

ELSA Moot Court Competition (EMC2)
on WTO Law

Case 2013-2014

***Aquitania – Measures Affecting Water Distribution and Sewage
Collection Services***

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1. The Federal Republic of Aquitania is a developing country which acceded to the WTO in 2005. The United Kingdom of Commercia is a developed country and founding Member of the WTO. Aquitania and Commercia are also Members of the Occidental Free Trade Agreement (OFTA) which establishes a free trade area between its parties based on the model of the North American Free Trade Agreement. OFTA was signed in September 2003 and entered into force on 1 January 2004.
2. Aquitania is constituted as a federal state guaranteeing certain competences to its fifteen provinces. Among these competences is the right to organise and regulate the collection, purification, treatment and distribution of drinking water to households and commercial entities as well as the right to organise and regulate the collection and treatment of sewage from households and commercial entities. As a consequence, each province has enacted its own regulatory framework for the supply of water distribution and sewage services in the form of provincial water and sewage laws and regulations.
3. Nevertheless, water distribution and sewage collection and treatment were considered a public function and were provided by public entities in all provinces until the late 1990s. In some provinces, these entities were formed at the municipal level and controlled by the municipalities. In other provinces, water distribution and sewage collection and treatment was organised at the provincial level with a variety of systems: In some provinces, the services were provided directly through the provincial governments, while in others concessions were granted to public



companies owned by the province and established in some cases as commercial companies under the Commercial Code of Aquitania. Private companies were not involved in the supply of any of these services.

4. In all provinces the relevant laws obliged the entities supplying water and collecting and treating sewage to serve all households and commercial companies regardless of their geographical location and on the same terms and conditions, including the price. This so-called “universal service obligation (USO)” has been an important element of the national development strategy of Aquitania for many decades. Households and companies were charged fees for water and sewage services. While the fees were based on actual consumption, they were lower than the actual costs of providing these services. Consequently, the supply of water and the collection and treatment of sewage were also financed through the provincial budgets.

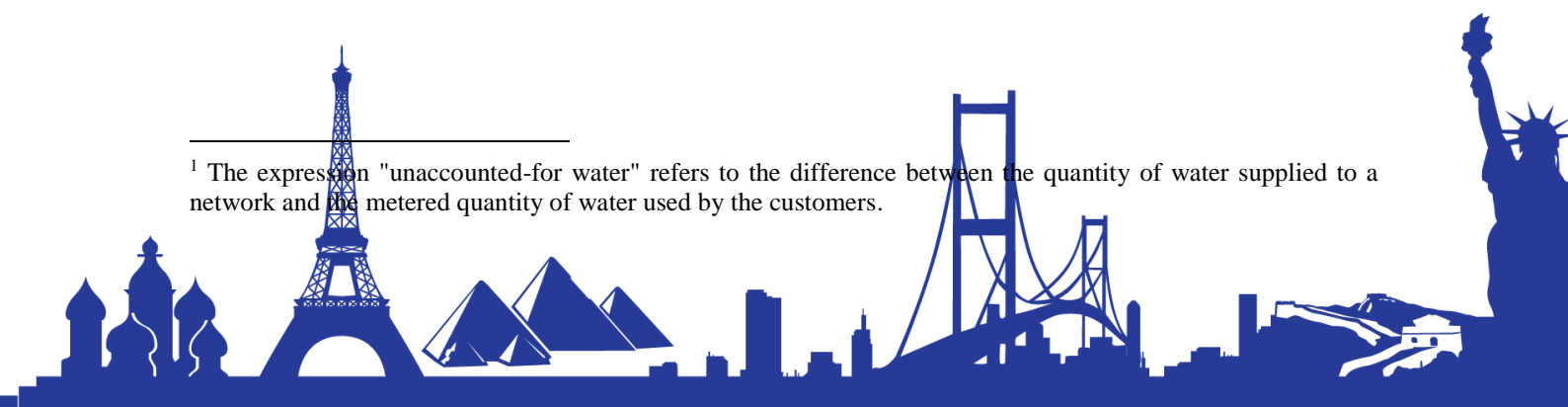
5. The Province of Nova Tertia is one of the poorest provinces of Aquitania. Between 1963 and 2010, Aguas Tercias SA, an entity organised as a commercial company under the Commercial Code of Aquitania, but owned and operated entirely by the provincial government of Nova Tertia, was in charge of supplying water and collecting and treating sewage based on a concession granted by the provincial government. The CEO and the Board of Directors of Aguas Tercias were appointed by the Governor of Nova Tertia and confirmed by the Provincial Parliament.

6. Aguas Tercias was able to reach about 70% of all households and 90% of all commercial entities in the province. In some remote mountain villages and many informal settlements (slums) in the larger cities, not every household was connected to the water and sewage infrastructure. The quality of the water supplied by Aguas Tercias was relatively good and met WHO standards for drinking water. The percentage of unaccounted-for water¹ was negligible. However, sewage collection and treatment services were less than satisfactory: There were recurrent service interruptions and sewage leaks into the ground due to old infrastructure, in particular pipes, and inadequate sewage treatment facilities.

7. In 2003, the political party that had ruled for many decades lost the general elections in the province of Nova Tertia. Due to the subsequent change in the provincial government and as a reaction to budget constraints, the province changed its water policy and decided to partially privatise the supply of water distribution and sewage services. That same year, the province enacted the Water Distribution and

Sewage Services Law of Nova Tertia (the 2003 Law). The following sections of the

¹ The expression "unaccounted-for water" refers to the difference between the quantity of water supplied to a network and the metered quantity of water used by the customers.



2003 Law are relevant to this case:

Section One

(A) The distribution of drinking water and the collection and treatment of sewage are essential services provided to all citizens of the province of Nova Tertia in fulfilment of the human right to water and sanitation.

(B) The principle of universal service obligation shall continue to apply.

Section Two

(A) The provincial Government will grant concessions for the collection, purification, treatment and distribution of drinking water and the collection and treatment of sewage over public networks to public or private companies or joint ventures of public and private companies, including Aguas Tertas SA.

(B) The expression "public network" refers to local water infrastructures (pipes and other facilities) used to supply water distribution and sewage services to the public generally and owned by the Province.

(C) The Provincial Government may adopt regulations and administrative guidelines containing the necessary details of the concessions mentioned in paragraph (A) of this section.

(D) The provincial Government may transfer the right to grant concessions to local authorities in the case of municipalities with more than 100,000 inhabitants.

Section Three

Until new concessions have been issued, Aguas Tertas SA shall continue providing the services mentioned in Section One.

8. In 2004 the provincial government of Nova Tertia adopted the Water and Sewage Concession Regulation (the 2004 Regulation), complementing the 2003 Law. The 2004 Regulation contains detailed provisions regarding the respective rights and obligations between, on the one hand, a company supplying water distribution and sewage services (the Company) and the local public authority (the Authority), on the other hand. The 2004 Regulation is meant to provide the legal framework for concession contracts and addresses issues such as minimum standards for drinking water and effluent released from treatment facilities, terms of the universal service obligation and relationships between consumers and the Company, in particular procedures for setting and collecting charges from consumers. The following provisions of the 2004 Regulation are relevant to this case:



1. A Company which has been granted a concession will operate the public network for water distribution and sewage collection and treatment, including pipes, tanks, pumping and distribution stations and other elements of the infrastructure. The Company will also be responsible for the maintenance and repair of the public network. The ownership of the public network remains in the hands of the Authority.
2. The Company shall collect all relevant charges for drinking water and sewage services directly from consumers. It may increase these charges at the earliest one year after the conclusion of the contract and thereafter annually in so far as such increases are necessary to ensure the quality of the service. Any such increase should not exceed 35 per cent of the current charges, except where exceptional circumstances are shown to exist. The situation of special customers, in particular the elderly and persons with disabilities should be taken into account.
3. The Company shall after consulting with the Authority expand the public networks into areas which are not yet connected to the network. Such expansion will be based on a plan agreed upon by the Company and the Authority.

At the end of 2004, the provincial government of Nova Tertia transferred the right to grant concessions to the capital the province, the city of Tertia, which has about two million inhabitants.

9. In May 2005, the city of Tertia decided to grant a water and sewage concession to a private water company. After a public tender, the city government selected Avanti SA, a company duly established under the laws of Aquitania, to supply drinking water and to collect and treat sewage in Tertia. Avanti SA is 100%-owned by Avanti Ltd., an international water distribution company headquartered in Commerciana. In December 2005, Tertia and Avanti SA signed a contract whereby Tertia granted Avanti SA a concession to supply drinking water and to collect and treat sewage on Tertia's public network until 31 December 2025. The contract is based on the 2003 Law and the 2004 Regulation, and incorporates the provisions highlighted above. It also stipulates that the 2003 Law and the 2004 Regulation are not altered by the contract.

10. In December 2007, Avanti SA imposed an increase of 75% of the water and sewage charges. Avanti SA justified this on the basis of investments it needed to make in Tertia's dated and poorly maintained pipe network and sewage treatment facilities. Avanti undertook a number of repair works and investments into the



network in 2008. However, despite these investments, many leaks in the networks remained leading to the loss of sewage into the ground. According to independent studies, the problem actually increased compared to the time when Aguas TERTIAS was in charge. However, Avanti claimed that its investments prevented even greater environmental damage because the infrastructure was in a very poor condition.

11. Over the last four decades price increases in water and sewage services were minimal, even lower than the general inflation rate in Nova TERTIA. Leaks, however, were frequent. Yet, due to changed perceptions and better education many citizens of TERTIALIA are increasingly concerned about the environmental dangers associated with these leaks. When Avanti announced in a press release in October 2008 that despite its investments, it could not prevent leaks and that further price increases were necessary, public opposition to Avanti grew leading to media campaigns and demonstrations against Avanti in the subsequent months. In 2007 and 2008, the city of TERTIALIA also repeatedly invited Avanti to develop plans for the expansion of the infrastructure as stipulated in the 2004 Regulation and the contract. However, Avanti refused to do so claiming that such investments would have no meaningful commercial basis, because the areas which were not yet connected to the network are very poor neighbourhoods.

12. As a consequence of these events, the city of TERTIALIA decided to terminate the agreement with Avanti SA on 15 April 2009. In its letter of termination, the city claimed that Avanti breached clauses 2 and 3 of the 2004 Regulation and the corresponding contract provisions. Avanti filed a law-suit against this termination before the competent courts of Aquitania which is still pending. In December 2009, Avanti SA terminated all activities in TERTIALIA and dismantled its commercial presence there. On 1 January 2010, Aguas TERTIAS resumed services in TERTIALIA and re-established the conditions for the supply of water and sewage collection which existed before 2003 including the tariff structure thus lowering substantially consumer charges. However, sewage leaks persisted.

13. Following another general election which brought a party opposing water privatisation to power, the Province of Nova TERTIA changed its Water and Sewage Law in September 2011 (Water and Sewage Law of 2011) excluding private companies from providing water distribution and sewage collection services. The relevant section of the Water and Sewage Law of 2011 reads as follows:

Section Two

(A) The collection, purification, treatment and distribution of drinking water to households and commercial entities and the collection and treatment of sewage from households and commercial entities will be operated by a public



company which is owned and controlled in its entirety by the Provincial Government.

In adopting this legislation, the Provincial Parliament provided the following reasons:

“It has been shown that the supply of water and the collection of sewage in private hands lead to price increases and dangerous under-investment in the network and infrastructure. While the former threatens the basic human right to water and sanitation, the latter can endanger human health and the environment. These challenges are better met by a public company closely controlled by the Provincial Government.”

In addition, the new provincial government announced new plans to significantly improve the sewage infrastructure in order to reduce the leakage problems and to expand the network to areas not yet connected. The necessary investments should be financed on the basis of an increase in taxes.

14. In January 2013, Avanti Ltd approached the Trade Ministry of Commercica to lodge a complaint against Aquitania at the WTO and before the dispute settlement mechanism of the OFTA. The OFTA dispute settlement mechanism is identical to NAFTA Chapter 20 and contains *inter alia* a clause (Art. 2005:6 OFTA) which provides that once dispute settlement procedures have been initiated under the OFTA or the WTO the forum selected by the complaining party shall be used to the exclusion of the other.

15. In February 2013 the Trade Ministry of Commercica requested consultations with Aquitania regarding the changed Water and Sewage Law under the dispute settlement provisions of both the DSU and the OFTA. The request reminded Aquitania of its “commitments under the agreements we both signed, OFTA and GATS”. Aquitania replied that its activities are in conformity with all international agreements and indicated that it did not intend to change its law. Commercica therefore considered that consultations with Aquitania failed to settle the dispute

16. In a letter dated 2 May 2013 the Trade Ministry of Commercica requested a meeting of the OFTA Free Trade Commission which is in charge of dispute settlement under the OFTA and submitted the dispute to the Commission. On 3 May 2013 the Trade Ministry also requested the establishment of a WTO panel in accordance with Article 4.7 of the DSU. It should be noted that the OFTA Free Trade Commission which consists of one Commissioner from each OFTA member country has not met for two years because the state of Oppositia, a member of OFTA, refuses



to send its Commissioner to the meetings due to political reasons. The OFTA Free Trade Commission is only competent to hear a case if all Commissioners are present.

17. At its meeting of 30 August 2013 the DSB established a panel in accordance with Article 6 of the DSU, with standard terms of reference, to examine the matter referred to the DSB by Commercia in its panel request. Commercia claims that the Nova Tertia Water and Sewage Law of 2011, in particular Section 2 (A) of that law, which practically prohibits the supply of water and sewage services to all private companies, violates Aquitania's obligations under the General Agreement on Trade in Services (GATS). According to Commercia, the law practically prohibits supply of water and sewage services to all private companies even though Aquitania made full market access and national treatment commitments in the relevant sectors. Hence, Commercia claims a violation of Articles XVI:1 and XVI:2(a), and XVII GATS.

18. In reply, Aquitania claims, as a preliminary objection, that the case is inadmissible on the ground that Commercia had first selected the OFTA dispute settlement mechanism before turning to the WTO. On merits, Aquitania argues that water supply and sewage collection and treatment in Nova Tertia are services supplied "in the exercise of governmental authority pursuant to Article I:3(b) of the GATS, and thus fall outside the scope of the GATS. Should the panel find otherwise, Aquitania argues that its GATS specific commitments do not cover water distribution and sewage collection and treatment services. Aquitania further argues that the 2011 law of Nova Tertia is not in breach of GATS Articles XVI and XVII. In any event, Aquitania considers its law to be justifiable under Art. XIV (a) and (b) GATS, because the imposition of universal service obligation is a fundamental value of the Aquitanian society and reflects also Aquitania's human rights obligations. Universal service obligations cannot be met by private companies. Furthermore, the environmental dangers associated with sewage leaks can only be addressed by significant public investments which a private company is not willing to undertake.

NOTE: Aquitania and Commercia are parties to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CPRD).



The following parts of Aquitania's GATS Schedule are relevant to the case:

Sector or subsector	Limitations on market access	Limitations on national treatment
<p>3. CONSTRUCTION AND RELATED ENGINEERING SERVICES</p> <p>A. General construction work for buildings B. General construction work for civil engineering C. Installation and assembly work D. Building completion and finish work E. Other except special trade construction work</p>	<p>1) Unbound*</p> <p>2) Unbound*</p> <p>3) Only in the form of joint ventures, with foreign majority ownership permitted</p> <p>4) Unbound</p>	<p>1) Unbound*</p> <p>2) Unbound*</p> <p>3) None</p> <p>4) Unbound</p>
<p>4. DISTRIBUTION SERVICES</p> <p>A. Commission agents' Services B. Wholesale trade services C. Retailing services D. Franchising E. Other</p>	<p>1) Unbound</p> <p>2) None</p> <p>3) Only in the form of joint ventures, with foreign majority ownership permitted</p> <p>4) Unbound</p>	<p>1) Unbound</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound</p>



<p>6. ENVIRONMENTAL SERVICES</p> <p>A. Sewage and related services</p> <p>B. Refuse disposal services</p> <p>C. Sanitation and similar services</p> <p>D. Other</p>	<p>1) Unbound</p> <p>2) None</p> <p>3) None, except that a concession is required</p> <p>4) Unbound</p>	<p>1) Unbound</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound</p>
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* Unbound due to lack of technical feasibility

