's claim before the Tribunal under the Convention because both the claims and the parties are different: (i) the parties to the Bidding Terms are the Province, AAS and OBA, not Azurix and Argentina; (ii) the Commitment Letters signed by Azurix (the only Contract Documents signed by Azurix) were undertakings to ensure OBA complied with its obligations as the qualified technical operator under the Bidding Terms; (iii) Argentina is not a beneficiary of the undertakings given by Azurix in the Commitment Letters; and (iv) the Concession Agreement was signed by the Province, AGOSBA and ABA, the latter being the Argentine incorporated subsidiary appointed concessionaire under the Agreement as required by the Bidding Terms.¹⁸

34. Further, clarifying Circular 11(A) cannot have the effect attributed to it by Argentina because: (i) the Privatization Commission did not answer the question put to it; (ii) both the question and the answer related to the Bidding Terms only; (iii) any waiver of investment rights must be express and unequivocal (citing *North American Dredging*) and no such express and unequivocal waiver can be found in the question and answer in Circular 11(A); (iv) the provincial body which answered the question in Circular 11(A), the Privatization Commission, was unable to modify or repeal treaty commitments entered by Argentina; (v) treaties prevail over local regulations and the Province lacks the capacity to alter or rescind treaty obligations; and (vi) only Argentina can decide whether its constituent subdivisions or agencies

¹⁸ Ibid., paras. 22-26.

may have standing before an ICSID tribunal, and no such designation was made by Argentina in respect of the Province.¹⁹

35. Additionally, under Argentina's constitutional structure, local provincial courts lack both subject matter and personal jurisdiction over the Federal Government to entertain BIT claims – only federal courts have such jurisdiction. Therefore, the scope of the choice of forum provisions is limited to contract claims.²⁰ In any case, Azurix has the choice under Article VII.2(3) of the BIT to submit its dispute to ICSID or in accordance with any pre-agreed dispute settlement procedure.²¹

36. According to the Claimant, ICSID tribunal decisions in *Lanco* and *Salini*, the award in *Vivendi I*, and the decisions of the *ad hoc* Committees in respect of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (hereinafter “*Vivendi II*”)²² and *Wena Hotels Ltd v. Egypt*²³ support a finding of jurisdiction in this case.²⁴

¹⁹ *Ibid.*, paras. 54-80.

²⁰ *Ibid.*, paras. 82-89, and 91-92.

²¹ *Ibid.*, paras. 93-101.

²² *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision of the *ad hoc* Committee of July 3, 2002, 41 *ILM* 1135 (2002).

²³ *Wena Hotels Ltd v. Egypt*, Decision of the *ad hoc* Committee of February 5, 2002, 41 *ILM* 933 (2002).

²⁴ Claimant's Counter-Memorial on Jurisdiction, paras. 102-148.

2. Second objection to jurisdiction – the dispute submitted by Azurix has already been submitted to the courts of Argentina under Article VII of the BIT (“fork-in-the-road” argument)

37. Argentina argues that the Tribunal’s jurisdiction is excluded because Azurix has already submitted this dispute to the Argentine courts and thus exercised the jurisdictional option under Article VII of the BIT. Five administrative appeals (twelve since then)²⁵ have been made by ABA and the dispute between the ABA and the Province over the termination of the Concession Agreement has been submitted to the Court of Justice of the Province. Further, Argentina claims that Azurix and ABA acknowledge in their pleadings in the case before that Court that the basis of the legal action is identical to that brought before the ICSID Tribunal.²⁶

38. In response, the Claimant alleges that Argentina overlooks the existence of causes of action before the Tribunal which are independent of the Concession Agreement and erroneously concludes that Azurix has submitted claims to administrative tribunals and provincial courts for the purposes of the BIT. Furthermore, the parties and subject matter of the proceedings before the Argentine courts and the Tribunal are not the same.²⁷

39. The Claimant disputes that ORAB - the body hearing the administrative review claims - qualifies as a court or administrative tribunal for the purposes of Article VII of the BIT and Argentine law.²⁸ ORAB was constituted as a regulator, not as a judicial body with power to

²⁵ Argentina’s Memorial on Jurisdiction, paras. 78-79 and footnote 69 in Claimant’s Rejoinder on Jurisdiction.

²⁶ Ibid., paras. 80-85.

²⁷ Claimant’s Counter-Memorial on Jurisdiction, paras. 154, 159 and ff.

²⁸ Ibid., para. 158.

determine disputes; and, in respect of ABA, it is only reviewing prior decisions it has made and is not acting as an impartial judicial body. Argentine federal courts have held that bodies constituted in the same way as ORAB lack the capacity to exercise judicial type functions, except in specific circumstances. Even where they do, the courts have been reluctant to label them as “administrative tribunals”, and exercise of any such power is limited to disputes between private parties. In any case, Azurix’s rights under the BIT were not involved in any way in the reviews.²⁹

40. The Claimant further alleges that the request for arbitration was filed with the Centre before the local court proceedings were initiated and therefore, under the terms of the jurisdiction provisions of the BIT, no choice of fora can be implied by Azurix’s action.³⁰ In any case, ABA filed the local action specifically to protect its position under provincial law.³¹ It has asked the court to abstain from pursuing the proceeding any further because Azurix has chosen to pursue arbitration under the BIT before an ICSID Tribunal³² although Azurix acknowledges that “the BIT does not impose any requirement on ABA to waive or suspend its claims before local courts in order for Azurix to pursue its separate and independent claims for violations of the

²⁹ Ibid., paras. 167-175.

³⁰ Ibid., paras. 180-182. See also footnote 69 in Claimant’s Rejoinder on Jurisdiction for a list of cases before the Supreme Court of the Province.

³¹ Ibid., para. 183.

³² Ibid., paras. 183-186.

BIT before ICSID”.³³ In any case, ABA is obligated under the relevant company legislation to take all possible legal action necessary to protect its shareholders.³⁴

41. In its Rejoinder, Argentina’s reply to Azurix’s arguments in so far as it raises new points not previously made by Argentina, can be summarized as follows:

-Azurix’s assertion that the Province cannot limit or modify any international agreement is basically true but it is irrelevant because Azurix was free to contract out of its rights (by way of waiver) as an investor under the BIT, which it did. The possibility of such a waiver has been acknowledged by the *Ad hoc* Committee in *Vivendi II*. Argentina has not alleged that Azurix has waived the ICSID jurisdiction as such, but that it has “waived the right to put forward controversies in terms of said investments related to the interpretation and performance before the forums set forth under the Treaty” and this cannot be recast by Azurix as a refusal to apply the law by Argentina (because the Provincial courts do not have jurisdiction over Argentina). In any case, Azurix has a remedy through ABA using the mechanisms in the Concession Agreement.³⁵

-Argentina refutes Azurix’s claim that the court actions before the Province were exclusively aimed at protecting its legal position because: (i) ABA is requesting an order nullifying ORAB’s regulatory decisions; (ii) the filings before both tribunals are identical as to their substance; and (iii) ABA is not protecting its shareholders.³⁶

³³ Ibid., para. 198.

³⁴ Ibid., paras. 187-188.

³⁵ Argentina’s Rejoinder on Jurisdiction, paras. 93-108.

³⁶ Ibid., paras. 128-131.

3. Azurix does not have *ius standi*

42. In its Rejoinder, Argentina has raised, as a subsidiary objection that, if Azurix is not one and the same personality as ABA - in which case it would be a party to ABA's agreements as to jurisdiction of the courts of La Plata and the waiver of other dispute settlement fora - then it is only a shareholder of ABA with no *ius standi* to bring this dispute under the BIT. Argentina is claiming that Azurix is "trying to have it both ways": Azurix is "washing its hands" of its subsidiaries' obligations by using the BIT to penetrate the juridical personalities of the local companies yet also attempting to cut loose from the jurisdictional commitments entered by those companies on the basis of its separate legal identity. In Argentina's view, Azurix's subsidiaries are *alter egos* and, therefore, it cannot cut itself free of the contractual commitments entered by those companies.³⁷

43. If, on the other hand, Azurix is only a shareholder of ABA, it lacks *ius standi* to put forward indirect claims relating to such company's contractual rights. Argentina notes in its Rejoinder on Jurisdiction that in general BITs have not modified the rule that shareholders are not entitled to bring claims for damages suffered by the company in which they have shares (indirect claims). Argentina argues that under Articles 1(a)(ii), II(4) and VII(8) of the BIT the local companies are an investment and can be parties to ICSID procedures. If Azurix does not argue that ABA is an "investment" within the BIT definitions, then its only investment is the

³⁷ Ibid., paras. 3-4, 16.

shares in ABA and, accordingly, it has no *ius standi* to claim for damages sustained by ABA for alleged breaches of contract.³⁸

44. In response, Azurix claims that, under Arbitration Rule 41, the *ius standi* objection should have been first raised by Argentina in its Memorial on jurisdiction and, therefore, it is untimely. Any entitlement Argentina had to raise the objection was waived when it failed to do so.³⁹ Nonetheless, Azurix rejects these contentions, relying on the terms of the Convention and the BIT to show that it has standing to bring this dispute before the Tribunal.

4. Additional consequences alleged by Argentina

45. In addition to the arguments outlined above, Argentina makes a number of additional points which, because they do not obviously fall under the objections of *ius standi* headings, the Tribunal will deal with them separately. Most of the points made are assumed consequences of the Tribunal finding that it has jurisdiction. The Tribunal summarizes these points as follows:

-The Tribunal is forum *non conveniens* for the Province and could entail the denial of justice to the Province which is not a party to the proceeding and is also a creditor of ABA.⁴⁰

-The possible adverse economic impacts of Azurix's overall strategy, *inter alia*: ABA is making itself insolvent to the detriment of its creditors such as the Province; ABA's receivables in respect of its debtors and creditors,

³⁸ Ibid., paras. 9 and 14.

³⁹ Claimant's Rejoinder on Jurisdiction, paras. 14-20.

⁴⁰ Argentina's Memorial on Jurisdiction, para. 77.

including the Province, have been pesified, yet Azurix formulates its claims in US dollars.⁴¹

-Azurix prevents ABA from exercising its rights under the Concession Agreement before local courts and brings a claim before an arbitration tribunal to its own benefit and by doing so is ignoring the rights of ABA's other shareholders who, due to Azurix's actions, are not going to have the chance to be granted a remedy.⁴²

-It is impossible for this Tribunal to resolve the dispute without deciding the scope of ABA's and the Province's rights under the Concession Agreement or performing regulatory functions by undertaking the task of judicial review of the decisions of the regulatory agencies of the Province and Argentina.⁴³

-The proceedings initiated by Azurix and ABA before different fora constitute an abuse of process.⁴⁴

5 Additional request

46. During the hearing on jurisdiction the Respondent made an additional request that the Tribunal consider suspending this proceeding until the Supreme Court of the Province has decided the case before it.⁴⁵

⁴¹ Argentina's Reply on Jurisdiction, paras. 30-34.

⁴² Ibid., para. 35.

⁴³ Ibid., paras. 38-39.

⁴⁴ Ibid., paras. 144-145.

⁴⁵ Hearing on Jurisdiction, September 9-10, 2003, Transcripts of September 10, 2003, p. 11.

IV. APPLICABLE LAW

47. In its Memorial, Azurix's affirmed that, since the parties have not chosen the applicable law to the dispute under Article 42(1) of the Convention, the law applicable to this dispute is international law because the BIT is itself the governing law as *lex specialis* between the parties and it expressly requires Argentina to comply with international law.⁴⁶ According to Argentina, under Article 42(1) of the Convention, the law applicable to the dispute is primarily Argentine law which is the law applicable to the contractual and provincial administrative issues underlying Azurix's claim. In Argentina's view, the BIT is the point of reference to establish the merits of Argentina's obligations regarding Azurix's investment, and international law from unconventional sources is relevant provided that reference to it is made in the BIT or if it is relevant for the interpretation of the BIT or is incorporated into the law of Argentina.⁴⁷

48. As pointed out by both parties, the relevant provision for determining the law applicable to this dispute is Article 42(1) of the Convention. However, the rules applying to the dispute under Article 42(1) address the resolution of disputes on the merits, and so will not necessarily be those which apply to the Tribunal's determination of its jurisdiction under Article 41 at this stage of the proceedings.⁴⁸

49. Article 41 of the Convention provides that the Tribunal shall be the judge of its own competence, and any objection by a party to the dispute that that dispute is not within the

⁴⁶ Claimant's Memorial, pp. 149-156.

⁴⁷ Argentina's Memorial on Jurisdiction, paras. 13-15.

⁴⁸ See also *CMS v. Argentina*, paras. 88-89.

jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal. Article 41 does not state what the applicable law rules are for the determination of the Tribunal's competence over the dispute as opposed to those applicable to the dispute itself.

50. The jurisdiction of the Centre is determined by Article 25 of the Convention. In addition, the competence of the Tribunal is governed by the terms of the instrument expressing the parties' consent to ICSID arbitration. Therefore, the task of the Tribunal is to assess whether the Claimant's request for arbitration falls within the terms of said Article 25 of the Convention and Article VII of the BIT.

V. CONSIDERATIONS

1. Preliminary Considerations

51. The Tribunal will first review the threshold conditions under the Convention and the BIT that a claim needs to meet for purposes of the jurisdiction of the Centre and the competence of the Tribunal, whether or not said conditions have been subject of controversy between the parties.

52. For this purpose, it is useful to recall the key provisions, Article 25 of the Convention and Article VII of the BIT, on which the jurisdiction of the Centre and the competence of this Tribunal rest. Article 25 provides:

- (1) "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When

the parties have given their consent, no party may withdraw its consent unilaterally.

- (2) "National of another Contracting State" means:

any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

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

- (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
- (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."

Article VII of the BIT reads as follows:

1. "For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
 - (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
 - (b) in accordance with any applicable, previously agreed dispute-settlement procedure; or
 - (c) in accordance with the terms of paragraph 3.
3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
 - (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention ...”

53. It will also be helpful to reproduce here the definition of “investment” agreed in the BIT. The term “investment” is defined in Article I.1(a) as meaning:

“every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

- (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
- (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value and directly related to an investment;
- (iv) intellectual property ...; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law.”

54. Before considering the specific objections to jurisdiction, the Tribunal will first address whether an attempt was made to reach an amicable settlement of the dispute within the first six months after it arose as required by Article VII(3) of the BIT, and then will consider the requirements of consent to ICSID jurisdiction: “national of another Contracting Party”, “legal dispute”, and “dispute arising directly out of an investment”.

a) Attempt at amicable settlement

55. Under paragraphs 2 and 3 of Article VII of the BIT the parties to the dispute should initially seek a resolution through consultation and negotiation and the national or company concerned may have recourse to arbitration only after six months from the date that the dispute arose. The Claimant delivered notice of the existence of an investment dispute under the BIT to the President of the Argentine Republic on January 11, 2001.⁴⁹ According to the Arbitration Request, dated September 19, 2001, Azurix pleaded repeatedly for assistance from the Respondent.⁵⁰ The Argentine Republic responded on September 5, 2001 disclaiming the existence of an investment dispute or attribution of responsibility for the acts of the Province.⁵¹ The Tribunal is satisfied that the Claimant attempted to resolve the dispute through consultation or negotiation and failed.

⁴⁹ Exhibit 178 to the Arbitration Request.

⁵⁰ Ibid. Exhibits 179 and 180.

⁵¹ Ibid. Exhibit 182.

b) Consent by the parties to the jurisdiction of ICSID

56. Article VII.4(a) of the BIT embodies the consent of the parties to the BIT - the US and Argentina - to the submission of any investment dispute to binding arbitration in accordance with the choice of the national or company in question, and further provides that such consent satisfies the requirement for written consent for purposes of Chapter II of the Convention. Argentina signed the Convention on May 21, 1991, and the ICSID Convention came into force in respect of Argentina on November 18, 1994. The open invitation provided by the parties to the BIT to investors to settle their claims, *inter alia*, through arbitration, has been taken up by the Claimant by its letter, dated July 12, 2001,⁵² to the Respondent and the Secretary General of the Centre consenting to ICSID jurisdiction. Furthermore, the filing of the request for arbitration is by itself sufficient evidence of the Claimant's consent. Therefore, the Tribunal is satisfied that both parties to the dispute have consented to ICSID jurisdiction.

c) National of another Contracting Party

57. The Claimant is a company incorporated in the United States of America (the Convention came into force in respect of the United States of America on October 14, 1966). As already noted, the Respondent, Argentina, is a Contracting Party. The Tribunal is satisfied with the evidence presented by the Claimant establishing its nationality and that, as required by the BIT, it is not controlled by nationals of third parties.

⁵² Ibid. Exhibit 181.

d) Legal dispute

58. The dispute as raised by the Claimant - an alleged breach by Argentina of obligations owed by it to Azurix under the BIT - is a legal dispute which, in the words of the Report of the Executive Directors of the World Bank on the Convention, concerns “the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation, and is more than a mere ‘conflict of interest.’”

e) Dispute arising directly out of an investment

59. What constitutes Azurix’s “investment” has been a matter of controversy between the parties. For the Claimant, the dispute arises directly from an investment made in Argentina consisting of “Azurix’s payment of its US\$438.6 million canon (which constitutes invested capital), its ownership interest and investment in ABA, and the rights in the Concession Agreement, all of which are investments under the BIT and the ICSID Convention.”⁵³ On the other hand, the Respondent claims that the dispute is a contractual dispute related to the Concession Agreement. According to the Respondent, “The Concession Agreement is neither and[sic] investment agreement, an agreement for economic development, nor an international contract.”⁵⁴ Furthermore, only the Province may be party to such contractual dispute since “the Argentine Republic is not a party to such a Concession Agreement, neither has it guaranteed in any way whatsoever the fulfillment of the contractual obligations of the Province. The Argentine Republic is a federal state and the Province has broad powers to assume the

⁵³ Azurix’s Rejoinder on Jurisdiction, para. 6(ii).

⁵⁴ Argentina’s Memorial on Jurisdiction, para. 11.

obligations it assumed under the Concession Agreement.”⁵⁵ Therefore, the Tribunal needs to consider whether the investment as defined by the Claimant qualifies as an investment for purposes of the BIT and whether the dispute between the parties to these proceedings is directly related to it.

60. The Respondent admits that “The definition of investment in the Treaty allows a local company to qualify as an *investment* and that such company be a party to an ICSID arbitral procedure”⁵⁶. The Respondent also considers that “it is clear that the local companies that AZURIX used to take part in the bidding process, and even ABA - the company that signed the Concession Contract - qualify as *investment* according to the Treaty and could be party to an ICSID procedure.”⁵⁷ However, the Respondent finds that the Claimant has failed to clarify this issue and concludes that, as defined by AZURIX in the Counter-Memorial on Jurisdiction, “AZURIX considers that its investment consists of i) 90% of the ABA shares and ii) the rights provided for in the Concession Contract. AZURIX does not allege that ABA qualifies as an investment pursuant to the Treaty definitions. Nor is ABA part of the present arbitration procedure.”⁵⁸

61. The Respondent also maintains that, according to the BIT, “the rights arising from the Concession Contract qualify as an investment of AZURIX if they are... rights on some

⁵⁵ Ibid., para. 12.

⁵⁶ Argentina’s Reply on Jurisdiction, heading II.b). (Emphasis in the original).

⁵⁷ Ibid., para. 9. (Emphasis in the original).

⁵⁸ Ibid., para. 11. (Emphasis in the original).

operation that has economic value and that is directly related to an investment”⁵⁹. In this case, the requirement is met only if ABA is an investment. To qualify as an investment, the rights conferred by law or contract are “an *investment* to the extent that they are held by a company that qualifies as an *investor* (national or company of one of the contracting parties) - which does not occur in this case -, or that they are under the direct or indirect control of an *investor*. But with respect to the latter – what does, indeed, occur in the present case -, the local company has to be controlled by the *investor* and hence to be an *investment*”. As a result, since Azurix alleges that ABA and the other subsidiaries are not an investment, then the contractual rights under the Concession are not an investment protected under the BIT.⁶⁰

62. The Tribunal finds difficulty in following the Respondent’s reasoning on the basis of the definition of investment in Article I.1(a) of the BIT. First, a concession contract, such as that entered by ABA with the Province, qualifies as an investment for purposes of the BIT given the wide meaning conferred upon this term in the BIT that includes “any right conferred by law or contract”.⁶¹ The Concession Agreement itself refers repeatedly to investments. For instance, in the context of the determination of the tariff level, the Concession Agreement refers to “a

⁵⁹ Ibid., para.12. (Emphasis in the original).

⁶⁰ Ibid., paras. 13 and 14. (Emphasis in the original).

⁶¹ Article I.1.(a)(v).

reasonable return on the amounts *invested* by the Concessionaire”⁶², and “the Concessionaire does hereby undertake to make all necessary *investments* to execute...”⁶³

63. Second, the Respondent bases in part its argument on sub-paragraph (iii) of the definition which requires a claim to money or a claim to performance to have economic value and to be “directly related to an investment”⁶⁴. The definition of investment lists a “company”, “shares of stock” and, in a separate category, “any right conferred by law or contract”. A company, shares held in a company or rights under a contract, any contract, qualify as an investment. Provided the direct or indirect ownership or control is established, rights under a contract held by a local company constitute an investment protected by the BIT. The definition in Article I.1(a) simply lists examples of what an investment is, the list is not exhaustive and each item is independent from each other. The only condition is that, whatever the form an investment may take, it must be directly or indirectly owned or controlled by nationals or companies of the other party to the BIT⁶⁵.

64. Azurix made an investment by paying a “canon” to obtain the concession to provide water and wastewater services to the Province.⁶⁶ To carry out the investment, Azurix

⁶² Clause 12.1.1 of the Concession Agreement. (Emphasis added).

⁶³ Ibid., Clause 7.8. (Emphasis added).

⁶⁴ Argentina’s Reply on jurisdiction, para. 12. (Emphasis in the original).

⁶⁵ The purpose of the definition as explained by the drafter is, *inter alia*, not to distinguish “between investment owned or controlled directly and that owned or controlled through corporate tiers” and to ensure that “local subsidiaries *per se* are covered investment. Further, the company need not be wholly owned by the investor. Any ownership or other interest in a company would be considered investment.” Kenneth J. Vandeveld, *United States Investment Treaties. Policy and Practice* (1992) pp. 45-46.

⁶⁶ Azurix’s Memorial at 1.

organized several subsidiaries, as required by the Bidding Terms, and established a locally registered company in Argentina, ABA. The objective of the definition of investment in the BIT is precisely to include this type of structure established for the exclusive purpose of the investment in order to protect the real party in interest. In commenting on the reference to foreign control in Article 25(2)(b) of the Convention, the tribunal in *CMS Gas Transmission Company v. Argentina* (hereinafter *CMS*)⁶⁷ stated that “foreign control in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State is precisely meant to facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment”⁶⁸.

65. The Tribunal is satisfied that the investment described by Claimant in its Rejoinder on Jurisdiction is an investment protected under the terms of the BIT and the Convention: (a) Azurix indirectly owns 90% of the shareholding in ABA, (b) Azurix indirectly controls ABA, and (c) ABA is party to the Concession Agreement and was established for the specific purpose of signing the Concession Agreement as required by the Bidding Terms.

66. Having determined that the Claimant’s investment is an investment protected by the BIT, the Tribunal concludes that the dispute as presented by the Claimant is a dispute arising directly from that investment.

⁶⁷ *CMS Gas Transmission Company v. Argentine Republic*, (ICSID Case No. ARB/01/8). Decision of the Tribunal on Objections to Jurisdiction of July 17, 2003, 42 *ILM* 800.

⁶⁸ *Ibid*, para. 51. (Emphasis added).

2. *Ius standi*

67. The Respondent introduced a new objection to the jurisdiction of the Tribunal in its Reply on Jurisdiction alleging that Azurix has no standing to assert rights that arise from the Concession. According to the Respondent, only ABA could assert these rights and ABA is not a party to these proceedings. The Claimant has requested the Tribunal to reject this objection on the basis that it is untimely and has been waived pursuant to Arbitration Rule 41(1). The Respondent, during the hearing on jurisdiction, justified the timing of the objection on the basis of the allegations made by the Claimant in its Counter-memorial on Jurisdiction. Only then did it become evident that the Claimant was trying to avoid by all means the commitments assumed by itself and the companies controlled by it while at the same time availing itself of the rights of the local companies.⁶⁹

68. While the Tribunal agrees that the objection has been filed out of time, it considers that the issues it raises are such that they should be considered upon at the Tribunal's own initiative under Arbitration Rule 41(2)⁷⁰. The Tribunal is assisted in its consideration by the fact that this point has been fully argued by the parties since the Claimant responded "out of an abundance of caution."⁷¹

⁶⁹ Argentina's Reply on Jurisdiction, paras. 3 and 146.

⁷⁰ Arbitration Rule 41(2) provides: "The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence."

⁷¹ Azurix's Rejoinder on Jurisdiction, para. 21.

69. According to the Respondent, “If the treaty allows the judicial penetration of the local entity in order to attribute the rights of said entity to the controlling shareholder, the obligations undertaken must be then assigned on the same basis.”⁷² The Respondent has no doubt that an investor in shares has standing to activate dispute settlement mechanisms under BITs in “cases of acts by the host state that affect it directly”⁷³ but, because the shareholders and the corporation have distinct legal personality, “it is a different situation when a shareholder brings a claim related to assets or situations concerning the company it has shares in... The issue is not related either to the investor qualification of the claimant, nor to the investment qualification of the shares, but to claimant’s standing or *ius standi* in respect of certain situations.”⁷⁴

70. The Respondent bases its argument primarily on the decision of the International Court of Justice (hereinafter “ICJ”) in *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)* (hereinafter *Barcelona Traction*)⁷⁵ which it considers a statement of customary international law on this matter. The Respondent admits that BITs include clauses that extend the scope of operation of the treaty to create an exception of conventional nature which overcomes “the lack of *ius standi* of the shareholders to file indirect claims.”⁷⁶ When “the

⁷² Argentina’s Reply on Jurisdiction, para. 146.

⁷³ *Ibid.*, para. 148.

⁷⁴ *Ibid.*, para. 149.

⁷⁵ *Barcelona Traction, Light and Power Company, Limited* (New Application, 1962), Judgment 5 February 1970 (Reports 1970, p. 3).

⁷⁶ Argentina’s Reply on Jurisdiction, para. 153.

local company controlled by the investor also qualifies as investor, the *ius standi* obstacle for indirect claims is surpassed with the possibility that [sic] local company be the one to allege the existence of an infringement of the Treaty. In these cases, investment treaties allow to turn an indirect claim into a direct one.”⁷⁷

71. The Claimant has pointed out that the decision in *Barcelona Traction* has been widely criticized as being an incorrect statement of customary international law and that the ICJ’s decision did not examine whether international law provided an independent source of rights and protections of shareholders but only whether a State could protect its shareholders in a foreign corporation affected by measures of a third State.⁷⁸ The ICJ considered it likely that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. The ICJ also noted developments of investor protection through treaty stipulations whereby companies are themselves vested with a direct right to defend their interests against States. More recently, in *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*,⁷⁹ the ICJ accepted the protection of foreign shareholders by the State of their nationality against the State of incorporation. The jurisdiction of the ICJ in this case was based on the Treaty of Friendship, Commerce and Navigation between the United States of America and Italy, a category of treaties which are the direct precursor of BITs.

⁷⁷ Ibid., para. 152.

⁷⁸ Azurix’s Rejoinder on Jurisdiction, paras. 24-27.

⁷⁹ *Elettronica Sicula S.p.A. (ELSI)*, Judgment 20 July 1989 (*Reports* 1989, p. 15).

72. The issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by treaty, namely, under the BIT. The Tribunal does not find it necessary to resolve the controversy regarding the extent of the right of a State under public international law to protect its nationals who are shareholders in foreign companies.

73. The Tribunal has already found that given the wide meaning of investment in the definition in Article I.1(a), the provisions of the BIT protect indirect claims. This conclusion, based on an analysis of the text of the provision, concurs with decisions of tribunals that have interpreted the same provision in the same BIT or similar provisions in other BITs to which Respondent is a party and that have been referred to by the parties in their pleadings. Thus in *CMS* the tribunal concluded that “jurisdiction can be established under the terms of the specific provision of the BIT. Whether the protected investor is in addition a party to a concession agreement or a license agreement with the host State is immaterial for the purpose of finding jurisdiction under those treaty provisions, since *there is a direct right of action of shareholders*”.⁸⁰

74. We conclude the discussion on *ius standi* by affirming the *ius standi* of Azurix in these proceedings: Azurix is the investor that made the investment through indirectly owned and controlled subsidiaries. Whether this conclusion binds Azurix to the commitments made by its

⁸⁰ *Ibid.*, para. 65. (Emphasis added).

subsidiaries, as argued by the Respondent, is the subject of the consideration of the first objection to jurisdiction – to which we now turn.

3. First objection to jurisdiction - agreement to the jurisdiction of the courts of La Plata and waiver of all other fora

75. The Respondent bases this objection on the nature of the dispute and the scope of commitments made by the Claimant under the provisions of the Bidding Terms, the Concession Agreement, the Commitment Letters and the Clarifying Circular 11(A).

76. According to the Respondent, the dispute is of a contractual nature and related to the interpretation of and performance under the Concession Agreement. However, for purposes of determining its jurisdiction, the Tribunal should consider whether the dispute, as it has been presented by the Claimant, is *prima facie* a dispute arising under the BIT. The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent to Claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot *per se* transform the dispute under the BIT into a contractual dispute. This follows from the scope of the jurisdiction clauses in the Contract Documents and the identity of the parties to whom the commitments were made.

77. The scope of the jurisdiction and waiver of any other forum clauses, whether included in the Bidding Terms, the Concession Agreement or the Commitment Letters, indicates that such clauses relate to disputes under the terms of the document concerned and between the

parties to that particular document. Understandably, the Respondent is consistent with its conception of the dispute as a contractual dispute when it maintains that these clauses exclude claims against itself. However, Azurix has not filed with this Tribunal a claim against any of the parties to the Contract Documents but against the Respondent. The Respondent itself has stated repeatedly in this proceeding that it is not party to any of the Contract Documents.

78. The Respondent argues that the existence of the waiver in addition to the forum selection clause distinguishes this case from other ICSID cases where tribunals have held that a forum selection clause in the Contract Documents underlying the investment referring to the domestic courts of the State party does not preclude the jurisdiction of an ICSID tribunal. In particular, the Respondent has pointed out that said provision was added to the Contract Documents in light of the decisions in *Lanco* and *Vivendi I* precisely to avoid the situation in which the Respondent finds itself now.⁸¹

79. The tribunals in the cases cited concluded that such forum selection clauses did not exclude their jurisdiction because the subject-matter of any proceedings before the domestic courts under the contractual arrangements in question and the dispute before the ICSID tribunal was different and therefore the forum selection clauses did not apply. This reasoning applies equally to the waiver of jurisdiction clause in this case. The claims or causes of action before this Tribunal are different in nature from any claims which ABA could bring before the courts of the city of La Plata under the Contract Documents.

⁸¹ Hearing on Jurisdiction, September 9-10, 2003, Transcripts of September 9, 2003, p. 18 and ff.

80. As already noted, the Respondent has indicated that the specific waiver words in the clause were included precisely to avoid that claims under the Contract Documents would be brought to the venues for settlement provided under the BIT. The Tribunal finds that the addition of the waiver has not made a substantive difference to the exclusive forum clause included in the concessions agreements considered by ICSID tribunals in *Lanco* or *Vivendi I*, since the acceptance of the exclusivity of a forum implies by definition the renunciation of any other fora whether or not explicitly stated in the clause.

81. The Claimant has contended that the waiver, as understood by the Respondent, would mean that the Claimant would be deprived of recourse since the courts of La Plata would not be competent to consider claims against the Respondent. The Respondent considers this not to be the case: “the Argentine Republic has not alleged that AZURIX had waived the ICSID jurisdiction, but it has alleged that it [Azurix] had waived the right to put forward controversies in terms of investments related to the interpretation and performance before the forums set forth under the Treaty” and “AZURIX aims to create the impression that the non-availability of the ICSID jurisdiction implies bringing plaintiff to a deadlock for the defense of its rights. That is not correct. ABA, and therefore AZURIX, have useful [sic] and expressly agreed upon remedies to its disposal in order to enforce the same rights relative to the Concession Contract as those claimed in this proceeding.”⁸² The point is that the rights under the Concession Agreement and under the BIT are not the same and that the generality of the waiver would exclude even the

⁸² Argentina’s Reply on Jurisdiction, paras. 105 and 108, respectively.

courts at the federal level which would normally be competent to consider claims against the Respondent.

82. The scope of the waiver has also been discussed by the parties in the context of the Clarifying Circular 11(A). The Respondent attributes to this Circular great significance in terms of explaining to the prospective bidders for the concession that they were waiving their rights to arbitration under the BIT. While this was the question that the Privatization Commission was asked, its response seems to have avoided the answer and, in fact, repeated the terms of the clause to be clarified rather than clarifying it. At best, the Commission's reply is ambiguous.

83. The validity of the waiver under international law has also been a matter of extensive discussion by the parties. It has been alleged by the Respondent that now that individuals have rights recognized under international law as direct subjects of international law they may renounce to such rights. The Respondent has urged that "the legal situation arising as a consequence of AZURIX's claim holds certain similarities with those issues already resolved on the validity of the 'Calvo clause.'"⁸³ The Respondent argues that the criticism of this clause was based on the fact that it implied a waiver by individuals of a right that belonged to their national States: "Accordingly the United States has consistently maintained that the individual could not waive a right which was not his but was the right of his state. Under the hypothesis that it is the individual himself who has rights under international law, this basic objection loses all logical

⁸³ Argentina's Memorial on Jurisdiction, paras. 62 and ff.

force. The rights which appertain to the individual may be waived by the individual.”⁸⁴ This leads the Respondent to the conclusion that “Since investment treaties regulate and protect merely economic interests, and considering the broad-spectrum of options available to investor [sic] to enforce this type of rights, there can be no doubts on the possibility to waive the right to bring investment disputes in general, or at least, before this international arbitration tribunal.”⁸⁵

84. The Respondent further supports its argument by reference to the decisions of the United States of America-Venezuela and United States of America-Mexico Claims Commissions in *Woodruff*⁸⁶ and *North American Dredging*,⁸⁷ respectively. In both cases the Commissions recognized the waiver in contracts signed by the claimant with the State. The parties disagree on the significance of the decisions for purposes of the instant dispute. The Respondent alleges that the decisions support the right of a private party to renounce its rights under a treaty, while the Claimant maintains that their significance is limited to the waiver of contractual rights. Both are correct according to whether the present dispute is a contractual dispute or a dispute between a State and an investor under a BIT. The Commissions that decided these cases recognized that an individual could commit himself to submit his contractual claims to the local courts, but at the same time they differentiated these claims from the claims of their States under international law which they, as individuals, could not have waived. An early commentator on the “Calvo clause”

⁸⁴ *Ibid.*, quote from Judge Jessup in para. 64.

⁸⁵ *Ibid.*, para. 66.

⁸⁶ *Woodruff v. Venezuela*, *RIAA*, volume IX, Hague ICJ Registry, p. 213.

⁸⁷ *North American Dredging Company of Texas v. United Mexican States*, *RIAA*, volume IV, Hague ICJ Registry, p. 26.

and *North American Dredging* said: “in so far as the Calvo clause demands resort to local remedies for breach of contract, it is legitimate, but superfluous; for that rule is clearly stated and thoroughly established in international law. In so far as the clause attempts to forbid interposition under any circumstances, whether by a promise to that effect, or by regarding the alien as a citizen for the purposes of the contract, or by a unilateral definition of denial of justice, or otherwise, it is illegal and futile; for international law clearly states the right to interpose in case of denial of justice.”⁸⁸

85. The significance of the cases for this Tribunal is that the private parties could waive access to the Commissions to settle contractual disputes with a State with which they had contracted. In the dispute before the present Tribunal, as has been affirmed by the Respondent, the State is not a party to any of the Contract Documents, and there was no waiver commitment made by the Claimant in favor of Argentina. Since the Tribunal has found that the waiver does not cover the claim of Azurix in the dispute before it, the Tribunal does not need to comment further on the issue of renunciation by individuals of rights conferred upon them by treaty.

4. Second objection to jurisdiction – the dispute has already been submitted to the courts of Argentina under Article VII of the BIT (“fork-in-the-road” argument)

86. Argentina bases this objection on the administrative appeals filed by ABA, and on the fact that “all the issues relative to the dispute between the Province and ABA have been submitted to the Court of Justice of the Province in the framework of the discussions around the

⁸⁸ C. Eagleton, *The Responsibility of States in International Law*, New York University Press, 1928, p. 175.

validity of Decree No. 2598/01, by which it rescinded the Concession Agreement.”⁸⁹ The Respondent argues that the action before the Supreme Court and the claim before the Tribunal have an identical basis and that ABA and Azurix have recognized this by requesting that the submitted claim be “filed” due to this arbitration.⁹⁰ The administrative appeals filed fall within the scope of what the BIT defines as administrative courts. In support of its argument the Respondent refers to the decisions on jurisdiction in *Waste Management, Inc. v. United Mexican States* (hereinafter *Waste Management*)⁹¹ and *Vivendi I*. These decisions, in the Respondent’s opinion, “consider that what matters from the viewpoint of the choice of jurisdiction established by the bilateral investment treaties is that there should be coincidence between the basis of the arbitration case presented under such international instruments and the claim brought before the local alternative forum.”⁹²

87. The Claimant considers the objection to lack merit because there is no identity of parties between this arbitration and the cases brought by ABA before the local courts: the latter are actions directed to protect ABA’s rights without compromising Azurix’s access to ICSID arbitration, there is no identity of claims, and the arbitration was initiated before the first court action was filed by ABA.⁹³ The Claimant denies that ORAB is an administrative tribunal for purposes of the BIT and that proceedings carried out before this entity could have marked the

⁸⁹ Argentina’s Memorial on Jurisdiction, para. 80.

⁹⁰ *Ibid.*, paras. 82 and 85.

⁹¹ *Waste Management, Inc. v. United Mexican States*, June 2, 2000, 5 *ICSID Rep.* 443.

⁹² Argentina’s Memorial on Jurisdiction, para. 92.

⁹³ Azurix’s Rejoinder, paras. 103 and ff.

commencement of the proceedings now before local courts.⁹⁴ The Claimant also considers as misplaced the reliance on *Waste Management* by the Respondent to assert that identity of facts is sufficient to trigger the fork-in-the-road provision of the BIT. It notes that this is specific to NAFTA and that “the majority of the first tribunal in *Waste Management* held that Article 1121, in order to bar access to international arbitration, required merely an identity of facts without taking into consideration whether the proceedings were based on claims arising from domestic law or NAFTA.”⁹⁵ On the other hand, the fork-in-the-road provision of the BIT “requires identity of facts and causes of action in the local and international proceedings for the provisions to be triggered.”⁹⁶

88. In one of the first cases that an ICSID tribunal had to decide on the existence of a pending suit and its relevance to the ICSID proceedings, the tribunal “declared that there could only be a case of *lis pendens* where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals”⁹⁷.

89. This line of reasoning has been consistently followed by arbitral tribunals in cases involving claims under BITs, unless, as noted above, the controlling agreement provided otherwise, as in the case of NAFTA. The most recent instance involves the same BIT and Respondent as in the present case. In *CMS*, the tribunal referred to decisions of several ICSID

⁹⁴ *Ibid.*, para. 119.

⁹⁵ *Ibid.*, para. 132.

⁹⁶ *Ibid.*

⁹⁷ *Benvenuti and Bonfant SRL v. the Government of the People’s Republic of the Congo*, 1 *ICSID Rep.* 340 at para. 1.14.

tribunals that have held that “as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration. This Tribunal is persuaded that with even more reason this view applies to the instant dispute, since no submission has been made by CMS to local courts and since, even if TGN had done so –which is not the case–, this would not result in triggering the “fork-in-the-road” provision against CMS. Both the parties and the causes of action under separate instruments are different.”⁹⁸

90. Neither of the parties is a party to the proceedings before the local courts. Even if Azurix had joined ABA as a plaintiff in those courts, there would not be party identity since Argentina is not party to any of those proceedings.

91. The parties have discussed extensively the jurisdictional nature of ORAB in relation to the date when the administrative proceedings started. The significance of this date being that, if the filings before ORAB are considered to be claims before a court for purposes of Article VII of the BIT, then all 12 cases were filed with the administrative courts after the request for arbitration in the instant case was submitted to ICSID.

92. Given the conclusion reached above on the differentiation of the claims and the parties, the Tribunal does not need to consider this matter extensively; it simply records that it is not persuaded that ORAB is equivalent to an administrative tribunal for purposes of the BIT. It does not have the independence required of a tribunal and does not have a judicial function to

⁹⁸ *CMS Gas Transmission Company v. the Republic of Argentina* (Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction of July 17, 2003, 42 *ILM* 800, para. 80.

settle conflicts with the concessionaire. The law under which ORAB was established characterizes the decisions of ORAB, taken within the limits of its competence, as administrative acts that bind the concessionaire and against which the latter may interpose administrative remedies as permitted by the provincial law and without prejudice to its right to file a claim before courts.⁹⁹ To maintain otherwise is to admit that ORAB as a judicial organ may be party and judge in the same dispute.

5. Alleged additional consequences

93. The Respondent has presented arguments based on the consequences that would follow from an affirmation of jurisdiction by the Tribunal. They concern claims that (a) the Tribunal is *forum non conveniens*, (b) it is impossible for the Tribunal to decide on the claims made by Azurix without interpreting the Concession Agreement or performing regulatory functions, (c) the Claimant has indulged in abuse of process, (d) certain adverse economic impacts will result from the Tribunal's exercise of jurisdiction, (e) the subsidiaries of Azurix are its *alter ego*, and (f) double recovery. The Tribunal will now consider each of these alleged consequences.

a) *Forum non conveniens*

94. Argentina claims that the Tribunal is *forum non conveniens* for the Province, saying that a finding that it has jurisdiction could entail a denial of justice to the Province because it is not a party to the proceeding and it is also a creditor of ABA. In the same vein the Respondent has argued that ABA's other shareholders are not going to have the opportunity of

⁹⁹ Law 11.820, Annex II, Chapter XII, Article 51.

being granted a remedy because of the submission of the dispute to arbitration by Azurix. The Tribunal finds that these are not relevant factors for determining its jurisdiction. Other creditors, including the Province, or other shareholders are not precluded from bringing claims provided they meet the jurisdictional requirements of the forum to which they apply.

b) Determination of the scope of rights under the Concession Agreement and performance of regulatory functions

95. As to Argentina's claim that it is impossible for this Tribunal to resolve the dispute without deciding the scope of ABA's and the Province's rights under the Concession Agreement or performing regulatory functions by undertaking the task of judicial review of the decisions of the regulatory agencies of the Province and Argentina, the Tribunal notes that its role is limited to deciding whether Argentina has breached its obligations to Azurix under the BIT. The extent to which this requires an analysis of facts which may have been put before an Argentine court or administrative tribunal, and the extent to which those facts are relevant to the Tribunal's determination of merits is not for the Tribunal to judge at this stage but they are not relevant considerations for the Tribunal to take into account in determining the jurisdiction of the Centre and its on competence on the basis of Article 25 of the Convention and Article VII of the BIT.

c) Abuse of process

96. Based on the reasons given in the consideration of the second objection to jurisdiction, the Tribunal finds that there is no abuse of process by Azurix by the submission of its claim to this forum.

d) Economic impact

97. The Respondent has requested that the Tribunal bear in mind certain “economic variables” in determining its jurisdiction and assessing ABA’s and Azurix’s strategy.¹⁰⁰ The Respondent has listed possible adverse economic impacts of Azurix’s overall strategy, *inter alia*: ABA is making itself insolvent to the detriment of its creditors such as the Province, and ABA’s receivables in respect of its debtors and creditors, including the Province, have been pesified, yet Azurix formulates its claims in US dollars. On the basis of the provisions that frame its competence, the Tribunal finds that it has no grounds to include such variables in a determination of its competence.

98. Whether these variables should be considered in the merits phase as the Respondent has requested should the Tribunal dismiss its jurisdictional objection, is a matter, if raised again, for decision at that time.

e) *Alter ego* issue

99. Argentina claims that “AZURIX participated in the Bidding procedure through companies whose capital belonged one hundred per cent to AZURIX, they were mere instruments and a simple *alter ego* of AZURIX. ABA was also a simple vehicle to express

¹⁰⁰ Argentina’s Reply on Jurisdiction, para. 23 and ff.

AZURIX's interests and will.”¹⁰¹ This structure is then used by Azurix to exercise contractual rights or rights under the BIT according to its convenience.¹⁰²

100. The Tribunal has already discussed the issues related to the multiple fora and the rights that Azurix may have under the BIT as an investor through the companies that participated in the bidding and ABA. The Tribunal needs only to note here for purposes of the *alter ego* argument that the Province awarded the Concession to said subsidiaries and the Province required that they formed a local company with whom it signed the Concession Agreement. These undisputed facts are sufficient ground for the Tribunal to dismiss the *alter ego* argument.

f) Double recovery

101. In the course of its submissions Argentina has indicated its concern that Azurix should not be able to recover twice, through proceedings before this Tribunal and via ABA through proceedings before the local courts. The Tribunal appreciates Argentina's concern, and notes that any compensation awarded must be based on the actual loss a claimant is able to show. However, the question before the Tribunal at this stage is whether it has jurisdiction; whether the Claimant can prove loss is a matter to be considered as part of the merits.

VI. DECISION

102. Having carefully considered the parties' arguments in their written pleadings and oral submissions, and for the reasons stated above, the Tribunal:

¹⁰¹ Ibid., para. 16.

¹⁰² Ibid., Heading, para. 19 and ff.

1. Finds that:
 - (a) Azurix has shown that, *prima facie*, it has a claim against Argentina for breach of obligations owed by Argentina to Azurix under the BIT.
 - (b) Azurix has *ius standi* to bring this claim, and
 - (c) the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal.
2. Rejects the request of the Respondent to suspend the proceeding.

103. The Tribunal has, accordingly, made the necessary Order under Arbitration Rule 41(4) for the continuation of the procedure.

104. Each party has requested that the costs of the jurisdictional phase of the proceedings, including its own costs, be borne by the other. The Tribunal further decides to consider this matter as part of the merits.

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

Dr. Andrés Rigo Sureda
President of the Tribunal

Sir Elihu Lauterpacht, C.B.E. Q.C.
Arbitrator

Dr. Daniel H. Martins
Arbitrator