

Azurix Corp.

v.

The Argentine Republic

**(ICSID Case No. ARB/01/12)
(Annulment Proceeding)**

**Decision on the Application for Annulment
of the Argentine Republic**

Members of the *ad hoc* Committee

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Judge Bola Ajibola
Mr. Michael Hwang S.C.

Secretary of the *ad hoc* Committee: Ms. Natalí Sequeira

Assistant to the *ad hoc* Committee: Ms. Freya Baetens

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Date of dispatch to the parties: September 1, 2009.

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TABLE OF ABBREVIATED REFERENCES

AAS	Azurix AGOSBA S.R.L.
ABA	Azurix Buenos Aires S.A. (also referred to as “the Concessionaire”)
ADC Award	<i>ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary</i> , ICSID Case No. ARB/03/16, Award, October 2, 2006
AES Jurisdiction Decision	<i>AES Corporation v. Argentine Republic</i> , ICSID Case No. ARB/02/17, Decision on Jurisdiction, April 26, 2005
AGOSBA	Administración General de Obras Sanitarias de la Provincia de Buenos Aires
<i>Amco</i> Annulment Decision	<i>Amco Asia Corporation and others v. Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Decision on Annulment, December 17, 1992
AMT Award	<i>American Manufacturing & Trading, Inc. v. Republic of Zaire</i> , ICSID Case No. ARB/93/1, Award, February 21, 1997
Argentina	The Argentine Republic (the Respondent)
AAPL Award	<i>Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka</i> , ICSID Case No. ARB/87/3, Award, June 27, 1990
Award	<i>Azurix Corp. v. Argentine Republic</i> , ICSID Case No. ARB/01/12, Award, July 14, 2006

Azurix	Azurix Corp. (the Claimant)
<i>Barcelona Traction case</i>	<i>Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)</i> , Second Phase, Judgment, I.C.J. Reports 1970, p. 3
BIT	Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed November 14, 1991; entered into force October 20, 1994
<i>Camuzzi</i> Jurisdiction Decision	<i>Camuzzi International S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/2, Decision on Jurisdiction, May 11, 2005
Canon	Canon payment of 438,555,554 Argentine pesos made by ABA to the Province on June 30, 1999
CDC Annulment Decision	<i>CDC Group plc v. Republic of Seychelles</i> , ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005
<i>Chorzów Factory</i>	<i>The Factory At Chorzów (Claim for Indemnity) (The Merits)</i> , P.C.I.J., Ser. A., No. 17, 1928
CME Partial Award	<i>CME Czech Republic B.V. (Netherlands) v. Czech Republic</i> , UNCITRAL Partial Award, September 13, 2001
CMS Annulment Decision	<i>CMS Gas Transmission Company v. Argentine Republic</i> , ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007

CMS Jurisdiction Decision	<i>CMS Gas Transmission Co. v. Argentine Republic</i> , ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction, July 17, 2003
Comfort letter	See paragraph 9 of this Decision
Committee	See paragraph 5 of this Decision
Concession Agreement	See paragraph 27 of this Decision
<i>Continental-Casualty</i> Jurisdiction Decision	<i>Continental Casualty Company v. Argentine Republic</i> , ICSID Case No. ARB/03/9, Decision on Jurisdiction, February 22, 2006
Decision on Jurisdiction	<i>Azurix Corp. v. Argentine Republic</i> , ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003
<i>Diallo case</i>	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i> , Preliminary Objections Judgment, I.C.J., 24 May 2007
Disqualification Decision	<i>Azurix Corp. v. Argentine Republic</i> , ICSID Case No. ARB/01/12, Decision on the Challenge to the President of the Tribunal, February 25, 2005
<i>Duke Award</i>	<i>Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru</i> , ICSID Case No. ARB/03/28, August 18, 2008
<i>ELSI case</i>	<i>Case concerning Elettronica Sicula S.p.A. (ELSI) (United States America v. Italy)</i> , Judgment, I.C.J. Reports 1989, p. 15

ENRON	See paragraph 24 of this Decision
<i>Enron Ancillary Claim</i> Jurisdiction Decision	<i>Enron v. Argentine Republic</i> , ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) August 2, 2004
<i>Enron</i> Jurisdiction Decision	<i>Enron v. Argentine Republic</i> , ICSID Case No. ARB/01/3, Decision on Jurisdiction January 14, 2004
Envelopes Nos. 1 and 2	See paragraph 220 of this Decision
<i>Feldman Award</i>	<i>Marvin Roy Feldman Karpa v. The United Mexican States</i> , ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002
Fulbright	See paragraph 251 of this Decision
<i>GAMI Award</i>	<i>GAMI Investments, Inc. v. Mexico</i> , NAFTA UNCITRAL Final Award, November 15, 2004
<i>Gas Natural</i> Jurisdiction Decision	<i>Gas Natural SDG, S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/10, Decision on Jurisdiction, June 17, 2005
<i>Genin Award</i>	<i>Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia</i> , ICSID Case No. ARB/99/2, Award, June 25, 2001
<i>Goetz Award</i>	<i>Antoine Goetz and others v. Republic of Burundi</i> , ICSID Case No. ARB/95/3, February 10, 1999
Hytza	See paragraph 24 of this Decision
ICSID	International Centre for Settlement of Investment Disputes

ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159
<i>Klöckner</i> Annulment Decision	<i>Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais</i> , ICSID Case No. ARB/81/2, Decision on Annulment, May 3, 1985
<i>Lanco</i> Jurisdiction Decision	<i>Lanco International, Inc. v. Argentine Republic</i> , ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, December 8, 1998
Law, the	See paragraph 24 of this Decision
<i>LG&E</i> Jurisdiction Decision	<i>LG&E Energy Corp. v. Argentine Republic</i> , ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, April 30, 2004
<i>Lucchetti</i> Annulment Decision	<i>Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru</i> , ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007
<i>Maffezini</i> Jurisdiction Decision	<i>Emilio Agustin Maffezini v. The Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000
<i>Malaysian-Historical Salvors</i> Annulment Decision	<i>Malaysian Historical Salvors, SDN, BHD v. Malaysia</i> , ICSID Case No. ARB/05/10, Decision on Annulment, April 16, 2009

<i>MINE</i> Annulment Decision	<i>Maritime International Nominees Establishment v. Republic of Guinea</i> , ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989
<i>Mitchell</i> Annulment Decision	<i>Patrick Mitchell v. Democratic Republic of the Congo</i> , ICSID Case No. ARB/99/7, Decision on Annulment, February 9, 2004
<i>MTD</i> Annulment Decision	<i>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile</i> , ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007
<i>Myers</i> Award	<i>S.D. Myers, Inc. v. Canada</i> , NAFTA, Partial Award, November 13, 2000
NAFTA	North American Free Trade Agreement, 32 I.L.M. 289 (1993) (table of contents, preamble, parts I-III) and 32 I.L.M. 605 (1993) (parts IV-VII, annexes)
OBA	See paragraph 26 of this Decision
ORAB	See paragraph 24 of this Decision
<i>Pan American</i> Jurisdiction Decision	<i>Pan American Energy LLC v. Argentine Republic</i> , ICSID Case No. ARB/03/13, Decision on Jurisdiction, July 27, 2006
<i>Repsol</i> Annulment Decision	<i>Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)</i> , ICSID Case No. ARB/01/10, Decision on Annulment, January 08, 2007
Schroeders	See paragraph 24 of this Decision

<i>Sempra</i> Jurisdiction Decision	<i>Sempra Energy International v. Argentine Republic</i> , ICSID Case No. ARB/02/16, Decision on Jurisdiction, September 28, 2007
<i>Siemens</i> Jurisdiction Decision	<i>Siemens A.G. v. Argentine Republic</i> , ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004
<i>Soufraki</i> Annulment Decision	<i>Hussein Nuaman Soufraki v. United Arab Emirates</i> , ICSID Case No. ARB/02/7, Decision on Annulment, June 5, 2007
<i>Suez</i> Jurisdiction Decision	<i>Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006
<i>Total</i> Jurisdiction Decision	<i>Total S.A. v. Argentine Republic</i> , ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, August 25, 2006
Tribunal	See paragraph 31 of this Decision
Vienna Convention	Vienna Convention on the Law of Treaties, Vienna, May 23, 1969; 1155 U.N.T.S. 331
<i>Vivendi</i> Annulment Decision	<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic</i> , ICSID Case No. ARB/97/3, (first Annulment), Decision on Annulment, July 3, 2002
<i>Vivendi II</i> Jurisdiction Decision	<i>Compañía de Aguas del Aconquija S.A. & Vivendi Universal (formerly Générale des Eaux) v. Argentine Republic</i> (“ <i>Vivendi II</i> ”), ICSID Case No. 97/3, Decision on Jurisdiction, November 14, 2005

Waste-Management Award *Waste Management, Inc. v United Mexican States*, ICSID
Case No. ARB(AF)/00/3, Award, April 30, 2004

Wena Hotels *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID
Annulment Decision Case No. ARB/98/4, Decision on Annulment, February 5,
2002

A. Introduction

1. On November 13, 2006, the Argentine Republic (“Argentina”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application in writing requesting the annulment of the Award, rendered by the Tribunal in the arbitration proceeding between Azurix Corp. (“Azurix”) and Argentina on July 14, 2006.
2. The Application was made within the time period provided in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”).¹ In its Application, Argentina sought annulment of the Award on four of the five grounds set forth in Article 52(1) of the ICSID Convention, specifically claiming that:
 - (a) under Article 52(1)(a) the Tribunal was not properly constituted;
 - (b) under Article 52(1)(b) the Tribunal manifestly exceeded its powers;
 - (c) under Article 52(1)(d) there had been a serious departure from a fundamental rule of procedure; and
 - (d) under Article 52(1)(e) the Award failed to state the reasons on which it was based.
3. The Application also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), for a stay of enforcement of the Award until the Application for Annulment was decided.
4. The Secretary-General of ICSID registered the Application on December 11, 2006 and on the same date, in accordance with Rule 50(2) of the ICSID Arbitration Rules, transmitted the Notice of Registration to the parties. The parties were also notified that, pursuant to ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 575 UNTS 159

5. By letter of June 14, 2007, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the parties were notified by the Centre that an *ad hoc* Committee (“the Committee”) had been constituted, composed of Dr. Gavan Griffith Q.C., a national of Australia, Judge Bola Ajibola, a national of Nigeria, and Mr. Michael Hwang S.C., a national of Singapore. On the same date the parties were informed that Ms. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary of the Committee. On May 14, 2009, Ms Natalí Sequeira, Counsel, ICSID, was appointed as Secretary of the Committee.
6. On August 3, 2007, after hearing both parties’ views concerning the schedule for the filing of written observations on the continuation of the stay of enforcement of the Award as requested by Argentina, the Committee invited the parties to simultaneously submit their written observations on September 12, 2007. By the same letter, the Committee confirmed that the oral arguments on this matter would take place during the first session and informed the parties that the Committee would make a decision on the continuation of the stay of enforcement of the Award in accordance with ICSID Arbitration Rule 54.
7. In compliance with the Committee’s instructions, on September 12, 2007, Argentina filed its Observations on the Continuation of the Stay of Enforcement of the Award, and Azurix filed its Opposition to Argentina’s Request to Continue to Stay Enforcement of the Award.
8. The first session of the Committee was held, as scheduled with the agreement of the parties, on September 20 and 21, 2007, at the premises of the World Bank in Washington D.C. Prior to the start of the session, the Secretariat distributed to the parties copies of the Declarations, signed by each Member of the Committee, pursuant to ICSID Arbitration Rule 52(2). During the session on September 20, 2007, several issues of procedure were agreed and decided. On September 21, 2007, both parties addressed the Committee with their respective arguments concerning the question of the

continuance of the stay of enforcement of the Award. During the session, the Committee put questions to the parties.

9. After having heard the parties' arguments, the Committee offered Argentina an opportunity to file within seven days a statement in writing of its intention to comply with the Award under the ICSID Convention in the event that the Award was not annulled ("the Comfort letter"). The Committee further decided that it would welcome Azurix to file any comments on Argentina's written statement within seven days after such statement. At the same time, it decided to continue the stay of enforcement of the Award until it had taken a decision.
10. On September 27, 2007, Argentina submitted a written statement signed by Dr. Osvaldo César Guglielmino, Argentina's Attorney-General (Procurador General del Tesoro de la Nación Argentina), which stated "*[t]he Republic of Argentina hereby provides an undertaking to Azurix Corp. that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event annulment is not granted.*"
11. In a letter dated October 4, 2007, Azurix expressed its concern that Dr. Guglielmino's letter did not in fact provide additional comfort or security to Azurix, given Argentina's prior actions, and particularly in light of its recent public announcements that Argentina would not acknowledge the final and binding nature of the Decision on Annulment in *CMS v. Argentina* rendered by the CMS *ad hoc* Committee on September 25, 2007.²
12. By letter of October 5, 2007, Dr. Guglielmino responded to Azurix's letter of October 4, 2007, requesting the Committee not to reach a decision regarding the bank guarantee prior to giving Argentina an opportunity to present its case concerning the statements alleged by Azurix.

² *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007 ("CMS Annulment Decision").

13. After considering the parties' written and oral arguments on the matter and due deliberation, the Committee issued on December 28, 2007 its *Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award*.
14. In its Decision, the Committee unanimously ordered that the stay of execution "*should continue in force pending its decision on Argentina's application for annulment*" and declined "*to order the provision of any security during the period of the stay.*"
15. In accordance with the timetable set forth by the Committee during the September 21-22, 2007 session, Argentina filed its Memorial on Annulment on January 8, 2008. On May 7, 2008, Azurix filed its Counter-Memorial.
16. In reply to a letter from ICSID dated May 23, 2008, the parties signified their agreement on June 2, 2008 to the proposal of the President of the Committee to appoint a Legal Assistant, Ms. Freya Baetens, to assist the Committee in the proceedings.
17. The Argentine Republic filed its Reply on Annulment on June 18, 2008, and Azurix filed its Rejoinder on July 28, 2008.
18. After consultation with the parties, the President of the Committee held a preliminary organizational telephone conference call with counsel for both parties on September 3, 2008. The conference call was attended by Mr. Craig Miles, Mr. Rodrigo Castillo, Dr. Guido Santiago Tawil and Mr. Francisco Gutiérrez, on behalf of Azurix and by Dr. Gabriel Bottini, Professor Philippe Sands, Ms. Gisela Makowski and Ms. María Alejandra Etchegorry, on behalf of the Argentine Republic. During the conference call the parties agreed on the manner in which the hearing on annulment would be conducted. These agreements were reflected in the Committee's Procedural Order No. 1 dated September 10, 2008.

19. By letter dated September 16, 2008, Azurix submitted its additional documents for the hearing. By email of September 17, 2008, Argentina submitted its additional documents, including lists containing new Exhibits and new Legal Authorities.
20. As agreed, a 2-day hearing was held at the World Bank offices in Paris on September 29 and 30, 2008, at which counsel presented their arguments and submissions, and responded to questions from the Members of the Committee. Present at the hearing were:
 - the members of the Committee: Dr. Gavan Griffith Q.C., President; Judge Bola Ajibola and Mr. Michael Hwang S.C.;
 - the representatives of Azurix: Mr. R. Doak Bishop, Mr. Craig Miles and Ms. Nanni Kerrie of King & Spalding; Dr. Guido Santiago Tawil, Mr. Francisco Gutiérrez and Mr. Federico Campolieti of M. & M. Bomchil and Mr. Rod Castillo of Azurix Corp.; and
 - the representatives of the Argentine Republic: Mr. Adolfo Gustavo Scrinzi, Dr. Gabriel Bottini, Mr. Ignacio Pérez Cortés, Mr. Nicolás Diana, Ms. Verónica Lavista and Ms. María Alejandra Etchegorry of the Procuración del Tesoro de la Nación; Ms. Guillermina Cinti of the Provincia de Buenos Aires; Professor Philippe Sands of Matrix Chambers and University College London; Mr. Zachary Douglas of Matrix Chambers and Cambridge University; Ms. Penny Martin of University College London; and Alejandro Daniel Korn and Jonathan Etra of Ferrel Law: and
 - the legal assistant of the Committee: Ms. Freya Baetens;
21. Following the ruling of the Committee on September 29, 2008 as to the inadmissibility of experts' reports filed by the parties, on October 10, 2008, the parties filed letters identifying particular paragraphs of their expert reports

upon which they relied as part of their submissions, to which answering objections were made by the parties by letters dated October 17, 2008.

22. On August 24, 2009, the Committee declared the closure of the proceeding pursuant to Arbitration Rule 38.
23. During the course of the proceedings, the Members of the Committee deliberated by various means of communication and have taken into account all pleadings, documents and testimony before them, including documents tendered at the hearing.

B. The dispute

24. In 1996 the Province of Buenos Aires (the "Province") commenced privatization of the services of Administración General de Obras Sanitarias de la Provincia de Buenos Aires ("AGOSBA"), the Province-owned and -operated company which provided potable water and sewerage services in the Province. The Province passed Law 11.820 ("the Law") to create the regulatory framework for privatization of AGOSBA's services. Under the Law, 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 ("ORAB"). The concessionaire was required to be a company incorporated in Argentina. The Province engaged Schroeders Argentina S.A. ("Schroeders") as adviser for the privatization of AGOSBA and requested Schroeders to distribute an information statement to potential investors. Schroeders sent the information statement to ENRON Corporation ("ENRON"), a United States corporation, inviting this company to participate in the bidding. ENRON requested from a consulting company, Hytsa Estudios y Proyectos S.A. ("Hytsa"), a preliminary report on the information furnished by the Province on AGOSBA and its operations.

25. The privatization process was conducted by the Privatization Commission, which tendered the concession on the international market on the basis of the Law and of a set of contract documents prepared in accordance with the Law by ORAB, including the Bidding Terms and Conditions and a draft Concession Agreement.
26. A bid offer was made by two companies of the Azurix group established for this specific purpose: Azurix AGOSBA S.R.L. (“AAS”) and Operadora de Buenos Aires S.R.L. (“OBA”). AAS and OBA are indirect subsidiary companies of Azurix. AAS was registered in Argentina and was 0.1% owned by Azurix and 99.9% owned by Azurix Argentina Holdings Inc. (a company incorporated in Delaware), which in turn was 100% owned by Azurix. OBA, also registered in Argentina, was 100% owned by Azurix Agosba Holdings Limited, a company registered in the Cayman Islands. Azurix owns 100% of the shares in Azurix Agosba Holdings Limited.
27. Having successfully won their bid, AAS and OBA incorporated Azurix Buenos Aires S.A. (“ABA”) in Argentina to act as concessionaire. On June 30, 1999, ABA (also referred to as “the Concessionaire”) made a “canon payment” of 438,555,554 Argentine pesos (“the Canon”) to the Province.³ On payment of the canon, ABA, AGOSBA and the Province executed a concession agreement (“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 (“the Concession”). Handover of the service took place on July 1, 1999.
28. Azurix declared that it knew and accepted the bidding conditions and committed itself to undertake all measures necessary to ensure that OBA would fulfill the obligations set forth in the bidding conditions and the Concession Agreement as operator of the Concession during the first 12

³ 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 (*Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003 [“Decision on Jurisdiction”], footnote 1).

years of operation. Similarly, Azurix accepted that it would be jointly responsible for the obligations of AAS and that during the first six years of the Concession there would be no change in the control of AAS.

29. In the proceedings Azurix contended:

- (a) that its investment in Argentina was expropriated by measures of Argentina tantamount to expropriation and that Argentina had, in addition, violated its obligations, under the BIT, of fair and equitable treatment, non-discrimination and full protection and security;
- (b) that such measures were actions or omissions of the Province or its instrumentalities that resulted in the non-application of the tariff regime of the Concession for political reasons;
- (c) that the Province did not complete certain works that were to remedy historical problems and were to be transferred to the Concessionaire upon completion;
- (d) that the lack of support for the concession regime prevented ABA from obtaining financing for its Five Year Plan;
- (e) that in 2001, the Province denied that the canon was recoverable through tariffs; and
- (f) that “*political concerns were always privileged over the financial integrity of the Concession*”,⁴ and “[w]ith no hope of recovering its investments in the politicized regulatory scheme, ABA gave notice of termination of the Concession and was forced to file for bankruptcy”.⁵

30. Argentina disputed the allegations of Azurix. According to Argentina, the dispute was a contractual dispute and the difficulties encountered by the

⁴ Award ¶ 43 referring to Azurix's Memorial, p. 7.

⁵ *Ibid.*

Concessionaire in the Province were of its own making. In particular, Argentina argued:

- (a) that the case presented by Azurix was intimately linked to Enron's business practices and its bankruptcy;
- (b) that the price paid for the Concession was excessive and opportunistic and related to the forthcoming IPO of Azurix at the time Azurix bid for the Concession through AAS and OBA; and
- (c) that the Concessionaire did not comply with the Concession Agreement, in particular its investment obligations, so that the actions of the Province, including the termination of the Concession Agreement by the Province, were justified.

31. On September 19, 2001, Azurix filed a request for arbitration with ICSID against the Republic of Argentina, based upon the alleged violation of several articles of the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (the "BIT").⁶ Azurix alleged that Argentina's treatment of Azurix's investment was tantamount to expropriation; that Argentina failed to provide fair and equitable treatment, and full protection and security to Azurix's investment; that Argentina did not observe the obligations that it had entered into with respect to Azurix's investment, had acted arbitrarily, and did not act transparently. The arbitral tribunal (the "Tribunal") was duly constituted on April 8, 2002.

32. The Tribunal rendered a decision on its jurisdiction (the "Decision on Jurisdiction") on December 8, 2003, in which the Tribunal found 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*

⁶ Signed November 14, 1991; entered into force October 20, 1994.

*(c) the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal.*⁷

33. The hearings on the merits took place from October 4 to 13, 2004 and on November 30, 2004 post-hearing briefs were filed. On November 29, 2004, Argentina submitted a proposal challenging the appointment of Dr. Rigo Sureda as President of the Tribunal, pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9(6).
34. Dr. Rigo Sureda defended his position in a letter of December 10, 2004 on which Argentina commented on December 30, 2004. Further correspondence from Azurix' counsel dated January 28, 2005 and February 1, 2005 elaborated on the disclosure of Fulbright & Jaworski's representation of one affiliate of Azurix Corp. and of one affiliate of Enron Corp. (see paragraphs 261 to 266 below).
35. On February 25, 2005, the two co-arbitrators of Dr. Rigo Sureda issued their decision on the matter of the Disqualification Request of Dr. Rigo Sureda (the "Disqualification Decision"),⁸ finding that:

*By any reasonable standard it cannot be said in the present case that the party putting forward its Proposal has acted promptly... The Tribunal therefore concludes that Argentina is deemed to have waived its right to request the disqualification of Dr. Rigo, on the ground that it has not reacted with the promptness required by Rules 9 and 27 of the Arbitration Rules ...*⁹

36. The Tribunal further rejected the challenge to Dr. Rigo Sureda on the ground that:

... [i]t is difficult to conclude that this situation would lead to a 'judge party relationship' as argued by Argentina. And to pretend that because of his appointment, Dr. Tawil would somehow "have authority" over Dr. Rigo, simply because he is a member of the firm which appointed him in a totally different case from the one in which Dr. Rigo acts as

⁷ Decision on Jurisdiction ¶ 102.

⁸ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Challenge to the President of the Tribunal, February 25, 2005 (the "Disqualification Decision").

⁹ Disqualification Decision ¶ 7–8.

arbitrator, would certainly be stretching any reasonable concept of the powers of arbitrators.

37. In its Award of July 14, 2006, the Tribunal unanimously decided:

1. *That the Respondent did not breach Article IV(1) of the BIT [the expropriation clause].*
2. *That the Respondent breached Article II(2)(a) of the BIT by failing to accord fair and equitable treatment to Azurix's investment.*
3. *That the Respondent failed to accord full protection and security to Azurix's investment under Article II(2)(a) of the BIT.*
4. *That the Respondent breached Article II(2)(b) of the BIT by taking arbitrary measures that impaired Azurix's use and enjoyment of its investment.*
5. *To award compensation to Azurix on account of the fair market value of the Concession in the amount of US\$165,240,753 (one hundred sixty-five million two hundred forty thousand seven hundred fifty-three US dollars), including in part the additional investments made by Azurix to finance ABA.*
6. *To award interest compounded semi-annually on the amount referred to in paragraph 5 of this decision: (i) as from March 12, 2002 to June 30, 2006 at the rate of 2.44%, which is the average rate applicable to US six-month certificates of deposit during that period, and (ii) as from 60 days after the dispatch of this award to the parties until such amount has been fully paid at the average rate applicable to US six-month certificates of deposit.*
7. *That each party shall be responsible for their own costs and counsel fees, and the Respondent shall bear the fees and expenses of the arbitrators and the costs of the ICSID Secretariat except for US\$34,496 (thirty-four thousand four hundred ninety six U.S. dollars) which shall be borne by Claimant.*
8. *That all other claims are dismissed.*¹⁰

¹⁰ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006 (the "Award") ¶ 442.

38. Argentina now asks the Committee to annul this Award.

C. The grounds for annulment

(a) Introduction

39. Article 52(1) of the ICSID Convention provides as follows:

- (1) *Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
 - (a) *that the Tribunal was not properly constituted;*
 - (b) *that the Tribunal has manifestly exceeded its powers;*
 - (c) *that there was corruption on the part of a member of the Tribunal;*
 - (d) *that there has been a serious departure from a fundamental rule of procedure; or*
 - (e) *that the award has failed to state the reasons on which it is based.*

40. In the present case, Argentina identifies a number of matters which it claims are grounds for annulment, relating to the Tribunal's jurisdictional findings, to its findings relating to the applicable law, to its consideration of evidence, to the constitution of the Tribunal, as well as to the Tribunal's calculation of the damages. Argentina relies on four of the five grounds of annulment provided for in the ICSID Convention, namely those under sub-paragraphs (a), (b), (d) and (e) of Article 52(1).

41. An ICSID award is not subject to any appeal or to any other remedy except those provided for in the ICSID Convention.¹¹ In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute,¹² but can

¹¹ ICSID Convention, Article 53(1).

¹² *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007 ("Lucchetti Annulment Decision") ¶ 101; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007 ("MTD Annulment Decision") ¶¶ 52-54; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, June 5, 2007 ("Soufraki Annulment Decision") ¶ 20; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on

only determine whether the award should be annulled on one of the grounds in Article 52(1).¹³

42. As was for instance stated in the *MTD* Annulment Decision, annulment has a limited function since a committee:

*... cannot substitute its determination on the merits for that of the Tribunal. Nor can it direct a Tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a res judicata but on a question of merits it cannot create a new one. A more interventionist approach by committees on the merits of disputes would risk a renewed cycle of tribunal and annulment proceedings of the kind observed in Klöckner and AMCO.*¹⁴

(b) Improper constitution of the Tribunal (Article 52(1)(a))

43. Article 57 allows for the disqualification of an arbitrator “on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.” Article 14(1) states that “persons designated to serve on the Panels shall be persons... who may be relied upon to exercise independent judgment.”

Annulment, May 03, 1985 (“*Klöckner* Annulment Decision”) ¶ 61; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, December 17, 1992 (*Amco* Annulment Decision”) 39 (¶ 7.19), 51 (¶ 8.08); *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989 (“*MINE* Annulment Decision”) 87 (¶ 5.04), 88 (¶ 5.08); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, (“*Wena Hotels* Annulment Decision”) 135 (¶ 18); *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) Decision on Annulment, June 29, 2005, (“*CDC* Annulment Decision”) 248-250 (¶¶ 34-37); *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, February 9, 2004 (“*Mitchell* Annulment Decision”) ¶ 21; *CMS Annulment Decision*, ¶ 43.

¹³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, (first Annulment), Decision on Annulment, July 3, 2002, (“*Vivendi* Annulment Decision”) 357-8 ¶¶ 62 (citing other authorities), 64; *Klöckner* Annulment Decision ¶¶ 3, 83; *MTD* Annulment Decision ¶ 90; *Soufraki* Annulment Decision ¶ 23.

¹⁴ *MTD* Annulment Decision ¶ 54. Also *MINE* Annulment Decision, ¶ 4.02 (“even within the framework of the Convention it [the award] is not subject to review on the merits”) and ¶ 4.04 (“Annulment is not a remedy against an incorrect decision. Accordingly, an ad hoc Committee may not in fact reverse an award on the merits under the guise of applying Article 52”). Further *CMS* Annulment Decision, ¶¶ 43-44: “[A Committee] cannot substitute its determination on the merits for that of the Tribunal. Nor can it direct a Tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a res judicata but on a question of merits it cannot create a new one.” Also *Soufraki* Annulment Decision ¶ 24.

44. The scope of this ground of annulment is considered in paragraphs 274-284 (applicable principles) and 286-292 (Committee's views) below.

(c) Manifest excess of powers (Article 52(1)(b))

45. This ground of annulment will exist where the Tribunal lacked jurisdiction, for instance because the dispute is not covered by the arbitration agreement. As was stated by the *ad hoc* committees in the *Klöckner I* Annulment Decision and *CMS* Annulment Decision:

an arbitral tribunal's lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an "excess of powers" under Article 52 (1)(b).¹⁵

46. However, the ground of manifest excess of powers is not limited to lack of jurisdiction. This ground of annulment may also exist where the tribunal disregards the applicable law or bases the award on a law other than the applicable law under Article 42 of the ICSID Convention.¹⁶ As the *ad hoc* committee in the *CMS* Annulment Decision stated:

A complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can also constitute a manifest excess of powers.¹⁷

47. However, there is a distinction between *non-application* of the applicable law (which is a ground for annulment), and an *incorrect application* of the applicable law (which is not),¹⁸ although this is a distinction that may not always be easy to draw. In the *MINE* Annulment Decision it was said that:

Disregard of the applicable rules of law must be distinguished from erroneous application of those rules

¹⁵ *Klöckner* Annulment Decision ¶ 4.

¹⁶ *Klöckner* Annulment Decision ¶ 59; *MINE* Annulment Decision ¶ 5.03; *CMS* Annulment Decision ¶ 49; *Lucchetti* Annulment Decision ¶ 98; *MTD* Annulment Decision ¶ 44; *Soufraki* Annulment Decision ¶ 45.

¹⁷ *CMS* Annulment Decision ¶ 49.

¹⁸ *MINE* Annulment Decision ¶ 5.04; *CMS* Annulment Decision ¶ 50-51; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment, January 08, 2007 ("*Repsol* Annulment Decision") ¶ 38; *Soufraki* Annulment Decision ¶ 85; *Lucchetti* Annulment Decision ¶ 112; *MTD* Annulment Decision ¶ 45-49.

*which, even if manifestly unwarranted, furnishes no ground for annulment.*¹⁹

To the same effect, in the *CMS* Annulment Decision, it was said that:

*The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.*²⁰

48. Additionally, as was observed in the *MTD* Annulment Decision, it is an express requirement of Article 52(1)(b) of the ICSID Convention that:

*the error must be “manifest”, not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.*²¹

(d) Serious departure from fundamental rule of procedure (Article 52(1)(d))

49. As was stated in the *Vivendi* Annulment Decision:

*... [u]nder Article 52(1)(d), the emphasis is clearly on the term “rule of procedure,” that is, on the manner in which the Tribunal proceeded, not on the content of its decision.*²²

50. The terms of Article 52(1)(d) indicate that, for this ground of annulment to be established, not only must the departure from the rule of procedure be “serious”, but the rule of procedure in question must be “fundamental”.²³

51. In the *Wena Hotels* Annulment Decision it was further stated that:

In order to be a “serious” departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from

¹⁹ *MINE* Annulment Decision ¶ 5.04.

²⁰ *CMS* Annulment Decision ¶ 136.

²¹ *MTD* Annulment Decision ¶ 47.

²² *Vivendi* Annulment Decision ¶ 83.

²³ *MINE* Annulment Decision ¶¶ 5.05 and 5.06; *MTD* Annulment Decision ¶ 49.

*what it would have awarded had such a rule been observed.*²⁴

52. This point was elaborated upon in the *MINE* Annulment Decision:

A first comment on this provision concerns the term "serious". In order to constitute a ground for annulment the departure from a "fundamental rule of procedure" must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.

A second comment concerns the term "fundamental": even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is "fundamental". The Committee considers that a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: "The parties shall be treated with equality and each party shall be given full opportunity of presenting his case." The term "fundamental rule of procedure" is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.²⁵

(e) Failure to state reasons (Article 52(1)(e))

53. It is generally accepted that this ground of annulment only applies in a clear case when there has been a failure by the tribunal to state any reasons, and not in a case where there has merely been a failure by the tribunal to state correct or convincing reasons. In the *MINE* Annulment Decision it was said that:

[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e)...

In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how

²⁴ *Wena Hotels* Annulment Decision ¶ 48.

²⁵ *MINE* Annulment Decision ¶¶ 5.05-5.06.

*the tribunal proceeded from Point A. to point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*²⁶

54. Similarly, in the *Wena Hotels* Annulment Decision the *ad hoc* committee considered that:

*Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.*²⁷

*It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the *ad hoc* committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself.*²⁸

55. The *ad hoc* committee in the *Vivendi* Annulment Decision added in this respect:

[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. ... Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must

²⁶ *MINE* Annulment Decision ¶¶ 5.08-5.09.

²⁷ *Wena Hotels* Annulment Decision ¶ 81.

²⁸ *Wena Hotels* Annulment Decision ¶ 83.

be allowed a degree of discretion as to the way in which they express their reasoning.

In the Committee's view, annulment under Article (52)(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.²⁹

56. Thus, in the CMS Annulment Decision, the *ad hoc* committee found that this ground of annulment had not been established because:

although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal.³⁰

D. Derivative claims

(a) Introduction

57. In the course of the proceedings before the Tribunal relating to Argentina's challenge to the Tribunal's jurisdiction, Argentina raised an objection that Azurix had no standing to assert rights that arise from the Concession. Argentina argued, that because the Concession was a contract entered into between the Province and ABA, only ABA could assert rights under the Concession against the Province. Argentina claimed that Azurix, being only a shareholder of ABA, lacked *ius standi* to put forward "indirect claims" or "derivative claims" relating to ABA's contractual rights.

²⁹ *Vivendi* Annulment Decision ¶¶ 64-65.

³⁰ *CMS* Annulment Decision ¶ 127.

58. Although the Tribunal considered that this objection to jurisdiction had been filed out of time as it was only raised in Argentina's Rejoinder on Jurisdiction, it decided that the issues it raised were such that they should be considered at the Tribunal's own initiative under ICSID Arbitration Rule 41(2).³¹
59. The Tribunal found that, given the wide meaning of "investment" in the definition in Article I.1(a) of the BIT, the provisions of the BIT protect indirect claims. The Tribunal further considered that this conclusion concurred with decisions of tribunals that have interpreted the same provision in the same BIT or similar provisions in other BITs to which Argentina is a party.³² The Tribunal affirmed the *ius standi* of Azurix in this case, finding that Azurix was the investor that made the investment through indirectly owned and controlled subsidiaries.³³ The Tribunal therefore rejected the objection to jurisdiction.
60. In its Application for Annulment, Argentina contends that the Tribunal manifestly exceeded its powers, within the meaning of Article 52(1)(b) of the ICSID Convention, by exercising jurisdiction over Azurix's claim for damages, as all of Azurix's claims alleged interference by the Province with rights arising from or attaching to the Concession, to which ABA, and not Azurix, was the party. Argentina further contends that Azurix incurred its alleged losses only derivatively through its indirect participation in ABA, but the Tribunal allowed Azurix to recover damages equivalent to the fair market value of the Concession Agreement as if there were no corporate distinction between Azurix and ABA.³⁴

(b) Arguments of the parties

61. Argentina argues, *inter alia*, that:

³¹ Decision on Jurisdiction ¶ 68.

³² Decision on Jurisdiction ¶ 73.

³³ Decision on Jurisdiction ¶ 74.

³⁴ Application for Annulment ¶¶ 19-22.

- (a) The fact that the Tribunal had jurisdiction over Azurix does not mean that it had jurisdiction over any type of claim asserted by Azurix as a shareholder of ABA. While a shareholder with the requisite nationality has the capacity or standing of an investor under the treaty, there is an entirely different question concerning the scope of the claims that can be advanced by a shareholder as a shareholder.
- (b) The substantive rights that attach to shares in a company is a question that can only be resolved by the *lex societatis*, since neither investment treaties nor international law in general say anything about the rights of shareholders.³⁵ A fundamental characteristic of a corporation, which cannot be ignored in the investment treaty context, is that it is a legal entity separate from its shareholders, with rights and liabilities entirely distinct from theirs. A person does not have an individual cause of action against third parties for wrongs or injuries to a corporation in which he or she holds stock, even if the stockholders suffer harm from the damage to the corporation, such as a reduction in the value of his or her stock.
- (c) The Tribunal failed to distinguish between the procedural right of a shareholder to pursue an investment treaty claim and the substantive rights that might form the object of that claim, and failed to state reasons for its decision to extend the rights of Azurix as a shareholder beyond those recognised in the municipal legal system.
- (d) The rights of ABA under the Concession could not be a form of “*any rights conferred by law or contract*” for the purposes of Article I(1)(a)(v) of the BIT, as a right arising out of a relationship to which Azurix is not privy, could not constitute an investment of Azurix.

³⁵ Relying on *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970, p. 3 (“*Barcelona Traction case*”) ¶¶ 33-34.

- (e) Awards in other cases adopting the approach of allowing shareholders to bring indirect claims in respect of the diminution of the value of their shares, ignore the basic contours of the rights attaching to shares in all municipal legal systems. There is no doctrine of precedent in investment treaty arbitration and the Committee should decide this case on the basis of the force of the legal arguments deployed by each of the parties.
- (f) At the time of drafting of the ICSID Convention, drafters considered and rejected the possibility of granting a direct action to controlling shareholders of local companies. Instead, they included the possibility prescribed by Article 25(2)(b) of the ICSID Convention, which ensures that damages are paid to the company rather than to the shareholders thereby protecting the rights of the company's creditors and other third parties, while also eliminating the possibility of the local company and its shareholders pursuing different claims in different *fora* in respect of the same damage. By virtue of Article 25(2)(b), if Azurix exercised control over ABA, it was obliged to bring claims under the BIT and the ICSID Convention in the name of ABA and for the account of ABA.³⁶ The Tribunal's decision circumvents the requirements of Article 25(2)(b) and makes that provision pointless.
- (g) Where investment treaties do allow claims to be brought on behalf of a local company, they insist that the claim be brought in the local company's name and that any damages awarded be paid to the company and not to the controlling shareholder.³⁷
- (h) If damages are payable to the shareholders directly, then (1) the rights of the company's creditors may be prejudiced if the company cannot pay its debts as they fall due, (2) the company is effectively absolved from the tax regime of the host state in relation to the damages paid by

³⁶ Referring to Christoph Schreuer, *The ICSID Convention: A Commentary*, 291 (CUP 2001).

³⁷ Citing North American Free Trade Agreement, 32 I.L.M. 289 (1993) (table of contents, preamble, parts I-III) and 32 I.L.M. 605 (1993) (parts IV-VII, annexes) ("NAFTA") Articles 1117 and 1135.

the state, (3) the shareholder can bypass the company's own governing bodies by pursuing a strategy that the company itself does not endorse and there is a risk of double recovery, and (4) in the case of a multinational company, a single measure of the host state causing prejudice to that company could potentially generate an endless number of claims from individual or corporate shareholders with different levels of direct or indirect control over the same investment for the same damage.

- (i) For the purposes of Article 1 of Protocol I to the European Convention on Human Rights, the European Court of Human Rights³⁸ has held that, whenever a shareholder's interests are harmed by any measure directed at the company, it is up to the latter to take appropriate action.
- (j) Azurix's argument, that in pursuing its BIT claims it was in fact invoking its own rights rather than the rights of ABA, is sophistry as it relied on ABA's rights under the Concession.
- (k) This case is distinguishable from most other cases brought by shareholders against Argentina because ABA was in a position to bring a claim under Article 25(2)(b) in terms of the required foreign control, and because the reasoning of the Tribunal in certain parts of the Award—such as the rejection of Azurix's claim under the umbrella clause—is contradictory to the admission of Azurix's derivative claim.

62. Azurix argues, *inter alia*, that:

- (a) Argentina's argument ignores the very nature of the dispute before ICSID in which Azurix claimed that Argentina violated its obligations under the BIT. As required by Argentine law, Azurix invested in

³⁸ The first paragraph of Article 1 of Protocol I to the European Convention on Human Rights states that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

Argentina through ABA, and that investment was entirely lost because of the acts and omissions in Argentina in specific violation of the BIT.

- (b) The jurisdiction of ICSID is determined by Article 25 of the ICSID Convention and is governed by the terms of the instrument expressing the parties consent to arbitration, which in the present case is the BIT.
- (c) Because Article 25 of the ICSID Convention did not define “investment”, that task was left largely to the terms of bilateral investment treaties or other instruments on which jurisdiction is based. After considering the facts and weighing the evidence the Tribunal found that Azurix’s investment satisfies the definition of “investment” in the Treaty, and that Azurix’s claims arose “directly from” its investment in Argentina.
- (d) The Tribunal’s decision is consistent with more than 14 other ICSID cases that have discussed this same issue and have unanimously found jurisdiction to exist in the same circumstances.³⁹

³⁹ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction, July 17, 2003 (“CMS Jurisdiction Decision”); *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, Apr. 26, 2005 (“AES Jurisdiction Decision”); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, Apr. 30, 2004 (“LG&E Jurisdiction Decision”); *Lanco International, Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, Dec. 8, 1998 (“Lanco Jurisdiction Decision”); *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006 (“Suez Jurisdiction Decision”); *Total SA v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, Aug. 25, 2006 (“Total Jurisdiction Decision”); *Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) Aug. 2, 2004 (“Enron Ancillary Claim Jurisdiction Decision”); *Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan. 14, 2004 (“Enron Jurisdiction Decision”); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, Feb. 22, 2006 (“Continental Casualty Jurisdiction Decision”); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, June 17, 2005 (“Gas Natural Jurisdiction Decision”); *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, May 11, 2005 (“Camuzzi Jurisdiction Decision”); *Compañía de Aguas del Aconquija S.A. & Vivendi Universal (formerly Générale des Eaux) v. Argentine Republic* (“Vivendi II”), ICSID Case No. 97/3, Decision on Jurisdiction, Nov. 14, 2005 (“Vivendi II Jurisdiction Decision”); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction, Sept. 28, 2007 (“Sempra Jurisdiction Decision”); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004 (“Siemens Jurisdiction Decision”).

- (e) The Tribunal did not override the principle of privity of contract by exerting jurisdiction. Instead it distinguished between claims for breach of contract and claims for violation of the BIT, and denied several of Azurix's claims because it considered them to be contractual claims.
- (f) The *Barcelona Traction* case has been distinguished by many previous ICSID cases, and no one arbitration panel has interpreted that case as holding that a foreign shareholder does not have the right to claim damages when its investment includes a domestic subsidiary, as is the case here.⁴⁰ The *Barcelona Traction* case itself recognised the developments occurring in international law on investment protection, especially investment protection treaties, which may accord direct protection to shareholders.⁴¹
- (g) Argentina's acts and omissions may amount to both violations of the BIT for which Azurix can seek redress before ICSID and breaches of the Concession. Azurix is not barred from bringing its own claims simply because Argentina's acts and omissions also breached the Concession, and at least 10 other ICSID tribunals have rejected this argument of Argentina.⁴² It is inaccurate to refer to Azurix's claims as "derivative claims", as Azurix sought a remedy for the harm to its investment, not for ABA's breached contractual rights.
- (h) Article 25(2)(b) of the ICSID Convention is not applicable in the current case because ABA was not a party to the arbitration. Whether ABA can bring a claim under Article 25(2)(b) does not affect the right of action of foreign shareholders under the BIT in order to protect their own interests in the qualifying investment.

⁴⁰ Referring to *CMS Jurisdiction Decision* ¶ 43.

⁴¹ Referring to *Barcelona Traction* case ¶ 90.

⁴² Referring to *CMS Jurisdiction Decision* ¶¶ 65-68; *LG&E Jurisdiction Decision* ¶¶ 48-63; *Lanco Jurisdiction Decision* ¶¶ 10-11; *Total Jurisdiction Decision* ¶¶ 68-69; *Enron Jurisdiction Decision* ¶ 49; *Continental Casualty Jurisdiction Decision* ¶¶ 85-86; *Camuzzi Jurisdiction Decision* ¶ 83; *Vivendi II Annulment Decision* ¶¶ 112-113; *Sempra Jurisdiction Decision* ¶ 95; *Siemens Jurisdiction Decision* ¶¶ 180-183; *Total Jurisdiction Decision* ¶ 80.

(c) The standard of review under Article 52(1)(b) of the ICSID Convention

63. As noted above, a tribunal will have “exceeded its powers” for the purposes of Article 52(1)(b) of the ICSID Convention if and to the extent that it has exceeded its jurisdiction.⁴³

64. However, Article 52(1)(b) expressly provides that, in order to justify annulment of an award under this provision, the tribunal must not only have exceeded its powers, but must have done so “manifestly”.⁴⁴

65. In the *Lucchetti* Annulment Decision, the *ad hoc* committee considered the effect of the word “manifestly” in Article 52(1)(b) in cases where it is claimed that the tribunal exceeded its jurisdiction. It stated:

However, the requirement in Article 52(1)(b) of the ICSID Convention is not only that the Tribunal has exceeded its powers but that it has done so “manifestly”. From the writings of legal scholars it appears that there are divergent views on the impact of this additional requirement of “manifestness”. On the one hand, the view has been expressed that where an ad hoc committee finds that a tribunal has wrongly either exercised or failed to exercise jurisdiction, the award should be annulled, wholly or partly, without any further examination of whether the excess was manifest. On the other hand, it has been held by others that there should be no annulment when the tribunal has wrongly assumed, or failed to assume, jurisdiction, but its decision on this point was tenable, since in such a case the tribunal would not have manifestly acted contrary to the BIT.⁴⁵

The *ad hoc* committee then went on to conclude as follows:

The Ad hoc Committee, for its part, attaches weight to the fact that the wording of Article 52(1)(b) is general and makes no exception for issues of jurisdiction. Moreover, a

⁴³ See, *inter alia*, *Klöckner* Annulment Decision ¶ 4; *Vivendi* Annulment Decision ¶ 86; *Soufraki* Annulment Decision ¶ 37.

⁴⁴ *Klöckner* Annulment Decision ¶ 59; *MINE* Annulment Decision ¶ 5.03; *CMS* Annulment Decision ¶ 49; *Lucchetti* Annulment Decision ¶ 98; *MTD* Annulment Decision ¶ 44; *Soufraki* Annulment Decision ¶ 45.

⁴⁵ *Lucchetti* Annulment Decision ¶ 100.

request for annulment is not an appeal, which means that there should not be a full review of the tribunal's award. One general purpose of Article 52, including its subparagraph (1)(b), must be that an annulment should not occur easily. From this perspective, the Committee considers that the word "manifest" should be given considerable weight also when matters of jurisdiction are concerned.

... Bearing in mind the requirement of "manifestness", the Ad hoc Committee will now examine whether the Tribunal exceeded its powers and, in the affirmative, whether it did so to such an extent as to justify annulment.⁴⁶

66. In the present case, the Committee agrees with the *ad hoc* committee in the *Lucchetti* Annulment Decision that the wording of Article 52(1)(b) is general and makes no exception for issues of jurisdiction. Thus, an award will only be annulled under that provision on grounds that the tribunal lacked jurisdiction or exceeded jurisdiction if the lack or excess of jurisdiction was manifest.
67. Article 41(1) of the ICSID Convention provides that "[t]he Tribunal shall be the judge of its own competence". As is clear from Article 41(2), issues of whether the tribunal has "competence" include the question of whether the tribunal has jurisdiction. Thus, by virtue of Article 41, in cases where there is any uncertainty or doubt as to whether or not a tribunal has jurisdiction, that question falls to be settled by the tribunal itself in exercise of its *compétence-compétence* under that provision.
68. The Committee is of the view that Article 52(1)(b) does not provide a mechanism for *de novo* consideration of, or an appeal against, a decision of a tribunal under Article 41(1) after the tribunal has given its final award. The Committee is rather of the view that it is only where the tribunal has *manifestly* acted without jurisdiction that an *ad hoc* committee can intervene under Article 52(1)(b).⁴⁷ The expression "manifestly" in Article 52(1)(b) means "obvious" rather than "grave", and the relevant test is thus whether the excess of power

⁴⁶ *Lucchetti* Annulment Decision ¶¶ 101-102.

⁴⁷ *Klöckner* Annulment Decision ¶ 4.

“can be discerned with little effort and without deeper analysis”.⁴⁸ Thus, if it is obvious, without deeper analysis, that a tribunal lacked or exceeded jurisdiction, an *ad hoc* committee may annul the tribunal’s award under Article 52(1)(b) at least to the extent of the lack or excess of jurisdiction. If, on the other hand, reasonable minds might differ as to whether or not the tribunal has jurisdiction, that issue falls to be resolved definitively by the tribunal in exercise of its power under Article 41 before the award is given, rather than by an *ad hoc* committee under Article 52(1)(b) after the award has been given.

69. In these circumstances, even if it is subsequently seen to be arguable whether or not the tribunal’s decision under Article 41 was correct, it cannot be said that the tribunal *manifestly* lacked jurisdiction, and there is no basis for an *ad hoc* committee in purported exercise of its power under Article 52(1)(b) to substitute its own decision for that of the tribunal. As the tribunal’s decision under Article 41 must be treated as conclusive, in such a case there is also no occasion for an *ad hoc* committee to express its own view on whether or not the tribunal had jurisdiction.
70. The Committee now determines this ground of annulment in the light of these principles by reference to the claims made by Azurix, and determined by the Tribunal.

(d) Azurix’s claims and the Tribunal’s findings

71. First, Azurix claimed that its investment had been expropriated as a result of “*measures tantamount to expropriation*” taken by the Province, contrary to Article IV(1) of the BIT. In respect of this claim, the Tribunal found that a breach of *contract* by a State or one of its instrumentalities will not amount to a breach of a *treaty* unless it be proved that the State or its emanation has

⁴⁸ *Repsol* Annulment Decision ¶ 36 (citing other authorities): “*It is generally understood that exceeding one’s powers is ‘manifest’ when it is ‘obvious by itself’ simply by reading the Award, that is, even prior to a detailed examination of its contents*”. Compare *Soufraki* Annulment Decision ¶¶ 38-40 (stating that “*the excess of power should at once be textually obvious and substantively serious*” (emphasis added)).

gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign.⁴⁹ The Tribunal rejected the claim, and found that in this case the impact on the investment attributable to the Province's actions did not amount to an expropriation because Azurix did not lose the attributes of ownership. At all times it continued to control ABA and its ownership of 90% of the shares was unaffected.⁵⁰

72. Secondly, Azurix claimed that Argentina was in breach of the obligation in Article II(2)(a) of the BIT,⁵¹ which provides that an “[i]nvestment shall at all times be accorded fair and equitable treatment”. The Tribunal found that impugned actions of the Province reflected “a pervasive conduct of the Province in breach of the standard of fair and equitable treatment”,⁵² hence Argentina was found in breach of this obligation.⁵³
73. Thirdly, Azurix claimed that the Province and Argentina failed to observe their obligations under Article II(2)(c) of the BIT (the “umbrella clause”),⁵⁴ which provides that “[e]ach Party shall observe any obligation it may have entered into with regard to investments”. In respect of this claim, the Tribunal found that there was no relevant contract between Azurix and Argentina, and that while Azurix may submit a claim under the BIT for breaches by Argentina, there was no undertaking to be honoured by Argentina to Azurix other than the obligations under the BIT,⁵⁵ and that accordingly there was no breach of the umbrella clause in the BIT.⁵⁶
74. Fourthly, Azurix claimed that the Province failed to observe its obligations under Article II(2)(b) of the BIT,⁵⁷ which provides that “[n]either Party shall in any way impair by arbitrary or discriminatory measures the management,

⁴⁹ Award ¶ 315.

⁵⁰ Award ¶ 322.

⁵¹ Award ¶ 330.

⁵² Award ¶ 377.

⁵³ Award ¶ 442.

⁵⁴ Award ¶ 379.

⁵⁵ Award ¶ 384.

⁵⁶ Implied in Award ¶ 384.

⁵⁷ Award ¶ 386.

operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments". In respect of this claim, the Tribunal found that various actions of the provincial authorities were arbitrary actions without basis under the law or the Concession Agreement and impaired the operation of Azurix's investment,⁵⁸ and that Argentina was therefore in breach of this obligation.

75. Fifthly, Azurix claimed that the Province and Argentina failed to observe their obligations under Article II(2)(a) of the BIT,⁵⁹ which provides that "[i]nvestment shall enjoy full protection and security". In respect of this claim, the Tribunal found that Argentina, having failed to provide fair and equitable treatment to the investment, also breached the standard of full protection and security under the BIT.⁶⁰

(e) The Committee's views

(i) Introduction

76. According to Argentina, it is a general principle that:

A person does not have an individual cause of action against third parties for wrongs or injuries to a corporation in which he or she holds stock, even if the stockholders suffer harm from the damage to the corporation, such as a reduction in the value of his or her stock.

Argentina contends that, as all of Azurix's claims alleged interference by the Province with rights arising from or attaching to the Concession, to which ABA and not Azurix was the party, Azurix lacked *ius standi* to bring these claims.

77. On this ground, the Committee regards it as necessary to distinguish between two separate issues.

⁵⁸ Award ¶ 393.

⁵⁹ Award ¶ 396.

⁶⁰ Award ¶ 408.

78. The first issue concerns the extent of the substantive protections afforded by the investment protection treaty. Even if a shareholder in a company is an “investor” for the purposes of the investment protection treaty, and even if the shareholder’s interest in the company amounts to an “investment” for the purposes of the treaty, the substantive protections afforded by the treaty may not extend to protecting that investment against conduct causing harm to the company, as opposed to conduct causing harm to the shareholder directly. Regardless of any question of *ius standi*, in that event any claim by the shareholder alleging a breach of the treaty in respect of the shareholder’s investment caused by a wrong or injury to the company would fail on its merits. On the other hand, the claim might well succeed on the merits if the treaty also conferred protections on the investment of the company itself (for instance because the company, although locally incorporated, is deemed to be a foreign investor because of its foreign control).
79. The second issue concerns the *ius standi* of a particular claimant to bring a particular claim. In the example just given, questions of *ius standi* might include whether the shareholder has *ius standi* to bring a claim alleging violations of the treaty in respect of the shareholder’s own investment, whether the shareholder has *ius standi* to bring a claim alleging violations of the treaty in respect of the investment of the company as opposed to that of the shareholder, and whether the company has *ius standi* to bring a claim alleging violations of the treaty in respect of the company’s investment.
80. In the present case, Azurix did not seek to bring a claim on behalf of ABA or in respect of alleged violations of rights of ABA. Rather, each of Azurix’s claims alleged violations of the BIT in respect of what Azurix claimed was, for the purposes of the BIT, Azurix’s own investment. The Committee therefore considers that no issue arose in this case as to the *ius standi* of Azurix to bring a claim on ABA’s behalf or in respect of ABA’s rights. Rather, the issue was whether Azurix had *ius standi* to bring a claim alleging a violation of the BIT in respect of Azurix’s own investment and, if so, whether, in the

circumstances of the case the provisions of the BIT had been violated in respect of Azurix's investment.

81. The resolution of these issues is a matter of interpretation and application of the relevant provisions of the BIT and ICSID Convention. It is the BIT which determines which particular kinds of interests are protected, and it is the BIT and ICSID Convention which determine the persons who may bring proceedings in respect of an alleged violation of the BIT in respect of a particular protected investment. While certain provisions or formulations may be commonly used in different investment protection treaties, each treaty must be applied according to its own specific terms.
82. As indicated in paragraphs 41-42 above, it is not the Committee's function to reach its own conclusion on the correct interpretation of the BIT and ICSID Convention in respect of these questions. That is the function of the Tribunal. Here the task of the Committee is confined to determining whether the Tribunal manifestly exceeded its powers in reaching the conclusion that it did. In addressing this question, the Committee must itself consider the terms of the BIT and the ICSID Convention.

(ii) *The Vienna Convention on the Law of Treaties*

83. The relevant BIT and the ICSID Convention fall to be interpreted in accordance with the principles articulated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention"),⁶¹ which reflect the customary international law rules of treaty interpretation as they already existed at the time that the text of the ICSID Convention and the BIT were adopted.⁶² Articles 31 and 32 of the Vienna Convention state:

⁶¹ Vienna, May 23, 1969; 1155 U.N.T.S. 331.

⁶² *E.g., Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at pp. 645-646, ¶ 37.

Article 31
General rule of interpretation

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in the relations between the parties.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) *leaves the meaning ambiguous or obscure; or*
- (b) *leads to a result which is manifestly absurd or unreasonable.*

84. Article 32 of the Vienna Convention demands that the Committee determine the interpretation resulting from the application of Article 31 before considering the potential application of Article 32.

(iii) *The principles in Article 31 of the Vienna Convention*

85. The parties have not referred to any relevant agreement or instrument of the kind referred to in Article 31(2) of the Vienna Convention, nor any “subsequent practice” of the kind referred to in Article 31(3)(b) that would establish an agreed interpretation of the BIT between Argentina and the United States of America. Nor have the parties referred the Committee to any agreement or rules of international law of the kind referred to in Article 31(3)(a) and (c), other than the BIT and the ICSID Convention, and general principles of customary international law.

86. Argentina argues that the relevant provisions of the BIT and ICSID Convention must be read in the light of general principles of customary international law under which the distinction in municipal law between the rights of a company and those of its shareholders is transposed onto the international plane. Argentina relies in support of this argument on the *Barcelona Traction* case, in which the ICJ said that:

*If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it.*⁶³

⁶³ *Barcelona Traction* case ¶ 50.

The ICJ thus observed that, because a corporation has a legal personality separate from that of its shareholders:

*... whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.*⁶⁴

In the context of ICSID proceedings, Argentina takes the position that a shareholder cannot bring a claim in respect of harm done to a company merely because the shareholder has been prejudiced through a diminution in the value of the shares.

87. In this regard the Committee notes that the *Barcelona Traction* case concerned customary international law rules of diplomatic protection rather than investment treaty arbitration. The ICJ held that in the field of diplomatic protection the general rule is that, in cases of an unlawful act committed against a company, only the national State of the company is authorised to make a claim, and not the national State of the shareholders.⁶⁵ However, the ICJ recognised in that case, as well as in the subsequent *Diallo* case,⁶⁶ that this general rule of international law may be subject to possible exceptions.⁶⁷ Furthermore, the ICJ indicated in the *Barcelona Traction* case that this general rule of international law was applicable “*in the absence of any treaty on the subject between the Parties*”.⁶⁸ It thereby acknowledged that the general rule can be modified by treaty provisions. The ICJ stated that:

... Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special

⁶⁴ *Barcelona Traction* case ¶ 44.

⁶⁵ *Barcelona Traction* case ¶ 88.

⁶⁶ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections Judgment, I.C.J., 24 May 2007 (the “*Diallo* case”).

⁶⁷ *Barcelona Traction* case ¶¶ 65-66, 92; *Diallo* case ¶ 91.

⁶⁸ *Barcelona Traction* case ¶ 36.

*instruments or within the framework of wider economic arrangements. Indeed, whether in the form of unilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures.*⁶⁹

88. Similarly, in the *Diallo* case the ICJ said that:

*... in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative.*⁷⁰

89. As an example, a treaty could provide for the possibility of diplomatic protection of shareholders by their national State in respect of an injury to a company having the nationality of another State and thereby modify the otherwise applicable rule of customary international law. Similarly, a treaty might provide for a company to bring arbitration proceedings directly against the host State in the event of an injury to the company by the host State. For instance, in the event of an injury to the company, a treaty might enable shareholders to bring arbitration proceedings directly against the host State.

⁶⁹ *Barcelona Traction* case ¶ 89-90.

⁷⁰ *Diallo* case ¶ 88.

90. The Committee accepts that a treaty may need to be interpreted against the general fabric of customary international law. However, except where norms of *ius cogens* are involved, a treaty is capable of modifying the rules of customary international law that would otherwise be applicable as between the States parties to the treaty. Indeed, often the very purpose of a treaty is to effect such a modification. The purpose of investment protection treaties is generally is to augment or modify the customary international law procedures for protection of foreign investors. Hence the starting point in determining the effect of the treaty is the terms of the treaty itself, rather than the principles of customary international law that may or may not be displaced by the treaty provisions.
91. Here the BIT confers specific protections on “investments”. Article I(1)(a) clarifies that the investments protected by the BIT are those in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other party. It is not disputed that Azurix is a company of the United States of America, and it follows that, according to its terms, the protections accorded by the BIT apply to every investment in Argentina that is “*owned or controlled directly or indirectly*” by Azurix. The term “investment” is defined very broadly in Article I(1)(a) as “*every kind of investment*”. The words “*includes without limitation*” in the chapeau of that provision indicate that the list in that provision of types of investment is non-exhaustive. Types of investment in that list include not only “*shares of stock ... in a company*”, but also “*a company*” itself, as well as any “*other interest in a company*”, or even any “*interests in the assets thereof*”. Other types of investment listed include “*tangible and intangible property, including rights, such as mortgages, liens and pledges*” (Article I(1)(a)(i)); “*a claim to money or a claim to performance having economic value and directly related to an investment*” (Article I(1)(a)(iii)); and “*any right conferred by law or contract, and any licenses and permits pursuant to law*” (Article I(1)(a)(v)).
92. Azurix claimed in its Rejoinder on Jurisdiction that its investment in Argentina consisted 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”.*⁷¹

93. The Tribunal found that:

*Azurix made an investment by paying a “canon” to obtain the concession to provide water and wastewater services to the Province. To carry out the investment, Azurix organized several subsidiaries, as required by the Bidding Terms, and established a locally registered company in Argentina, ABA.*⁷²

The Tribunal ultimately concluded that:

*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.*⁷³

94. In its ordinary meaning, the wording of Article I(1)(a) of the BIT embraces that ABA itself would be an “investment” of Azurix for purposes of the BIT, since ABA is a company (Article I(1)(a)(iii)) owned and controlled directly or indirectly by Azurix (Article I(1)(a), chapeau). Although assets of ABA would as a matter of law belong to ABA and not to Azurix, Azurix nonetheless had, by virtue of its controlling shareholding in ABA, “*interests in the assets*” of ABA (Article I(1)(a)(ii)), and through that shareholding indirectly controlled those assets (Article I(1)(a), chapeau). Assets of Azurix would also be an “investment” of Azurix for the purposes of the BIT. Additionally, the legal and contractual rights of ABA (Article I(1)(a)(v)), including the rights of ABA under the Concession, being indirectly controlled by Azurix through its majority shareholding in ABA (Article I(1)(a), chapeau), would similarly be “investments” of Azurix for the purposes of the BIT. Contrary to what Argentina seeks to argue, the Committee considers that there is nothing in the

⁷¹ Decision on Jurisdiction ¶ 59, referring to Azurix’s Rejoinder on Jurisdiction ¶ 6(ii).

⁷² Decision on Jurisdiction ¶ 64 (footnotes omitted).

⁷³ Decision on Jurisdiction ¶ 65.

wording of Article I(1)(a) that would suggest that it is only Azurix's legal rights as a shareholder in ABA that are protected.

95. By reference to the wide terms of Article 1(1)(a) of the BIT the Committee does not consider the Tribunal's conclusion as to the definition of Azurix's investment to be manifestly inconsistent with an interpretation of the BIT made in accordance with the principle in Article 31(1) of the Vienna Convention.

96. As to the *ius standi* of Azurix to bring the proceedings in this case, the Tribunal ultimately found as follows:

*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.*⁷⁴

97. The Committee notes that none of the critical documents governing the jurisdiction of the Tribunal (the BIT, the ICSID Convention and the ICSID Arbitration Rules) expressly addresses the issue of who has *ius standi* to bring investor-host State arbitration proceedings pursuant to those treaties. However, Article VII(1) of the BIT defines an "investment dispute" for the purposes of that provision as including:

... a dispute between a Party and a national or company of the other Party arising out of or relating to ... (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

In this case there was clearly a dispute between Azurix and Argentina, and that dispute concerned an alleged breach of rights conferred by the BIT with respect to what the Tribunal found was, for the purposes of the BIT, an investment of Azurix. In its ordinary meaning, here there was an investment dispute between Azurix and Argentina.

98. Paragraphs (2) and (3) of Article VII then provide for the possibility of "*the national or company concerned*" to choose to consent in writing to the

⁷⁴ Decision on Jurisdiction ¶ 74.

submission of the dispute for settlement by binding arbitration to ICSID. The reference to “*the national or company concerned*” logically means Azurix, as the party to the “*investment dispute*” with Argentina. The Committee concludes that the ordinary meaning of these words enable Azurix to bring these proceedings. Indeed, it seems logical that Azurix would have *ius standi* to bring a claim alleging violations of the BIT in respect of what is, for the purposes of the BIT, Azurix’s own investment.

99. However, Argentina argues that paragraphs (1) to (3) of Article VII of the BIT are to be read in the context of Article VII(8) of the BIT and Article 25(2)(b) of the ICSID Convention. Article VII(8) of the BIT provides that:

For purposes of an arbitration held under paragraph 3 of this Article [dealing with investor-host State arbitration], any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.

Article 25(2)(b) of the ICSID Convention provides that in Article 25, the expression “*National of another Contracting State*” includes:

... 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.

100. Argentina argues that, by virtue of these provisions, Azurix is not entitled to bring ICSID proceedings in respect of alleged violations of the Concession, to which ABA and not Azurix is a party, and that only ABA could be entitled to do so.
101. The Committee agrees that the effect of these provisions is to treat ABA as a national of the United States of America for purposes of the investor-host

State arbitration clause in Article VII the BIT and for the purposes of Article 25 of the ICSID Convention. Although the Committee notes that Argentina's position is that ABA could not have so invoked those provisions because of a waiver provision in the Concession, these provisions appear to give ABA the capacity to bring ICSID proceedings in respect of alleged violations of the BIT with respect to the Concession.

102. Here the Committee finds that it is not called upon in this case to decide whether or not ABA could in practice have brought ICSID arbitration proceedings under Article VII(8) of the BIT and Article 25(2)(b) of the ICSID Convention. Although these provisions establish a possibility in certain circumstances for a company incorporated in the host State to bring proceedings against the host State for violations of the BIT, there is nothing in the wording of these provisions that derogates from any right that the shareholders in the company might otherwise have to bring proceedings under Article VII of the BIT. Similarly there is nothing in the wording of any other provision of the BIT or the ICSID Convention to suggest that any right that a person might otherwise have to bring proceedings is in some way limited by or subject to Article VII(8) of the BIT or Article 25(2)(b) of the ICSID Convention.
103. For these reasons the Committee does not consider the Tribunal's conclusion as to Azurix's *ius standi* to be manifestly inconsistent with an interpretation of the BIT and the ICSID Convention in accordance with the principle in Article 31(1) of the Vienna Convention.
104. As to the merits of the case, the Tribunal rejected the first and third of Azurix's claims on the basis that Azurix had established no relevant breach of the BIT.⁷⁵ In particular, in respect of Azurix's third claim, the Tribunal found that there had been no breach of the "umbrella clause" of the BIT with respect to Azurix's investment, given that Azurix was not a party to the Concession.⁷⁶

⁷⁵ See paragraphs 71 and 73 above.

⁷⁶ See paragraphs 73 above.

The Tribunal also found that certain matters did not constitute breaches of the BIT as they were purely contractual matters.⁷⁷ However, the Tribunal upheld Azurix's other claims, having found that there had been breaches of the BIT for which Argentina was responsible in respect of Azurix's investment.⁷⁸

105. On this issue, the Committee considers that if ABA itself is an investment of Azurix for the purposes of the BIT, it follows that conduct towards ABA also will be characterised as conduct towards an investment of Azurix. Thus, for instance, a failure to afford fair and equitable treatment to ABA would be a failure to afford fair and equitable treatment to an investment of Azurix.
106. Argentina argues that this interpretation, which would enable Azurix to bring ICSID proceedings alleging violations of the BIT in respect of assets belonging to ABA and not to Azurix, and in respect of the Concession to which ABA and not Azurix is a party, ignores the separate legal personalities of Azurix and ABA and the fundamental distinction that exists in municipal law between the rights of the company and those of its shareholders. Argentina argues that no legal system can tolerate a situation whereby two entities have precisely the same rights over the same thing.
107. The Committee does not accept that this is the result of the Tribunal's interpretation. In this respect, an analogy might be drawn with contracts of insurance. Although only one person may be the legal owner of an item of property, there may be others who would suffer financial loss if the property were damaged or destroyed, and who are therefore entitled to insure that property. In many cases, such others may be persons having some direct or indirect legal interest in the property falling short of legal title, such as a beneficial owner, a lessor or mortgagor. However, in some legal systems it may also be possible for a person having no direct or indirect legal interest in the property to insure it simply on the basis that that person would suffer a financial loss if the property was damaged or destroyed. If all such persons

⁷⁷ Award ¶¶ 150, 155, 160.

⁷⁸ See paragraphs 72, 74-75 above.

separately insured the same property, this would not mean that all of them thereby have become the legal owners of the property, or that all of them have the same legal rights in the same thing. In the event that the property is lost or destroyed, it may be possible for all such persons to make insurance claims, although each may ultimately only be entitled to be compensated to the extent of their own pecuniary loss rather than for the full value of the property.

108. In the same way, the Committee considers that, even where a foreign investor is not the actual legal owner of the assets constituting an investment, or not an actual party to the contract giving rise to the contractual rights constituting an investment, that foreign investor may nonetheless have a financial or other commercial interest in that investment. This is so, irrespective of whether the actual legal owner of the assets or contractual rights constituting the investment is a wholly or partly owned subsidiary of the investor, or whether the actual legal owner is an unrelated third party. The Committee sees no reason in principle why an investment protection treaty cannot protect such an interest of a foreign investor, and enable the foreign investor to bring arbitration proceedings in respect of alleged violations of the treaty with respect to that interest. An investment protection treaty having this effect does not alter the legal nature of the investor's interest nor that of the legal owner of the investment, nor does it ignore the separate legal personalities and separate legal rights and obligations of the shareholder and the company. Rather, it merely ensures that whatever interest, legal or otherwise, that the investor does have will be accorded certain protections.
109. Where this occurs, conduct which violates the treaty in respect of the investor's investment may also violate the rights of the legal owner under municipal law and/or under the same or a different investment protection treaty. This is so irrespective of whether the actual legal owner of the assets or contractual rights constituting the investment is a wholly or partly owned subsidiary of the investor, or an unrelated third party. In such circumstances the Committee perceives that there is no reason why a treaty cannot permit

the investor to bring a claim under the treaty in respect of its own interest directly protected by the treaty, whether or not the legal owner of the rights constituting the investment may simultaneously be able to bring proceedings in respect of its own rights before the domestic courts or a different arbitration tribunal. Although more than one person may be able to claim in different *fora* in respect of the same damage to the same assets, each may ultimately only be entitled to be compensated to the extent of its own loss.

110. Here the BIT confers certain protections on certain investments of Azurix as defined in the treaty and permits Azurix to bring ICSID proceedings in respect of alleged violations of the BIT in respect of such investments. The arguments of Argentina effectively seek to insert a proviso into the wording of the BIT to the effect that an investor may bring proceedings for an alleged violation of the BIT with respect to the investor's investment "*except where the investment is a company and the alleged violation of the BIT consists of an alleged injury to the company or to assets or rights which are legally owned by the company rather than the investor*". No such wording is apparent in the terms of the BIT, and the Committee would see such an exception as inconsistent with the broad definition of "investment" in Article I(1)(a) of the BIT.
111. For these reasons the Committee does not accept that the Tribunal's conclusions with respect to the *ius standi* issue are manifestly inconsistent with an interpretation of the BIT and the ICSID Convention in accordance with the principle in Article 31(1) of the Vienna Convention.

(iv) Article 32 of the Vienna Convention

112. The Committee does not consider the provisions of Article VII(8) of the BIT and Article 25(2)(b) of the ICSID Convention to be ambiguous or obscure. However, Argentina in effect argues that the interpretation referred to above leads to a result which is manifestly absurd or unreasonable.

113. First, Argentina claims that if damages in respect of an injury to a company are payable to the shareholders directly, then the rights of the company's creditors may be prejudiced if the company cannot pay its debts as they fall due. In addition, according to Argentina, if the State pays damages directly to the shareholders, the company is effectively absolved from the tax regime of the host State in relation to such damages. Argentina also argues that there is a danger of double recovery if both the host State and a shareholder, and possibly several different shareholders, are able to bring separate proceedings in respect of the same injury to the company.
114. The Committee considers that while there may be unresolved problems in relation to the possibility of multiple proceedings, double recovery and the extent to which minority shareholders should be compensated if the local company remains a going concern, this in itself does not make the interpretation of the BIT referred to above "ambiguous or obscure" or "manifestly absurd or unreasonable" within the meaning of Article 32 of the Vienna Convention. In the present case, Azurix is in the not unusual position of a foreign investor incorporating a subsidiary in the host State through which the investment is made. That investment was found by the Tribunal to have been rendered worthless by action for which the host State was found to be responsible. The need to protect foreign investors in Azurix's position was one of the main reasons why investment protection treaties and ICSID itself have been adopted. As the problems identified by Argentina appear to be hypothetical in the present case, the Committee finds that it does not need to address them.
115. A further issue raised by Argentina is that, if both the host State and a shareholder are able to bring separate proceedings in respect of the same injury to the company, this could lead to an endless number of claims "*creating general chaos in the form of multiple proceedings by shareholders in the company with the inevitable risk of double recovery*", with "*disastrous consequences for the sustainability of the system of investment treaty arbitration*". Argentina points out that Azurix owns ABA indirectly through

several other corporate layers and argues that other companies in this layer might similarly have brought a claim in respect of the same subject-matter. Argentina also argues that, where one or more shareholders bring proceedings in respect of an injury to a company, and especially where the company in addition also brings proceedings in its own name, the various courts and tribunals may not take the same approach to the assessment of damages, and that it would be difficult to ensure that each claimant in each proceedings recovers only for that claimant's actual loss. Argentina contends that Article 25(2)(b) of the ICSID Convention was included to avoid this problem.

116. On the basis of the material before it the Committee is not satisfied that this is the purpose and effect of Article 25(2)(b). There have been examples of such multiple claims in practice,⁷⁹ and it has not been demonstrated by Argentina that any real risk of “*general chaos*” or “*disastrous consequences*” has emerged. Indeed to the contrary: tribunals have repeatedly pointed out that mechanisms exist in international law for preventing double recovery.⁸⁰ Although Argentina criticises such statements, the Committee does not consider that the hypothetical possibilities raised suffice to conclude that this particular interpretation of a treaty leads to a result which is manifestly absurd or unreasonable.
117. Argentina also suggests that a minority shareholder might bring ICSID arbitration proceedings in respect of an injury to the company while the company's own governing body is seeking to settle the matter with the host

⁷⁹ See in particular *Ronald S. Lauder v. Czech Republic*, Award of 3 September 2001, 14 WORLD TRADE AND ARBITRATION MATERIALS 35 (2002); *CME Czech Republic BV v. Czech Republic*, Partial Award of September 13, 2001, 14 WORLD TRADE AND ARBITRATION MATERIALS 109 (2002), Final Award of 14 March 2003, Court of Appeals of Stockholm decision of May 15, 2003, 42 ILM 919 (2003) 15 WORLD TRADE AND ARBITRATION MATERIALS 83 (2003).

⁸⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction (November 14, 2005) ¶¶ 270-272; *Camuzzi* Jurisdiction Decision ¶ 89. See also Lowe, Vaughan, *Changing Dimensions of International Investment Law*, (2007) Oxford Legal Studies Research Paper No. 4/2007, 110 *et seq.*; Sacerdoti, Giorgio, *The Proliferation of Bits: Conflicts of Treaties, Proceedings and Awards*, Bocconi Legal Studies Research Paper No. 07-02, (2007).

State. Whilst the Committee acknowledged such a possibility, in that event the tribunal would only award the shareholder damages for the shareholder's own loss and the amount of any settlement reached by the company would be a matter to which the tribunal would have regard in assessing such damages. Again, the Committee does not consider that Argentina has demonstrated the existence of any real problem in practice in this respect.

118. A further matter raised by Argentina is that if a shareholder brings ICSID proceedings and recovers damages, there is no way of ensuring that the compensation received by the shareholder is applied for the benefit of the company. Argentina suggests that any compensation received by a shareholder should be applied for the benefit of the company, as is the case under the NAFTA Treaty.⁸¹
119. The Committee is not persuaded that as a matter of principle any compensation received by the shareholder should be applied for the benefit of the company. As the Committee has already observed, Azurix is a foreign investor that has incorporated a subsidiary in the host State through which the investment is made, and that investment of Azurix was found to have been rendered worthless by action for which the host State was found to be responsible. As a matter of principle, compensation for such loss should be paid to Azurix.
120. Argentina then argues that to allow a shareholder to bring ICSID proceedings in respect of an injury to a company would enable the shareholder to circumvent an exclusive choice of forum clause in a contract between the host State and the company. Here Argentina argues that, in a clause of the Concession entered into between ABA and Argentina, ABA waived recourse to international arbitration and provided for the exclusive jurisdiction of the Argentine courts. However, successful recourse to the national courts by a company would not necessarily prevent the shareholder from subsequently bringing ICSID proceedings alleging that its loss as a result of the breach of

⁸¹ Relying on NAFTA Articles 1117 and 1135.

the treaty has not been fully compensated, notwithstanding the amounts recovered by the company in proceedings before the national courts. Again, the Committee does not consider that this possibility is to be regarded as a result which is manifestly absurd or unreasonable.

121. For these reasons the Committee is not satisfied that the interpretation of the BIT and ICSID Convention that results from the application of the principle in Article 31(1) of the Vienna Convention is to be regarded as leading to a result which is manifestly absurd or unreasonable. Hence the Committee is not required to have recourse to supplementary means of interpretation under Article 32 of the Vienna Convention.
122. Nevertheless, having regard to the extensive arguments made by the parties, the Committee does also consider whether recourse to such supplementary means of interpretation would mandate any different conclusion to that reached above. In this regard, the supplementary means of interpretation to which the Committee has been referred include case law, writings of publicists and preparatory work to the ICSID Convention.
123. As to other case-law, Azurix relies on some 14 arbitral decisions in which it says that ICSID tribunals have allowed shareholders to claim under an investment protection treaty in respect of an injury to a company in which they were shareholders.⁸²

⁸² Azurix refers to CMS Annulment Decision ¶¶ 68-76; *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/997/7, Decision of the Tribunal on Objections to Jurisdiction, Jan. 25, 2000 (“*Maffezini* Jurisdiction Decision”) ¶¶ 65-70; *Vivendi* Annulment Decision ¶¶ 46-50; *LG&E* Jurisdiction Decision ¶¶ 50, 63; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case ARB/93/1, Award, Feb. 21, 1997 (“*AMT* Award”) ¶¶ 5.14-5.16; *CME Czech Republic B.V. (Netherlands) v. Czech Republic*, UNCITRAL Partial Award, Sept. 13, 2001 (“*CME* Partial Award”) ¶¶ 375 *et seq.*; *Camuzzi* Jurisdiction Decision ¶¶ 12, 78-82, 140-145; *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Feb. 10, 1999 (“*Goetz* Award”); *Gas Natural* Jurisdiction Decision, ¶¶ 32-35, 50-52; *AES* Jurisdiction Decision ¶¶ 85-89; Jurisdiction Decision ¶¶ 43-65; *Vivendi II* Jurisdiction Decision ¶¶ 88-94; *Continental Casualty* Jurisdiction Decision ¶¶ 51-54, 76-89; *Pan American Energy LLC v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Jurisdiction, July 27, 2006 ¶¶ 209-22, (“*Pan American* Jurisdiction Decision”); *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, ICSID Case no. ARB/87/3, Award of June 27, 1990, (“*AAPL* Award”); *Lanco* Jurisdiction Decision ¶¶ 9-10; *GAMI Investments, Inc. v. Mexico*, NAFTA UNCITRAL Final Award ¶¶ 26-33, 43, Nov. 15, 2004 (“*GAMI* Award”); *Sempra* Jurisdiction Decision ¶¶ 90-102; *Alex Genin, Eastern Credit*

124. Argentina seeks to distinguish some of these cases, arguing that they involved direct injuries to the legal rights of the shareholders, and argues that some decisions either are wrong or unhelpfully follow earlier cases without analysis of the relevant principles.
125. The Committee considers that even if this case-law was resorted to pursuant to Article 32 of the Vienna Convention, it would not militate towards a different interpretation of the BIT and the ICSID Convention compared to that resulting from the application of Article 31.
126. As to writings of publicists, the Committee has been referred to some references that support the conclusion reached by the Tribunal,⁸³ but to none that would lead to a different interpretation of the BIT and ICSID Convention to that resulting from the application of Article 31.
127. As to the preparatory work to the ICSID Convention, Argentina argues that, at the time of drafting of the ICSID Convention, drafters considered and rejected the possibility of granting a direct action to controlling shareholders of local companies and instead included the possibility prescribed by Article 25(2)(b). In this regard the Committee is not satisfied that it has been established from the preparatory work that the inclusion of Article 25(2)(b) in the ICSID Convention was intended to preclude the possibility of a shareholder bringing proceedings in respect of a violation of an investment protection treaty in respect of the shareholder's own investment, merely because the investment consisted of the shareholder's participation in a

Limited, Inc. and A.S. Baltoil v The Republic of Estonia, ICSID Case No. ARB/99/2, Award ¶¶ 319-29 (June 25, 2001), ("Genin Award"); *Siemens Jurisdiction Decision* ¶¶ 125, 135-44; *Enron Jurisdiction Decision* ¶¶ 37-40; *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award ¶¶ 76-85 (Apr. 30, 2004) ("*Waste Management Award*"), (all referred to herein as "the cases upholding shareholder claims").

⁸³ Christoph Schreuer, *The ICSID Convention: A Commentary*, 290-291(CUP 2001) (see footnote 37); Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 57; Engela C. Schlemmer, *Investment, Investor, Nationality, and Shareholders*, in Peter Muchlinski, Federico Ortino and Christoph Schreuer [Eds.], *The Oxford Handbook of International Investment Law* (OUP 2008), at 81-86; Ian Laird, *A Community of Destiny – The Barcelona Traction case and the Development of Shareholder Rights to Bring Investment Claims*, in Todd Weiler [Ed.] *International Investment Law and Arbitration*, (Cameron May 2005) at 77-96.

company which might potentially instead have brought proceedings in its own name pursuant to Article 25(2)(b).

128. Argentina also has referred by analogy to the European Convention on Human Rights and NAFTA. As the extent of the protections afforded by an investment protection treaty depends in each case on the specific terms of the treaty in question, the Committee regards comparisons with differently-worded treaties as of limited utility, especially treaties outside the field of investment protection. It is noted that the European Court of Human Rights has held that (subject to possible exceptions) a shareholder in a company does not have standing to bring a claim for a violation of the company's right's under Article 1 of Protocol No. 1 of the European Convention on Human Rights, and that the mere fact that there has been a violation of the company's right's under Article 1 of Protocol No. 1, does not of itself mean that there has been a violation of the shareholder's rights under that provision.⁸⁴ However, such an approach does not inform the situation where a law or treaty might confer certain rights directly on a shareholder which would be violated by an injury to the company, or answer the question whether the shareholder could have standing to bring a claim in that event.
129. The Committee concludes that even if resorted to the principles in Article 32 of the Vienna Convention would not require a different interpretation of the BIT and ICSID Convention to that resulting from the application of Article 31.

⁸⁴ On shareholder rights under ECHR law in general see: *Agrotexim Hellas SA and Others v Greece* A 330 (1995); (1996) 21 EHRR 250; *Association and H v Austria* (1984) 36 DR 187 at 191–2; *Matos e Silva Lda and Others v Portugal* 1996-IV 1092; (1997) 24 EHRR 573; *Société Colas Est et autres v France* 2002-III 421; *Autronic AG v Switzerland* A 178 (1990); (1990) 12 EHRR 485; *Demuth v Switzerland* 2002-IX 704; (2004) 38 EHRR 20; *Comingersoll SA v Portugal* 2000-IV 355; (2001) 31 EHRR 772. On shareholder rights under Protocol 1(1) in particular: *Olczak v Poland*, Decision of November 7, 2002, EHRR 2002-X ¶¶ 61; *Company S-S I AB and BT v. Sweden*, Application 11189/84 (1986) 50 DR 121, 138; *Bramelid and Malmström v. Sweden*, Application 8588-89/79 (1982) 29 DR 64, 81; (1983) 5 EHRR 249. For an extensive analysis see Marius Emberland, *The human rights of companies: exploring the structure of ECHR protection* (OUP 2006) at 65 *et seq.*

(v) Conclusion

130. For the above reasons, the Committee concludes that the Tribunal did not manifestly exceed its powers in determining that Azurix had *ius standi* to bring its claim. The Committee rejects this ground of annulment.

E. Applicable law

(a) Introduction

131. Article 42(1) of the ICSID Convention provides that:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

132. Argentina claims that the Tribunal failed to apply the law of Argentina to disputed issues arising out of the Concession Agreement, as expressly required by Article 42(1) of the ICSID Convention. Instead, Argentina says that the Tribunal considered that its inquiry was governed “*by the ICSID Convention, by the BIT and by applicable international law*”, and that the Tribunal determined the disputed issues arising out of the Concession Agreement on the basis that they were of a “*factual nature*”. Argentina seeks annulment of the Award on the basis that, in failing to apply the law of Argentina to disputed issues arising out of the Concession Agreement, the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention.⁸⁵
133. Argentina further claims that the Tribunal expressed contradictory reasons with respect to the law applicable to disputed issues arising out of the Concession Agreement, which were critical to its findings of liability against

⁸⁵ Application for Annulment ¶¶ 16-18.

Argentina. Argentina maintains that on the one hand the Tribunal stated that the law of Argentina was “*helpful in the carrying out of the Tribunal’s enquiry*” but that the Tribunal also characterised the issues arising out of the Concession Agreement as factual issues, and dealt with Argentine law in a part of the Award headed “The Facts”. Argentina further seeks annulment of the Award on the ground that by issuing such contradictory reasons with respect to the applicable law the Tribunal failed to state the reasons on which the Award was based, within the meaning of Article 52(1)(b) of the ICSID Convention.⁸⁶

(b) Arguments of the parties

134. Argentina argues, *inter alia*, that:

In relation to the ground of annulment in Article 52(1)(b) of the ICSID Convention

- (a) It is a settled principle that a tribunal’s application of the wrong law is an excess of authority and a ground for annulment.⁸⁷
- (b) As the parties did not agree on the applicable law, the Tribunal was obliged, in accordance with Article 42 of the ICSID Convention, to apply Argentine law and international law “*as may be applicable*”.⁸⁸ Despite this obligation, the Tribunal concluded that “*the Tribunal’s inquiry is governed by the ICSID Convention, by the BIT and by applicable international law*”.⁸⁹
- (c) Although the Tribunal stated that it did not completely discard Argentine law, insofar as “*the law of Argentina should be helpful in the carrying*

⁸⁶ Application for Annulment ¶ 30.

⁸⁷ Relying on Eric A. Schwartz, *Finality at What Cost? The Decision of the Ad Hoc Committee in Wena Hotels v. Egypt*, in ANNULMENT OF ICSID AWARDS 43, 55 (Emmanuel Gaillard and Yas Banifatemi eds., 2004); CMS Annulment Decision ¶ 49; MINE Annulment Decision ¶ 5.03.

⁸⁸ Relying on Amco I Annulment Decision ¶¶ 20-22; Klöckner Annulment Decision ¶¶ 68-69; CDC Annulment Decision ¶¶ 45-46; Repsol Annulment Decision ¶ 37; MTD Annulment Decision ¶ 44.

⁸⁹ Referring to Award ¶ 67.

out of the Tribunal's inquiry into the alleged breaches of the Concession Agreement to which Argentina's law applies",⁹⁰ the Tribunal stated that this inquiry should be limited because of "*the treaty nature of the claims under consideration*".⁹¹ The Tribunal thereby disregarded Argentine law in deciding the controversy since although it found that Argentine law may be used to inquire into the alleged breaches of the Concession Agreement, it also found that such breaches of the Concession Agreement were not part of the "*claims under consideration*". As such, Argentine law was not considered by the Tribunal to be law applicable to the claims under consideration, contrary to Article 42(1).

- (d) The Tribunal noted that "*the allegations of [Azurix] are based on disputes related to the Concession Agreement*",⁹² and, by its express terms, the law of Argentina governed the interpretation of the Concession Agreement.⁹³
- (e) The Tribunal referred to what it considered to be Argentine law in a section of the Award dealing with the "Facts" and proceeded to determine the disputed issues arising out of the Concession Agreement on the basis that they were of a "factual" nature.⁹⁴ The Tribunal could not avoid the application of Argentine law as the governing law of the contract by re-labelling issues of contractual interpretation as issues of fact. Even if, in general international law, a national law "*is generally regarded as a fact with reference to which rules of international law have to be applied*", under Article 42(1) of the ICSID Convention, national law has to be treated as part of the applicable law and not as a fact.

⁹⁰ Referring to Award ¶ 67.

⁹¹ Referring to Award ¶ 67.

⁹² Referring to Award ¶ 53.

⁹³ Referring to Award ¶ 67.

⁹⁴ Referring to Award ¶ 68.

- (f) The Tribunal found that in light of the principle of *exceptio non adimpleti contractus* (the “*exceptio* principle”), the Province should have accepted ABA’s unilateral termination of the Concession Agreement, and that the Province’s failure to do so was ultimately a breach of the “fair and equitable treatment” provision in Article II(2)(a) of the BIT. However, the *exceptio* principle is not part of Argentine administrative law, which follows French administrative law in creating a special regime for public contracts, one of the essential features of which is that the concessionaire does not have the right to suspend its performance of the contract even if the state party is in breach. The Tribunal in effect modified the applicable law by relying upon a legal principle unknown in Argentine law, and by then testing the Province’s conduct against the “fair and equitable treatment” provision by reference to that principle. The Tribunal’s reference to the *exceptio* principle was a fundamental part of its decision regarding Argentina’s alleged breach of the fair and equitable treatment standard.
- (g) An expert opinion presented by Professor Tomás Ramón Fernández in the original proceedings held that the inapplicability of the *exceptio* principle to public service concessions is subject to exceptions where the concession agreement foresees otherwise, or when the inapplicability of the principle may force “*one person to go bankrupt for the benefit of another, or for the benefit of society as a whole*”. While Argentina rejects Professor Fernández’s analysis of the exceptions, in any event, none of those exceptions—as the Tribunal itself recognised—exist in the present controversy: the Concession Agreement did not foresee the *exceptio* in this case, and ABA could not have requested judicial termination of the Concession if it could not continue the Concession.
- (h) The Tribunal’s decision therefore abandons the applicable law and in so doing destroys the legitimate expectations of the parties to the

Concession Agreement, who contracted on the basis of the applicable Argentine administrative law on public contracts.

- (i) In purporting to provide “a balance to the relationship between the government and the concessionaire”,⁹⁵ and by resorting to the *exceptio* principle, the Tribunal in effect impermissibly decided *ex aequo et bono* instead of deciding in accordance with Argentine law as the law governing the Concession Agreement.⁹⁶ The Tribunal recognised the applicable law, saw what it thought the result would have been and decided that it would apply something different.
- (j) If the Tribunal’s decision is generalised, the absence of the *exceptio* principle in the legal regime applicable to public contracts may constitute a *per se* violation of the equitable treatment standard, and either the compatibility of public contracts with investment protection obligations is now in doubt in all continental legal systems, or the Tribunal has manifestly exceeded its powers by rewriting the rules applicable to the Concession between ABA and the Province.

In relation to the ground of annulment in Article 52(1)(e) of the ICSID Convention

- (k) Since the law which the Tribunal allegedly applied was not applicable law at all, such law cannot provide a ground for the Tribunal’s conclusion.
- (l) Contradictory reasons in an award have been regularly recognized by ICSID *ad hoc* committees as a failure to state reasons,⁹⁷ and “two genuinely contradictory reasons cancel each other out”.⁹⁸

⁹⁵ Referring to Award ¶¶ 260.

⁹⁶ Relying on *Soufraki* Annulment Decision ¶¶ 96.

⁹⁷ Relying on *Klöckner* Annulment Decision ¶ 116; *Amco I* Annulment Decision ¶¶ 97-98; *Amco II* Annulment Decision ¶ 1.18; *Vivendi* Annulment Decision ¶ 63; *CDC* Annulment Decision ¶ 70; *Mitchell* Annulment Decision ¶ 21; *Repsol* Annulment Decision ¶ 37; *MTD* Annulment Decision ¶ 78; *Lucchetti* Annulment Decision ¶ 127; *Soufraki* Annulment Decision ¶ 122.

- (m) The Tribunal's statement that that it would not apply Argentine law except to the alleged breaches of the Concession Agreement, and its statement that it would not analyse the alleged breaches of the Concession Agreement as they are not "*under consideration*", are two contradictory statements that cancel each other out. Either the Tribunal applies Argentine law or it does not apply Argentine law, but for the Tribunal to apply Argentine law to issues which it will not decide on is a contradiction in terms.
- (n) Another contradiction in the Award is that the Tribunal acknowledged that in accordance with Argentine administrative law, the only party who could terminate the agreement was the Provincial Executive Authority, yet the Tribunal found that the refusal by the Province to accept Azurix's notice of termination of the Concession was a breach of the fair and equitable treatment standard. Either these two conclusions are contradictory, or the Tribunal manifestly exceeded its powers by applying the *exceptio* principle.
- (o) The Tribunal also failed to state reasons as regards its conclusion on the issue of the zoning coefficients,⁹⁹ since Tribunal in its conclusion failed to address Argentina's position that the ORAB's decision had become administratively final. The failure to address arguments raised by the parties, if the answer could have affected the Tribunal's conclusion, amounts to a failure to state reasons.¹⁰⁰
- (p) In dealing with the "full protection and security" provision in Article II(2)(a) of the BIT, the Tribunal did not refer to the standard necessary to violate that standard but rather decided that "*the Tribunal, having failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and*

⁹⁸ Relying on *Klöckner* Annulment Decision ¶ 116.

⁹⁹ Award ¶¶ 78-92.

¹⁰⁰ Relying on *MINE* Annulment Decision ¶ 5.13.

security under the BIT".¹⁰¹ If the standard of full protection and security were the same as the standard of fair and equitable treatment under the Treaty, there would be no *effet utile* for the second standard.¹⁰² Therefore, the Tribunal has not provided reasons for its conclusion regarding the standard of full protection and security. Furthermore, if the standard of fair and equitable treatment is annulled, this must necessarily imply (as a direct consequence) the annulment of the Tribunal's conclusion as regards the standard of full protection and security.

135. Azurix argues, *inter alia*, that:

In relation to the ground of annulment in Article 52(1)(b) of the ICSID Convention

- (a) With respect to the applicable law, the Tribunal's methodology is clearly set out in paragraphs 65 and 66 of the Award. The Tribunal notes that, under Argentine law, international treaties have primacy over domestic laws, and that the Tribunal would apply "*both legal orders*" since each one had "*a role to play*" which "*may vary depending on which element of the dispute is considered*".¹⁰³ The Tribunal applied the BIT, the ICSID Convention, international law and Argentine law to consider Azurix's claims, applying each of them in its proper role.
- (b) The Tribunal, upon applying Argentine law to the claims related to the zoning coefficients,¹⁰⁴ construction variations,¹⁰⁵ Valuations 2000,¹⁰⁶ and the Bahía Blanca crisis,¹⁰⁷ arrived at the conclusion that the Province's conduct not only violated the Concession Agreement and

¹⁰¹ Award ¶ 408.

¹⁰² The Tribunal understands the term "effet utile" to have the same meaning as the Latin maxim "*ut res magis valeat quam pereat*".

¹⁰³ Award ¶¶ 65-66.

¹⁰⁴ Referring to Award ¶¶ 90-92.

¹⁰⁵ Referring to Award ¶¶ 99-102.

¹⁰⁶ Referring to Award ¶ 107.

¹⁰⁷ Referring to Award ¶¶ 141-144.

the regulatory framework, but also evidenced the exercise of sovereign power that violated BIT standards.¹⁰⁸ Conversely, in the case of the Retail Price Index (RPI) and certain Circular 31(A) works, the Tribunal dismissed Azurix's claims by considering that the Province's conduct did not violate Argentine law (RPI)¹⁰⁹ or that they were simple contractual matters (Circular 31 works) rather than evidencing the exercise of sovereign power.¹¹⁰

- (c) The approach of the Tribunal is consistent with international practice.¹¹¹
- (d) The BIT is *lex specialis* under Article 42(1) of the ICSID Convention,¹¹² as well as from the standpoint of Argentine national law, since international treaties are part of Argentine law and prevail over local legislation according to Article 75(22) of the Argentine Constitution.
- (e) The Tribunal did not "re-label" issues of contractual interpretation as issues of fact. From the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied, rather than as a rule to be applied on the international plane as a rule of law.¹¹³
- (f) The Tribunal interpreted Argentine law as a step in determining if any breach of contract occurred. Having found certain breaches of contract, the Tribunal examined Azurix's claims to determine if the conduct of the State violated the BIT. Not every breach of contract by a State automatically amounts to a violation of international law, but the fact that there is a breach of contract does not exclude the possibility that

¹⁰⁸ Referring to Award ¶¶ 374-377, 393, 408.

¹⁰⁹ Referring to Award ¶¶ 114-119.

¹¹⁰ Referring to Award ¶¶ 150, 155, 160.

¹¹¹ Relying on *Siemens Award* ¶ 78.

¹¹² Relying on *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007 ¶¶ 217-218.

¹¹³ Relying on OPPENHEIM'S INTERNATIONAL LAW 83 (Jennings & Watts ed. 1992).

there has been a breach of international law; the standards are simply different.¹¹⁴

- (g) The Tribunal applied the BIT and international law to Azurix's claims under the BIT, and also considered Argentine law in reaching its conclusions on both liability and damages. This approach is consistent with Article 42(1) of the ICSID Convention, and cannot be considered as a "manifest" excess of powers.
- (h) The Tribunal's findings regarding the termination of the Concession Agreement and the violation of the fair and treatment standard are not based on the *exceptio* principle. The Tribunal's discussion of that principle was *obiter dicta* and not central to its decision concerning failure to accord fair and equitable treatment. The Tribunal considered that the Province's previous improper conduct and its subsequent decision to refuse ABA's "*reasonable request*" to terminate the Concession in September 2001 for the fault of the Grantor and instead to unilaterally terminate the Contract due to an erroneously claimed abandonment of service in March 2002 was a clear breach of the fair and equitable treatment standard. This conclusion is not grounded on the *exceptio* principle, which deals with the right of one party to withhold its own contractual performance while the other party is not performing its obligations. The *exceptio* principle was not directly involved because ABA continued rendering the service until the Province's take-over.
- (i) Argentina mischaracterizes the *exceptio* principle by mixing it with ABA's right to unilaterally terminate the Contract and the Province's duty to accept termination due to its own breaches. These are different legal categories that do not overlap.

¹¹⁴ Relying on Christopher Schreuer, *Investment Treaty Arbitration and Jurisdiction over Contract Claims—the Vivendi I Case Considered*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, 281, 295-296 (T. Weiler ed., 2005); *MTD Annulment Decision* ¶ 75.

- (j) Even the historical legal doctrine which denies the right to apply the *exceptio* principle in government contracts admits that, upon the State's serious breaches, the private party always is entitled to request termination. The Concession Agreement itself provides that the concessionaire may claim termination based on the Grantor's fault in specified circumstances.
- (k) The Tribunal did not conclude that ABA could terminate the contract unilaterally; it merely asserted that ABA could request termination and that the Province was compelled by the facts of its own breaches to accept such a request given the circumstances of the case. Regardless of who was entitled to issue the formal declaration of termination, what the Tribunal considered of relevance is that, given the Province's previous behaviour and the significance of its own breaches, it should not have refused a reasonable request for termination of the contract.
- (l) In addition, termination of the Contract was not the only basis for the Tribunal's finding that the fair and equitable treatment standard was violated. The Award also found that the fair and equitable treatment standard was violated by the politicization of the tariff regime and the measures taken by the Province during the Bahía Blanca incident.
- (m) Argentina mischaracterises the scope of the *exceptio* principle under Argentine law. Both Argentine legal doctrine and case law have recognised that the exception principle can be invoked by a private party if the State engages in an abuse of rights or in breaches that materially jeopardize the ability of the contractor to comply with the terms of the contract, which was the situation in this case.
- (n) Argentina's disagreement with the Tribunal's observations on this matter of Argentine law is not enough to meet the standard of annulment under Article 52(1)(b) of the ICSID Convention, since to constitute a manifest excess of power, there must be a wilful refusal to apply the proper law and not just an error in its interpretation or

application. There is no evidence that the Tribunal applied a different legal system from that required by Article 42(1) of the ICSID Convention.¹¹⁵

- (o) Since the Tribunal did not rely on the *exceptio* principle to conclude that the Province had violated the fair and equitable treatment standard, Argentina's argument that the Tribunal decided *ex aequo et bono* by resorting to this doctrine is without merit.

In relation to the ground of annulment in Article 52(1)(e) of the ICSID Convention

- (p) Argentina's argument that the Tribunal failed to state its reasons in the award must fail as it is also reduced to the erroneous premise that the Tribunal misapplied the law and decided the case according to general equitable principles (*ex aequo et bono*).

- (q) There was no failure by the Tribunal to state reasons for its finding that there had been a breach of the "full protection and security" provision in Article II(2)(a) of the BIT. The Tribunal thoroughly detailed its reasons for finding that Argentina breached the fair and equitable treatment standard, and then concluded that these same reasons supported its finding that Argentina breached the full protection and security clause.

(c) Failure to apply the correct law as a ground of annulment under Article 52(1)(b) of the ICSID Convention: applicable principles

- 136. The few prior decisions of ICSID *ad hoc* committees confirm, and the Committee accepts, that a tribunal may manifestly exceed its powers where the tribunal disregards the applicable law, or bases the award on a law other

¹¹⁵ Relying on *Amco II* Annulment Decision ¶ 7.21; *CMS* Annulment Decision ¶ 50; *MINE* Annulment Decision ¶ 5.04.

than the applicable law under Article 42 of the ICSID Convention.¹¹⁶ Grounds for annulment under Article 52(1)(b) will exist where the tribunal fails to apply any law at all in determining the dispute, for instance, where the tribunal decides the dispute *ex aequo et bono* despite not being authorised to do so under Article 42(3).¹¹⁷ Such grounds for annulment will similarly exist where the tribunal purports to apply a law other than the law applicable under Article 42, or where while purporting to apply the law applicable under Article 42, the tribunal manifestly applies a different body of law.¹¹⁸

137. Such earlier ICSID *ad hoc* committee decisions emphasise that while *non-application* by the tribunal of the law applicable under Article 42 may be a ground for annulment, the *incorrect application* by the tribunal of the applicable law is not.¹¹⁹ In this respect, the Committee agrees with the observation made by the *ad hoc* committee in the *Amco I* Annulment Decision (the first ICSID annulment decision) and subsequently quoted with approval in the *Soufraki* Annulment Decision, that:

The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law would constitute a

¹¹⁶ *Klöckner* Annulment Decision ¶ 59; *MINE* Annulment Decision ¶ 5.03; *CMS* Annulment Decision ¶ 49; *Lucchetti* Annulment Decision ¶ 98; *MTD* Annulment Decision ¶ 44; *Soufraki* Annulment Decision ¶ 45.

¹¹⁷ *Klöckner* Annulment Decision ¶ 79; *Amco II* Annulment Decision ¶ 7.28; *MTD* Annulment Decision ¶ 44.

¹¹⁸ *MTD* Annulment Decision ¶ 47, cited with approval in *CMS* Annulment Decision ¶ 51: "... the notion of endeavouring to apply the law is not a merely subjective matter. An award will not escape annulment if the tribunal while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be 'manifest', not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough."

¹¹⁹ *MINE* Annulment Decision ¶ 5.04; *CMS* Annulment Decision ¶¶ 50-51; *Repsol* Annulment Decision ¶ 38; *Soufraki* Annulment Decision ¶ 85; *Lucchetti* Annulment Decision ¶ 112; *MTD* Annulment Decision ¶¶ 45-49.

manifest excess of power on the part of the Tribunal and a ground for nullity under Article 51(1)(b) of the Convention. The ad hoc Committee approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.¹²⁰

(d) Failure to apply the correct law as a ground of annulment under Article 52(1)(b) of the ICSID Convention: the Committee’s views

138. The claims made by Azurix and contested by Argentina that were determined by the Tribunal in this case are described in paragraphs 29-31 above. All claims were for alleged violations of the BIT. The Tribunal upheld three of the five claims.

139. The Tribunal’s findings in respect of the applicable law are contained in paragraphs 65 to 68 of the Award, following a discussion of the arguments of the parties on the issue at paragraphs 58 to 64.

140. At paragraph 65 of the Award, the Tribunal began by noting “*the agreement of the parties with the statement that the BIT is the point of reference for judging the merits of Azurix’s claim*”. At paragraph 66, the Tribunal noted that “*Article 42(1) has been the subject of controversy on the respective roles of municipal law and international law*”, and stated that “*both legal orders have a role to play, which role will depend on the nature of the dispute and may vary depending on which element of the dispute is considered*”.

141. At paragraph 67 of the Award, the Tribunal then stated that:

Azurix’s claim has been advanced under the BIT and, as stated by the Annulment Committee in Vivendi II, the Tribunal’s inquiry is governed by the ICSID Convention, by the BIT and by applicable international law. [Emphasis added.]

¹²⁰ *Amco I* Annulment Decision ¶ 23, cited with approval in *Soufraki* Annulment Decision ¶ 85.

142. The Committee considers that the reference in this passage to *Vivendi II* clearly relates to the paragraphs of the *Vivendi* Annulment Decision mentioned in earlier paragraphs of the Award summarising the arguments of the parties. In particular, in paragraph 60 of the Award, the Tribunal refers to paragraph 102 of the *Vivendi* Annulment Decision, which states:

In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties. [Emphasis added.]

143. This statement in the *Vivendi* Annulment Decision is further explained by earlier passages in that decision, in which the *ad hoc* committee said:

As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles, which is entitled "Characterization of an act of a State as internationally wrongful":

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of

*Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.*¹²¹

144. The *ad hoc* committee in the *Vivendi* Annulment Decision went on to quote from the judgment in the *ELSI* case, in which the ICJ said:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.

*... the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.*¹²²

145. The Committee agrees with these findings in the *Vivendi* Annulment Decision and the *ELSI* case.
146. Here the principles are straightforward. Each of Azurix's claims in this case was for an alleged breach of the BIT. The BIT is an international treaty between Argentina and the United States. By definition, a treaty is governed

¹²¹ *Vivendi* Annulment Decision ¶¶ 95-96.

¹²² *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States America v. Italy)*, Judgment, I.C.J. Reports 1989, p. 15 ("ELSI" case) ¶¶ 73 and 124, quoted in ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Resolution 54/83, 12 December 2001, commentary to Article 3, quoted in *Vivendi* Annulment Decision ¶ 97.

by international law,¹²³ and not by municipal law. It is a fundamental principle that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.¹²⁴ In any claim for breach of an investment treaty, the question whether or not there has been a breach of the treaty must therefore be determined, not through the application of the municipal law of any State, but through the application of the terms of the treaty to the facts of the case, in accordance with general principles of international law, including principles of the international law of treaties. Bearing in mind that an investment treaty, whether bilateral or multilateral, is itself a source of international law as between the States parties to that treaty,¹²⁵ the applicable law in any claim for a breach of that treaty can thus be said to be the treaty itself specifically, and international law generally.

147. Furthermore, in arbitration proceedings under the ICSID Convention, the tribunal also must comply with the terms of the ICSID Convention, which is also an international treaty to be interpreted and applied in accordance with general principles of international law, including principles of the international law of treaties. The Committee considers that, in a claim for breach of an investment treaty, the application by the tribunal of the terms of the investment treaty and of international law as the applicable law is foreseen by the words “*and such rules of international law as may be applicable*” in Article 42(1) of the ICSID Convention. The Committee considers that the second sentence of Article 42(1) cannot possibly be understood as having the effect that, in the absence of an express choice of law clause, the municipal law of the Contracting State will be the applicable law in claims for alleged breaches of an investment treaty.

148. The Committee concludes that the Tribunal correctly identified the law applicable under Article 42 of the ICSID Convention to Azurix’s claims of

¹²³ Vienna Convention on the Law of Treaties, Article 2(1)(a).

¹²⁴ Vienna Convention on the Law of Treaties, Article 27.

¹²⁵ Compare Statute of the International Court of Justice, Article 38(1)(a).

breaches of the BIT to be “*the ICSID Convention, ... the BIT and ... applicable international law*”.¹²⁶

149. In some cases, it may be an express term of the investment treaty that the host State is required to comply with specified provisions of its own municipal law. In such cases, a breach by the host State of municipal law may thus amount to a breach of the treaty. Although municipal law does not as such form part of the law applicable to a claim for breach of a treaty, in such cases it may be necessary to determine whether there has been a breach of municipal law as a step in determining whether there has been a breach of the treaty. As the International Law Commission has said:

*The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.*¹²⁷

150. As a potential example of this, the Committee recalls the arguments of the parties concerning the effect of Article II(2)(c) of the BIT, which states that “[e]ach Party shall observe any obligation it may have entered into with regard to investments”. In the present case, Azurix argued that the reference

¹²⁶ Award ¶ 67.

¹²⁷ ELSI case ¶ 124, quoted in ILC Articles, commentary to Article 3, quoted in *Vivendi Annulment Decision* ¶ 97.

to “obligations” in this provision included obligations both under municipal law and international law. Argentina on the other hand contended that contractual claims do not become automatically treaty claims by virtue of this provision. The Tribunal ultimately did not decide between these two competing arguments. The Tribunal rejected Azurix’s claim for breach of Article II.2(c) of the BIT on the basis that the parties to the Concession Agreement were not the parties to the present case, Azurix and Argentina. The parties to the Concession Agreement were ABA (a subsidiary of Azurix) and the Province (a political subdivision of Argentina), and, in the Tribunal’s view, there was “*no undertaking to be honored by Argentina to Azurix other than the obligations under the BIT*”.¹²⁸

151. If Azurix and Argentina had been the parties to the Concession Agreement, and if the Tribunal had found that the word “obligations” in Article II.2(c) of the BIT included obligations under municipal law (a matter on which the Committee is not called upon to express any view), it might have become necessary for the Tribunal to determine whether Argentina was in breach of obligations under municipal law in order to determine a claim under Article II.2(c) of the BIT. In that event, it would have been necessary for the Tribunal to apply Argentine municipal law in determining whether there was a breach of obligations under municipal law. However, even in this situation, municipal law would not thereby become part of the applicable law under Article 42 of the ICSID Convention for purposes of determining whether there was a breach of Article II.2(c) of the BIT. Rather, any breach of municipal law that might be established would be a fact or element to which the terms of the BIT and international law would be applied in order to determine whether there was a breach of Article II.2(c).
152. Having determined that its inquiry in this case was “*governed by the ICSID Convention, by the BIT and by applicable international law*”, the Tribunal went on to say that:

¹²⁸ Award ¶ 384.

*While the Tribunal's inquiry will be guided by this statement, this does not mean that the law of Argentina should be disregarded. On the contrary, the law of Argentina should be helpful in the carrying out of the Tribunal's inquiry into the alleged breaches of the Concession Agreement to which Argentina's law applies, but it is only an element of the inquiry because of the treaty nature of the claims under consideration.*¹²⁹

153. In the Committee's view, this statement is consistent with the principles set out above. The Committee therefore finds no fault with the Tribunal's identification of the applicable law under Article 42.
154. The Committee turns then to the question whether the Tribunal did in fact, in deciding each of the three claims of Azurix that it upheld, apply the law that it had identified as the applicable law. These three claims of Azurix were for breach, respectively, of the "fair and equitable treatment" standard under Article II(2)(a) of the BIT, of the "arbitrary or discriminatory measures" provision in Article II(2)(b) of the BIT, and breaches of the "full protection and security" provision in Article II(2)(a) of the BIT.
155. As to the claim for breach of the "fair and equitable treatment" standard under Article II(2)(a) of the BIT, the Tribunal began by stating that:

*... the BIT is an international treaty that should be interpreted in accordance with the norms of interpretation established by the Vienna Convention. As already noted, the Vienna Convention is binding on the parties to the BIT. Article 31(1) of the Convention requires that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".*¹³⁰

156. The Tribunal then found, applying these principles, that:

... It follows from the ordinary meaning of the terms fair and equitable and the purpose and object of the BIT that fair and equitable should be understood to be treatment in

¹²⁹ Award ¶ 67.
¹³⁰ Award ¶ 359.

*an even-handed and just manner, conducive to fostering the promotion of foreign investment.*¹³¹

157. The Tribunal went on to consider the expression “fair and equitable treatment” in the context of the wording of Article II.2(a) of the BIT as a whole,¹³² and to consider how “fair and equitable treatment” standards, as found in various different investment protection treaties, have been interpreted by different arbitral tribunals.¹³³ Following this analysis, the Tribunal concluded that “*there is a common thread in the recent awards ... which does not require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably*”.¹³⁴
158. It is clear to the Committee that in determining the content of the “fair and equitable treatment” standard, the Tribunal applied the terms of the BIT itself and the applicable general principles of international law, including the international law of treaties. There was no suggestion that the content of the standard was defined by municipal law or that the question whether there had been a breach of the standard depended on whether or not there had been a breach of obligations under municipal law.
159. The Tribunal then concluded, at paragraphs 374 to 376 of the Award, that three separate instances “*reflect[ed] a pervasive conduct of the Province in breach of the standard of fair and equitable treatment*”.¹³⁵ The Tribunal did not expressly find that any of these instances in isolation would necessarily amount to a breach of that standard, but indicated that a breach of the standard was established when the three instances were “*considered together*”.
160. As to the first of these instances, the Tribunal said, at paragraph 374:

¹³¹ Award ¶ 360.

¹³² Award ¶ 361.

¹³³ Award ¶¶ 365-372.

¹³⁴ Award ¶ 372.

¹³⁵ Award ¶ 377.

The Tribunal is struck by the conduct of the Province after the Claimant gave notice of termination of the Concession Agreement. ABA had requested to terminate it in agreement with the Province. The Province refused what was a reasonable request in light of the previous behavior of the Province and its agencies. The refusal by the Province to accept that notice of termination and its insistence on terminating it by itself on account of abandonment of the Concession is a clear case of a breach of the fair and equitable treatment standard. It is evident from the facts before this Tribunal that the Concession was not abandoned.

161. Contrary to what is argued by Argentina, the Committee also finds no suggestion in this paragraph of the Award that the Tribunal considered Azurix to have a unilateral right under Argentine municipal law to terminate the Concession Agreement, either by virtue of a principle of *exceptio non adimpleti contractus* or otherwise. The Tribunal does not refer in this paragraph to the position under Argentine municipal law at all. The reference to the Province having “refused” a “request” by ABA to terminate the Concession would appear to indicate an assumption on the part of the Tribunal that ABA had *no* legal right to do so unilaterally.
162. A plain reading of the wording of this paragraph of the Award indicates to the Committee that what the Tribunal took into account as one of the three instances amounting to a breach of the fair and equitable treatment standard were (1) the *conduct* of the Province in insisting on itself terminating the Concession Agreement on account of abandonment of the Concession by ABA, when it was evident from the facts that the Concession was *not* abandoned, and (2) the *conduct* of the Province in refusing to allow ABA to terminate the Concession in agreement with the Province. Regardless of whether or not such conduct was justified under municipal law, the Tribunal found this conduct of the Province to be material to a breach of the treaty standard of fair and equitable treatment.
163. Argentina suggests that this reading of paragraph 374 of the Award is contradicted by paragraph 260 of the Award, in which the Tribunal says that

“the application of the maxim exceptio non adimpleti contractus provides a balance to the relationship between the government and the concessionaire”. According to Argentina, the Tribunal erroneously found that the *exceptio* principle was a part of the municipal law of Argentina, and the Tribunal’s finding in paragraph 374 of the Award is based on this erroneous finding.

164. In this regard the Tribunal’s reference to the *exceptio* principle in paragraph 260 of the Award is in the context of its consideration of Article 14.1.4 of the Concession Agreement dealing with “Termination due to Fault of the Granting Authority”. At paragraphs 255 to 259, the Tribunal dealt with the difficulties in interpreting this provision. Then, at the impugned paragraph 260 the Tribunal stated:

The difficulty in interpreting the provisions of Article 14 harmoniously is compounded by Article 49-II of the Law which, as already noted, prescribes that termination “must be resolved by the Provincial Executive Authority with the intervention of ORAB.” The Law does not distinguish between termination by the Grantor or the Concessionaire. It would seem appropriate that the Concession Agreement be interpreted consistently with the provisions of the Law. On the other hand, the Tribunal cannot ignore the practical result of this interpretation: if taken to the extreme, a concessionaire would be obliged to continue to provide the service indefinitely at the discretion of the government and its right to terminate the Concession Agreement would be deprived of any content. For this reason, the application of the maxim exceptio non adimpleti contractus provides a balance to the relationship between the government and the concessionaire. The Tribunal considers it immaterial whether ABA raised this defense in its recourse to the Argentine courts. The Tribunal is assessing the conduct of the Respondent and its instrumentalities in the exercise of its public authority against the standards of protection of foreign investors agreed in the BIT, and the application of the maxim exceptio non adimpleti contractus has been raised by the Claimant in these proceedings. This exception is not unknown to Argentine law and to legal systems generally as it is a reflection of the principle of good faith. The Tribunal will take it into account when evaluating the actions of the Province under the standards of protection.

165. On the basis of this paragraph the Committee is not satisfied either (1) that the Tribunal found there to be an *exceptio* principle in Argentine municipal law on which Azurix was entitled to rely in the circumstances of this case; or (2) that the Tribunal's finding of a breach of the fair and equitable treatment standard was premised on any finding by the Tribunal that the Province had denied ABA its right under Argentine law to rely on the *exceptio* principle.
166. First, as has been noted above, the Tribunal expressly stated in paragraph 67 of the Award that in determining Azurix's claims under the BIT, the Tribunal's inquiry is governed "*by the ICSID Convention, by the BIT and by applicable international law*". The Tribunal relied for this proposition on the *Vivendi* Annulment Decision, which makes clear that treaty standards are independent of municipal law standards, such that the question whether or not there has been a breach of the former does not depend on whether or not there has been a breach of the latter. The Committee finds that it therefore cannot read into paragraphs 260 and 374 of the Award any implied finding by the Tribunal that the breach of the fair and equitable treatment standard was due to ABA having been denied any specific right under Argentine municipal law.
167. Secondly, there is no clear finding made in paragraph 260 that the *exceptio* principle does in fact exist in Argentine municipal law. Indeed, the first three sentences of this paragraph appear to assume that it does not or, at the least, may not. The fourth sentence of this paragraph then refers to the practical consequences of this conclusion. The fifth sentence of the paragraph then states "*[f]or this reason, the application of the maxim exceptio non adimpleti contractus provides a balance to the relationship between the government and the concessionaire*". It is not clear from the wording of this particular sentence whether the Tribunal is speaking of the position under Argentine municipal law or of the position under the treaty standard. However, the remaining sentences of that paragraph appear to confirm that it is speaking of the position under the *treaty standard*. In the remaining sentences the

Tribunal says that it is immaterial whether the *exceptio* principle was raised before the municipal courts because “[t]he Tribunal is assessing the conduct of the Respondent and its instrumentalities ... against the standards of protection ... in the BIT, and the [exceptio principle] ... has been raised by the Claimant in these proceedings”. The Tribunal says that the *exceptio* principle is not unknown “to legal systems generally as it is a reflection of the principle of good faith” and that the Tribunal would therefore “take it into account when evaluating the actions of the Province under the standards of protection”.

168. Although the Tribunal also says in this paragraph that the *exceptio* principle is “not unknown to Argentine law”, the Committee cannot read into this a specific finding by the Tribunal that ABA would have been entitled in the circumstances of this case to invoke this principle as a matter of Argentine municipal law. In its Memorial on Annulment, Argentina appears to accept that in Argentine law “in some cases the *exceptio* is a defence that can be invoked by a concessionaire, although not an essential utility concessionaire”.¹³⁶ The Tribunal’s statement that the principle is “not unknown in Argentine law” is therefore not incorrect. On the most adverse construction of what the Tribunal said, the Committee considers that the Tribunal did not go beyond referring to such principle merely as an *additional* justification when applying the treaty standard. In any event, even if the Tribunal had been wholly wrong in considering that the *exceptio* principle was “not unknown to Argentine law”, nonetheless it would not constitute an annulable error for the Tribunal to have taken it into account when applying the treaty standard.
169. Furthermore, even if it were the case, contrary to the Committee’s conclusions above, that the Tribunal erroneously found that ABA had the right under Argentine law to rely on the *exceptio* principle in this case, and then found that the Province’s denial of this right amounted to a breach of the fair and equitable treatment standard, that would not in the Committee’s view

¹³⁶ Memorial on Annulment, footnote 116.

amount to an annulable error. The Tribunal correctly identified the applicable law under Article 42 as the ICSID Convention, the BIT and applicable international law. It would have been open to the Tribunal to find that the treaty standard had been violated in circumstances where ABA had been denied a right that it had under Argentine municipal law. Even if the Tribunal had been wholly incorrect in finding that ABA had such a right under Argentine law, the Committee considers that this would be a matter going to the merits of the Tribunal's findings. And, as noted above, it is not a ground of annulment under Article 52(1)(b) of the Convention that there are "*errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied*".¹³⁷

170. Argentina argues that if the Tribunal's decision is generalised, the result is that, in every municipal legal system in which the *exceptio* principle is not recognised in the legal regime applicable to public contracts, the absence of this principle may constitute a *per se* violation of the fair and equitable treatment standard, such that the compatibility of public contracts with investment protection obligations is now in doubt in those legal systems. The Committee does not accept this argument. The Tribunal's decision was based on the specific factual circumstances of this particular case, and is merely an example of a case in which it was found that, in all the circumstances, there was a breach of a treaty standard even if there may have been no breach of any obligation under municipal law.
171. In paragraphs 375 and 376 of the Award, the Tribunal refers to the two other instances which, in the Tribunal's view, considered together with the instance referred to in paragraph 374, amounted to a breach of the fair and equitable treatment standard. In neither paragraphs 375 and 376 did the Tribunal suggest that the question whether there was a breach of this treaty treatment standard depended on whether or not there had been a breach of Argentine

¹³⁷ See paragraph 137 above.

law. The quotes from the *ELSI* case above confirm that a breach of municipal law is not a prerequisite to a finding of a breach of the treaty standard, although it may be a relevant consideration. From the wording of paragraphs 92, 102 and 375 of the Award, it appears to the Committee that in the case of the zoning coefficients and construction variations, the Tribunal's conclusion was based not on any finding that there had been specific breaches of Argentine law by the Province or its authorities, but on a finding that the conduct of the relevant authorities was based on political considerations rather than on applying the terms of the Concession Agreement, as evidenced for instance in the different treatment given to the new service provider after the Concession Agreement with ABA had been terminated.

172. As to the breach of the “arbitrary or discriminatory measures” standard in Article II(2)(b) of the BIT, the Tribunal found on the basis of the plain wording of the text of that provision (which it said was not contested by Argentina) that a measure needs only to be arbitrary to constitute a breach of this provision.¹³⁸

173. The Tribunal then stated that:

*The Tribunal is required to consider the ordinary meaning of the terms used in the BIT under Article 31 of the Vienna Convention. The findings of other tribunals, and in particular of the ICJ, should be helpful to the Tribunal in its interpretative task.*¹³⁹

The Tribunal went on to consider the ordinary meaning of the word “arbitrary”, and decisions of other international arbitration tribunals and the *ELSI* case,¹⁴⁰ and ultimately concluded that certain actions of the Province were “*arbitrary actions without base on the Law or the Concession Agreement*” which “*impaired the operation of Azurix's investment*”.¹⁴¹ The Committee considers

¹³⁸ Award ¶ 391.

¹³⁹ Award ¶ 391.

¹⁴⁰ Award ¶ 392.

¹⁴¹ Award ¶ 393.

that the law that the Tribunal applied was the applicable law under Article 42 referred to above.

174. As to the breach of the “full protection and security” standard in Article II(2)(a) of the BIT, the Tribunal referred to other relevant international arbitration case law,¹⁴² to differences in wording in analogous provisions in other bilateral investment treaties,¹⁴³ and to the ordinary meaning of the expression.¹⁴⁴ The Tribunal stated that other cases showed, and the Tribunal apparently agreed, that:

*... full protection and security ... go[es] beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view.*¹⁴⁵

175. The Tribunal went on to conclude that:

*... the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT.*¹⁴⁶

The Committee once more is satisfied that the law that the Tribunal applied was the applicable law under Article 42 referred to above.

176. The Committee reiterates that it is not part of its function in annulment proceedings to examine the merits of the Tribunal’s decision to uphold the claims of Azurix that it upheld, or to reject the claims of Azurix that it rejected. In particular, as noted above, in relation to the present ground of annulment, the Committee’s function is confined to determining whether Tribunal applied the correct applicable law, not whether the Tribunal applied the applicable law correctly.

¹⁴² Award ¶ 406.

¹⁴³ Award ¶¶ 407-408.

¹⁴⁴ Award ¶ 408.

¹⁴⁵ Award ¶ 408.

¹⁴⁶ Award ¶ 408.

177. For these reasons, the Committee rejects Argentina's ground of annulment under Article 52(1)(b) based on the alleged failure of the Tribunal to apply the applicable law under Article 42 of the ICSID Convention.

(e) Failure of the award to state the reasons on which it is based as a ground of annulment under Article 52(1)(e) of the ICSID Convention: applicable principles

178. The scope of this ground of annulment has been considered in various decisions of *ad hoc* committees in different cases. It has been said that:

*[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons ... Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning. ... In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.¹⁴⁷*

In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact

¹⁴⁷ *Vivendi* Annulment Decision ¶¶ 64-65; quoted in *MTD* Annulment Decision ¶ 50.

*or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*¹⁴⁸

*In the end the question is whether an informed reader of the Award would understand the reasons given by the Tribunal and would discern no material contradiction in them.*¹⁴⁹

*... annulment under Article 52(1)(e) should only occur in clear cases and ... a failure to state reasons, in order to lead to annulment, must not only lack in any expressed rationale, but the relevant point must also be necessary to the tribunal's decision.*¹⁵⁰

(f) Failure of the award to state the reasons on which it is based as a ground of annulment under Article 52(1)(e) of the ICSID Convention: the Committee's views

179. As the Committee has found above that the Tribunal applied the correct applicable law, Argentina's argument that the Tribunal applied the incorrect law is rejected.
180. For the reasons given above, the Committee must also reject Argentina's argument that the Award contains two contradictory statements, namely (1) that it would not apply Argentine law except to the alleged breaches of the Concession Agreement, and (2) that it would not analyse the alleged breaches of the Concession Agreement as they are not "*under consideration*". At paragraph 67 of the Award, the Tribunal found that as Azurix's claims were based on the BIT and not on any contract, the Tribunal's enquiry was governed by "*the ICSID Convention, ... the BIT and ... applicable international law*". However, the Tribunal found that alleged breaches of the Concession Agreement could be an element in that enquiry. The extent to which alleged breaches of contract were material to the determination of claims of breaches of a treaty standard was a matter for the Tribunal to

¹⁴⁸ *MINE* Annulment Decision ¶ 5.09.

¹⁴⁹ *MTD* Annulment Decision ¶ 92.

¹⁵⁰ *Lucchetti* Annulment Decision ¶ 128. See also, for instance, *Wena Hotels* Annulment Decision ¶¶ 81-83; *Soufraki* Annulment Decision ¶¶ 121-128; *CMS* Annulment Decision ¶¶ 53-57.

determine when dealing with each of the individual claims. The Committee finds nothing contradictory in the Award in this respect.

181. Argentina further argues that the Tribunal failed to state reasons for its conclusion on the issue of the zoning coefficients,¹⁵¹ since it failed to address in its conclusion Argentina's position that the ORAB's decision had become administratively final. The Committee finds that the Tribunal's conclusion was that the action of ORAB referred to in paragraph 83 of the Award "*reflect[ed] a concern with the political consequences of the elimination of the coefficients rather than with keeping to the terms of the Concession Agreement*",¹⁵² and that there was a breach of the BIT due to the fact that "*the tariff regime was politicized because of concerns with forthcoming elections or because the Concession was awarded by the previous government*".¹⁵³ The Committee is not persuaded that it was material to this reasoning of the Tribunal whether or not ORAB's decision had become administratively final, and the Committee therefore considers that the failure of the Tribunal to address this argument expressly does not amount to a failure to state reasons upon which its decision was based.
182. Argentina additionally claims that the Tribunal did not state the standard necessary to violate the "full protection and security" standard in Article II(2)(a) of the BIT, but merely stated that "*the Tribunal, having failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT*".¹⁵⁴ Argentina argues that the Tribunal thereby treats the standard of full protection and security as if it were the same as the standard of fair and equitable treatment, and that this denies any *effet utile* for the full protection and security standard.

¹⁵¹ Award ¶¶ 78-92.

¹⁵² Award ¶ 92.

¹⁵³ Award ¶ 375.

¹⁵⁴ Award ¶ 408.

183. The Tribunal's findings with respect to the content of the fair and equitable treatment standard are set out in paragraphs 359 to 372 of the Award, and its findings in respect of the full protection and security standard are contained in paragraphs 406 to 408. The Committee considers it apparent from these paragraphs that the Tribunal did not necessarily consider the two standards identical, but that it did consider the latter to be, in effect, a sub-category of the former, in the sense that a breach of the latter standard would necessarily entail a breach of the former standard. This is apparent not only from the sentence in paragraph 408 of the Award relied upon by Argentina, but also from the statement in paragraph 407 of the Award that:

The tribunal in Occidental based its decision on a clause worded exactly like in the BIT, and nonetheless considered that, after it had found that the fair and equitable standard had been breached, "the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security."¹⁵⁵

184. Argentina's argument that the Tribunal's findings in this respect leave no *effet utile* for the full protection and security standard might, if accepted, support a conclusion that the Tribunal was wrong in law. However, mere error of law, even if this could be established, is not a ground for annulment. The Committee considers that the Tribunal's reasoning, right or wrong, is quite clear. The Committee therefore considers that there is no basis for annulling this finding under Article 52(1)(e) of the ICSID Convention.

F. Denial of fundamental evidence and failure to consider key arguments

(a) Introduction

¹⁵⁵ Award ¶ 407, referring to *Occidental Exploration and Production Company v. Ecuador* (LCIA Administered Case No. UN 3467) Award, dated July 1, 2004, ¶ 187.

185. Argentina claims that it was denied evidence essential to its defence, by virtue of the Tribunal's Procedural Orders No. 2 to No. 6, and that the Tribunal failed to consider key arguments of Argentina in relation to certain matters or to give reasons for its decision on those matters.

(b) Background

186. In its Counter Memorial in the proceedings before the Tribunal, Argentina requested the Tribunal, under the terms of ICSID Arbitration Rules 33 and 34, to request Azurix to:

- a) *Produce, and notify the Argentine Republic of, all the reports, analyses, and all other documentation relating to its participation in the privatisation in Buenos Aires Province. This documentation should include all the documents, records, reports, minutes of directors' meetings, letters, and e-mails in possession of AZURIX relating to the Bidding Process. Specially, AZURIX is asked to attach a copy of the documentation filed with the Buenos Aires Province for participating in the Bidding Process (Envelope No. 1 and Envelope No. 2).*
- b) *Produce, and notify the Argentine Republic of, all the documentation filed with the Securities and Exchange Commission (SEC) and with any other (federal or state) governmental entity of the United States of America relating to Azurix's initial public offering (IPO) on the New York Stock Exchange (NYSE) in 1999, as well as all other subsequent documentation submitted during the period AZURIX's stock was listed on the stock markets (e.g., balance sheets).*

187. The Counter-Memorial stated that:

The purpose of the foregoing is to prove the unfairness of AZURIX's offer, its opportunistic behaviour, the direct relation with the impending IPO of AZURIX, its relation with ENRON, as well as to prove the circumstances associated with Information Letters Nos. 51(B) and 52(A) and Section 12.1.1 of the Contract.

188. By letter of March 15, 2004, Azurix objected to Argentina's request, stating *inter alia* that the request was inconsistent with the ICSID Rules, the parties' agreements at the First Session of the Tribunal, and the general principles on evidence in the IBA Rules on the Taking of Evidence in International Commercial Arbitration, that the requests were grossly overbroad, that Argentina had not explained how or why these documents were relevant to the issues in dispute or would materially affect the outcome of the case, and that many of the requested documents were already in Argentina's possession. The letter stated that Argentina's request appeared to be "*little more than an impermissible fishing expedition*" designed to delay the proceedings.
189. By letter of March 26, 2004, Argentina rejected Azurix's objections and stated that Argentina would have no problem in requesting the Province of Buenos Aires to produce evidence that the Tribunal considered relevant under the terms of ICSID Arbitration Rule 34.
190. On April 19, 2004, the Tribunal issued Procedural Order No. 2, which noted that the Reply of Azurix was due by May 7, 2004, and resolved:
1. *To invite the Respondent to request the Province to provide it with "the documentation filed with the Buenos Aires Province for participating in the Bidding Process (Envelope No. 1 and Envelope No. 2)" ...*
 2. *To postpone consideration of the production of the remainder of the evidence requested until the Tribunal has had the opportunity to review the Claimant's Reply.*
191. By letter dated May 17, 2004, Argentina informed the Tribunal that the documents requested in Procedural Order No. 2 would be shortly submitted, but stated:
- Given that there are irregularities in this documentation, especially in connection with Circulars Nos. 51(B) and 52(A), and that there is no circular supporting the inclusion of article 12.1.1 or other amendments in the Concession Contract, the Argentine Republic requests the Tribunal not to send a copy of the aforesaid documentation to Azurix*

Corp. until the latter has produced a copy of the Envelopes Nos. 1 and 2 that it submitted in the bidding process.

192. By letter dated May 20, 2004, Argentina informed the Tribunal that it had sent to the Tribunal the documentation received from the Province and repeated the request it had made in its letter of May 17, 2004.
193. On May 24, 2004, the Tribunal issued Procedural Order No. 3, which noted that there was a dispute between the parties relating to the documentation presented in the bidding process, and decided to:

1. *Request the Claimant to furnish to the Tribunal the said envelopes No. 1 and No. 2 not later than June 7, 2004 and, upon their receipt, to send to each party the envelopes No. 1 and No. 2 received from the other party.*
2. *Inform the parties that the Tribunal will take into account the relevance of such information and the cost of this procedural incident in its decision on the costs of these proceedings.*

194. By letter to the Tribunal dated May 31, 2004, Argentina stated *inter alia* as follows:

The purpose of the request for the confidentiality of the documentation until after Azurix had submitted Envelopes Nos. 1 and 2 was for Claimant to produce copies of the documents in its possession so as to allow the Tribunal to compare them with those to be produced by Argentina. Thus, the Tribunal would be able to know the actual facts.

...

On Friday, May 28, this Treasury Attorney General's Office became aware of Azurix Corp.'s failure to comply with the confidentiality established in Procedural Order No. 3.

Pursuant to item 1 of Procedural Order No. 3, Azurix was only to have access to the Envelopes in possession of the Province after it had sent its own copies of the Envelopes. However, Azurix requested copies of Envelopes Nos. 1 and 2 from the Province.

...

The request for access to the administrative record does not make any reference to this arbitration.

...

According to the fax attached to this letter, on 28 May, Azurix's representatives had access to the requested administrative record, in particular to Envelopes Nos. 1 and 2 of Azurix's offer, and asked for photocopies thereof.

...

Owing to Azurix's behaviour, the Argentine Republic hereby waives the confidentiality it had requested from the Tribunal by letters dated 17 and 20 May because the confidentiality ordered by the President is pointless at present.

...

For the same reason, the Argentine Republic hereby withdraws its request for Azurix to produce copies of Envelopes Nos. 1 and 2 of its offer in the bidding process.

...

Notwithstanding the waiver of the confidentiality and the withdrawal of the request for evidence, the Argentine Republic requests the President to bear in mind that by breaching a procedural order Azurix has infringed this party's right of defence since it has deprived Argentina of evidence deemed essential to the safeguarding of its rights.

...

... the Tribunal (and Claimant) are hereby informed about the irregularities of Envelope No. 2 of Azurix's offer, a copy of which was sent by the Province (and forwarded to the Tribunal).

In particular, the following should be observed with regard to Envelope No. 2 submitted by Azurix to the Province:

- (a) Volume 1 of Envelope No. 2 includes the circulars signed and accepted by Azurix upon submitting the economic offer. This volume ends with the last page of the list of personnel included in Circular No. 50(B); i.e. the volume with the circulars accepted by Azurix ends with Circular No. 50(B).*

- (b) *Circulars Nos. 51(B) and 52(A) were inserted into the List of Personnel to be transferred, in a place where two pages of such list of personnel are missing.*
- (c) *There seems to be no circular supporting the inclusion of articles 12.1.1 and 13.2.5.6 in the Concession Contract.*

195. By a letter dated June 7, 2004, the Secretary to the Tribunal informed the parties as follows:

The Tribunal notes the waiver by the Argentine Republic of the confidentiality of the documentation furnished to the Secretary of the Tribunal under cover of a communication dated May 20, 2004, and the withdrawal by the Argentine Republic of its request to the Tribunal regarding the documentation referred to in Procedural Order No. 3. The Tribunal notes further that, according to the Claimant, copies of envelopes 1 and 2 are not readily available in its own records.

The Tribunal will consider the relevance of the matters raised in said communications as part of its overall examination of the submissions by the parties in this case.

196. By letter to the Tribunal dated July 22, 2004, Argentina stated as follows:

Considering item 2 of Procedural Order No. 2, and in light of the fact that Azurix filed its Reply on 7 May 2004, without enclosing any documentation or evidence related to the request made by the Argentine Republic in its Counter-Memorial, the Tribunal is requested to order the submission of the evidence that was requested in due time by this Office and was not covered by Procedural Order No. 3.

It should be noted that the remainder of the evidence requested is essential for the Argentine Republic to be able to exercise its right of defence in this arbitration.

By a letter dated July 28, 2004, Azurix opposed this request on the ground that it was belated, overbroad and that Argentina had not explained how the requested documents were relevant.

197. On July 29, 2004, the Tribunal issued Procedural Order No. 4, which noted that the Tribunal had now had the opportunity to review Azurix's reply, and decided to reject Argentina's July 22, 2004 request for production of evidence

“because of its general nature and failure to justify it on the basis of the reasons adduced”.

198. By letter to the Tribunal dated August 2, 2004, the stated purpose of which was *“to justify in more detail the request for evidence made by this Office and make it more precise”*, Argentina asked the Tribunal to order Azurix to submit the following documents:

- a) *the report prepared by the consulting firm “HYTSA Estudios y Proyectos S.A.” for Azurix Corp. within the context of the bidding process in the Province of Buenos Aires for the purpose of evaluating the Concession;*
- b) *the technical, economic or legal studies of Azurix Corp., or those prepared at the request of Azurix Corp., in order to submit the technical offer (Envelope No. 1) and the economic offer (Envelope No. 2) in the bidding of the Province of Buenos Aires; and*
- c) *the January to August 1999 Board of Directors meeting minutes of Azurix Corp., Enron Corp., Operadora de Buenos Aires SRL, and Azurix AGOSBA SRL, related to the bidding.*

That letter went on to state that:

The evidence requested is aimed at confirming that the offer submitted by Azurix Corp. in the bidding process was aggressive and opportunistic and that it was related to the imminent initial public offering (IPO) by Azurix Corp. on the New York Stock Exchange.

This request for evidence is made in the knowledge that it is a general principle of law that the party that is in a better position to prove a fact bears the burden of proof, and that the Argentine Republic has proved perfectly well that the offer made by Azurix Corp. was aggressive and opportunistic.

This request is not aimed at postponing the hearing on the merits. Claimant should be in possession of the evidence requested and should be able to produce it within one or two weeks. In that case, the parties and their experts would

have enough time to examine it before the scheduled hearing.

Azurix opposed this request.

199. On August 16, 2004, the Tribunal issued Procedural Order No. 5, in which the Tribunal decided:

To reject the Respondent's request for production of evidence formulated in its communication of August 2, 2004 because, even if such request is more precise in terms of the requested evidence than the request that was the subject of Procedural Order No. 4, it fails to be adequately justified since it continues to be based on the amount paid by the concession and accepted by the Province of Buenos Aires.

200. By letter to the Tribunal dated August 23, 2004, Argentina requested the Tribunal *"to reconsider Respondent's request for evidence so as to preserve the Argentine Republic's right of defence in these arbitration proceedings"*.

That letter stated, *inter alia*:

... in the exercise of its right of defence, Argentina has sufficiently proven that:

- a) *Azurix Corp.'s offer in the Province of Buenos Aires was aggressive (it was six to eighteen times higher than the next best bid).*
- b) *There was a close and direct relationship between the offer in the Province of Buenos Aires and the imminent IPO in New York, as well as between the former and the permanent objective to renegotiate the terms of the Concession Contract.*
- c) *Azurix Corp. needed to be awarded the provincial water and sewage Concession to gain experience in the water sector.*
- d) *In accordance with the legal system applicable to the Concession Contract, the Concessionaire was not entitled to transfer the canon to tariffs.*

2.- In addition to producing its own evidence, the Argentine Republic requested the Tribunal to order Azurix Corp. to produce the documents in its possession, in order to confirm what had already been proven by Respondent.

Azurix Corp. objected to this request by letter of 15 March 2004.

3.- In such circumstances, by Procedural Order No. 2 the Tribunal decided: "To postpone consideration of the production of the remainder of the evidence requested until the Tribunal has had the opportunity to review the Claimant's Reply."

4.- In its Reply, Azurix Corp. attempted to deny Argentina's contentions. However, it did not produce the evidence requested in the Counter-Memorial nor did it adequately refute the statements included therein.

5.- This was noted by the Argentine Republic in its letters of 22 July and 2 August 2004 and in the Rejoinder.

6.- In the context described above and based on item 2 of Procedural Order No. 2, Respondent asks the members of the Tribunal to reconsider Argentina's request for evidence.

The reason for this petition for reconsideration is that if Argentina's allegations were not taken into account or were held not to have been proven, Respondent's right of defence would be seriously and inexplicably impaired.

...

Respondent is feeling extremely discouraged by seeing how the Tribunal is gradually depriving Argentina of some of its most basic defensive elements ...

It is not possible to understand the reasoning that allows reconciling the natural urge of every impartial arbitrator to know the material truth with the rejection of evidence that might easily lead the arbitrator to find such truth. [Footnotes omitted.]

Azurix reiterated its objections to this request.

201. On September 9, 2004, the Tribunal issued Procedural Order No. 6, in which it said that it had considered anew Argentina's request and had now had the opportunity to review the Rejoinder, and in which it decided:

To request the Claimant to submit, not later than September 17, 2004, the study prepared by HYTSA referred to in paragraph 35 of the Rejoinder, and

To request the Respondent to submit, not later than September 17, 2004, the bid evaluation reports related to each stage of the bidding for the concession prepared under the authority of the Province of Buenos Aires.

(c) Arguments of the parties

202. Argentina argues, *inter alia*, that:

- (a) It was part of Argentina's case that, because Azurix needed to win the bidding process in order for its upcoming IPO to be successful, Azurix had made an unreasonable offer in the bidding process, expecting to later renegotiate the terms of the Concession Agreement. With the purpose of proving that, Argentina requested the Tribunal to order Azurix to submit all the documents on which it had relied to make such offer and all the documents connected with the IPO.

Despite the importance of this evidence to Argentina's defence, at first the Tribunal postponed consideration of Argentina's request until after the submission of the Reply, and then subsequently twice rejected the request, and then only partially granted it.

The Tribunal's decision to order Azurix to submit the HYTSA Report was issued seven months after Argentina's initial request and less than a month before the hearing on the merits, and Argentina received the HYTSA Report only one week before the hearing on the merits, which was too late to use it.

By depriving Argentina of evidence that might have supported its allegations, the Tribunal seriously affected Argentina's right of defence which constitutes "*an essential part of the right to a fair trial*", a violation of which constitutes a "*serious departure from a fundamental rule of procedure*" within the meaning of Article 52(1)(d) of the ICSID Convention.

- (b) The minutes of the first session of the Tribunal were stated to be “[w]ithout prejudice to the power of the Tribunal to request the parties to produce any further evidence at any stage of the proceedings”. Under the ICSID Arbitration Rules, a party is not required to make a request for evidence at any particular time, and is not required to tailor its requests for evidence to the points to which the evidence would be directed or under an obligation to explain why the documents are relevant and material to the outcome of the case. In other ICSID cases, evidence has been requested by a respondent in its counter-memorial or later.
- (c) One of the consequences of the principle of cooperation of the parties with the tribunal in establishing the relevant facts is that “*any party is obliged to provide the [tribunal] with relevant documents, which only it possesses.*”¹⁵⁶
- (d) Instead of submitting its own copies of Envelopes No. 1 and 2 as ordered in Procedural Order No. 3, Azurix instead obtained copies from the Province of Buenos Aires, this destroying the ability of the Tribunal to compare the two sets of documents. Pursuant to ICSID Arbitration Rule 34(3), in case of failure of a party to comply with its obligation to cooperate with the Tribunal in the production of evidence, the Tribunal must take formal note of it. However, in the Award the Tribunal did not establish what the consequences of Azurix’s conduct were. It simply held that there was no evidence to support Argentina’s allegations of irregularities in the bidding process, without considering Azurix’s failure to submit evidence which might have confirmed the existence of such irregularities. By disregarding Azurix’s breach of Procedural Order No. 3, the Tribunal seriously affected Argentina’s right of defence,

¹⁵⁶ Relying on Robert Kolb, *General Principles of Procedural Law, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 793, 829 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., 2006).

which was a serious departure from a fundamental rules of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.

- (e) The Tribunal did not afford equal treatment of the parties with regard to evidentiary issues. By Procedural Order No. 2 the Tribunal immediately granted Azurix's request for evidence of March 15, 2004, while it postponed consideration of Argentina's request for evidence of February 9, 2004. Furthermore, Azurix only had to make its request for evidence once, whereas Argentina had to make its request five times, which the Tribunal only partially granted seven months after the initial request. In addition, the Tribunal did not order Azurix to submit the studies on which it had relied to make its offer in the bidding process, but ordered Argentina to submit the bid evaluation reports related to each stage of the bidding process. The Tribunal's unequal treatment of the parties are constitutes a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.

- (f) Fundamental to Argentina's case was the relationship between Azurix and Enron. In addition to the fact that the relationship between Azurix and Enron was public knowledge, Argentina produced various pieces of evidence with the purpose of proving the existence of that relationship. The fact that the HYTSA Report was not addressed to Azurix but to Enron further proved the existence of this relationship. However, the Tribunal neither granted Argentina's request for the Tribunal to order Azurix to produce certain other evidence aimed at confirming the existence of the relationship between Azurix and Enron, nor acted on Argentina's proposal that the Tribunal request the United States Congress to submit its reports on the Enron scandal and its connection with Azurix.

Despite the evidence and requests of Argentina, the Tribunal denied any relevance to the relationship between Azurix and Enron. The

Tribunal did not give any reasons for disregarding the evidence produced by Argentina on the connection between Azurix and Enron. The Tribunal simply held that “[b]ased on the documentation submitted by the parties, the Tribunal considers that nothing has been proven that relates the case before this Tribunal to ENRON’s case”.¹⁵⁷ If the Tribunal was dissatisfied with the evidence before it, it should have granted Argentina’s request for evidence. It was contradictory for it not to grant such a request and then hold that the evidence in the record was insufficient. The Tribunal thereby failed to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention.

- (g) The Tribunal also failed to state reasons, within the meaning of Article 52(1)(e) of the ICSID Convention, in disregarding the existence of irregularities in the bidding process without explaining why, and in particular, in failing to explain why it did not give heed to Azurix’s breach of Procedural Order No. 3.
- (h) Procedural Orders No. 2 to 6, signed by the President of the Tribunal, took on a new meaning in the context of the proposal to disqualify Dr. Rigo Sureda.

203. Azurix argues, *inter alia*, that:

- (a) Argentina has failed to identify any ICSID procedural rule that it says was violated. No party has an unfettered right of access to any and all of the opposing party’s documents.
- (b) Argentina’s requests for production of documents were made more than two and a half years after the case was filed and one and a half years after Azurix filed its Memorial; and Argentina did not “narrow” its request until more than two months after Azurix’s Reply was filed, and only days before Argentina’s Rejoinder was due and just two months before the final hearing date.

¹⁵⁷ Referring to Award ¶ 55.

- (c) Argentina's requests were overbroad, untimely and irrelevant. These defects are what caused the Tribunal to deny Argentina's requests, not bias against Argentina.
- (d) Even if Azurix's bid was found to be too large, in no way would this provide Argentina with any defense to its unfair and inequitable treatment of Azurix's investment. The Province accepted the bid and took the entire \$438.55 million offered, never suggesting at the time that it was unreasonable.
- (e) Argentina's reasoning would deny the Tribunal any discretion relating to evidence requests.
- (f) Argentina has not established how proving Azurix's connection to Enron or that Azurix's bid was unreasonable would have proven or have been of relevance to the issues in this case.
- (g) Each party was given precisely the same opportunities with regard to discovery issues. The Tribunal did not deny Argentina the ability to make requests, but merely held that Argentina was obligated to comply with the same rules that were applicable to Azurix. Argentina's failure to conform its requests to the rules does not mean the parties were treated unequally.
- (h) The Tribunal decided this case in a way that made any allegations of an "unreasonable offer" by Azurix moot, since the Tribunal did not base damages on the amount of the offer tendered by Azurix, but decided instead that the Concession was worth only a fraction (USD 60 million) of the total amount received by Argentina. In effect, Argentina prevailed on this point.

- (i) Argentina's disagreement with the conclusion reached by the Tribunal does not demonstrate any serious departure from a fundamental rule of procedure.¹⁵⁸
- (j) The Tribunal did evaluate Argentina's argument concerning Azurix's relationship to Enron, and ultimately rejected it.¹⁵⁹ Enron's problems had absolutely no bearing on the case filed by Azurix against Argentina for the latter's violations of the BIT. The Tribunal did not state that there was not enough evidence to support a connection between Azurix and Enron; rather, it stated that nothing showed that Enron's problems were related to Azurix's case against Argentina.
- (k) The Tribunal expressly addressed the issue of "irregularities" in paragraph 56 of the Award, and rejected Argentina's argument due to lack of evidence. Argentina seeks to reopen the issue of alleged "corruption" at this stage without giving a single reason why the Tribunal's finding might be deemed inaccurate.
- (l) Azurix did not breach Procedural Order No. 3; on the contrary it sought access to the official public file precisely in order to comply with the Tribunal's request, as it has not kept copies of every document filed.
- (m) Even if the Tribunal had breached a fundamental rule, Argentina has not demonstrated that the breach was "serious" by showing that the result would have been different had the departure from the rule not occurred.

¹⁵⁸ Relying on *Wena Hotels Annulment Decision* ¶¶ 59-61.

¹⁵⁹ Referring to Award ¶ 55, and relying on *Soufraki Annulment Decision* ¶ 131: "*It is of course not necessary for a tribunal to give a reason for an assertion which is in itself a reason. That would be to initiate an endless and regressive cycle of reasoning. Not every word has to be explained.*"

(d) Serious departure from a fundamental rule of procedure as a ground of annulment under Article 52(1)(d) of the ICSID Convention: applicable principles

204. The principles applicable to a ground of annulment based on Article 52(1)(d) of the ICSID Convention are considered by the Committee in paragraphs 49-52 above.

(e) Failure of the award to state reasons as a ground of annulment under Article 52(1)(e) of the ICSID Convention: applicable principles

205. The principles applicable to a ground of annulment based on Article 52(1)(e) of the ICSID Convention are considered by the Committee in paragraphs 53-55 and 178 above.

(f) The Committee's views

(i) Introduction

206. Argentina claims that grounds of annulment exist, first, by virtue of the Tribunal's "*denial of fundamental evidence*", and secondly, by virtue of the Tribunal's "*failure to consider key arguments*". The Committee will consider each of these in turn.

(ii) Argentina's claim of "*denial of fundamental evidence*"

207. Argentina's claim of "*denial of fundamental evidence*" concerns the Tribunal's response to a number of requests, made by Argentina to the Tribunal during the course of the proceedings, for the Tribunal to exercise its power under Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2)(a) to call upon Azurix for the production of certain documents.

208. As is clear from their terms each provision states that the power is discretionary as one that the tribunal “*may*” exercise, “*at any stage of the proceeding*”. Neither provision makes the exercise of the power contingent upon a request being made to the tribunal by one of the parties; hence the power may be exercised by the tribunal of its own motion. There is nothing to prevent the tribunal from exercising the power pursuant to a request by a party, but conversely, there is nothing to require the tribunal to accede to any such request. Nor does either of these provisions lay down the criteria to be considered by the tribunal when deciding whether to exercise this power. The discretion of the tribunal in the exercise of this power is unfettered.
209. Because the unfettered nature of the discretion, there is a potentially wide range of considerations to which the tribunal might legitimately have regard in deciding whether to exercise that power pursuant to a request of a party, such as the timing of the request, the importance of the documents to an identified issue, the relevance of the identified issue to the determination of the dispute, the reasonableness of the scope of the request and, in particular, whether the other party objects to the request, and if so, the nature and basis for those objections.
210. Because the power is discretionary, a decision by a tribunal not to accede to a party’s request to exercise that power can never, in and of itself, be a departure from a fundamental rule of procedure. A decision by a tribunal whether or not to exercise a discretionary power that it has under a rule of procedure is an *exercise* of that rule of procedure, and not a *departure from* that rule of procedure. It is only where the exercise of that discretion, in all of the circumstances of the case, amounts to a serious departure from another rule of procedure of a fundamental nature that there will be grounds for annulment under Article 52(1)(e) of the ICSID Convention.
211. Argentina invokes two fundamental rules of procedure which it claims have been violated as a result of the Tribunal’s response to Argentina’s requests

for the production of documents. These are, first, Argentina’s “right of defence”, and secondly, “the principle of equality of the parties”.

212. As to the “right of defence”, the Committee notes that in the *Wena Hotels* Annulment Decision it was said that:

*[Article 57(1)(d) of the ICSID Convention] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to stake its claim more its defence and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.*¹⁶⁰

Subsequent ICSID case law has affirmed these propositions.¹⁶¹

213. As to the “principle of equality of the parties”, the Committee notes that in the *MINE* Annulment decision, it was said that:

The Committee considers that a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides:

*The parties shall be treated with equality and each party shall be given full opportunity of presenting his case.*¹⁶²

214. The Committee notes that, additionally, it was observed in the *Klöckner* Annulment Decision that:

Impartiality of an arbitrator is a fundamental and essential requirement. Any shortcoming in this regard, that is any sign of partiality, must be considered to constitute, within the meaning of Article 52(1)(d), a “serious departure from a fundamental rule of procedure” in the broad sense of the term “procedure,” i.e., a serious departure from a

¹⁶⁰ *Wena Hotels* Annulment Decision ¶ 57.

¹⁶¹ *MTD* Annulment Decision ¶ 49; *CDC* Annulment Decision ¶ 49.

¹⁶² *MINE* Annulment Decision ¶ 5.06. See also, for instance, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, June 6, 2008, ¶¶ 153-155.

*fundamental rule of arbitration in general, and of ICSID arbitration in particular.*¹⁶³

215. However, in the Committee's view, in the ICSID system, none of these fundamental rules of procedure imply a *right* of a party to obtain evidence in the hands of the opposing party. In its letter dated August 2, 2004, Argentina refers to what it claims is "*a general principle of law that the party that is in a better position to prove a fact bears the burden of proof*" (see paragraph 198 above). The Committee does not accept that such general principle exists in ICSID proceedings: to the contrary, the Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that "who asserts must prove", and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.
216. There are no provisions in the ICSID Convention or ICSID Arbitration Rules providing for any particular regime of discovery or disclosure of documents by one party to another. It is well known that different national legal systems take different approaches to the question of discovery and disclosure of documents, and these differences have also been reflected in diverging attitudes in international commercial arbitrations. As was stated in the *Noble Ventures Award*:

Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2)(a) ... do not provide a basis for the application of national rules of discovery such as those of the United States Federal Rules of Civil Procedure or those for the District of Columbia ...

The Tribunal recognises that, on one hand, requests and orders regarding the production of documents are today a regular feature of international arbitration ... but, on the other hand, the present arbitration is a case between a Government of a Civil Law country where production of documents is used far less than in Common Law countries from where the investor comes. ...

¹⁶³ Klöckner Annulment Decision ¶ 95.

The Tribunal further recognises that, on one hand, ordering the production of documents can be helpful in the Tribunal's task of establishing the facts of the case relevant for the issues to be decided, but, on the other hand, (1) the process of discovery and disclosure may be time-consuming, excessively burdensome and even oppressive and that unless carefully limited, the burden may be disproportionate to the value of the result, and (2) Parties may have a legitimate interest of confidentiality.

... Finally the Tribunal notes that, insofar as a Party has the burden of proof, it is sufficient for the other Party to deny what the respective Party has alleged and then, later in the procedure, respond to and rebut the evidence provided by that respective Party to comply with its burden of proof.¹⁶⁴

217. The Committee finds that the fundamental rules of procedure referred to above do not require any particular regime of discovery or disclosure to be applied by a tribunal, and do not confer any particular right on a party to compel the production of evidence by the opposing party. The extent to which the tribunal does call upon one party to produce documents at the request of another party will always be a matter for the tribunal to determine in its discretion.
218. Argentina is correct when it argues that under the ICSID Arbitration Rules, a party is not required to make a request for evidence at any particular time, and is not required to tailor its requests for evidence to the points to which the evidence would be directed, and is not under an obligation to explain why the documents are relevant and material to the outcome of the case. However, matters such as the timing of the request for evidence, and whether the request is sufficiently precise in identifying the requested evidence and the reasons why it is needed, are matters that the tribunal is entitled to, and in practice no doubt normally will, take into account in deciding how to exercise its discretion. It is not the case that a party has the right to demand any evidence at any time without justification. Even where a request is timely, precise and justified, the tribunal may in its discretion reject the request.

¹⁶⁴ *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11, Award, October 12, 2005 ¶ 20.

Where the request is not timely, precise and justified, the tribunal is even more likely to do so.

219. The Committee finds that a party cannot, simply by requesting the tribunal to call upon the other party to produce documents which are said to be relevant to a particular allegation, mandate the tribunal either to require the production of those documents or to accept the truth of the allegation in default of production. A tribunal might in its discretion refuse the request to require the documents to be produced, and ultimately find the asserted fact not to be proved. Regardless of whether or not the tribunal decides to call upon a party to produce documents, it will decide all of the issues on the basis of the evidence before it. That is not to deny that in some circumstances a tribunal's refusal to exercise its power under Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2)(a) at the request of a party could amount to a denial of a party's right to be heard. However, the fact that the tribunal decides to exercise its discretion one way rather than the other cannot in itself be an annulable error. To establish an annulable error, it is not sufficient to show that the tribunal rejected repeated requests for the production of evidence that the requesting party considered crucial to its case. Rather, it is necessary to establish that, in all of the circumstances there has been a serious departure from a fundamental rule of procedure.
220. In the present case, Argentina, in its Counter Memorial, requested the Tribunal to call upon Azurix to produce certain documents, including a copy of the documentation filed with the Province for participating in the Bidding Process ("Envelopes Nos. 1 and 2"). Azurix objected on the grounds referred to in paragraph 202 above. Argentina subsequently stated that Argentina would have no problem in requesting the Province to produce evidence that the Tribunal considered relevant (see paragraph 189 above). The Tribunal then adopted Procedural Order No. 2, in which the Tribunal invited Argentina to request the Province to provide it with Envelopes Nos. 1 and 2, and decided to postpone consideration of the remainder of Argentina's request

until after the filing of Azurix's Reply, which was then due in little more than 2 weeks.

221. In circumstances where Argentina had stated that it would have no problem in requesting the Province to produce the evidence that Argentina was seeking to obtain, and where Azurix had objected to Argentina's request, the Committee does not see how it could be regarded as a departure from any fundamental rule of procedure for the Tribunal to have proceeded as it did.
222. By letters dated May 17 and 20, 2004, Argentina subsequently informed the Tribunal that it was sending the Tribunal copies of Envelopes Nos. 1 and 2 that it had obtained from the Province, but requested the Tribunal not to send a copy of this documentation to Azurix until Azurix had produced its own copy of Envelopes Nos. 1 and 2 (see paragraph 202 above). By Procedural Order No. 3, the Tribunal acceded to this request of Argentina, and this action by the Tribunal cannot be the subject of complaint by Argentina.
223. By letter to the Tribunal dated May 31, 2004, Argentina stated that it was withdrawing its request for Azurix to provide its own copies of Envelopes Nos. 1 and 2. Argentina claimed that this was because Azurix's conduct had made Argentina's request futile, and Argentina requested the Tribunal to take this into account. By a letter from the Secretary of the Tribunal dated June 7, 2004 (paragraph 202 above), the parties were informed that the Tribunal took note of Argentina's withdrawal of its request for Azurix to produce Envelopes Nos. 1 and 2, and that the Tribunal "*will consider the relevance of the matters raised in said communications as part of its overall examination of the submissions by the parties in this case*". The Tribunal thereby effectively acceded to Argentina's request, and this action by the Tribunal also cannot be the subject of complaint by Argentina.
224. By letter to the Tribunal dated July 22, 2004, Argentina requested the Tribunal to order the submission of the evidence requested by Argentina in its Counter Memorial that was not covered by Procedural Order No. 3. Azurix opposed this request. In its Procedural Order No. 4, the Tribunal, noting that it

had now had the opportunity to review Azurix's reply, declined this request of Argentina "*because of its general nature and failure to justify it on the basis of the reasons adduced*".

225. The original request for the production of evidence made in Argentina's Counter Memorial, and the relevant parts of Argentina's letter of July 22, 2004 are set out in paragraphs 186-187 and 196 above. The Committee considers that the Tribunal was acting within its discretion in declining Argentina's request on the ground that it did, and the Committee is therefore not satisfied that it is established that in the circumstances there was a breach of any fundamental rule of procedure.
226. By a letter dated August 2, 2004, the stated purpose of which was "*to justify in more detail the request for evidence made by this Office and make it more precise*", Argentina requested that Azurix be called upon to produce one specific document, the HYTSA Report, and two general categories of documents (see paragraph 198 above). The justification for the request was that the requested documents were aimed at confirming that the offer submitted by Azurix in the bidding process was "*aggressive and opportunistic*" and that it related to the imminent IPO by Azurix (see paragraph 198 above). In its Procedural Order No. 5, the Tribunal rejected this request, stating that "*it fails to be adequately justified since it continues to be based on the amount paid by the concession and accepted by the Province*". Although the reasons given in this Procedural Order are not very detailed, the Committee considers it sufficiently clear that because the Province had accepted the amount offered by Azurix for the Concession, the Tribunal could not see the relevance of the reasons that Azurix may have had for offering the price that it did. Having regard to the justifications that had been advanced by Argentina in all of its requests for the production of documents, the Committee considers that it was within the discretion of the Tribunal to reject Argentina's request on the basis that it did.

227. By letter to the Tribunal dated August 23, 2004, Argentina requested the Tribunal “*to reconsider Respondent’s request for evidence so as to preserve the Argentine Republic’s right of defence in these arbitration proceedings*” (see paragraph 200 above). That letter stated, *inter alia*, that “*Argentina has sufficiently proven*” certain facts, and that “[*i*]n addition to producing its own evidence, the Argentine Republic requested the Tribunal to order Azurix Corp. to produce the documents in its possession, in order to confirm what had already been proven by Respondent”.
228. On September 9, 2004, the Tribunal issued Procedural Order No. 6, in which it said that it had considered anew Argentina’s request and had now had the opportunity to review the Rejoinder, and in which it decided to request Azurix to submit the HYTSA Report and to request Argentina to submit the bid evaluation reports related to each stage of the bidding for the Concession.
229. The Committee sees no contradiction in the Tribunal’s decision (in Procedural Order No. 6) to call upon Azurix to produce the HYTSA Report, having previously declined to do so in Procedural Order No. 5. The text of Procedural Order No. 6 indicates that, since the previous order, the Tribunal had had the opportunity to review Argentina’s Rejoinder, and it is necessarily implicit in the latter order that this influenced the Tribunal’s change in position. In any event, the Tribunal, by calling upon Azurix to produce the HYTSA Report, thereby acceded to a request by Argentina, and in the Committee’s view this action by the Tribunal cannot be the subject of complaint by Argentina.
230. Argentina claims that it received the HYTSA Report too late for it to be used by Argentina in the oral arguments in the case. The Committee notes, however, that the Tribunal’s Procedural Order No. 6 was the result of Argentina’s request dated August 23, 2006. Procedural Order No. 6 was issued just over 2 weeks after Argentina’s request, and that order required production of the HYTSA Report within some 8 days of the date of the order. The Committee therefore considers that the Tribunal responded promptly to

Argentina's request, and that the timing of Argentina's receipt of the Report was a function of the timing of Argentina's request. In any event, if Argentina considered itself to be materially prejudiced by the timing of its receipt of the Report, it could have applied to the Tribunal for appropriate relief, including (for instance) by applying for a postponement of the oral arguments if it considered this to be necessary. In the material before the Committee, there is no suggestion that Argentina ever sought any relief from the Tribunal in this respect. The Committee considers that Argentina, having failed to do so, cannot now claim that there has been a departure from a fundamental rule of procedure that would justify annulment.

231. Procedural Order No. 6 also requested Argentina to produce the bid evaluation reports related to each stage of the bidding. It is not clear from the material before the Committee whether the Tribunal was requested by either party to call for the production of this evidence. However, the Committee considers this to be immaterial, since the power under Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2)(a) may be exercised on the Tribunal's own motion. The Tribunal's decision to call for the production of certain evidence that the Tribunal deemed necessary clearly cannot amount to a "fundamental denial of evidence".
232. Procedural Order No. 6 rejected Argentina's request for the production of the documents referred to in paragraph 198(b) and (c) above. The Committee finds that this was consistent with Procedural Order No. 5, and finds, for the same reasons given in respect of Procedural Order No. 5 above, that this decision did not depart from any fundamental rule of procedure.
233. As to Argentina's claim that the Tribunal's Procedural Orders No. 2 to No. 6 did not treat the parties equally, the Committee observes that the fact that a request by one party is allowed while a request by another party is denied does not mean that there has been an inequality in the treatment of the parties. Each request by each party must be considered and determined by the tribunal on its own individual merits. It is only where it can be shown that

a tribunal has applied inconsistent standards in the way that it has treated the requests of the different parties that there can be said to be inequality of treatment. On the basis of the material before it, the Committee considers that there are no grounds for suggesting that the Tribunal did anything other than consider each party's requests on their own merits, and that there are no grounds for suggesting there was any inequality of treatment of the parties.

234. The Committee also notes that in order to be a "serious" departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.¹⁶⁵ The only evidence which Argentina ultimately sought to have produced that the Tribunal failed to call upon Azurix to provide were the documents referred to in paragraph 198(b) and (c) above. As to the relevance of these documents to the case, Argentina stated in its Memorial on Annulment that:

... one of Argentina's key allegations was that there had been irregularities in the bidding process. The importance of this contention lied in preventing Azurix from invoking illegitimate expectations.

and that:

Demonstrating the existence of those irregularities was important for preventing Azurix from invoking expectations based on the already mentioned circulars and articles, especially Circular No. 52(A) and Article 12.1.1 of the Concession Contract.

235. On the material before it, it is not apparent to the Committee that in its defences to the claims Argentina invoked the principle that claims based on contracts obtained by corruption cannot be upheld by an arbitral tribunal. Nor is it apparent to the Committee that Argentina "specifically" or "in terms" claimed that the documents it requested would establish that the contract had been obtained by corruption. Rather, the position of Argentina appears to have been that "irregularities" in the bidding process would prevent Azurix

¹⁶⁵ See above paragraphs 49-52.

from relying on “expectations” based on particular provisions of the Concession Agreement, in particular Circular No. 52(A) and Article 12.1.1 of the Concession Agreement.

236. However, in any event, the Tribunal noted that:

*... the Procurador General present at the hearing confirmed that the investigation was continuing but that no evidence of improper conduct had surfaced. No further information has been transmitted to the Tribunal.*¹⁶⁶

On the basis of the material before it, the Committee is not satisfied that there is any justification for concluding that it was reasonably likely that the documents requested by Argentina, had they been available in the proceedings, would have established that the Concession Agreement was obtained by corruption.

237. As to irregularities falling short of corruption, the Committee finds that the Tribunal expressly took Argentina’s arguments into account.¹⁶⁷ It is true that the Tribunal appears to have made no express findings as to whether or not such irregularities had in fact been established. However, the Committee regards it as implicit in the Award that the Tribunal considered that any such irregularities would not have invalidated the Concession Agreement or have affected Azurix’s right to invoke the protections of the BIT in respect of its investment.¹⁶⁸ The controversy over Circular No. 52(A) and Article 12.1.1 of the Concession Agreement went to the issue of Canon recovery.¹⁶⁹ The Tribunal ultimately resolved that issue in Argentina’s favour,¹⁷⁰ and also found that the value of the Concession was only a fraction of what Azurix had paid for it. Thus, the Committee finds it to be implicit from the Award that, in the Tribunal’s view, any such irregularities, even if they had been established, would not have affected the Tribunal’s decision.

¹⁶⁶ Award ¶ 56.

¹⁶⁷ Award especially ¶¶ 23, 25, 201, 203, 209, 242.

¹⁶⁸ See especially Award ¶ 242.

¹⁶⁹ Award ¶¶ 195-243.

¹⁷⁰ See especially Award ¶¶ 219-243.

238. On the basis of the material before it, the Committee is therefore not satisfied that there is any basis for concluding that it was reasonably likely that the documents requested by Argentina, had they been available in the proceedings, would have caused the Tribunal to reach a substantially different result.
239. The Committee therefore rejects Argentina’s argument based on “denial of fundamental evidence”.

(iii) Argentina’s claim of “failure to consider key arguments”

240. In addressing Argentina’s contention that the Tribunal failed to consider certain of its key arguments, the Committee recalls the *Vivendi* Annulment Decision where it was said that:

*No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with.*¹⁷¹

241. Argentina argues that the Tribunal failed to state reasons, within the meaning of Article 52(1)(e) of the ICSID Convention, in disregarding the existence of irregularities in the bidding process without explaining why, and in particular, in failing to explain why it did not give heed to Azurix’s breach of Procedural Order No. 3.
242. For the reasons given in paragraph 237 above, the Committee considers that it is apparent that the Tribunal took Argentina’s arguments concerning alleged irregularities in the bidding process into account.
243. Argentina argues that the Tribunal failed to take properly into account Azurix’s alleged breach of Procedural Order No. 3. The Committee notes that

¹⁷¹ *Vivendi* Annulment Decision ¶ 87; *MTD* Annulment Decision ¶ 50; *Lucchetti* Annulment Decision ¶ 128; *Wena Hotels* Annulment Decision ¶¶ 81-83; *Soufraki* Annulment Decision ¶¶ 121-128; *CMS* Annulment Decision ¶¶ 53-57; *MINE* Annulment Decision ¶ 5.09.

the parties were informed by the letter dated June 7, 2004 that the Tribunal would consider the relevance of the matters raised by Argentina in its letter of May 20, 2004 as part of its overall examination of the submissions by the parties in the case. The Committee is satisfied that the Tribunal must have done so, even if it did not make express or detailed findings on those matters in the Award itself. The fact that the Tribunal ultimately ordered Azurix to pay the Argentina's costs related to the "procedural incident" of Azurix's failure to submit its copies of Envelopes No. 1 and No. 2 as required by Procedural Order No. 3¹⁷² is further confirmation that the Tribunal did take Argentina's submissions in respect of this incident into account. Argentina's argument was in essence that Azurix's alleged breach of Procedural Order No. 3 deprived Argentina of the opportunity to obtain further evidence of irregularities in the bidding process. For the reasons given in paragraph 237 above, the Committee is satisfied that the Tribunal did not consider it material whether or not there had been irregularities in the bidding process. Accordingly, it would not have been material whether or not Azurix had breached Procedural Order No. 3.

244. Argentina argues that it was a part of its case that, because Azurix needed to win the bidding process in order for its upcoming IPO to be successful, it made an unreasonable offer in the bidding process, expecting later to renegotiate the terms of the Concession Agreement. The Committee notes that the Tribunal ultimately found that "*no well-informed investor, in March 2002*" would have paid what Azurix had paid for the Concession, and that for the purposes of assessing damages the Tribunal therefore took into account less than a sixth of what Azurix had actually paid. The Committee considers that the Tribunal thereby agreed with Argentina's claim that Azurix had paid an unreasonably large amount for the Concession. The Committee further finds it implicit from the Award as a whole that the Tribunal did not consider it to be material to its decision exactly *why* Azurix had done so. The Committee finds that it is not a serious departure from a fundamental rule of procedure

¹⁷² Award ¶¶ 441, 442.7.

for a tribunal to decline to consider an issue that it considers to be irrelevant, merely because one of the parties considers it to be important. For the reasons given in paragraph 237 above, the Committee is not persuaded that the Tribunal failed to consider Argentina's argument that, because of the alleged irregularities in the bidding process, Azurix was not entitled to any compensation at all.

245. Argentina also contends that the Tribunal failed to mention the evidence submitted by Argentina in order to show the existence of the relationship between Azurix and Enron. The Committee considers that it is implicit in the Award, including for the reasons given in the previous paragraph, that the Tribunal did not consider Azurix's relationship to Enron to be material to its decision in the case. At paragraph 55 of the Award, the Tribunal refers expressly to Argentina's arguments concerning the relationship between Azurix and Enron. The Committee is not persuaded that the Tribunal failed to consider these arguments. The Committee is satisfied that the Tribunal considered and rejected them.
246. The Committee therefore rejects Argentina's argument based on "failure to consider key arguments".

(g) Other ground of annulment advanced by Argentina

247. Argentina has also argued that "*Procedural Orders No. 2 to 6, signed by the President of the Tribunal, took a new meaning in the context of the proposal to disqualify Mr. Rigo Sureda*". This contention is considered by the Committee in connection with its consideration of Argentina's subsequent ground of annulment below.

(h) Conclusion

248. For the reasons given above, the Committee rejects Argentina's grounds of annulment based on the Tribunal's alleged denial of fundamental evidence and failure to consider key arguments.

G. Alleged conflict of interest and lack of independent judgment

(a) Introduction

249. Argentina claims that the Tribunal was not properly constituted, within the meaning of Article 52(1)(a) of the ICSID Convention, on account of the fact that the President of the Tribunal, Dr. Andrés Rigo Sureda, was "*immersed in various conflicts of interest*" which "*cast reasonable doubts on his impartiality*", such that "*it was not possible for an objective observer to be confident that he could be 'relied upon to exercise independent judgment'*".

250. Such doubts are claimed by Argentina to be reinforced by certain procedural orders adopted by the President of the Tribunal which, according to Argentina, denied evidence essential to Argentina's defence.

251. The conflicts of interest in which Dr. Rigo Sureda is said by Argentina to have been immersed are claimed to arise by virtue of three circumstances, namely:

(a) the fact that Dr. Rigo Sureda was employed as a consultant to the United States law firm, Fulbright & Jaworski LLP ("Fulbright"), which was representing the claimant in the case of *Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru* (ICSID Case No. ARB/03/28) ("the *Duke* case"), in which Fulbright appointed as arbitrator Dr. Guido Santiago Tawil, one of the counsel for Azurix in the present case;

(b) the fact that Fulbright provided legal advice to Azurix on other matters, including while the arbitration in the present case was in progress; and

- (c) the fact that Fulbright participated in matters related to Enron, which was Azurix's parent company.

252. In its Reply on Annulment, Argentina contended that there are seven main reasons why Dr. Rigo Sureda could not be relied upon to exercise independent judgment and did not inspire full confidence in his impartiality of judgment, namely:

- (a) the crossed roles played by Dr. Rigo Sureda and Dr. Santiago Tawil;
- (b) Dr. Rigo Sureda's failure to disclose that he had participated in the *Duke* case until after Argentina had proposed his disqualification;
- (c) Dr. Rigo Sureda's provision of misleading information with regard to his knowledge about Dr. Santiago Tawil's appointment in the *Duke* case;
- (d) the attorney-client relationships between Fulbright and Azurix and Fulbright and Enron;
- (e) Dr. Rigo Sureda's failure to investigate despite the fact that Argentina enquired about the possible attorney-client relationship between Fulbright and Enron as from Argentina's proposal to disqualify Dr. Rigo Sureda;
- (f) Dr. Rigo Sureda's resignation from Fulbright; and
- (g) the denial of evidence requested by Argentina in the Tribunal's Procedural Orders Nos. 2 to 6.

253. Argentina also contends that, by virtue of these conflicts of interest there has been a serious departure from a fundamental rule of procedure, within the meaning of Article 52(1)(d) of the ICSID Convention.

(b) Background

254. By letter dated March 27, 2002 the ICSID Secretariat informed Argentina and Azurix that Dr. Andrés Rigo Sureda was being considered for appointment as the presiding arbitrator in this case. That letter stated that Dr. Rigo Sureda had informed the ICSID Secretariat that the law firm to which he was advisor, Fulbright, was at the time representing several parties in matters against Enron Corp, but that he had not and would not participate in any of these matters and would take the necessary steps to ensure that he would be isolated from them. The letter requested the parties to indicate whether they had any objections to his appointment.
255. By letter dated April 8, 2002, the ICSID Secretariat informed Argentina and Azurix that Dr. Rigo Sureda had accepted appointment as President of the Tribunal in this case, and that in accordance with ICSID Arbitration Rule 6(1), the Tribunal was deemed to have been constituted and the proceedings to have begun on that date.
256. By letter dated March 30, 2004 Dr. Guido Santiago Tawil of M & M Bomchil Abogados, one of the counsel for Azurix, informed Argentina that he had been appointed as arbitrator in the *Duke* case.¹⁷³ The letter stated that, prior to accepting such nomination, he considered it relevant to inform Argentina that Dr. Rigo Sureda had previously been part of the legal team that was acting for the claimant in the *Duke* case, but that Dr. Rigo Sureda did not participate in the selection procedure that led to Dr. Santiago Tawil's appointment as arbitrator in that case and that Dr. Rigo Sureda no longer participated in the *Duke* case. The letter requested Argentina's consent for Dr. Santiago Tawil to accept his nomination as arbitrator in the *Duke* case.
257. In a letter to Dr. Santiago Tawil dated April 13, 2004 the Argentine Attorney-General's Office stated that:

Since the Republic of Argentina is absolutely unrelated to the case and bearing in mind, also, that the intervention of the head of this Office has been required on the grounds of

¹⁷³ See above paragraph 251.

professional ethics and politeness, due to the fact that you are a member of the Law Firm M&M BOMCHIL abogados--adversary to the Republic of Argentina in the cases SIEMENS AG and AZURIX Corp. which acting Tribunals are presided over by a member of the Law Firm who nominated you as arbitrator in [the Duke case] ... it is unnecessary for this Office to deliver a formal decision regarding your presentation.

258. By letter dated April 13, 2004 Dr. Santiago Tawil informed the ICSID Secretariat that he accepted his nomination as arbitrator in the *Duke* case, advised the ICSID Secretariat of the above matters and stated that “[p]rior to this letter I have disclosed these facts before the Argentine Republic, who has made no objection in such respect”.

259. In a letter to the ICSID Secretariat dated May 17, 2004 Dr. Rigo Sureda stated that he had learned of the appointment of Dr. Santiago Tawil as arbitrator in the *Duke* case, and said that:

Since Mr Tawil is counsel to the claimants in the cases of Siemens v. Argentina and Azurix v. Argentina, cases in which I chair the arbitral tribunal, I wish to confirm to you that I had no involvement in the selection of Mr Tawil as an arbitrator [in the Duke case], nor will I have any involvement with the representation of Duke Energy International by Fulbright & Jaworski.

260. On November 29, 2004 Argentina filed a proposal to disqualify Dr. Rigo Sureda pursuant to Articles 57 and 14(1) of the ICSID Convention (the “Disqualification Proposal”). That proposal stated, *inter alia*, that:

Mr Rigo Sureda is the President of two ICSID arbitration panels in cases against the Argentine Republic. In such cases Mr Tawil is co-counsel for the claimants. In addition, Mr Tawil was appointed arbitrator by Mr Rigo Sureda’s law firm in a case where such law firm is counsel for claimant. Mr Rigo Sureda and Mr Tawil are reciprocally arbitrators and parties.

In addition, Mr Rigo Sureda did not comply with the duty to inform the Tribunal and the parties of the clear supervening situation that might give rise to evident incompatibility. Moreover, according to the letter from Mr Tawil to the

Argentine Republic, it would appear that Mr Rigo Sureda participated in the case where Mr Tawil was appointed as arbitrator.

...

Mr Rigo Sureda's professional and financial interests in Fulbright & Jaworsky have been subjected to Mr Tawil's authority in the arbitration proceedings where the latter serves as arbitrator. In turn, Mr Guido Tawil is co-counsel for claimant in the present case. Mr Rigo Sureda is the President of the Tribunal in a case initiated by a company represented by Mr Tawil.

The particular position in which Mr Rigo Sureda has been placed in connection with these arbitration proceedings, his law firm and Mr Tawil — not only objectively but also considering the appearance of these relationships — provides the Argentine Republic — and any reasonable individual — with enough reasons to conclude that Mr Rigo Sureda's independence and impartiality have been impaired.

So far, Mr Rigo Sureda has not informed what his professional and business interests and relationships with Duke were and are.

Mr Rigo Sureda did not inform the parties about the supervening situation and limited himself to sending a letter to the ICSID's Deputy Secretary-General, Antonio Parra, informing about Mr Tawil's appointment as arbitrator in a case where his law firm is actively involved. This letter was forwarded to the Argentine Republic.

This information does not even meet the basic transparency and information duty that a president of an arbitral panel is required to comply with. In addition, according to Mr Tawil's letter, it would appear that Mr Rigo Sureda participated in the Duke case in the past.

...

Mr Rigo Sureda had a full, comprehensive, and detailed disclosure duty and he has breached such duty. It is not the Argentine Republic that should request the information, but the arbitrator himself who must have provided it in a timely manner.

...

The persistent withholding of information on the part of Mr Rigo Sureda increases the appearance and/or objective perception of partiality or bias. This is in itself a valid reason for a request for disqualification; even more so under the ICSID Convention standard. The same conclusion is reached by analysing other significant arbitration ethics rules.

261. In a letter dated December 10, 2004 addressed to the other two members of the Tribunal, Dr. Rigo Sureda furnished explanations to the Tribunal pursuant to ICSID Arbitration Rule 9.
262. In a communication dated December 17, 2004, Azurix responded to the Disqualification Proposal.
263. In a communication dated December 30, 2004, Argentina responded to Dr. Rigo Sureda's letter.
264. By a letter dated January 28, 2005 Azurix informed the ICSID Secretariat as follows:

After Mr Rigo was appointed President of the Tribunal in this matter, the officers and internal counsel of Azurix changed. In November 2002, the new offices and internal counsel of as Azurix Corp. (who were unaware of Mr. Rigo's relationship with Fulbright) engaged a Houston partner of Fulbright to provide advice on a limited engagement for the few months on a matter completely unrelated to this arbitration. That engagement did not involve the Argentine Republic or any project in Argentina and specifically had nothing to do with the Buenos Aries or Mendoza Province water systems or concessions or Azurix's subsidiaries in Argentina ...

That engagement was concluded by April 2003. Mr Rigo was not involved in that engagement since it included only lawyers in Fulbright's Houston office ...

This disclosure stems from the very recent realization of an officer of Azurix ...

In addition, although the Fulbright was adverse to Enron in several matters in April 2002, it was also representing through one of its Houston partners 16 pipeline companies in litigation with the United States Army Core of Engineers ... including Florida Gas Transmission Company, which was an affiliate of Enron until late 2004. It had no relationship with Argentina, and Mr. Rigo was not involved in any way.

265. By a communication dated February 1, 2005 Argentina responded to Azurix's communication of January 28, 2005 and stated that it was confirming and presenting new elements with respect to the disqualification of Dr. Rigo Sureda. That communication said *inter alia* that statements made in Azurix's communication of January 28, 2005 constituted a new fact to disqualify Dr. Rigo Sureda and confirmed the validity of the merits.
266. By a letter dated February 1, 2005 Dr. Rigo Sureda stated *inter alia* that he had no role in or knowledge of any of the matters disclosed in Azurix's communication of January 28, 2005, and that, on receipt of the letter, he had decided to resign from Fulbright with immediate effect so that he would serve as President of the Tribunal "*in a capacity of unquestionable independence unaffected by events of which I have no knowledge or information and over which I have no control*".
267. By a communication dated February 10, 2005, Argentina stated that it ratified its request for disqualification, and that it was furnishing new evidence for admissibility of that request. That communication stated *inter alia* that the resignation of Dr. Rigo Sureda from Fulbright implied recognition of the fact that he was not in a position to act with impartiality or undeniable independence, that the information provided on March 27, 2002 was irrelevant, that Dr. Rigo Sureda's statement was obscure, untimely and non-transparent, that Dr. Rigo Sureda had acknowledged that Fulbright was currently linked to Enron, and that the resignation of Dr. Rigo Sureda from Fulbright could neither restore the absolute confidence in his independence and impartiality nor wipe out the violation to the duty of disclosure and transparency. That communication also stated that in the procedural orders of

the Tribunal (as to which, see paragraph 254 above), Dr. Rigo Sureda “*unfairly kept a tight hold on the evidence requested in this proceeding by the Republic of Argentina*”, and that the expressions of Dr. Rigo Sureda in the procedural orders “*acquire today a new meaning in the light of the facts and circumstances that relate the law firm of Fulbright & Jaworski with Mr. Rigo Sureda and Azurix Corp*”.

268. On February 25, 2005, the other two members of the Tribunal, Mr. Lalonde and Mr. Martins, issued their “Decision on the Challenge of the President of the Tribunal” (the “Disqualification Decision”), in which they rejected Argentina’s proposal to disqualify Dr. Rigo Sureda.
269. The Disqualification Decision found that the Disqualification Proposal had to fail for procedural grounds, on the basis that Argentina had failed to “*state promptly its objections*” as required by ICSID Arbitration Rule 27. This was because it was found that Argentina was made aware of the facts on which the Disqualification Proposal was based as early as March 30, 2004, but that Argentina did not propose the disqualification of Dr. Rigo Sureda until November 29, 2004, some eight months later. The Disqualification Decision rejected an argument that the new Attorney-General of Argentina had only been informed of the matter recently, on the basis that the right to object did not belong to the Attorney General *in persona* but to the Argentine Republic. The Disqualification Decision therefore concluded that Argentina was deemed to have waived its right to request the disqualification of Dr. Rigo Sureda.
270. The Disqualification Decision also found that the Disqualification Proposal had to fail for substantive reasons. It was considered that the procedural orders were at the time taken by the three members of the Tribunal and not by the President alone and that these procedural orders had no bearing on the issue of disqualification raised by Argentina. The Disqualification Decision found that, based on the facts presented by Argentina in connection with the *Duke* case, there was no “*real risk of lack of impropriety*” that would “*negate*

or place in clear doubt the lack of impartiality". In the Disqualification Decision, the other two members of the Tribunal also found that they could not conclude that Dr. Rigo Sureda was in any way delinquent in the application of his information and transparency duty. The Disqualification Decision additionally considered that the new facts presented in Argentina's letter of February 1, 2005 were not sufficient to lead to the conclusion that Dr. Rigo Sureda should be disqualified as President of the Tribunal.

271. By a letter dated April 4, 2005 to the ICSID Secretariat, Argentina stated that it "*rais[ed] a formal objection to the rejection of Argentina's proposal to disqualify Mr Rigo Sureda*", which was said to "*infringe [...] Argentina's essential rights and guarantees recognised in the ICSID Convention*".

(c) Arguments of the parties

272. Argentina argues, *inter alia*, that:

- (a) The Disqualification Decision contains significant errors and defects, which lead to the conclusion that the President's disqualification was incorrectly rejected.
- (i) The Disqualification Decision concluded that the letter from the ICSID Secretariat dated March 27, 2002, had provided Argentina with enough information for it to raise an objection to Dr. Rigo Sureda's appointment. However, that letter only stated that Dr. Rigo Sureda had disclosed that Fulbright was representing several parties in matters *against* Enron, while the Disqualification Proposal and comments of December 30, 2004 had requested information regarding a possible attorney-client relationship between Fulbright and Enron. It was not until January 28, 2005 that Mr. Bishop disclosed that Florida Gas Transmission Company, which had been an affiliate of Enron until late 2004, had been a client of Fulbright.

- (ii) The Disqualification Decision stated that there was no allegation or evidence that Dr. Rigo Sureda had neglected to inform himself or had wilfully withheld information, when in fact Dr. Rigo Sureda appears to have been negligent in his approach and should have investigated the possible client-attorney relationship between Fulbright and Enron, at least as from the moment Argentina raised this issue in its Disqualification Proposal.
 - (iii) While the Disqualification Decision appeared to adopt an “apparent bias” test in determining whether Dr Rigo Sureda’s disqualification was justified, the decision not to disqualify him was inconsistent with the ostensible adoption of the “apparent bias” test.
 - (iv) The Disqualification Decision disregarded the *Pinochet* case¹⁷⁴ and the *Commonwealth Coatings* case,¹⁷⁵ which Argentina cited in support of its claim.
- (b) Although annulment proceedings are not an appeal, the Committee does have the power to decide itself whether the Tribunal was properly constituted, independently of what was decided in that regard in the Disqualification Decision.
- (c) The ground of annulment in Article 52(1)(a) of the ICSID Convention, “*that the Tribunal was not properly constituted*”, leads to Article 57 of the ICSID Convention which provides that “[a] party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14”. Article 14(1) requires that an ICSID arbitrator be a person who, amongst other things, “*may be relied upon to exercise independent judgment*”.

¹⁷⁴ Argentina Memorial on Annulment ¶¶167 referring to Disqualification Decision at 15 (Exhibit AR 35).

¹⁷⁵ Argentina Memorial on Annulment ¶¶167 referring to Disqualification Decision at 18.

- (d) There is a difference of meaning between the English, French and Spanish texts of Article 14 of the ICSID Convention. The meaning which best reconciles the texts, for purposes of Article 33(4) of the Vienna Convention on the Law of Treaties, which reflects customary international law, is that those designated to serve as arbitrators must be persons who both may be relied upon to exercise independent judgment (or offer every guarantee of independence in exercise of their functions) and inspire full confidence in their impartiality of judgment.
- (e) A violation of the right to a fair hearing before an independent, impartial and unbiased tribunal amounts to a “*serious departure from a fundamental rule of procedure*”, so that if the member of the tribunal cannot be relied upon to exercise independent judgment and/or does not inspire full confidence in his or her impartiality of judgment, the validity of the award may be challenged under both Article 52(1)(a) and Article 52(1)(d) of the ICSID Convention. Although these are separate grounds of annulment, the former must be considered as a specific case of the latter.
- (f) As to the crossed roles played by Dr. Rigo Sureda and Dr. Santiago Tawil:
 - (i) each was in a situation where they exercised authority over the other, which lent itself to a *quid pro quo*;
 - (ii) it was not until after Argentina made a proposal to disqualify him that Dr. Rigo Sureda revealed that he had assisted two partners in Fulbright in the preparation of the arbitration request in the *Duke* case;
 - (iii) it is at least doubtful that Dr. Rigo Sureda, as he claims, only learned of Dr. Santiago Tawil’s appointment as arbitrator in the *Duke* case from the ICSID Secretariat.

- (g) Argentina did not consent to Dr. Santiago Tawil accepting appointment as arbitrator in the *Duke* case. By its letter of April 13, 2004 Argentina states that it was not for it to give such permission.
- (h) Argentina has not waived its right to complain regarding Dr. Santiago Tawil's role as arbitrator in the *Duke* case through any failure to object in a timely manner, given that ICSID Arbitration Rule 27 does not apply to proposals for disqualification and given that there were new facts between Dr. Rigo Sureda's letter of May 17, 2004 and the Disqualification Proposal.
- (i) Where an arbitrator is appointed from a large firm which also advises the client, even though the arbitrator may not have been directly involved with the client, other colleagues in the firm would be, and this may raise concerns of conflicts of interest.
- (j) Bias can be either actual or apparent. Apparent bias relies on the principle that justice must not only be done but be seen to be done and relies on the concept of justifiable doubts. The existence of justifiable doubts is determined by applying an objective test, which makes it necessary to ask whether a reasonably well-informed person would believe that the perceived apprehension of impartiality is justified.
- (k) The word "manifest" in Article 57 of the ICSID Convention means "obvious" or "evident" or "easily understood or recognised by the mind". The apparent bias test and the test of "manifest" in Article 14 of the ICSID Convention do not contradict each other. What must be manifest is that the arbitrator cannot be relied upon to exercise independent judgment or does not inspire full confidence in his or her impartiality of judgment, not that he or she is actually partial or dependent.

- (l) The apparent bias test has been adopted in ICSID cases.¹⁷⁶ Article 14(1) of the ICSID Convention incorporates the test of whether there are reasonable doubts as to the impartiality of an arbitrator.¹⁷⁷
- (m) The relationships between Fulbright and Azurix, and Fulbright and Enron, fit squarely within the category of cases where the apprehension of bias results from some direct or indirect relationship, experience or contact with a person interested or otherwise involved in the proceedings. Dr. Rigo Sureda played two incompatible roles, namely the role of President of the Tribunal in this case, and the role of senior advisor with Fulbright, which appointed Dr. Santiago Tawil as arbitrator in the *Duke* case and advised Azurix and an affiliate of Enron, Azurix's parent company.
- (n) It cannot be argued that, because Dr. Rigo Sureda was only one of three members of the Tribunal, the ultimate result of the Award would have been the same if he had not served, given that improper constitution of the tribunal compromises the integrity of the entire arbitral process and is a ground of annulment, and given that Dr. Rigo Sureda's privileged position as President may have allowed him to sway his fellow arbitrators and his power to issue procedural orders allowed him to shape the entire arbitral process.
- (o) The Award favoured Azurix. The fact that the Award rejected some of Azurix's claims and did not award compensation for the full amount claimed by Azurix is no evidence that Dr. Rigo Sureda could be relied

¹⁷⁶ Relying on *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenged to the President of the Committee, Oct. 3, 2001, ¶ 25; *SGS Société Générale de Surveillance v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator of December 19, 2002; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision of Professor Domingo Bello Janeiro on the Proposal of the Argentine Republic to Disqualify Dr Andrés Rigo Sureda Pursuant to Articles 14 and 57 of the ICSID Convention and Arbitration Rule 9, 11 February 2005, at 26.

¹⁷⁷ Argentina Memorial on Annulment ¶¶193.

upon to exercise independent judgment and inspired full confidence in his impartiality of judgment.

- (p) All of Argentina's challenges to arbitrators in other cases have been based on justified reasons and have not been dilatory tactics.

273. Azurix argues, *inter alia*, that:

- (a) Argentina's annulment request puts forth merely a disagreement with the Disqualification Decision, which is not a ground for annulment.
- (b) Argentina's numerous unsuccessful challenges to arbitrators in other ICSID and UNCITRAL arbitrations reflects a general strategy to challenge arbitrators whose decisions it does not like and to delay the arbitral process.
- (c) Argentina is not entitled to receive a *de novo* review of its challenges to Dr. Rigo Sureda as this would be tantamount to granting Argentina a *de facto* appeal of this issue. Consistent with the ICSID Convention's approach to annulment on all other grounds, the Committee's review should be confined to reviewing the Disqualification Decision for manifest error.
- (d) For an award to be annulled under Article 52(1), Argentina must prove by objective evidence that Dr. Rigo Sureda had a "manifest" lack of the qualities required by Article 14(1). The lack of independence must be "manifest" or "highly probable" and not just "possible".
- (e) Argentina does not analyse the facts according to the standard of an independent observer, but merely makes the same assertions already rejected in the Disqualification Decision without presenting new arguments or new facts that would change the Disqualification Decision.

- (f) Before accepting appointment as an arbitrator in the *Duke* case, Dr. Santiago Tawil informed Argentina that he was considering accepting the nomination, and Argentina did not object.
- (g) While the Disqualification Proposal was pending, Azurix disclosed Fulbright's limited representation of Azurix and another subsidiary of Enron on unrelated matters as soon as Azurix's current management and counsel became aware of this. Fulbright had no ongoing relationship with either company. Dr. Rigo Sureda was not involved with or aware of either representation, and resigned from Fulbright to avoid even the appearance of any impropriety which he was not required to do.
- (h) The Disqualification Proposal correctly concluded that Argentina had waived its argument based on the alleged relationship between Dr. Rigo Sureda and Dr. Santiago Tawil.
- (i) Argentina's complaint that Dr. Rigo Sureda did not disclose that he had participated in the *Duke* case until after the proposal for disqualification was made is wrong.
- (j) Argentina even agreed to have Dr. Rigo Sureda serve as President of another tribunal after it received this disclosure letter.
- (k) The Disqualification Decision did not disregard the *Pinochet* and *Commonwealth Coating* cases, but considered both cases inapplicable because of their factual differences and because they were not decided under the standard in the ICSID Convention.
- (l) Argentina asserts "*a veiled and completely unsubstantiated allegation*" that Dr. Rigo Sureda actually knew of Fulbright's limited connection with Azurix and an Enron subsidiary and failed to disclose it, which is untrue.

- (m) Contrary to what Argentina claims, the “apparent bias” test is not the correct standard that the ICSID Convention requires, which is whether Dr. Rigo Sureda could be “*relied upon to exercise independent judgment*” and whether the facts indicated a “*manifest lack of the qualities required by paragraph (1) of Article 14*”. This is the test that the Disqualification Decision applied.
- (n) Although not legally binding on Argentina and Azurix, and although not yet even adopted at the time of Dr. Rigo Sureda’s appointment as President of the Tribunal in this case, the IBA Guidelines on Conflicts of Interest provide additional support for the Disqualification Decision.
- (o) Even a cursory review of the unanimous Award and its rejection of many of Azurix’s claims and damages clearly demonstrate independence and a lack of bias by the Tribunal.
- (p) As there was no ground to disqualify Dr. Rigo Sureda, there was no “*serious departure from a fundamental rule of procedure*” in this regard. In any event, as Argentina’s request for annulment did not include this claim, it was waived.

(d) Improper constitution of the tribunal as a ground of annulment under Article 52(1)(a) of the ICSID Convention: applicable principles

- 274. The ICSID Convention does not contain provisions specifying when a tribunal will or will not be “properly constituted” for the purposes of Article 52(1)(a).
- 275. As a matter of principle, in its interpretation of Article 52(1)(a) of the ICSID Convention, the Committee is guided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”).¹⁷⁸
- 276. The Committee therefore gives the expression “properly constituted” its ordinary meaning in the context of the ICSID Convention and in the light of its

¹⁷⁸ See paragraphs 83-130 above.

object and purpose, as a reference to proper compliance with the provisions of the ICSID Convention and ICSID Arbitration Rules dealing with the constitution of the tribunal. Such provisions appear to include Section 2 of Chapter IV (Articles 37-40) of the ICSID Convention (entitled “Constitution of the Tribunal”) as well as Chapter V (Articles 56-58) of the ICSID Convention (entitled “Replacement and Disqualification of Conciliators and Arbitrators”).

277. Argentina contends that there has been non-compliance with only one of the provisions relating to the constitution of the Tribunal, namely the first sentence of Article 57.
278. The first sentence of Article 57 states that “[a] party may propose to a ... Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14”. Article 58 then sets out the procedure for a decision on such a proposal for disqualification.
279. Article 52 does not state that “any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14” will constitute a ground of annulment. Rather, the ground of annulment in Article 52(1)(a) is that the tribunal was “not properly constituted”. The procedure for constituting the tribunal, including the procedure for challenging arbitrators on grounds of a manifest lack of the qualities required Article 14(1), is established by other provisions of the ICSID Convention. If the procedures established by those other provisions of the ICSID Convention have been properly complied with, the Committee considers that the tribunal will be properly constituted for the purposes of Article 52(1)(a).
280. It must follow from this that if a party proposes the disqualification of an arbitrator under the first sentence of Article 57 of the ICSID Convention, and if that proposal is rejected in accordance with the procedure established in Article 58 of the ICSID Convention and ICSID Arbitration Rule 9 for deciding such proposals, then it cannot be said that the tribunal was “not properly constituted” by reason of non-compliance with the first sentence of Article 57.

The Committee considers that Article 52(1)(a) cannot be interpreted as providing the parties with a *de novo* opportunity to challenge members of the tribunal after the tribunal has already given its award. A Committee would only be able to annul an award under Article 52(1)(a) if there had been a failure to comply properly with the procedure for challenging members of the tribunal set out in other provisions of the ICSID Convention.

281. This means that if a party never proposed the disqualification of a member of a tribunal under Article 57 of the ICSID Convention (with the consequence that there was never any decision under Article 58), there would be no basis for seeking annulment on the ground that the provisions of Article 57 and 58 were not properly complied with. In the event that the party only became aware of the grounds for disqualification of the arbitrator after the award was rendered, this newly discovered fact may provide a basis for revision of the award under Article 51 of the ICSID Convention but, in the Committee's view, such a newly discovered fact would not provide a ground of annulment under Article 52(1)(a). If no proposal for disqualification is made by a party under Article 57, there will be no decision under Article 58, and in such a case there can (in the Committee's view) be no basis for contending that the tribunal was not properly constituted by reason of any failure to comply with Article 57 or Article 58.
282. The Committee further is of the view that an *ad hoc* committee cannot decide for itself whether or not a decision under Article 58 was correct, as this would be tantamount to an appeal against such a decision. All that an *ad hoc* committee can consider is whether the provisions and procedures prescribed under Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9 were complied with. Thus, for instance, a ground of annulment might exist under Article 52(1)(a) if a proposal for disqualification was made under Article 57, but was never decided under Article 58 before the award was given, or if a decision on a proposal for disqualification was purportedly taken by a person or body other than the person or body prescribed by Article 58. In either of these cases, because these provisions of the ICSID Convention

relating to the constitution of the Tribunal would not have been properly complied with, the Tribunal would not have been “properly constituted” within the meaning of Article 52(1)(a).

283. Azurix argued in its Counter Memorial on annulment that:

... consistent with the ICSID Convention’s approach to annulment on all other grounds, the Committee’s review should be confined to reviewing the unanimous decision already made by the unchallenged arbitrators for manifest error. Argentina has presented no reason why the Committee’s task for deciding this issue should differ from the type of analysis used for the other grounds for annulment. Such narrow review of the arbitrators’ decision is consistent with the way the ICSID Convention demands that all annulment challenges be approached, which does not authorize a de novo appeal of the arbitrators’ decision.

284. The Committee understands this argument to raise the possibility that a decision under Article 58 on a proposal for disqualification might itself be annulled on any of the grounds of annulment in Article 52(1). The Committee notes that this possibility seems at odds with the literal wording of Article 52, which provides only for annulment of the *award*. However, the Committee does consider that it is self-evident that a decision under Article 58 must, for instance, be taken by the correctly constituted body, and that such decision must not manifestly exceed the powers of the body taking the decision. If these requirements are not met, the proposal for disqualification will not have been properly decided under Article 58. There will thus have been a material non-compliance with a fundamental provision relating to the constitution of the tribunal, with the consequence that the tribunal was not “properly constituted” within the meaning of Article 52(1)(a).

(e) Serious departure from a fundamental rule of procedure as a ground of annulment under Article 52(1)(d) of the ICSID Convention: applicable principles

285. The principles applicable to a ground of annulment based on Article 52(1)(d) of the ICSID Convention are considered by the Committee in paragraphs 49-52 above.

(f) Improper constitution of the tribunal as a ground of annulment under Article 52(1)(a) of the ICSID Convention: the Committee's views

286. On November 29, 2004 Argentina filed a proposal under Article 57 of the ICSID Convention for the disqualification of Dr. Rigo Sureda. Pursuant to ICSID Arbitration Rule 9(2), the proposal was transmitted to members of the Tribunal, and Azurix was notified of the proposal. Pursuant to ICSID Arbitration Rule 9(3), Dr. Rigo Sureda furnished explanations to the Tribunal. Pursuant to Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4), the proposal was considered and voted on by the other two members of the Tribunal in the absence of Dr. Rigo Sureda. The Committee finds that the procedure prescribed by Article 58 of the ICSID Convention and ICSID Arbitration Rule 9 were complied with in relation to Argentina's proposal to disqualify Dr. Rigo Sureda.

287. There is no suggestion that the body which took the Disqualification Decision, namely the other two members of the Tribunal, Mr. Lalonde and Mr. Martins, was not the proper body prescribed by Article 58.

288. The Committee finds that there is no basis for concluding that Mr. Lalonde and Mr. Martins, in making the Disqualification Decision, manifestly exceeded their powers. In particular, the Committee finds that there is no basis for concluding that they failed to apply the correct law in considering and deciding upon the Disqualification Proposal. Mr. Lalonde and Mr. Martins expressly applied Articles 14, 57 and 58 of the ICSID Convention, and ICSID

Arbitration Rule 9. Argentina argues that Mr. Lalonde and Mr. Martins failed to apply the correct legal test and that they failed to consider certain authorities. However, the Committee finds that Argentina thereby argues that Mr. Lalonde and Mr. Martins failed to apply the law correctly, rather than that they failed to apply the correct law. The Committee finds that it cannot annul an award under Article 52 on the basis that the body which took a decision under Article 58 of the ICSID Convention failed to apply the law correctly (see, by way of analogy, paragraphs 46-48 and 136-137 above).

289. The Committee further finds that there is no basis for concluding that Mr. Lalonde and Mr. Martins seriously departed from any fundamental rule of procedure in dealing with the Disqualification Proposal. In particular, the Committee finds that Argentina was given a full opportunity to present its case in respect of the Disqualification Proposal.
290. The Committee notes that, unlike Article 48(3) of the ICSID Convention (which provides that an award must state the reasons upon which it is based), Article 58 does not state that a decision on a proposal for disqualification of a member of the Tribunal must give reasons. Nevertheless, a duty to state reasons for a decision under Article 58 might be considered implicit. The Committee finds that it need not determine in the present proceedings the extent to which decisions under Rule 58 must be reasoned. This is because the Committee finds that the Disqualification Decision in this case, which consisted of some 18 pages of single spaced text, fully analysed the arguments, documents and authorities of both parties and was a well-reasoned decision.
291. Moreover, the Committee agrees that Argentina was alerted to the situation by Dr. Santiago Tawil's letter dated March 30, 2004, and again by Dr. Rigo Sureda's letter in May 2004, where it had the chance to make further enquiries if it had so wished. However, did not challenge Dr. Rigo Sureda until November 29, 2004. There was thus an eight-month period between Dr. Santiago Tawil's letter and the submission of Argentina's Proposal for

Disqualification. During that time, the hearing on the merits took place and the parties submitted their post-hearing memorials. Accordingly, the Committee agrees with the Disqualification Decision that Argentina had waived its right to and/or was estopped from raising objections to the President of the Tribunal.

292. For these reasons the Committee concludes that the Disqualification Proposal was decided in accordance with the requirements of Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9, and that as a result of the Disqualification Decision, Dr. Rigo Sureda properly remained a member of the Tribunal. The Committee rejects Argentina's claim that the Tribunal was not properly constituted.

(g) Serious departure from a fundamental rule of procedure as a ground of annulment under Article 52(1)(d) of the ICSID Convention: the Committee's views

293. Argentina has argued that, by virtue of these conflicts of interest, there has also been a serious departure from a fundamental rule of procedure. However, Argentina states that, although the improper constitution of the tribunal and the serious departure from a fundamental rule of procedure are listed as separate grounds for annulment under Article 52 of the ICSID Convention, it must be considered that the former is a specific case of the latter. The Committee finds that Argentina has advanced no argument in respect of its ground of annulment under Article 52(1)(d) that has not already been considered by the Committee above in relation to the ground of annulment based on Article 52(1)(a).

(h) Conclusion

294. For the reasons in this Section G, the Committee rejects Argentina's grounds of annulment based on the alleged improper constitution of the Tribunal.

H. Damages

(a) Introduction

295. Argentina seeks annulment under Article 52(1)(b) of the ICSID Convention on the basis that the Tribunal manifestly exceeded its powers when it determined the applicable standard of compensation. According to Argentina, the Tribunal, having found that there had been no expropriation but that there had been breaches of other obligations under the BIT, considered that it had a full discretion to determine the appropriate standard of compensation in the circumstances. Argentina maintains that the Tribunal had no such discretion, that the applicable standard of compensation was a question of law, and that by exercising a discretion that it did not have and in failing to decide the standard of compensation in accordance with the applicable law, the Tribunal manifestly exceeded its powers.¹⁷⁹

296. Argentina also seeks annulment under Article 52(1)(e) of the ICSID Convention on the basis that the Tribunal failed to state reasons and/or issued contradictory reasons, in that:

(a) on the one hand, the Tribunal ruled that there had not been an expropriation because the measures attributable to Argentina had not completely destroyed the value of Azurix's investment; on the other hand, the Tribunal, by awarding damages for the full market value of the investment in respect of breaches of other provisions of the BIT, contradicted its previous finding that Argentina was not responsible for the complete destruction of Azurix's investment;¹⁸⁰

(b) the Tribunal failed to provide any analysis whatsoever as to the causal link between the findings of liability in Part VII of the Award, and, the

¹⁷⁹ Application for Annulment ¶¶ 23-25, referring to Award ¶¶ 419-424.

¹⁸⁰ Application for Annulment ¶ 36.

assessment of damages in Part VIII of the Award, and in quantifying the amount of compensation, the Tribunal simply assumed, without stating any reasons, that the breaches of the BIT identified in Part VII of the Award had caused the total destruction of Azurix's investment;¹⁸¹

(c) the Tribunal failed to state reasons:

- (i) in relation to the first head of damages, as to how it calculated or otherwise obtained the figure of USD 60 million as “*what an independent well-informed third party would have been willing to pay for the Concession in March 2002, in a context where the Province would have honoured its obligations*”;¹⁸²
- (ii) in relation to the second head of damages, as to why it adopted the figure of USD 105,240,753 as the “*additional investments to finance ABA*”;¹⁸³
- (iii) as to why it decided to award *both* USD 60 million for the “*value of the Canon*” and USD 105,240,753 for the “*additional investments to finance ABA*”;¹⁸⁴
- (iv) as to why Azurix was entitled to 100% of what a third party would pay for the Concession in circumstances where Azurix indirectly owned 90% of ABA's shares.¹⁸⁵

(b) Arguments of the parties

297. Argentina argues, *inter alia*, that:

- (a) The BIT does not expressly provide for the standard of compensation for breaches of provisions of the BIT other than in the case of

¹⁸¹ Application for Annulment ¶¶ 37-39.

¹⁸² Application for Annulment ¶ 41, referring to Award ¶¶ 427, 429.

¹⁸³ Application for Annulment ¶ 42, referring to Award ¶ 430.

¹⁸⁴ Application for Annulment ¶ 43, referring to Award ¶¶ 427-429.

¹⁸⁵ Application for Annulment ¶ 44, referring to Award ¶ 322.

expropriation. The tribunal was obliged to refer to customary international law to fill that *lacuna*, and not to determine the standard of damages as a matter of discretion.¹⁸⁶

- (b) The Tribunal's decision on the appropriate standard of compensation is contained in five paragraphs of Award.¹⁸⁷ There is no attempt in this section of the Award to divine principles of law and the standard of compensation for a breach of the fair and equitable standard of treatment or any other obligation in the BIT. The Tribunal's ultimate decision on the appropriate standard of compensation is contained in paragraph 424 of the Award in a single sentence, which is an assertion of an unfettered discretion, and not an adequate statement of the Tribunal's legal reasons for its decision.
- (c) The need for supporting reasons is particularly acute as the idea that the same standard of compensation should be applied to a breach of each and every investment protection obligation of the BIT makes expropriation as a cause of action redundant.
- (d) The “fair market value” standard of compensation applies only to situations of expropriation, and in cases of breaches of other treaty provisions, the standard of compensation is “*the amount of loss or damage that is adequately connected to the breach*” or the “*amount of the loss or damage actually incurred*”.¹⁸⁸
- (e) The Tribunal did not have the discretion to apply the standard of compensation for an expropriation (fair market value of the investment) to breaches of other obligations in the BIT. By exercising a discretion

¹⁸⁶ Relying on Vienna Convention on the Law of Treaties, Article 31(3)(c); ICSID Convention, Article 42(1); *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award of March 17, 2006 ¶ 254, referring to *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, p. 161, ¶¶ 23, 41 and *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of June 27, 1990 ¶ 41.

¹⁸⁷ Referring to Award ¶¶ 419-424.

¹⁸⁸ Relying on ILC Articles, Articles 31, 36 and 39; *Marvin Roy Feldman Karpa v. The United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award of December 16, 2002 (“*Feldman Award*”) ¶ 194.

that it did not have and failing to decide the standard of compensation in accordance with the applicable law, the Tribunal manifestly exceeded its powers.

- (f) If the approach adopted by the Tribunal were to be generalised, there would be no reason for a claimant to seek to establish the higher threshold of a liability for expropriation because the claimant would obtain the same amount of damages for a breach of any obligation of the BIT.
- (g) On the one hand, the Tribunal ruled that there had not been an expropriation because the measure attributable to Argentina had not completely destroyed the value of Azurix's investment. On the other hand, in upholding Argentina's liability under the other obligations and awarding damages for the full market value of the investment, the Tribunal contradicted its previous findings that Argentina was not responsible for the complete destruction of as Azurix's investment.¹⁸⁹
- (h) The Tribunal failed to state any reasons with respect to the question of causation. Having found that Argentina had breached certain obligations under the BIT, the Tribunal proceeded in Part VIII of the Award to quantify damages on the basis of the full market value of the Concession Agreement without providing any analysis whatsoever as to the causal link between the findings of liability in Part VII of the Award and the assessment of damages in Part VIII of the Award or the standards of compensation related to the violations that it had established.¹⁹⁰ Causation must be positively established by Azurix, and the issue of causation is fundamental in the determination of damages in international law as well as in municipal law.¹⁹¹ While it must follow that the Tribunal was persuaded that Argentina caused *some* damage

¹⁸⁹ Referring to Award ¶¶ 322, 424 and *MINE* Annulment Decision ¶¶ 6.105 to 6.107.

¹⁹⁰ Referring to Award ¶¶ 424, 428.

¹⁹¹ Referring to Award ¶ 322; ILC Draft Articles on State Responsibility, Article 31(2); John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 *GEORGETOWN JOURNAL OF INTERNATIONAL LAW* 61, 66 (2004).

to Azurix's investment, the connection between Argentina's specific acts and the damage to the investment is never explained in the Award.

- (i) In its analysis of the calculation of damages in the Award, the Tribunal's reasoning is contradictory. Having defined the standard of "fair market value",¹⁹² the Tribunal then awarded compensation to Azurix under two separate heads of damages: USD 60 million for the "*value of the Canon*" and USD 105,240,753 for the "*additional investments to finance ABA*".
- (j) As to the first of these heads of damages, the Tribunal stated that the figure of USD 60 million was "*what an independent and well-informed third party would have been willing to pay for the Concession in March 2002, in a context where the Province would have honoured its obligations*",¹⁹³ but failed to provide any formulae or principles in the Award as to how that figure was calculated or otherwise obtained.¹⁹⁴
- (k) As to the second of these heads of damages, the Tribunal failed to state any reasons for adopting the figure of USD 105,240,753. The Tribunal's approach and decision contradicts and is inconsistent with its findings with respect to the first head of damages in so far as the actual amount invested by Azurix to finance ABA would not correspond to the amount recoverable upon a sale to a hypothetical third party (that is, the fair market value).
- (l) It was completely contradictory for the Tribunal to award compensation based upon *both* the fair market value of the concession on March 12, 2002 *and* the additional investments to finance ABA.
- (m) The Tribunal further failed to state reasons when it decided to award both heads of damages. If the first head of damages represents the

¹⁹² Referring to Award ¶¶ 424.

¹⁹³ Referring to Award ¶¶ 418, 424-430.

¹⁹⁴ Contrasting *MTD* Annulment Decision ¶ 103; and drawing an analogy with *Klöckner* Annulment Decision ¶ 176.

amount that a third party might pay for the Concession in March 2002 based upon the profits that the Concession Agreement would generate over time, then logically that amount must include the second head of damages.

298. Azurix argues, *inter alia*, that:

- (a) Although the BIT is *lex specialis*, it contains no *lex specialis* standard of compensation for violations of the BIT standards of fair and equitable treatment, full protection and security, and arbitrary measures. Customary international law may therefore fill the *lacunae* and provide governing rules of compensation.¹⁹⁵
- (b) The accepted standard of compensation under customary international law is found in the ILC Articles on State Responsibility,¹⁹⁶ and in the *Chorzów Factory* case.¹⁹⁷ This standard has been applied by many tribunals in investment arbitrations.¹⁹⁸
- (c) The Tribunal applied this standard, but then adjusted the amount of the compensation to take into account certain responsibilities that it decided Azurix should bear.¹⁹⁹
- (d) The international law standard of compensation is not expressed in formulaic terms, and tribunals exercise a broad discretion in determining how best to provide full compensation in a given case. Past arbitral tribunals have taken various approaches to determine a

¹⁹⁵ Referring to *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 (“ADC Award”) ¶ 483.

¹⁹⁶ Referring to ILC Articles on State Responsibility, Article 36.

¹⁹⁷ Referring to Permanent Court of International Justice, *Chorzów Factory* case, Merits, 1928, Ser. A No. 17, p. 47. (“*Chorzów Factory* case”)

¹⁹⁸ Referring to *CMS Award* ¶ 400; *Siemens Award* ¶¶ 352-353; *ADC Award* ¶ 497; *MTD Award* ¶ 238; *Amoco Award* ¶¶ 191-193; *SD Meyers Award*, Chapter XI; *Metalclad Award* ¶ 122.

¹⁹⁹ Referring to Award ¶ 432.

measure of damages appropriate to the individual circumstances of each case.²⁰⁰

- (e) Like the present Tribunal, several other investment arbitral tribunals have used the fair market value standard for calculating damages for violations of the fair and equitable treatment standard, even though no expropriation was found in those cases.²⁰¹ This is an exercise by the tribunal of assessing the best way to compensate given the full and specific factual circumstances of the case. Expropriation requires different elements from other BIT standards, but it is not a higher standard, merely a different one. There is no law or rule or BIT provision mandating that only acts of expropriation can give rise to an award of full compensation or fair market value.
- (f) Other tribunals have exercised their judgement to apply different methodologies to compensate for non-expropriatory violations for which the BIT provided no explicit standard.²⁰² These varying approaches show that arbitral tribunals possess discretion in determining how damages are best calculated in the full circumstances of the case in the absence of a *lex specialis* in the BIT.
- (g) It is essential that tribunals are granted the discretion to exercise their own judgement to determine the best manner in which to compensate for harm. In both common law countries and in civil law countries there is a broad discretion in fixing the amount of damages awarded. International treaties also provide tribunals discretion in calculating damages.²⁰³

²⁰⁰ Referring to *CMS Award* ¶ 409; *SD Meyers Award* ¶ 309.

²⁰¹ Referring to *CMS Award* ¶ 410; *Enron Award* ¶¶ 360-363; *Sempra Award* ¶¶ 403-404; *SD Meyers Award* ¶¶ 311-315; *Metalclad Award* ¶ 122; *BG Group Plc v. Argentine Republic*, UNCITRAL Rules, Award, December 24, 2007 ¶ 422.

²⁰² Referring to *PSEG Award* ¶ 304; *LG&E Award* ¶ 36; *ADC Award* ¶¶ 496, 521.

²⁰³ Referring to United Nations Convention on Contracts for the International Sale of Goods, Secretariat Commentary ¶ 4, in Guide to GISG article 74; UNIDROIT Principles of International Commercial Contracts, Article 7.4.3(3) (2004).

- (h) It is not necessary to prove the exact damage suffered in order to award damages; determining damages is not an exact science, and a certain amount of independent judgement is required.²⁰⁴
- (i) There is nothing contradictory between the Tribunal's finding that there was no expropriation and the Tribunal's decision to award the fair market value of the Concession as damages. The Tribunal did not use the fair market value of the Concession simply "because" it found the Province had taken it over; the Tribunal found that fair market value was "appropriate" because other tribunals had used that method in non-expropriation cases, and "particularly since" the Province had taken over the Concession.
- (j) Not every reason needs to be stated and even reasoning that is implicit or inferred can amount to a well reasoned award. The Tribunal sufficiently explained the causal link between its findings of liability and its determination of damages.
- (k) In fact, the Award does expressly state its causation findings. The Tribunal made several findings that in the aggregate amounted to breaches of the BIT, and specifically when "*considered together, ... reflect a pervasive conduct of the Province in breach of the standard fair and equitable treatment*",²⁰⁵ in particular, the politicisation of the tariff regime,²⁰⁶ damage inflicted on Azurix's relationships with its customers,²⁰⁷ and the Province's response to Azurix's notice of termination.²⁰⁸ The Tribunal found that these cumulative actions with respect to the Concession reduced the value of Azurix's investment.²⁰⁹

²⁰⁴ Referring to *Sapphire International Petroleum Ltd v. National Iranian Oil Co*, Arbitral Award, March 15, 1963 ¶¶ 187-188; *Delagoa Bay and East African Railway Co (United States and Great Britain v. Portugal)* (1900), quoted in Marjorie M. Whiteman, 3 Damages in International Law 1694, 1699 (1943).

²⁰⁵ Referring to Award ¶ 377.

²⁰⁶ Referring to Award ¶¶ 92, 102, 167, 375.

²⁰⁷ Referring to Award ¶¶ 320, 375-376.

²⁰⁸ Referring to Award ¶ 374.

²⁰⁹ Referring to Award ¶ 393.

In this case, the "causal link" that the Tribunal found was not something complicated, in need of elaborate explanation.²¹⁰

- (l) The Tribunal took great care to assess damages only for Argentina's breaches that caused Azurix harm. The Tribunal rejected two of the four heads of damages claimed by Azurix. Regarding the two heads of damages the Tribunal accepted, the Tribunal expressly found that the Province caused the loss.²¹¹
- (m) As to the value of the Canon, the Tribunal based its Award on what it believed an informed, independent party would have been willing to pay in March 2002 and provided very specific reasons for this.²¹² The Tribunal accepted Argentina's argument that the fair market value was not equal to the price Azurix paid for the Concession.²¹³ The Tribunal sufficiently detailed its reasoning.²¹⁴ The Tribunal was not required to provide an exact formula for arriving at the amount of USD 60 million because it had a considerable discretion and its explanation was more than adequate.²¹⁵ The Award clearly states that the amount of USD 60 million is the Tribunal's estimation of the fair market value of the Canon payment as of March 2002, based on all the evidence in the case.²¹⁶
- (n) As to the damages for Azurix's additional investments, the Tribunal made its own calculation of the amount of additional investments and then decreased that amount to account for what it considered Azurix should bear as part of its business risk. Argentina never disputed that Azurix invested USD 102.4 million in additional capital contributions to

²¹⁰ Referring to *MTD* Annulment Decision ¶ 97.

²¹¹ Referring to Award ¶ 428.

²¹² Referring to Award ¶¶ 427-429.

²¹³ Referring to Award ¶ 413.

²¹⁴ Referring to Award ¶¶ 426, 429.

²¹⁵ Referring to *Wena Hotels* Annulment Decision ¶ 91; *SD Meyers* Second Partial Award ¶ 175.

²¹⁶ Referring to Award ¶ 430.

ABA. The Tribunal explained precisely how it arrived at the amount of additional investments made by Azurix.²¹⁷

- (o) The Tribunal did not contradict itself or fail to state reasons for awarding *both* the “*value of the Canon*” and the “*additional investments*”. The Tribunal found that, in addition to the Canon payment, “*Azurix should be compensated, as part of the fair market value of the Concession, for the additional investments to finance ABA*”.²¹⁸ It is perfectly appropriate to include actual investments in addition to the investor's initial acquisition cost when determining fair market value.²¹⁹ The fair market value of the Concession and the additional investments taken together, accurately represent the full value of what Azurix invested in Argentina, and are also parts of the Tribunal's opinion of the fair market value of the Concession as of the Province's takeover in March 2002.

(c) The Tribunal's findings with respect to damages

299. In Part VI of the Award, entitled “The Facts”, the Tribunal made relevant findings of fact.

300. In Part VII of the Award, entitled “Breach of the BIT”, the Tribunal then proceeded to consider and determine whether the facts as found in Part VI established any breach of the BIT as alleged by Azurix. The Tribunal decided that there had been no breach of the expropriation clause in Article IV of the BIT, or of the obligation in Article II(2)(c) of the BIT that “[*e*]ach Party shall observe any obligation it may have entered into with regard to investments”.²²⁰

²¹⁷ Referring to Award ¶ 430.

²¹⁸ Referring to Award ¶ 430.

²¹⁹ Referring to *Siemens* Award.

²²⁰ See paragraphs 150-151 above.

301. However, the Tribunal found that there had been breaches for which Argentina was responsible of the obligation in Article II(2)(a) of the BIT that investments must be “*at all times be accorded fair and equitable treatment*”, of the obligation in Article II(2)(b) of the BIT not to impair the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments “*by arbitrary or discriminatory measures*”, and of the obligation in Article II(2)(a) of the BIT that investments “*shall enjoy full protection and security*”.²²¹ The Committee has already determined in paragraphs 45-48, 138-177 and 179-184 above, that in making these findings the Tribunal did not manifestly exceed its powers within the meaning of Article 52(1)(b) of the ICSID Convention and did not fail to state reasons for its decision, within the meaning of Article 52(1)(e) of the ICSID Convention.
302. The issue of damages was then dealt with by the Tribunal in Part VIII of the Award, entitled “Compensation”. The Tribunal considered that there were three issues to be determined in relation to the question of compensation.²²²
303. The first issue was the question of what compensation had been claimed by Azurix. The Tribunal decided that it would not consider an additional head of compensation that had been included only in the Post-Hearing Memorial, namely an amount on account of discrete damages detailed in the NERA report.²²³ The decision of the Tribunal to exclude this additional head of damage was in Argentina’s favour and has not been challenged by Azurix.
304. The second issue, described by the Tribunal as “*the starting point for the calculation of damages*”,²²⁴ was the date on which the breach of the BIT had occurred. The Tribunal referred to the difficulties in establishing the relevant date where a breach of the BIT had been caused, as in this case, not by a single act occurring on a particular day, but by a series of acts over time.²²⁵ The Tribunal referred to an award of the Iran-U.S. Claims Tribunal, which

²²¹ See paragraphs 174-177 above.

²²² Award ¶ 415.

²²³ Award ¶ 416.

²²⁴ Award ¶ 415.

²²⁵ Award ¶ 417.

decided that “*where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property*”, the date of the expropriation is “*the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events*”.²²⁶ The Tribunal went on to say that in this case there could be “*legitimate disagreement*” as to what date was, but that the Tribunal considered there to be no doubt that by March 12, 2002 (the date on which the Province put an end to the Concession alleging abandonment by ABA), the breaches of the BIT had “*reached a watershed*”.²²⁷

305. The third issue was the question of the basis upon which damages should be assessed. In relation to this issue, the Tribunal found:

- (a) that the only BIT provision establishing the measure of compensation was Article IV(1), which provides for “*[c]ompensation ... equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known*”, in cases of an expropriation that meets the BIT’s requirements that it be done for a public purpose and be non-discriminatory,²²⁸
- (b) that in the *CMS Award*, the tribunal, when faced with a similar situation, applied “the standard of fair market value” to assess damages in a case where there had been breaches of provisions other than the expropriation provision of the same BIT;²²⁹
- (c) that case law indicates that under NAFTA, which also provides for a measure of compensation only in cases of expropriation, tribunals have in cases of non-expropriatory breaches “*exercised considerable discretion in fashioning what they believed to be reasonable*

²²⁶ Award ¶ 417, quoting *Malek v. Iran*, award 534-193-3, para. 114 (1992) (citing *Int’l Technical Prods. Corp. v. Iran*, Award No. 190-302-3, at 49, 9 Iran-U.S. Cl. Trib. Rep. 206, 240-241 (1985)).

²²⁷ Award ¶ 418.

²²⁸ Award ¶ 419.

²²⁹ Award ¶ 420, referring to *CMS Award* ¶ 410.

approaches to damages consistent with the requirements of NAFTA”;²³⁰

- (d) that case law indicates that under NAFTA it is “*open to the tribunals to determine it [compensation] in light of the circumstances of the case taking into account the principles of both international law and the provisions of NAFTA*”;²³¹
- (e) that in the *MTD* case, where the tribunal found a breach of the fair and equitable treatment obligation of the relevant BIT, the tribunal accepted the claimants’ proposal to apply the standard of compensation formulated in *Chorzów Factory* case;²³²
- (f) that in the present case, the Tribunal was “*of the view that a compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over*”.²³³

306. Having thus decided that the standard of compensation was the “fair market value”, the Tribunal proceeded to define that concept as:

*... the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.*²³⁴

307. The Tribunal then referred to the methodologies for measuring the fair market value in the present case that had been submitted by Azurix, namely the “actual investment” method and the “book value” method.²³⁵ As to the former, the Tribunal said:

²³⁰ Award ¶ 421, referring to *Feldman* Award, ¶ 197.

²³¹ Award ¶ 422, referring to *S.D. Myers, Inc. v. Canada*, NAFTA, Partial Award, November 13, 2000 (“*Myers* Award”) ¶¶ 303-319.

²³² Award ¶ 423, referring to *MTD* Award ¶ 238; *Chorzów Factory* case.

²³³ Award ¶ 424.

²³⁴ Award ¶ 424, quoting *International Glossary of Business Valuation Terms*, American Society of Appraisers, ASA website, June 6, 2001, p. 4.

²³⁵ Award ¶ 425.

*Under the actual investment method, Azurix claims to have invested \$449 million when it acquired the Concession, \$102.4 million in additional capital contributions to ABA, and \$15 million on consequential costs including corporate expenditures and legal costs related to negotiations with the Province.*²³⁶

The Tribunal referred to Azurix's submission that "*using actual investment is compelling as the investment is recent and highly ascertainable*", and concluded that this method was "*a valid one in this instance*".²³⁷

308. However, the Tribunal went on to say that "*a significant adjustment is required to arrive at the real value of the Canon paid by the Claimant*",²³⁸ on the ground that "*in the Tribunal's view, no well-informed investor, in March 2002, would have paid for the Concession the price (and more particularly, the Canon) paid by Azurix in mid-1999*".²³⁹
309. The Tribunal gave its reasons for this finding in paragraphs 426 to 428 of the Award.²⁴⁰ Considering various factors, the Tribunal concluded that the value of the Canon on March 12, 2002 was USD 60 million.
310. As to Azurix's claim for its further investments, the Tribunal found that there were investments additional to the Canon amounting to USD 112,844,446. However, the Tribunal considered that this amount should be reduced by USD 7,603,693 which represented those damages which the Tribunal found to be related to contractual claims²⁴¹ and that should be borne by Azurix as part of its business risk.²⁴²

²³⁶ Award ¶ 411.

²³⁷ Award ¶ 425.

²³⁸ Award ¶ 425.

²³⁹ Award ¶ 426. At ¶ 430 it is indicated that Azurix claimed that the initial sum invested by Azurix was USD 449 million of which USD 438,555,551 represented the payment for the Canon. At ¶ 41 it is indicated that the "canon payment" was 438,555,554 Argentine pesos (the Argentine peso being at the time at parity with the United States dollar): Decision on Jurisdiction, footnote 1.

²⁴⁰ Award ¶ 429.

²⁴¹ That is, losses arising from matters in which the Tribunal found that the Province did not exercise its public authority but acted as any other contractual party: see Award ¶¶ 150, 155, 160.

²⁴² Award ¶ 430.

311. As to Azurix's claim for unpaid bills to ABA for services rendered prior to the take over of the Concession by the Province and which the Province directed customers not to pay to ABA, the Tribunal found that this amount was owed by the Province to ABA and, therefore, should not be part of the compensation awarded to Azurix.²⁴³
312. As to Azurix's claim for corporate expenditures for negotiations with the Province, termination of the Concession and transfer of the service, the Tribunal found that it had not received sufficient evidence in support of such costs and that, in any case, these costs related to the business risk that Azurix took when it decided to make the investment.²⁴⁴ As to Azurix's claim for costs of the ICSID proceedings, the Tribunal decided to consider these as part of the award of costs in the proceedings.²⁴⁵
313. Finally, the Tribunal rejected a proposal by Azurix that damages be assessed, as an alternative to the fair market value of the investment, on the theory of unjust enrichment.²⁴⁶

(d) Failure to apply the correct law as a ground of annulment under Article 52(1)(b) of the ICSID Convention: applicable principles

314. The principles applicable to a ground of annulment based on Article 52(1)(b) of the ICSID Convention are considered by the Committee in paragraphs 136-137 above.

²⁴³ Award ¶ 431.

²⁴⁴ Award ¶ 432.

²⁴⁵ Award ¶ 432.

²⁴⁶ Award ¶¶ 434-438.

(e) Failure to apply the correct law as a ground of annulment under Article 52(1)(b) of the ICSID Convention: the Committee's views

315. It is not in dispute between the parties, nor in the Committee's view could it seriously be disputed, that the Tribunal had the power in this case to award damages for any loss that the Tribunal found to have been suffered by Azurix as a result of breaches of the BIT for which Argentina was responsible.

316. In considering how to assess damages, the Tribunal began by noting that the only BIT provision providing for the measure of compensation was the expropriation clause in Article IV(1).²⁴⁷ The Tribunal then proceeded to consider how damages were assessed for non-expropriatory treaty breaches in the *CMS Award* (which involved the same BIT as the present case), and in certain arbitrations under NAFTA and a BIT between Malaysia and Chile (both of which, analogously to the BIT in the present case, provide an express standard of compensation only in cases of expropriation).²⁴⁸ The Tribunal noted that in the NAFTA cases, it was found that in cases of non-expropriatory breaches of the treaty "*the tribunals exercised considerable discretion in fashioning what they believed to be reasonable approaches to damages consistent with the requirements of NAFTA*",²⁴⁹ and that

*... the lack of a measure of compensation in NAFTA for breaches other than a finding of expropriation reflected the intention of the parties to leave it open to the tribunals to determine it in light of the circumstances of the case taking into account the principles of both international law and the provisions of NAFTA.*²⁵⁰

317. The Committee considers that it is implicit from this discussion that the Tribunal considered that the law that it was to apply in determining the quantum of damages was the BIT itself, and that failing any express provision in the BIT, the matter was governed by general principles of international law. The Committee finds no fault with the Tribunal's identification of the

²⁴⁷ Award ¶ 419.

²⁴⁸ Award ¶¶ 420-423, referring to *Myers Award* ¶ 197; *Feldman Award* ¶ 303-319; *MTD Award* ¶ 238.

²⁴⁹ Award ¶ 421, quoting *Feldman Award* ¶ 127.

²⁵⁰ Award ¶ 422, quoting *Myers Award* ¶¶ 303-319.

applicable law for purposes of determining the quantum of damages, which is in fact consistent with Argentina's position.

318. The Committee finds that it is also implicit from the Tribunal's discussion of these cases that the Tribunal considered that under such general principles of international law, in the absence of any express provision in the BIT dealing with assessment of damages for breach of a particular provision of the BIT, the tribunal will have a discretion to determine what it considers to be a reasonable approach to damages.
319. Even if the Tribunal were wrong in its conclusion that under general principles of international law it has such a discretion, the Committee considers that this would be a case of *incorrect application* of the applicable law (which is not a ground of annulment), rather than a case of *non-application* of the applicable law.²⁵¹ Whether the Tribunal applied the applicable law rightly or wrongly, the Tribunal did in the Committee's view apply the correct applicable law, namely the BIT itself and general principles of international law.
320. The Committee therefore cannot accept Argentina's argument that the Tribunal determined the standard as a matter of discretion rather than applying principles of customary international law. The Tribunal decided to exercise a discretion *pursuant to* customary international law, and not to exercise a discretion *instead of* customary international law.
321. The Tribunal proceeded to determine how it would exercise its discretion in this particular case, and concluded that "[i]n the present case, ... a compensation based on the fair market value of the Concession would be appropriate" particularly since the Province had taken the investment over.²⁵²
322. Argentina argues that the Tribunal did not have the discretion to apply the "fair market value" standard of compensation because under the BIT, this is the standard of compensation for expropriation, and the Tribunal expressly

²⁵¹ See paragraphs 47-48 above.

²⁵² Award ¶ 424.

found in this case that there had been no expropriation. However, the Committee finds nothing in the BIT that reserves this standard of compensation solely to cases of expropriation. If the Tribunal had, as it found, a discretion in the approach that it adopted to the assessment of damages, there is no reason in logic why it might not, in the exercise of that discretion, in any case where it considered it appropriate to do so, also apply the “fair market value” standard to cases of non-expropriatory breaches of the treaty.

323. Argentina suggests that this conclusion would make “*expropriation as a cause of action redundant*” as there would be no reason for a claimant to seek to establish the “higher” threshold of liability for expropriation. The Committee is not persuaded by this argument. Indeed, the Committee does not accept Argentina’s premise that the BIT provides for the “fair market value” standard in cases of breaches of the BIT amounting to expropriation.
324. Article IV(1) of the BIT provides that investments shall not be expropriated or nationalised, except where certain conditions are satisfied, one of these being the payment of compensation “*equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken*”.²⁵³ Thus, where all requirements of Article IV(1) are met, including the payment of the fair market value, there will be *no breach* of the BIT. On the other hand, in cases where an expropriation *does* constitute a breach of the BIT, either because the requisite compensation has not been paid, or because one of the other requirements are not met, the BIT does not state what the applicable standard for the assessment of damages will be.²⁵⁴ It thus appears that the BIT does not provide the standard of compensation for

²⁵³ Article IV(1) of the BIT relevantly provides: “*Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (‘expropriation’) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier ...*”

²⁵⁴ Thus, in *ADC*, the tribunal found that in a case of an *unlawful* expropriation contrary to the BIT, the level of compensation is not the level provided for in the expropriation clause of the BIT (which applies to *lawful* expropriations), but the standard under customary international law: *ADC Award ¶¶ 479-500*, especially ¶¶ 485 and 495.

any type of breach of the BIT, in which case, on the Tribunal's reasoning the determination of the standard of compensation will always be in the tribunal's discretion.

325. In any event, even if it were the case that the "fair market value" standard is applicable to all breaches of the BIT involving expropriation, it would not make the expropriation provision of the BIT redundant for that standard of compensation also to be applied where the tribunal considers it appropriate to cases involving breaches of other provisions of the BIT. Contrary to what Argentina seems to suggest, the Tribunal did not find that the "fair market value" standard was the applicable standard for all breaches of all provisions of the BIT.
326. Argentina argues that, in cases of breaches of the BIT other than the expropriation clause, the standard of compensation is "*the amount of loss or damage that is adequately connected to the breach*" or the "*amount of the loss or damage actually incurred*", rather than the "fair market value" standard. The Committee considers that, by this argument, Argentina requests the Committee to find that the Tribunal incorrectly applied the applicable law (by applying an incorrect standard) rather than find that the Tribunal failed to apply the applicable law (the BIT and general principles of international law). The Committee reiterates that incorrect application of the applicable law is not a ground of annulment.
327. In any event, the Committee is not persuaded that the Tribunal failed to adopt an approach of ascertaining the "*amount of the loss or damage actually incurred*". The Tribunal referred to the standard of compensation identified in the *Chorzów Factory* case, namely that which would "*wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed.*"²⁵⁵ Furthermore, the Tribunal, in rejecting Azurix's proposal that damages be assessed on the theory of unjust enrichment, stated that:

²⁵⁵ Award ¶¶ 409 and 423 (referring to the submissions of Azurix and the MTD Award respectively).

... damages and unjust enrichment are conceptually distinct in terms of the principles of liability and the measure of restitution. In the case of damages, liability rests on an unlawful act, which is not necessarily the case in unjust enrichment. As to compensation on account of an unlawful act, it is based on the loss suffered, while, in the case of unjust enrichment, it is based on restitution ...²⁵⁶

328. It is apparent to the Committee that the Tribunal considered in the present case that the “fair market value of the investment” would be appropriate in the circumstances of this particular case to achieve the result of compensating Azurix for the actual loss suffered by it.

329. For these reasons, whether or not the Tribunal was right or wrong in applying the standard of compensation that it did, the Committee finds that the Tribunal did not fail to apply the applicable law. The Committee therefore finds no annulable error under Article 52(1)(b).

(f) Failure of the award to state reasons as a ground of annulment under Article 52(1)(e) of the ICSID Convention: applicable principles

330. The principles applicable to a ground of annulment based on Article 52(1)(e) of the ICSID Convention are considered by the Committee in paragraph 178 above.

(g) Failure of the award to state reasons as a ground of annulment under Article 52(1)(e) of the ICSID Convention: the Committee’s views

331. Argentina argues that the Tribunal’s decision on the appropriate standard of compensation is contained in five paragraphs of text²⁵⁷ which contain no attempt to divine principles of law and the standard of compensation for a breach of the fair and equitable standard of treatment or any other obligation in the BIT. For the reasons given above, the Committee does not accept this

²⁵⁶ Award ¶¶ 436 (emphasis added).

²⁵⁷ Award ¶¶ 419-424.

argument. The five paragraphs of text referred to by Argentina contain a discussion of other cases dealing with the same issue, and it is apparent that the Tribunal concluded that it had a discretion under the applicable law to determine the approach to damages.

332. The Committee does not consider that the Tribunal found the “fair market value” standard to be the standard of compensation for all breaches of the BIT. Rather, the Tribunal found that for breaches of BIT obligations other than the expropriation clause, the Tribunal has a discretion in determining the approach to damages, and that it may in its discretion, if it considers it appropriate, apply the “fair market value” standard.
333. As to the reasons why the Tribunal, in the exercise of the discretion that it found that it had, decided to adopt the “fair market value” standard, the Committee notes the following.
334. The Tribunal gave the following history relating to the termination of the Concession Agreement. On July 18, 2001, ABA requested the Province to cure its breaches of the Concession Agreement. On August 29, 2001, the Province replied denying any wrongdoing. On October 5, 2001, ABA terminated the Concession Agreement. On November 1, 2001, the Province issued an Executive Order rejecting the termination of the Concession Agreement and ordering ABA to cease and desist from claiming that it had terminated the Concession Agreement. On February 26, 2002, ABA filed for bankruptcy reorganization proceedings. On March 7, 2002, the Province deemed that ABA had abandoned the service. On March 12, 2002, the Province terminated the Concession Agreement alleging ABA’s fault. On March 15, 2002, ABA delivered the service to the Province.²⁵⁸
335. The Tribunal found that ABA’s request to terminate the Concession in agreement with the Province “*was a reasonable request in light of the previous behavior of the Province and its agencies*”, and that the Province’s

²⁵⁸ Award ¶¶ 244-245.

refusal to accept ABA's notice of termination and insistence on terminating it by itself on account of abandonment of the Concession was a clear case of a breach of the fair and equitable treatment standard.²⁵⁹

336. The Tribunal found that certain conduct of the Province prior to ABA's request to terminate the Concession also amounted to breaches of BIT for which Argentina was responsible.²⁶⁰ The Committee considers it implicit that it was because of this that the Tribunal considered ABA's request to terminate the concession to be "*a reasonable request in light of the previous behavior of the Province and its agencies*".
337. The Committee also considers it implicit from the above that the Tribunal considered that the breaches of the BIT for which Argentina was responsible had caused the termination of the Concession Agreement, and that the loss caused to Azurix by these breaches was therefore the value of the Concession on the date on which the Province terminated the Concession Agreement. This is particularly implicit in the Tribunal's comment that "*compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over*".²⁶¹
338. Thus, contrary to what Argentina claims, the Committee finds that the Tribunal did provide adequate reasons as to the causal link between the Tribunal's findings of liability in Part VII of the Award and its finding that the amount of damages would be the fair market value of the Concession on March 12, 2002.
339. Argentina claims that there is an inconsistency, on the one hand, between the Tribunal's finding that there had not been an expropriation, and, on the other hand, the Tribunal's finding that Azurix was entitled to the fair market value of the Concession, which is the standard of compensation provided for in Article IV(1) of the BIT in cases of expropriation.

²⁵⁹ Award ¶ 374.

²⁶⁰ Award ¶¶ 375-377, 393, 408.

²⁶¹ Award ¶ 424.

340. The Committee considers that these two findings cannot be considered to be contradictory for the reasons given in paragraphs 322-323 above. It is clear from the Tribunal's reasons that the Tribunal considered that the "fair market value" standard of compensation was not confined exclusively to cases of expropriation, but that it could be applied also in cases of breaches of other provisions of the BIT. The Tribunal's decision to apply the "fair market value" standard therefore does not contradict its finding that there was no expropriation.
341. As to the reasons why the Tribunal found that USD 60 million was the "fair market value" of the Concession on March 12, 2002, the Committee notes the following.
342. At paragraph 425 of the Award, the Tribunal determined that the methodology it would adopt for determining the "fair market value" of the Concession was the "actual investment" method. The Tribunal indicated that this was one of two methodologies put forward by Azurix,²⁶² and it appears from the Award that Argentina did not propose any particular alternative methodology.²⁶³ The Tribunal appeared to accept Azurix's submission that the "actual investment" method "*is compelling as the investment is recent and highly ascertainable*".²⁶⁴
343. The Tribunal said that "*the actual investment method is a valid one in this instance*".²⁶⁵ It is implicit from this that the Tribunal considered that the actual investment method was not the only valid method that might have been used to determine the fair market value, that the Tribunal had a discretion in determining the methodology that it would adopt, and that the Tribunal preferred the actual investment methodology for the reasons given. The Committee does not find any insufficiency in the Tribunal's reasons for adopting this methodology.

²⁶² Award ¶ 425.

²⁶³ Award ¶ 413.

²⁶⁴ Award ¶ 425.

²⁶⁵ Award ¶ 425 (emphasis added).

344. In then proceeding to determine Azurix’s “actual investment”, the only amounts that the Tribunal took into consideration were the Canon payment, and Azurix’s additional capital contributions. The Tribunal declined to take into account certain other amounts that had been claimed by Azurix.²⁶⁶ The Tribunal’s decision to exclude these additional amounts was one in Argentina’s favour, and Argentina raises no objection in respect of this decision.
345. Argentina has argued that the Tribunal failed to state reasons for deciding to include both the Canon payment and Azurix’s additional capital contributions. The Committee considers it clear that the damages awarded under the “actual investment” method correspond to the amounts actually invested by the claimant. As the additional contributions were amounts invested in addition to the Canon payment, it is quite logical that both would be taken into account under an “actual investment” methodology. The Committee does not find any insufficiency in the Tribunal’s reasons for including both of these amounts.
346. As to the Canon payment, the amount actually paid was in excess of USD 438 million.²⁶⁷ However, the Tribunal considered that “*a significant adjustment is required to arrive at the real value of the Canon paid by the Claimant*”.²⁶⁸ The Tribunal considered that the relevant amount to be taken into account was not what Azurix actually paid, but rather, “*what an independent and well-informed third party would have been willing to pay for the Concession in March 2002, in a context where the Province would have honored its obligations*”.²⁶⁹ Ultimately, the Tribunal concluded that what an independent and well-informed third party would have been willing to pay for the Concession in March 2002 was USD 60 million.

²⁶⁶ Award ¶¶ 416, 431-432.

²⁶⁷ Award ¶ 41, 414, 430.

²⁶⁸ Award ¶ 425.

²⁶⁹ Award ¶ 427.

347. Argentina claims that the Tribunal gave no reasons as to how it arrived at this figure of USD 60 million. However, the Committee considers it sufficiently clear from a reading of paragraphs 426 to 429 of the Award that the Tribunal considered that it had itself to “*try and determine*” the fair market value in March 2002 on the basis of all of the material before it.
348. One factor that the Tribunal took into account was that “*no well-informed investor, in March 2002, would have paid for the Concession the price (and more particularly, the Canon) paid by Azurix in mid-1999, irrespective of the actions taken by the Province and of the economic situation of Argentina at that time*”,²⁷⁰ and that “*that no more than a fraction of the Canon could realistically have been recuperated under the existing Concession Agreement*”.²⁷¹ The Tribunal had previously noted in this respect that other bidders for the Concession presented canons “*with values at least ten times lower than that submitted by the Claimant*”.²⁷² This suggests that the most that any other bidder would have been prepared to pay for the Concession in mid-1999 would have been in the order of USD 38.52 million.
349. However, against this, the Tribunal took into account that “[*w*hen the Province accepted Azurix’s bid, it considered it as the fair market value for the Concession and the Province benefited from the alleged aggressive price paid”.²⁷³ The Tribunal also took into account that the Province, “*through its actions and inaction, contributed to the loss in value of the Concession*”.²⁷⁴ The Tribunal also took into account the possibility of the hypothetical investor expanding the system and improving efficiency between the periodic 5 year tariff reviews and expected tariff increases from time to time due to increases in the inflation rate.²⁷⁵

²⁷⁰ Award ¶ 426.

²⁷¹ Award ¶ 429.

²⁷² Award ¶ 240.

²⁷³ Award ¶¶ 426.

²⁷⁴ Award ¶¶ 428.

²⁷⁵ Award ¶ 427.

350. Having balanced these competing considerations, the Tribunal arrived at a figure of USD 60 million, that is, a figure that was in the order of 56 percent more than what other investors would have been prepared to pay for the Concession in mid-1999, but that was less than one sixth of what Azurix had actually paid.

351. It has been said that:

*... it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science.*²⁷⁶

Although the Tribunal in this case may not have said so expressly, the Committee considers it clear from the Award that the figure of USD 60 million was an approximation that the Tribunal considered to be fair in all the circumstances. The Committee does not find any insufficiency in the Tribunal's reasons in arriving at this figure.

352. Argentina then argues that the Tribunal failed to state reasons as to why Azurix was entitled to 100% of what a third party would pay for the Concession in circumstances where Azurix indirectly owned 90% of ABA's shares. The Committee notes in this respect that both the Decision on Jurisdiction and the Award contain both statements that the Canon was paid by Azurix,²⁷⁷ and statements that the Canon was paid by ABA.²⁷⁸ However, at paragraph 64 of the Decision on Jurisdiction, the Tribunal said:

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

²⁷⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007 ¶ 8.3.16 (footnotes omitted).

²⁷⁷ For example, Decision on Jurisdiction ¶ 64; Award ¶ 426.

²⁷⁸ For example, Decision on Jurisdiction ¶ 22; Award ¶ 41.

The Tribunal also referred in paragraph 59 of the Decision on Jurisdiction to Azurix's claim that its "investment" consisted 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".

353. The Committee considers that it is sufficiently clear that the Tribunal considered that the whole of the Canon payment was an investment of Azurix, and that ABA was merely a vehicle for carrying out the investment. The Committee does not find any insufficiency in the Tribunal's reasons in taking into account the full value of the Concession.
354. Argentina further claims that the Tribunal gave no reasons as to why it adopted the figure of USD 105,240,753 as the "*additional investments to finance ABA*".
355. The Tribunal's reasons in this respect are set out in paragraph 430 of the Award, which must be read in conjunction with paragraph 411 of the Award, setting out the damages claimed by Azurix under the "actual investment" method.
356. The Tribunal noted that Azurix claimed to have invested USD 449 million when it acquired the Concession, an amount that included the Canon payment. This meant that, at the time that it acquired the Concession, in addition to the Canon payment of USD 438,555,554, Azurix had also invested an additional amount of USD 10,444,446 (the difference between the total amount of USD 449 million originally invested and the Canon payment).
357. The Committee further noted that Azurix also claimed to have made additional capital contributions to ABA of USD 102.4 million. This meant that Azurix's actual investment, in addition to the Canon payment, was USD 112,844,446 (the sum of USD 10,444,446 and USD 102.4 million). From paragraph 413 of the Award, it appears that Argentina did not dispute that these figures accurately reflected the actual amounts invested by Azurix in

addition to the Canon. In any event, it is clear from paragraph 430 of the Award that the Tribunal accepted Azurix's claim that they did.

358. The Tribunal then went on at paragraph 430 of the Award to find that the amount of USD 112,844,446 should be reduced by USD 7,603,693, which the Tribunal said represented:

*the aggregate of the claims presented by Azurix on account of damages which the Tribunal has found to be related to contractual claims—those related to the works listed in Circular 31(A) except for Bahía Blanca—and that should be borne by Azurix as part of its business risk.*²⁷⁹

This is a reference back to the Tribunal's findings in paragraphs 150, 155 and 160 of the Award. The footnote to paragraph 430 of the Award indicates that this figure of USD 7,603,693 was taken from a report by NERA, an expert consultancy company,²⁸⁰ that was annexed to Azurix's memorial. Argentina has not disputed this particular figure. If this sum of USD 7,603,693 is deducted from USD 112,844,446, that leaves the amount of USD 105,240,753 as the amount of Azurix's additional investments beyond the Canon payment.

359. However, Argentina argues that the Tribunal's adoption of this figure of USD 105,240,753:

*... contradicts and is inconsistent with its findings with respect to the first head of damages in so far as the actual amount invested by Azurix to finance ABA would not correspond to the amount recoverable upon a sale to a hypothetical third party (i.e. the fair market value).*²⁸¹

360. In this respect, the Committee notes that it has already found, at paragraph 305-306 above, that the Tribunal implicitly found that it had a discretion to determine what it considers to be the appropriate approach to damages in the circumstances of the particular case. The Tribunal decided to assess damages on the basis of the "fair market value" standard, and it further decided that it would determine the "fair market value" in accordance with the

²⁷⁹ Award ¶ 430.

²⁸⁰ Award ¶ 213.

²⁸¹ Argentina Memorial on Annulment ¶ 227.

“actual investment” method. Although the Tribunal did not spell out in detail what the “actual investment” method involved, the Committee considers it plain from the reasoning in the Award that under this method, the amount of damages would correspond to the amounts actually invested by Azurix prior to March 2002.²⁸² It logically follows from this that the sum of USD 105,240,753, being part of the amount actually invested by Azurix, was to be taken fully into account in the assessment of damages.

361. It would in principle therefore also follow from the Tribunal’s adoption of the “actual investment” method that the full amount of the Canon payment, USD 438,555,554, should also have been included in the damages awarded. While the Tribunal’s reasoning is not expressed in detail, the Committee finds that it is implicit from the reasoning as a whole that the Tribunal in fact decided to apply a modified form of the “actual investment” method. Under the method that the Tribunal employed, in determining the fair market value, the Tribunal took the actual amounts invested by Azurix as its starting point, but then reduced the relevant amounts when it considered that there were reasons justifying this. Thus, while the actual amount of the Canon payment was USD 438,555,554, the Tribunal only took USD 60 million of this into account in assessing damages, for the reasons given above. Similarly, while the actual amount of the additional capital contributions was USD 112,844,446, the Tribunal only took USD 105,240,753 of this into account in assessing damages, for the reasons given above.
362. The Committee recalls that it is not a court of appeal, and that it is not the function of the Committee to pass judgment upon the substance of the Tribunal’s decision with respect to the quantum of damages. In this ground of annulment under Article 52(1)(e) of the ICSID Convention, the issue for the Committee to determine is whether the award has failed to state the reasons

²⁸² In this respect, it is also noted that in the *Vivendi Award* ¶¶ 8.3.12, the tribunal referred to “generally accepted alternative means of calculating fair market value, such as ‘book value’ – the net value of an enterprise’s assets, ‘investment value’ – the amount actually invested prior to the injurious acts, ‘replacement value’ – the amount necessary to replace the investment prior to the injurious acts, or ‘liquidation value’ – the amount a willing buyer would pay a willing seller for the investment in a liquidation process”.

on which its decision as to the quantum of damages was based. The Committee is satisfied that the Award “enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion”,²⁸³ and that “an informed reader of the Award would understand the reasons given by the Tribunal and would discern no material contradiction in them”.²⁸⁴

363. The Committee considers it clear from the reasoning in the Award that the assessment of damages proceeded by the following steps:

- (1) Compensation was to be based on the fair market value of the investment on March 12, 2009.
- (2) The fair market value on March 12, 2009 was to be assessed by the actual investment method.
- (3) The actual investments made by Azurix to March 12, 2009 were:
 - (a) the Canon payment was USD 438,555,554; and
 - (b) the additional capital contributions of USD 112,844,446.
- (4) However, of these amounts actually invested by Azurix, the Tribunal would only take into account in the assessment of damages:
 - (a) USD 60 million of the Canon payment, this being the amount that an independent and well-informed third party would have been willing to pay for the Concession in March 2002, in a context where the Province would have honored its obligations; and
 - (b) USD 105,240,753 of the additional capital contributions, the remainder being an amount that Azurix should bear as part of its business risk.

²⁸³ *MINE* Annulment Decision ¶ 5.09.

²⁸⁴ *MTD* Annulment Decision ¶ 92.

364. The Committee sees no inconsistency or contradiction in steps (1) to (3) in this reasoning. The Committee accepts that step (4) at first blush may appear difficult to reconcile with steps (2) and (3). However, the Committee finds that steps (2) and (3) on the one hand, and step (4) on the other, are not “*genuinely contradictory*” reasons that “*cancel each other out*”, such that the Award is “*essentially lacking in any expressed rationale*”.²⁸⁵ For the reasons given above, the Committee considers that it is clear from the reasoning of the Award as a whole that steps (1) to (4) together constitute a modified form of the “actual investment” method that the Tribunal was applying.
365. Furthermore, even if step (4) was in genuine contradiction with the previous steps, in the Committee’s view this contradiction would not justify annulment of the entire portion of the Award dealing with quantum of damages. The Committee considers it clear that steps (1) to (3) were the fundamental basis of the Tribunal’s assessment of damages. If the last step in the Tribunal’s reasoning contradicted this fundamental basis, it was a contradiction that was very much in Argentina’s favour. The Committee has “*a certain measure of discretion as to whether to annul an award, even if an annulable error is found*”.²⁸⁶ Even if step (4) was contradictory, and for the reasons given the Committee does not think that it was, the Committee would in the circumstances of this case not be minded to annul the decision on quantum of damages on the basis of a contradiction that was to the advantage of the party requesting annulment.
366. The Committee therefore rejects Argentina’s request for annulment under Article 52(1)(e).

I. Costs

²⁸⁵ MTD Annulment Decision ¶ 50, quoting Vivendi Annulment Decision ¶¶ 64-65.

²⁸⁶ Vivendi Annulment Decision ¶ 66; MINE Annulment Decision ¶¶ 4.09 and 4.10; Soufraki Annulment Decision ¶¶ 24-27.

367. For the reasons given above, the Committee has rejected Argentina's application for annulment in its entirety. It follows that the Tribunal's ruling on the costs of the proceedings before the Tribunal stands.

368. As to the costs of the present annulment proceedings, under Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 47(1)(j), read in conjunction with Article 52(4) of the ICSID Convention and ICSID Arbitration Rule 53, the Committee has a discretion to determine how and by whom shall be paid the expenses incurred by the parties in connection with the proceedings, the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre.

369. The Committee notes that in the *MTD* Annulment Decision, it was said that:

*In all but one of the concluded annulment proceedings, Committees have made no order for the parties' own costs and have held that ICSID's costs should be borne equally by the parties. They did so not only where the application for annulment succeeded in whole or part but also where it failed.*²⁸⁷

In that case, the *ad hoc* committee went on to say that:

This result might be thought anomalous. However, in the interest of consistency of ICSID jurisprudence and in the circumstances of the present case, the Committee proposes to follow the existing practice.

The *ad hoc* committee in the *Soufraki* Annulment Decision,²⁸⁸ in adopting the same approach to costs, also referred to a "developing practice" in this respect, a practice which was followed in more recent cases such as the *CMS* Annulment Decision²⁸⁹ and the *Lucchetti* Annulment Decision.²⁹⁰

370. However, in the *MTD* Annulment Decision, the *ad hoc* committee added that:

... this practice is not without flexibility and admits of exception. In this regard, it observes that in CDC Group PLC v Republic of the Seychelles, the committee ordered

²⁸⁷ *MTD* Annulment Decision ¶ 110.

²⁸⁸ *Soufraki* Annulment Decision ¶ 138.

²⁸⁹ *CMS* Annulment Decision ¶¶ 161-162.

²⁹⁰ *Lucchetti* Annulment Decision ¶ 131.

*the unsuccessful respondent to pay both the claimant's and ICSID's costs of the annulment proceedings. The committee noted that the annulment application was "fundamentally lacking in merit" and that the respondent's case was "to any reasonable and impartial observer, most unlikely to succeed."*²⁹¹

Particular circumstances were also considered to justify a different order as to costs in the *Repsol Annulment Decision*²⁹² and the *Malaysian Historical Salvors Annulment Decision*.²⁹³

371. As regards the expenses incurred by the Centre in connection with this proceeding, including the fees and expenses of the members of the Committee, the Committee is of the view that what has been referred to as "existing practice" fails to accord proper deference to Regulation 14(3)(e) of the Administrative and Financial Regulations, which provides that in annulment proceedings:

... the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.

372. In this regard, in respect of ICSID's expenses there is a different regime as to costs advances between annulment proceedings and the original proceedings before the tribunal, where, pursuant to Regulation 14(3)(d) of the Administrative and Financial Regulations:

... unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention.

373. As to this difference in approach the Committee takes the view that a default position is thereby established that in the absence of other order, a party who

²⁹¹ *MTD Annulment Decision* ¶ 111.

²⁹² *Repsol Annulment Decision* ¶ 88.

²⁹³ *Malaysian Historical Salvors Annulment Decision* ¶ 82.

has applied for annulment and has paid in advance all of the costs of the Centre in relation to that application as is required by the Regulations should bear those costs.

374. On this issue of ICSID's costs, the Committee acknowledges that the annulment procedure is a feature of the ICSID system that is important for maintaining the confidence of parties in that system.²⁹⁴ Thus, the Committee has observed that a requirement for an applicant for annulment to provide security for a continuation of a stay of enforcement of the award pending annulment proceedings, other than in an exceptional case, could compromise this confidence-balancing function.²⁹⁵ On the other hand, the Committee considers that after an application for annulment by one party has proved to be entirely unsuccessful, it would risk compromising confidence in the ICSID system, and in the finality of ICSID awards, if the other party is required as of course to reimburse the unsuccessful applicant a share of the ICSID costs associated with the unsuccessful application.
375. Whilst the Committee is mindful of the high importance of maintaining consistency in the ICSID jurisprudence, the Committee does not consider that an approach that it sees as wrong in principle should continue to be followed, merely for the sake of consistency with precedent. The Committee agrees with the *MTD* Annulment Decision that the existing practice is "anomalous" to the extent that it normally requires the ICSID costs to be borne equally by the parties even in a case where the application for annulment was wholly unsuccessful. In the Committee's opinion, that anomalous position arises from having insufficient regard to the provisions of Regulation 14(3)(e) compared with Regulation 14(3)(d) that applies to proceedings before a tribunal.
376. As regards the existing practice, the Committee notes that there have only been six cases in which a final decision of the *ad hoc* committee rejected in

²⁹⁴ *Azurix* Stay of Proceedings Decision ¶ 30.

²⁹⁵ *Azurix* Stay of Proceedings Decision ¶¶ 31-32.

whole the application for annulment.²⁹⁶ In two of these cases, the *ad hoc* committee ordered the costs of the Centre and of the *ad hoc* committee to be paid wholly by the unsuccessful applicant for annulment.²⁹⁷ That leaves only four cases in which a wholly unsuccessful applicant for annulment was held to be entitled to recover part of the ICSID costs from the other party.

377. In all the circumstances, the Committee does not consider that it would amount to too fundamental a departure from precedent for it for apparent and good reasons of principle derived from the Regulations themselves for it to decline to follow the approach adopted in those four cases.
378. The Committee considers that under the Regulations, and as a matter of discretion, the normal course should be for a wholly unsuccessful applicant for annulment carry the burden of the whole of the costs of the Centre advanced by it associated with the proceedings, including the fees and expenses of the members of the *ad hoc* committee. Of course, the Committee does not exclude the possibility that circumstances might justify a departure from this normal rule, but the Committee finds no such exceptional circumstances in the present case. In particular, the fact that there are novel and complex issues to be determined in the annulment proceedings, as here, does not of itself amount to such exceptional circumstances. Also, as here, it is of the essence of annulment matters that they are original and difficult.
379. The Committee determines that Azurix shall not be ordered to refund Argentina a proportion of the expenses of the Centre in connection with this proceeding, including the fees and expenses of the members of the Committee.
380. As to each party's own litigation costs, the Committee notes that in only two previous cases was the wholly unsuccessful applicant for annulment ordered

²⁹⁶ *Wena Hotels* Annulment Decision; *MTD* Annulment Decision; *Repsol* Annulment Decision; *Soufraki* Annulment Decision; *CDC* Annulment; Decision *Lucchetti* Annulment Decision.

²⁹⁷ *Repsol* Annulment Decision ¶ 88; *CDC* Annulment Decision ¶ 90.

to pay all or half of the other party's costs.²⁹⁸ In the other four cases referred to above, there was either no order for such costs, or each party was ordered to bear its own costs. The Committee notes that each party to the present proceedings has borne its own litigation costs throughout the course of the proceedings. The Committee does not consider that there are circumstances in the present case that would justify an order for Argentina to reimburse Azurix for some or all of the latter's litigation costs.

²⁹⁸ *Repsol* Annulment Decision ¶ 88; *CDC* Annulment Decision ¶ 90.

Decision

For the reasons given above, the Committee decides:

- (1) The application for annulment of the Argentine Republic is dismissed in its entirety.
- (2) Argentina shall bear all expenses incurred by the Centre in connection with this proceeding, including the fees and expenses of the members of the Committee.
- (3) Each party shall bear its own litigation costs and expenses incurred with respect to this annulment proceeding, including its costs of legal representation.
- (4) Pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3), the stay of enforcement of the Award ordered by the Committee in its decision of December 28, 2007 is terminated.

[Signed]

Dr. Gavan Griffith Q.C.
President of the *ad hoc* Committee

[Signed]

Judge Bola Ajibola
Member of the *ad hoc* Committee

[Signed]

Michael Hwang S.C.
Member of the *ad hoc* Committee