

International Centre for
Settlement of Investment Disputes
(ICSID)

In the Matter of the Annulment Proceeding
in the Arbitration between

COMPAÑIA DE AGUAS DEL ACONQUIJA S.A.

and

VIVENDI UNIVERSAL (formerly COMPAGNIE GÉNÉRALE DES EAUX)

Claimants

v.

ARGENTINE REPUBLIC

Respondent

Case No. ARB/97/3

DECISION ON ANNULMENT

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President: Mr. L. Yves FORTIER, C.C., Q.C.

Members of the ad hoc Committee: Professor James R. CRAWFORD, S.C., F.B.A.

Professor José Carlos FERNÁNDEZ ROZAS

Secretary of the Committee: Mr. Alejandro A. Escobar

In Case No. ARB/97/3

BETWEEN: **COMPAÑÍA DE AGUAS DEL ACONQUIJA S.A. AND
VIVENDI UNIVERSAL (formerly COMPAGNIE GÉNÉRALE DES EAUX)**
(“*Claimants*”)

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And

ARGENTINE REPUBLIC (“*Respondent*”)

Represented by:

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THE *AD HOC* COMMITTEE

After deliberation,

Makes the following Decision:

A. THE ANNULMENT PROCEEDINGS

1. On 20 March 2001, Compañía de Aguas del Aconquija S.A. (“CAA”) and Compagnie Générale des Eaux (“CGE”; CGE and CAA are referred to, collectively, as “Claimants”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application in writing (the “Application”) requesting the partial annulment of an Award dated 21 November 2000 (the “Award”) rendered by the Tribunal in the arbitration between Claimants and Respondent.¹

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”). The Application sought partial annulment of the Award on three of the five grounds set out in Article 52(1) of the ICSID Convention, specifically: the Tribunal had manifestly exceeded its powers; there had been a serious departure from a fundamental rule of procedure; and the Award failed to state the reasons on which it was based.

3. The Application was registered by the Secretary-General of ICSID on 23 March 2001. In accordance with Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), the Secretary-General transmitted a Notice of Registration to the parties on that date and also forwarded to the Respondent copies of the Application and accompanying documentation. Thereafter, in accordance with Article 52(3) of the ICSID Convention and at the request of the Secretary-General, the Chairman of the Administrative Council proceeded to appoint an *ad hoc* Committee (the “Committee”).

4. The Committee was subsequently duly constituted – composed of Professor James R. Crawford, Professor José Carlos Fernández Rozas and Mr. L. Yves Fortier – and the parties were so notified by the Secretary-General on 18 May 2001, in accordance with Rule 52(2) of the Arbitration Rules. On 25 May 2001, the Secretary of the Committee informed the parties that Mr. L. Yves Fortier had been designated president of the Committee.

5. The first meeting of the Committee was held at the seat of ICSID, in Washington, D.C., on 21 June 2001. At that meeting all members made declarations in terms of Rule 6 of the Arbitration Rules. Mr. Fortier qualified his declaration in one respect, and the Respondent reserved the right to challenge him. Subsequently it did so, pursuant to Articles 14 and 57 of the ICSID Convention and Arbitration Rule 53. The challenge concerned Mr. Fortier's disclosure that one of the partners in his law firm had been engaged by CGE to advise on certain specific matters relating to taxation under Quebec law. Mr. Fortier had had no personal involvement in the work, which was wholly unrelated to the present case and which did not involve a general retainer. After receiving written statements from the parties, the other two members of the Committee, by a decision of 3 October 2001, dismissed the challenge.

6. In accordance with the procedural timetable laid down by the Committee at its meeting of 21 June 2001, the parties filed their respective Memorials on 20 August 2001 and on 12 November 2001. Claimants' Memorial was accompanied by an Expert Opinion prepared by Professor Christoph H. Schreuer, and Respondent filed an Expert Opinion rendered by Professor Arthur T. von Mehren. Claimants thereafter submitted a Reply on 10 December 2001. Respondent filed a Rejoinder on 8 January 2002.

7. A two-day hearing in this annulment proceeding was held at the seat of ICSID on 31 January and 1 February 2002, at which counsel for both parties presented their arguments and submissions, and responded to questions from the members of the Committee. The parties

¹ The text of the award is published at 40 ILM 426 (2001).

subsequently made observations to the English and Spanish transcripts made of the hearing, which have been taken into account by the Committee.

8. In the absence of any agreed request by the parties to vary the rules of procedure laid down in the ICSID Convention and the Arbitration Rules, the annulment proceeding was at all times conducted in accordance with the applicable provisions of Section 3 of Chapter IV of the ICSID Convention and the Arbitration Rules.²

B. THE TRIBUNAL'S AWARD

9. The dispute underlying the arbitration arose out of certain alleged acts of the Argentine Republic and its constituent Province of Tucumán that, according to Claimants, caused the termination of a thirty-year concession contract (the "Concession Contract") entered into by Tucumán and CAA on 18 May 1995. In the arbitration, Claimants asserted that all of these acts were attributable to the Argentine Republic under international law and, as such, violated Argentina's obligations under the Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments of 3 July 1991 (the "BIT").³ Relevant provisions of the BIT are set out later in this decision.

10. The Award that is the subject of the present annulment proceeding was rendered on 21 November 2000. In the Award, the Tribunal rejected the objections to its jurisdiction raised by the Argentine Republic. Having upheld its jurisdiction, the Tribunal nonetheless dismissed the claim.

² Article 52(4) of the ICSID Convention provides: "The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII [of the Convention, dealing with arbitration proceedings] shall apply *mutatis mutandis* to proceedings before the Committee."

³ Signed 3 July 1991; entered into force 3 March 1993; *United Nations Treaty Series*, vol. 1728, p. 282 (French text). The BIT provisions quoted, in English, in the present decision are drawn from the official United Nations English translation: *United Nations Treaty Series*, vol. 1728, p. 298. Appendix 1 to the Tribunal's Award of 21

11. In order to provide relevant background and context to the present decision, and before proceeding to consider the detailed findings of the Tribunal and the grounds for annulment to which those findings are said to give rise, the Committee can do no better than recite the Tribunal's own "Introduction and Summary":

A. Introduction and Summary

This case arises from a complex and often bitter dispute associated with a 1995 Concession Contract that a French company, Compagnie Générale des Eaux, and its Argentine affiliate, Compañía de Aguas del Aconquija, S.A. (collectively referred to as "Claimant" or "CGE"), made with Tucumán, a province of Argentina, and with the investment in Tucumán resulting from that agreement. The Republic of Argentina ("Argentine Republic") was not a party to the Concession Contract or to the negotiations that led to its conclusion....

The Concession Contract... makes no reference to either the BIT or ICSID Convention or to the remedies that are available to a French foreign investor in Argentina under these treaties. Articles 3 and 5 of the BIT provide that each of the Contracting Parties shall grant "fair and equitable treatment according to the principles of international law to investments made by investors of the other Party", that investments shall enjoy "protection and full security in accordance with the principle of fair and equitable treatment," and that Contracting Parties shall not adopt expropriatory or nationalizing measures except for a public purpose, without discrimination and upon payment of "prompt and adequate compensation." Article 8 of the Argentine-French BIT provides that, if an investment dispute arises between one Contracting Party and an investor from another Contracting Party and that dispute cannot be resolved within six months through amicable consultations, then the investor may submit the dispute either to the national jurisdiction of the Contracting Party involved in the dispute or, at the investor's option, to arbitration under the ICSID Convention or to an *ad hoc* tribunal pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law.

Article 16.4 of the Concession Contract between CGE and Tucumán provided for the resolution of contract disputes, concerning both its interpretation and application, to be submitted to the exclusive jurisdiction of the contentious administrative courts of Tucumán. While this case presents many preliminary and other related questions, the core issue before this Tribunal concerns the legal significance that is to be attributed to this forum-selection provision of the Concession Contract in light of the remedial provisions in the BIT and the ICSID Convention. This question bears both on the jurisdiction of the Centre and the competence of this Tribunal under the ICSID Convention and on the legal analysis of the merits of the dispute between CGE and the Argentine Republic.

November 2001 is the source of the English translation of the provisions of the Concession Agreement referred to herein: 40 ILM 426 (2001), pp. 449-451.

When CGE invoked the jurisdiction of ICSID in reliance on the terms of the BIT and the ICSID Convention and sought damages of over U.S. \$300 million, the Argentine Republic responded that it had not consented to submission of the dispute for resolution under the ICSID Convention. Because of the close relationship between the jurisdictional issue and the underlying merits of the claims, the Tribunal decided that it would not be able to resolve the jurisdictional question without a full presentation of the factual issues relating to the merits. Accordingly, the Tribunal, after receiving memorials from the parties and hearing oral argument, joined the jurisdictional issue to the merits.

For the reasons set forth in this Award, the Tribunal holds that it has jurisdiction to hear the claims of CGE against the Argentine Republic for violation of the obligations of the Argentine Republic under the BIT. Neither the forum-selection provision of the Concession Contract nor the provisions of the ICSID Convention and the BIT on which the Argentine Republic relies preclude CGE's recourse to this Tribunal on the facts presented.

With respect to the merits, CGE has not alleged that the Republic itself affirmatively interfered with its investment in Tucumán. Rather, CGE alleges that the Argentine Republic failed to prevent the Province of Tucumán from taking certain action with respect to the Concession Contract that, Claimants allege, consequently infringed their rights under the BIT. CGE also alleges that the Argentine Republic failed to cause the Province to take certain action with respect to the Concession Contract, thereby also infringing Claimants' rights under the BIT. In addition, CGE maintains that international law attributes to the Argentine Republic actions of the Province and its officials and alleges that those actions constitute breaches of the Argentine Republic's obligations under the BIT.

While CGE challenged actions of Tucumán in administrative agencies of the Province, CGE concedes that it never sought, pursuant to Article 16.4, to challenge any of Tucumán's actions in the contentious administrative courts of Tucumán as violations of the terms of the Concession Contract. CGE maintains that any such challenge would have constituted a waiver of its rights to recourse to ICSID under the BIT and the ICSID Convention.

The Tribunal does not accept CGE's position that claims by CGE in the contentious administrative courts of Tucumán for breach of the terms of the Concession Contract, as Article 16.4 requires, would have constituted a waiver of Claimants' rights under the BIT and the ICSID Convention. Further, as the Tribunal demonstrates below, the nature of the facts supporting most of the claims presented in this case make it impossible for the Tribunal to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement. By Article 16.4, the parties to the Concession Contract assigned that task expressly and exclusively to the contentious administrative courts of Tucumán. Accordingly, and because the claims in this case arise almost exclusively from alleged acts of the Province of Tucumán that relate directly to its performance under the Concession Contract, the Tribunal holds that the Claimants had a duty to pursue their rights with respect to such claims against Tucumán in the

contentious administrative courts of Tucumán as required by Article 16.4 of their Concession Contract.

CGE presented certain additional claims regarding allegedly sovereign actions of Tucumán that Claimants maintained were unrelated to the Concession Contract. CGE asserted that these actions of the Province gave rise to international responsibility attributable to the Argentine Republic under the BIT as interpreted by applicable international law. Furthermore, CGE alleged that the Argentine Republic was also liable for its failures to perform certain obligations under the BIT that Claimants submitted gave rise to international responsibility independent of the performance of Tucumán under the Concession Contract. The Tribunal finds that many of these other claims arose, in fact, from actions of the Province relating to the merits of disputes under the Concession Contract and, for that reason, were subject to initial resolution in the contentious administrative tribunals of Tucumán under Article 16.4. To the extent such claims are the result of actions of the Argentine Republic or of the Province that are arguably independent of the Concession Contract, the Tribunal holds that the evidence presented in these proceedings did not establish the grounds for finding violation by the Argentine Republic of its legal obligations under the BIT either through its own acts or omission or through attribution to it of acts of the Tucumán authorities.⁴

12. In the final section of its Award, after reviewing the procedural history of the arbitration,⁵ summarising the facts and respective legal positions of the parties⁶ and explaining its reasoning with respect to both its jurisdiction⁷ and the merits,⁸ the Tribunal disposed of Claimants' case in the following terms:

G. Award

The Tribunal herewith dismisses the claims filed by the Claimants against the Republic of Argentina.⁹

⁴ Award, Part A., pp. 1-3; 40 ILM 426 (2001), pp. 427-429 (footnotes omitted).

⁵ Award, Part B., paras. 1-23; 40 ILM 426 (2001), pp. 429-433.

⁶ Award, Part C., paras. 24-39; 40 ILM 426 (2001), pp. 433-435.

⁷ Award, Part D., paras. 40-55; 40 ILM 426 (2001), pp. 435-439.

⁸ Award, Part E., paras. 56-92; 40 ILM 426 (2001), pp. 439-446.

⁹ Award, Part G., p. 35; 40 ILM 426 (2001), p. 447. Part F. of the Award, paras. 93-96, contains the Tribunal's assessment and determination regarding the allocation of the costs and fees associated with the arbitration: 40 ILM 426 (2001), pp. 446-447.

13. Before considering the grounds for annulment presented to the Committee, it is necessary to set out in some greater detail the Tribunal's reasoning both as to its jurisdiction and regarding the merits of the claim.

(1) The Tribunal's Findings on Jurisdiction

14. The core of the Tribunal's reasoning in support of its jurisdictional finding is contained in paragraphs 49 to 54 of the Award. The Tribunal found as follows:

- (a) Claimants' claims concerning the actions of the federal government of Argentina as well as those of the provincial authorities of Tucumán are properly characterised as claims arising under the BIT, and not as contractual claims under the Concession Agreement.¹⁰
- (b) Under international law, the acts of organs of both the central government and provincial authorities are attributable to the state – in this case, the Argentine Republic – with the result that Argentina cannot rely on its federal structure as a means of limiting its treaty obligations.¹¹
- (c) Article 25 (3) of the ICSID Convention is intended to allow for constituent subdivisions or agencies of a state party to the ICSID Convention to be subject to ICSID jurisdiction and to be parties to ICSID cases, in their own right and in their own name, where they have so consented and the Contracting State in question has approved. Article 25 (3) neither limits the scope of the state's international responsibilities in accordance with normal rules of attribution nor qualifies the jurisdiction of an ICSID tribunal over that state. In the present case, it does not restrict the Tribunal's jurisdiction over the

¹⁰ Award, para. 50; 40 ILM 426 (2001), p. 438.

¹¹ Award, para. 49; 40 ILM 426 (2001), p. 437.

Argentine Republic pursuant to the BIT, and there is no question of the Province of Tucumán itself being a party to the arbitration in its own name.¹²

- (d) Similarly, Article 16 (4) of the Concession Contract – which provides that “[f]or purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán” – does not, and indeed could not, exclude the jurisdiction of the Tribunal under the BIT. Claimants’ claims “are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT”.¹³

15. The Tribunal went on to state that “[b]y this same analysis”,¹⁴ instituting proceedings against the Province of Tucumán before the contentious administrative tribunals for breach of the Concession Contract would not have been “the kind of choice by Claimants of legal action in national jurisdictions (*i.e.*, courts) against the Argentine Republic that constitutes the ‘fork in the road’ under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention.”¹⁵

(2) The Tribunal’s Findings on the Merits

16. In considering the Tribunal’s findings on the merits, it is necessary to distinguish between what the Tribunal referred to as, on the one hand, claims “based directly on alleged actions or

¹² Award, para. 51; in para. 52, the Tribunal supports this conclusion by reference to the *travaux* of Article 25; 40 ILM 426 (2001), p. 438.

¹³ Award, para. 53; 40 ILM 426 (2001), pp. 438-439 (footnote omitted). This conclusion is supported *inter alia* by reference to the decision of the ICSID Tribunal in *Lanco International Inc v. Argentine Republic* (Preliminary Decision on Jurisdiction of 8 December 1998), 40 ILM 457 (2001).

¹⁴ Referring to the analysis contained in paras. 53-54 of the Award (40 ILM 426 (2001), pp. 438-439) and summarized at para. 14 (d) of this decision.

¹⁵ Award, para. 55; 40 ILM 426 (2001), p. 439. Strictly speaking, this passage did not constitute part of the Tribunal’s findings on jurisdiction, though it flowed from its analysis of the jurisdictional situation. We return to it later in this decision.

failures to act of the Argentine Republic”¹⁶ and, on the other hand, claims relating to conduct of the Tucumán authorities which are nonetheless brought against Argentina and “rely ... upon the principle of attribution”.¹⁷ For the purposes of this decision, these two categories of claims will be referred to, respectively, as the “federal claims” and the “Tucumán claims”.

17. Although, as mentioned above, the Tribunal expressly “dismiss[e]d the claims filed by Claimants against the Republic of Argentina”,¹⁸ what it actually did – and did not do – was much disputed between the parties. According to the Respondent, the Tribunal carefully considered and, as stated in its Award, dismissed all of Claimants’ claims on the merits. According to Claimants, the Tribunal never actually considered the merits of their BIT claims at all, and by purporting to dismiss those claims without effectively considering them on their merits, the Tribunal manifestly exceeded its powers. Further, Claimants submit, even if it could be said that the Tribunal did consider their claims on the merits, it nonetheless failed to give any reasons for dismissing them. There is thus a fundamental difference between the parties as to the manner in which the Tribunal’s decision is to be characterised.

(a) The Federal Claims

18. The Tribunal dealt with the federal claims – that is, claims arising from alleged conduct on the part of the federal authorities of the Argentine Republic – in paragraphs 83-90 and 92 of the Award.

¹⁶ Award, para. 50; 40 ILM 426 (2001), p. 438.

¹⁷ Ibid. The terminology employed by the Tribunal in this regard is not entirely happy. All international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision. See ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Resolution 54/83, 12 December 2001 (hereafter “ILC Articles”), Articles 2 (a), 4 and the Commission’s commentary to Article 4, paras. (8)-(10). A similar remark may be made concerning the Tribunal’s later reference to “a strict liability standard of attribution” (Award, para. 63; 40 ILM 426 (2001), p. 440). Attribution has nothing to do with the standard of liability or responsibility. The question whether a state’s responsibility is “strict” or is based on due diligence or on some other standard is a separate issue from the question of attribution (cf. ILC Articles, Arts. 2, 12). It does not, however, appear that either of these terminological issues affected the reasoning of the Tribunal, and no more need be said of them.

¹⁸ Award, Part G., p. 35; 40 ILM 426 (2001), p. 447.

19. It began by noting that on only one occasion – in a letter dated 5 March 1996 – did Claimants ever raise the issue, as against the federal authorities directly, of a breach of the BIT.¹⁹ The Tribunal noted that nowhere in the letter did Claimants “ask Argentine officials to take any particular action relating to the Concession Contract or the pending differences between Claimants and the authorities of Tucumán”.²⁰ Accordingly the Tribunal determined that “[t]he record contains no evidence that Argentine officials ever failed to take any specific action that the Claimants requested.”²¹

20. The Tribunal nonetheless went on to deal with the federal claims in some detail. It surveyed the range of “legal and political means” which, according to Claimants, the federal authorities should have used “to protect Claimants’ rights”.²² These included: commencing legal proceedings against Tucumán in a federal court (para. 87); exercising financial (para. 88) and political (para. 89) leverage over the province; and notifying Tucumán that its conduct was in breach of the BIT (para. 90).

21. Representative of this discussion is the treatment of potential legal action by the federal government, in a federal court, designed “to compel Tucumán to comply with the BIT”.²³ The Tribunal acknowledged (but declined to resolve) the contested issue of Argentine law as to whether a federal court action would lie against a province for breach of a treaty. It observed that recourse to the Tucumán tribunals was available to Claimants (or at least to CAA) under the terms of the Concession Contract. It concluded by holding:

On the facts presented, the Tribunal finds that there was no action of the Province of Tucumán that, absent such a local court proceeding [viz. under Article 16(4) of the Concession Agreement], so obviously violated the BIT as to require the Argentine government to seek a legal remedy against the Province in the

¹⁹ Award, para. 83; 40 ILM 426 (2001), p. 444.

²⁰ Ibid.

²¹ Award, para. 84; 40 ILM 426 (2001), p. 444.

²² Award, para. 86; 40 ILM 426 (2001), p. 445.

²³ Award, para. 87; 40 ILM 426 (2001), p. 445.

Argentine courts nor, for that matter, did the Claimants ever specify any such action to the Argentine Republic.²⁴

22. The Tribunal's overall conclusion regarding the federal claims was as follows:

In conclusion, the Tribunal finds that the record of these proceedings does not provide a basis for holding that the Argentine Republic failed to respond to the situation in Tucumán and the requests of the Claimants in accordance with the obligations of the Argentine government under the BIT.²⁵

(b) The Tucumán Claims

23. Claimants' claims arising from the alleged conduct of Tucumán and its officials are discussed in paragraphs 57-82 and 91 of the Award.

24. After some initial discussion of the arguments of the parties regarding the so-called "strict liability standard of attribution" (paras. 57-61), the Tribunal declared that it would resolve the case not by answering any general question as to whether treaty provisions "impose a strict liability standard on a central government for actions of a political subdivision", but rather by analysing "the specific allegations on which the Claimants base their claims and their legal significance in light of the terms of the Concession Contract and the BIT".²⁶ It then proceeded to analyse what Claimants had identified as "four categories of 'acts of the Province attributable to [Respondent] that violated Claimants' rights under the BIT.'"²⁷

25. The first category of alleged BIT violations by Tucumán concerned "[a]cts that resulted in a fall in the recovery rate".²⁸ These included a decision by the Ombudsman, in December 1996, which was said to have deprived CGE of "their right to cut off service to non-paying customers", as well as certain decisions of a local regulatory authority, ERSACT, which were

²⁴ Ibid.

²⁵ Award, para. 92; 40 ILM 426 (2001), p. 446.

²⁶ Award, para. 62; 40 ILM 426 (2001), p. 440. Thus, as mentioned above (see note 17), the confusion inherent in the phrase "strict liability standard of attribution" seems to have no operative effect in the Award.

²⁷ Award, para. 63; 40 ILM 426 (2001), p. 440.

²⁸ Award, paras. 65-66; 40 ILM 426 (2001), pp. 440-441.

said to have “forced a reduction in the tariff and thereby created uncertainty as to what invoices had to be paid”. In respect of all these decisions, the Tribunal found that “Claimants never challenged in the courts of Tucumán any of these actions of the administrative agencies of Tucumán relating to implementation of the Concession Contract.”²⁹

26. Under this first category of impugned conduct, the Tribunal also considered Claimants’ allegations concerning public statements by provincial legislators and others purportedly urging customers not to pay their water bills. The Tribunal remarked that those allegations concerned “a highly disputed issue of fact, *i.e.*, whether Tucumán authorities organized a campaign for non-payment of invoices issued by Claimants”; but it determined that “[i]n any event, this non-payment issue relates to the grounds for non-payment under the Concession Contract”, and, as with the administrative decisions discussed above, the Tribunal found that “Claimants failed to challenge any of these acts in the Tucumán courts”.³⁰

27. The second category of Tucumán conduct allegedly in violation of Claimants’ rights under the BIT concerned “[a]cts that unilaterally reduced the tariff rate”.³¹ These were found to comprise essentially the same acts referred to in the first category, and the Tribunal determined that, as with the impugned conduct comprising the first category, they “were never challenged in the Tucumán courts”.³²

28. With respect to the third category of alleged Tucumán breaches of the BIT, which concerned certain “[a]buses of regulatory authority”,³³ the Tribunal again noted that “CGE never challenged in the Tucumán courts the interpretation that the Tucumán agencies gave to the provisions of the Concession Contract bearing on this issue”.³⁴

²⁹ Award, para. 65; 40 ILM 426 (2001), p. 440.

³⁰ Award, para. 66; 40 ILM 426 (2001), pp. 440-441.

³¹ Award, para. 67; 40 ILM 426 (2001), p. 441.

³² *Ibid.*

³³ Award, paras. 68-69; 40 ILM 426 (2001), p. 441.

³⁴ Award, para. 68. In para. 69, the Tribunal sidestepped a factual dispute as to whether “the ERSACT intervention” was a legitimate administrative intervention or was politically motivated, to the detriment of

29. The fourth category of alleged BIT violations by Tucumán concerned certain “[d]ealings in bad faith”.³⁵ A number of examples were given, including conduct by the provincial Governor designed to alter unilaterally “the terms of the second renegotiated agreement that was submitted to the Tucumán legislature” in the period March-August 1997 (paras. 70-71). After briefly reviewing the factual differences between the parties on this point (para. 72), the Tribunal observed that this aspect of the dispute related solely to the parties’ efforts to conclude a negotiated settlement. It stressed that, as Claimants themselves acknowledged, Tucumán was not “legally obligated to modify the Concession Contract” (para. 73). After noting that Argentina itself was involved in attempts to resolve the impasse, the Tribunal held that “on the evidence presented, the Tribunal does not find the basis for holding the Argentine Republic liable for actions of the Tucumán authorities”.³⁶

30. Three additional allegations were made by Claimants in support of their claim of bad faith. One concerned certain fines imposed on Claimants for poor water quality allegedly discovered during water testing by Tucumán. Argentina argued that the fines were authorised by the Concession Contract, and were in any event never collected; Claimants asserted that the fines were politically motivated and were intended to induce it to modify the Concession Contract, thus amounting to an abuse of power. For its part, the Tribunal concluded that “[s]ince none of the fines were ever enforced against Claimants, the Tribunal cannot base a finding of bad faith dealings on this alleged action, particularly when the dispute concerning its justification appears to depend in significant part on an interpretation of the Concession Contract that the parties thereto agreed would be decided by the Tucumán courts”.³⁷ Similarly, as regards the other acts of Tucumán allegedly committed in bad faith, the Tribunal concluded that “the parties disagree

Claimants, noting again that “Claimants never brought any legal challenge in the courts of Tucumán [in respect] of the ERSACT intervention on the ground that such action violated the rights of CGE under the Concession Contract”. See 40 ILM 426 (2001), p. 441.

³⁵ Award, paras. 70-76; 40 ILM 426 (2001), pp. 441-442.

³⁶ Award, para. 73; 40 ILM 426 (2001), p. 442. This conclusion is repeated in para. 82 of the Award: 40 ILM 426 (2001), p. 444.

³⁷ Award, para. 74; 40 ILM 426 (2001), p. 442.

over the meaning and applicability of the pertinent provisions of the Concession Contract, as well as over the underlying facts”.³⁸

31. The Tribunal’s conclusions, drawn from its analysis of these “four categories” of Tucumán acts, are summarised in paragraphs 77-84 of the Award.

32. The Tribunal opens this section of its Award with the statement that “it is apparent that all of the ... actions of the Province of Tucumán on which the Claimants rely ... are closely linked to the performance or non-performance of the parties under the Concession Contract”.³⁹ It concludes that “all of the issues relevant to the legal basis for these claims against Respondent arose from disputes between Claimants and Tucumán concerning their performance and non-performance under the Concession Contract”.⁴⁰ These findings lead to the Tribunal’s central conclusion:

[T]he Tribunal holds that, because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative courts of Tucumán and have been denied their rights, either procedurally or substantively.⁴¹

33. The Tribunal went on to make a number of additional findings in support of this overarching conclusion:

[G]iven the nature of the dispute between Claimants and the Province of Tucumán, it is not possible for this Tribunal to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract... To make such determinations the Tribunal would have to undertake a detailed interpretation and

³⁸ Award, para. 75; 40 ILM 426 (2001), p. 442. The Tribunal also referred summarily to the post-termination conduct of the parties, specifically Claimants’ allegations that they were forced to continue to provide services under the Concession Contract while the provincial authorities continued to obstruct their attempts to collect charges from their customers (para. 76). The Tribunal only summarised the arguments made by the parties in this regard.

³⁹ Award, para. 77; 40 ILM 426 (2001), p. 443.

⁴⁰ Ibid.

⁴¹ Award, para. 78; 40 ILM 426 (2001), p. 443.

application of the Concession Contract, a task left by the parties to that contract to the exclusive jurisdiction of the administrative courts of Tucumán.⁴²

...

There is no allegation before the Tribunal that the courts of Tucumán were unavailable to hear such claims or that they lacked independence or fairness in adjudicating them.⁴³

...

Because the Tribunal has determined that on the facts presented the Claimants should first have challenged the actions of the Tucumán authorities in its administrative courts, any claim against the Argentine Republic could arise only if Claimants were denied access to the courts of Tucumán to pursue their remedy under Article 16.4 or if the Claimants were treated unfairly in those courts (denial of procedural justice) or if the judgment of those courts were substantively unfair (denial of substantive justice) or otherwise denied rights guaranteed to French investors under the BIT by the Argentine Republic.⁴⁴

...

The Tribunal emphasizes that this decision does not impose an exhaustion of remedies requirement under the BIT because such requirement would be incompatible with Article 8 of the BIT and Article 26 of the ICSID Convention.

In this case, however, the obligation to resort to the local courts is compelled by the express terms of Article 16.4 of the [Concession Contract] and the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts.⁴⁵

34. Two further points should be noted. The first concerns Article 10 of the BIT, on which Claimants had relied to avoid the apparently preclusive effect of Article 16 (4) of the Concession Contract. Article 10 provides that:

Investments which have been the subject of a specific undertaking by one Contracting Party vis-à-vis investors of the other Contracting Party shall be governed, without prejudice to the provisions of this Agreement, by the terms of this undertaking, in so far as its provisions are more favourable than those laid down by this Agreement.

⁴² Award, para. 79; 40 ILM 426 (2001), p. 443.

⁴³ Ibid.

⁴⁴ Award, para. 80; 40 ILM 426 (2001), p. 443.

⁴⁵ Award, para. 81; 40 ILM 426 (2001), p. 444.

35. In a footnote, the Tribunal declared:

Article 10 protects rights granted to an investor under a special agreement if such rights are more favorable to the investor than those granted under the BIT. The question here is not whether one or the other is more favorable, but whether the Tribunal is in a position, on the facts of this case, to separate the breach of contract issues from violations of the BIT, considering that the parties to the Concession Contract have agreed to an exclusive remedy in the Tucumán courts for the determination of the disputed contractual issues which are not governed by the BIT.⁴⁶

36. The second point concerns the Tribunal's explanation of why, in its view, the so-called "fork in the road" provision of Article 8 (2) of the BIT has no application to Claimants in the circumstances of this case. Article 8 (2) provides in relevant part that, "[o]nce an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of those procedures is final". In the Tribunal's view, recourse by Claimants to the contentious administrative courts of Tucumán would not have precluded them from subsequently bringing claims before an ICSID tribunal in accordance with the BIT, i.e., it would not have amounted to a final "choice of one or the other of those procedures" within Article 8 (2). The Tribunal addressed this question twice, in paragraphs 55 and 81 of the Award.

37. In paragraph 55, the Tribunal announced this conclusion with the prefatory words "[b]y this same analysis". The analysis in question is found in paragraphs 53 and 54, where, after analysing the decision in the *Lanco* case, the Tribunal stated:

53. ... In this case the claims filed by CGE against Respondent are based on violation by the Argentine Republic of the BIT... As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.

54. Thus, Article 16.4 of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT.

⁴⁶ Award, para. 78, note 20; 40 ILM 426 (2001), p. 449.

55. *By this same analysis*, a suit by Claimants against Tucumán in the administrative courts of Tucumán for violation of the terms of the Concession Contract would not have foreclosed Claimant from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention...⁴⁷

38. As these passages show, the Tribunal interpreted Article 8 (2) as applying only to claims of a breach of the BIT, and not to purely contractual or other claims within the jurisdiction of the administrative courts of Tucumán, even if those claims overlapped with the claims for breach of the BIT. In other words, in the view of the Tribunal, the fork in the road set out in Article 8 (2) is limited in its application to claims which explicitly “allege a cause of action under the BIT” or which “[charge] the Argentine Republic with a violation of the Argentine-French BIT”; it does not apply in the circumstance of claims “based on the Concession Contract” or to “a suit by Claimants... for violation of the terms of the Concession Contract”.

39. That this is the correct interpretation of the Tribunal’s ruling as to Article 8 (2) is reinforced by the discussion contained in footnote 19, at paragraph 53 of the Award, where the Tribunal explicitly rejected Respondent’s contention that the Tucumán courts would have had jurisdiction over “a claim against the Argentine Republic based on the BIT”. It gave two reasons: first, “the Argentine Republic could have engaged in conduct or failed to act in violation of its obligations under the BIT even if Tucumán were not in violation of the Concession Contract”; and second, “the Tucumán courts do not have jurisdiction over such a suit [against the Argentine Republic] absent consent by Respondent”. The underlying assumption is, again, that for a claim before the Tucumán courts to be covered by Article 8 (2), it would have to be “based on the BIT”.

40. The Tribunal returned to the question in paragraph 81 of its Award:

That is why the Tribunal rejects Claimants’ position that they had no obligation to pursue such local remedies against the Province or that, in the event of a denial of justice of [sic] rights under the BIT, that any such legal action in the Tucumán

⁴⁷ 40 ILM 426 (2001), pp. 438-439 (emphasis added, footnote omitted).

courts would have waived their right to resort to arbitration against the Argentine Republic before ICSID under the BIT.⁴⁸

41. The Tribunal's stated rationale for rejecting Claimants' position is "the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts". The Tribunal appears to have considered that, because Claimants' contract and treaty claims could not be separated, a distinct claim "based on the BIT" was impossible in the circumstances of the case, at least prior to submission of the dispute to the provincial courts.

42. Thus, it seems that the Tribunal's conclusion that the fork in the road was never reached in this case is based on an interpretation of Article 8 (2) which limits its application exclusively to claims alleging a breach of the BIT, that is, to treaty claims as such.

43. The Tribunal returned to consider the Tucumán claims in paragraph 91 of the Award, which addresses Claimants' allegations regarding hostile and concerted "action by officials, legislative and executive". In this regard, the Tribunal said:

In addition to pointing out that the legislators on whose actions the Claimants rely were opponents of the governing party in Tucumán at the time that the disputes arose under the Concession Contract, Respondent presented a point by point refutation of the other evidence upon which Claimants rely for these allegations. After carefully reviewing the extensive memorials and testimony, the Tribunal finds that the record in these proceedings regarding these allegations does not establish a factual basis for attributing liability to the Argentine Republic under the BIT for the alleged actions of officials of Tucumán.⁴⁹

C. THE COMMITTEE'S ANALYSIS

44. Before proceeding to analyse the Tribunal's reasoning in more detail, with a view specifically to assessing the validity of the grounds of annulment raised by the parties, it is

⁴⁸ Ibid., p. 444.

⁴⁹ Ibid., p. 446.

necessary to say something about the France-Argentina BIT of 3 July 1991, and about the role of annulment panels and the scope of their powers.

(1) Relevant Provisions of the France-Argentina BIT

45. The Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments was signed by France and Argentina at Paris on 3 July 1991 and came into force on 3 March 1993.⁵⁰ It deals, *inter alia*, with the following matters relevant to the present proceeding.

(a) Definition of “Investor” and “Investment”

46. Article 1 (1) contains a broad definition of the term “investment”, which includes: “Shares, issue premiums and other forms of participation, albeit minority or indirect, in companies constituted in the territory of either Contracting Party”, which are invested in accordance with the law of the Contracting Party before or after the entry into force of the BIT.⁵¹

47. The term “investor” is defined in Article 1 (2). It is stated to apply to: (a) individuals; (b) bodies corporate having the nationality of one of the Contracting Parties, and also to

(c) Any body corporate effectively controlled, directly or indirectly, by nationals of one Contracting Party, or by bodies corporate having their registered office in the territory of one Contracting Party and constituted in accordance with that Party’s legislation.⁵²

48. At the time the Concession Contract was signed and the initial investment was made, the shareholding in CAA was divided between CGE, a Spanish company, Dragados y Construcciones Argentina S.A. (Dycasa), and an Argentine company, Benito Roggio e Hijos S.A. (Roggio), none of which had a controlling shareholding in CAA. When the letter of 5 March 1996 was written, Dycasa maintained its interest in CAA, hence the letter referred not

⁵⁰ Above, note 3.

⁵¹ BIT, Article 1(1)(b).

⁵² BIT, Article 1(2)(c).

only to the Argentine-France BIT but also to a BIT between Spain and Argentina. Subsequently, in June 1996, CGE acquired Dycasa's shareholding and thus had effective control of CAA within the meaning of Article 1 (2) (c) of the Argentine-French BIT at the time the arbitration proceedings were commenced.

49. Notwithstanding these facts (on which there seems to be no dispute between the parties) the Tribunal held, in a footnote, that "CAA should be considered a French investor from the effective date of the Concession Contract".⁵³ The Respondent claims that this finding was unsupported by any reasons and was in fact contradicted by uncontested evidence before the Tribunal. According to the Respondent, CGE was not the controlling shareholder at the time when most of the alleged BIT violations occurred, and CAA was accordingly not an "investor" for the purposes of the BIT at that time.

50. In common with other BITs, Article 1 clearly distinguishes between foreign shareholders in local companies and those companies themselves. While the foreign shareholding is by definition an "investment" and its holder an "investor", the local company only falls within the scope of Article 1 if it is "effectively controlled, directly or indirectly, by nationals of one Contracting Party" or by corporations established under its laws. In accordance with these provisions, which determine the scope of operation of the BIT, issues might well arise where there has been a transfer of control of a local company from a shareholder of one nationality to a shareholder of another. For example, if Dycasa had a Spanish treaty claim prior to March 1996, questions might arise as to how that claim could be later transferred to a French company, or as to how CGE could have acquired a French treaty claim in respect of conduct concerning an investment which it did not hold at the time the conduct occurred and which at that time did not have French nationality. At least, such questions might affect the quantum of recovery, but they might have further and even more basic legal consequences. But while it is arguable that the Tribunal failed to state any reasons for its finding that "CAA should be considered a French investor from the effective date of the Concession Contract", that finding played no part in the

⁵³ Award, para. 24, note 6; 40 ILM 426 (2001), pp. 447-448.

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

(b) Local Remedies and their Relation to Arbitration under the BIT

51. The role and effect, if any, of local remedies available to the investor under the France-Argentina BIT are addressed in Article 8 of the BIT, which is central to this case, and in certain articles of the ICSID Convention, especially Article 26.

52. In accordance with Article 26 of the Convention, consent to ICSID arbitration involves consent “to the exclusion of any other remedy”. A Contracting State may qualify its consent by requiring, as a pre-condition to arbitration, “the exhaustion of local administrative or judicial remedies”. Argentina did not impose such a pre-condition when it agreed to Article 8 of the BIT. Accordingly it is common ground (and the Tribunal so held) that the exhaustion of local remedies rule does not apply to claims under the BIT.

53. Article 8 of the BIT expressly gives investors a choice of forum. Article 8 provides in full as follows:

1. Any dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the two parties concerned.

2. If any such dispute cannot be so settled within six months of the time when a claim is made by one of the parties to the dispute, the dispute shall, at the request of the investor, be submitted:

- Either to the domestic courts of the Contracting Party involved in the dispute;
- Or to international arbitration under the conditions described in paragraph 3 below.

Once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final.

3. Where recourse is had to international arbitration, the investor may choose to bring the dispute before one of the following arbitration bodies:

- The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and National of other States opened for signature in Washington on 18 March 1965,¹ if both States Parties to this Agreement have already acceded to the Convention. Until such time as this requirement is met, the two Contracting Parties shall agree to submit the dispute to arbitration, in accordance with the rules of procedure of the Additional Facility of ICSID;
- An *ad hoc* arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

4. The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.

5. Arbitral decisions shall be final and binding on the parties to the dispute.

54. Two initial points may be made about these provisions. First, it is evident that the term “national jurisdictions” as used in Article 8 (2) (“juridictions nationales”/“jurisdicciones nacionales” in the authentic French and Spanish texts; “domestic courts” in the UNTS English translation) refers to all the courts and tribunals of the Contracting Parties, and not just to those at the federal level. In a treaty between a unitary and a federal state, such as France and Argentina respectively, one would not expect any disparity in the application of a phrase such as “national

jurisdictions”: all French courts and tribunals are national, as are, for the purposes of the BIT, all courts and tribunals of Argentina. The relevant distinction, as Article 8 (2) makes clear, is between “national” and “international” tribunals, not between “national” and “provincial” courts. Thus, there is no disparity between the phrases “national jurisdictions [*i.e.*, courts]” and “jurisdictions [courts] of the Contracting Party” as used in the two paragraphs of Article 8 (2). In consequence, the contentious administrative courts of Tucumán are to be considered as national courts falling within the scope of Article 8 (2).⁵⁴

55. Secondly, Article 8 deals generally with disputes “relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party”. It is those disputes which may be submitted, at the investor’s option, either to national or international adjudication. Article 8 does not use a narrower formulation, requiring that the investor’s claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with Article 11 of the BIT, which refers to disputes “concerning the interpretation or application of this Agreement”, or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11 “a claim that another Party has breached an obligation under” specified provisions of that Chapter. Consequently, if a claim brought before a national court concerns a “dispute relating to investments made under this Agreement” within the meaning of Article 8 (1), then Article 8 (2) will apply.⁵⁵ In the Committee’s view, a claim by CAA against the Province of Tucumán for breach of the Concession Contract, brought before the contentious administrative courts of Tucumán, would *prima facie* fall within Article 8 (2) and constitute a “final” choice of forum and jurisdiction, if that claim was coextensive with a dispute relating to investments made under the BIT.

⁵⁴ Although counsel for the Respondent contended otherwise before the Committee, the issue does not appear to have been the basis for the Tribunal’s ruling on Article 8 (2). See above, paras. 35-41, where the Committee summarises its understanding of the Tribunal’s reasoning on this point.

⁵⁵ Cf. *Waste Management, Inc. v. Mexico (No. 1)*, 40 ILM 56 (2001) at p. 68 (para. 28).

(c) Scope and Application of Substantive Provisions of the BIT

56. Claimants' case before the Tribunal was based on Articles 3 and 5 of the BIT, which deal, respectively, with "fair and equitable treatment according to the principles of international law" and with "measures of expropriation ... or any other equivalent measure".

57. Article 3 provides that:

Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, in accordance with the principles of international law, to the investments of investors of the other Party and to ensure that the exercise of the right so granted is not impeded either *de jure* or *de facto*.

58. Article 5 provides that:

1. Investments made by investors of one Contracting Party shall be fully and completely protected and safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in article 3 of this Agreement.

2. The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalization measures or any other equivalent measures having a similar effect of dispossession, except for reasons of public necessity and on condition that the measures are not discriminatory or contrary to a specific undertaking.

Any such dispossession measures taken shall give rise to the payment of prompt and adequate compensation the amount of which, calculated in accordance with the real value of the investments in question, shall be assessed on the basis of a normal economic situation prior to any threat of dispossession.

The amount and methods of payment of such compensation shall be determined not later than the date of dispossession. The compensation shall be readily convertible, paid without delay and freely transferable. It shall yield, up to the date of payment, interest calculated at the appropriate rate.

3. Investors of either Contracting Party whose investments have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency or uprising in the territory or maritime zone of the other Contracting Party shall be accorded by the latter Party treatment which is no less favourable than that accorded to its own investors or to investors of the most-favoured nation.

59. Both these Articles refer to an international law standard, expressly or by clear implication. The protection afforded under both Articles is extended to “investments made by investors”.

60. Again it is evident that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT’s standards and questions of contract. Article 8 (4), by expressly empowering the Tribunal to base its ruling on the provisions of the BIT as well as on the terms of any private agreements concluded on the subject of the investment, clearly acknowledges that possibility. So too does Article 8 (2), which contemplates that the very same dispute may be submitted either to the domestic courts of the Contracting Party (to be determined in accordance with the domestic law of that State), or to international arbitration (to be determined in accordance with the applicable law identified in Article 8 (4)).

(2) The Role of Annulment Under the ICSID Convention

61. It is against this background that the Committee has to consider the grounds for annulment relied on before it. Before doing so, however, some brief remarks on the role of annulment in the ICSID system are necessary.

62. Although the issue of the proper role of an annulment committee in the ICSID system must necessarily inform the analysis and the conclusions of this Committee, relatively little needs to be said about the issue for the reason that there seems to be little disagreement between the parties. Claimants and Respondent agree that an *ad hoc* Committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention. It also appears to be established that there is no presumption either in favour of or against annulment,⁵⁶ a point acknowledged by Claimants as well as Respondent.

63. No doubt the Committee must take great care to ensure that the reasoning of an arbitral tribunal is clearly understood, and must guard against the annulment of awards for trivial cause. But where a tribunal has “manifestly exceeded its powers” or has committed “a serious departure from a fundamental rule of procedure” – both grounds for annulment under Article 52 of the ICSID Convention and both relied on by Claimants in this proceeding – the matter is by definition not trivial.

64. A greater source of concern is perhaps the ground of “failure to state reasons”, which is not qualified by any such phrase as “manifestly” or “serious”. However, it 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.⁵⁷ It bears reiterating that an *ad hoc* committee is not a court of appeal. 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.

65. 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.

⁵⁶ Cf. *MINE v. Guinea*, Decision on Annulment of 22 December 1989, (1989) 4 ICSID Rep 79 at p. 86 (paras. 4.09-4.12); and see also C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) (hereafter “Schreuer”), at pp. 902-3.

⁵⁷ See Schreuer, pp. 984-1008.

66. Finally, it appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annulable error is found. Article 52 (3) provides that a committee “shall have the authority to annul the award or any part thereof”, and this has been interpreted as giving committees some flexibility in determining whether annulment is appropriate in the circumstances.⁵⁸ Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties. This question, as it applies in the circumstances of the present case, is addressed below.

67. Another question, which was debated between the parties in this case, is whether an *ad hoc* committee is limited to the grounds for annulment relied on by a Claimant, or whether the Respondent may itself raise additional grounds for annulment. In their Application, Claimants sought only the partial annulment of the Award, on three grounds: (1) that the Tribunal manifestly exceeded its powers; (2) that there had been a serious departure from a fundamental rule of procedure; and (3) that the Award failed to state the reasons on which it is based.⁵⁹ The Respondent not only resisted each of these contentions, it further argued that if any of them were to be upheld, the Award *as a whole* should be annulled, on the grounds either that the Tribunal had no jurisdiction at all, or that there was a fundamental contradiction in the Tribunal’s reasoning as between that part which dealt with jurisdiction and that part which dealt with the merits. By way of reply, in their written pleadings, Claimants argued that what they called Respondent’s “counterclaim” for annulment of the Award as a whole was inadmissible, on the ground that it was out of time and that Article 52 made no provision for counterclaims.

68. The Committee agrees with Claimants that a counterclaim for annulment, that is, a claim which is not raised by the party concerned as a separate request in accordance with Article 52 (1) of the Convention, is inadmissible. But it does not follow that a party, such as Respondent in the present case, may not present its own arguments on questions of annulment, provided that those arguments concern specific matters pleaded by the party requesting annulment, in this case the Claimants. In the opinion of the Committee, a party to annulment proceedings which

⁵⁸ See Schreuer, pp. 1018-1023, with references to the authorities, especially *MINE* at paras. 4.09-4.10.

successfully pleads and sustains a ground for annulment set out in Article 52 (1) of the ICSID Convention cannot limit the extent to which an *ad hoc* committee may decide to annul the impugned award as a consequence. Certain grounds of annulment will affect the award as a whole – for example, where it is demonstrated that the tribunal which rendered the award was not properly constituted (Article 52 (1) (a)). Others may only affect part of the award. An *ad hoc* committee is expressly authorised by the Convention to annul an award “in whole or in part” (Article 52 (3)).

69. Thus where a ground for annulment is established, it is for the *ad hoc* committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant’s characterisation of its request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award. This is reflected in the difference in language between Articles 52 (1) and 52 (3), and it is further supported by the *travaux* of the ICSID Convention. Indeed, Claimants in the present case eventually accepted this view.

70. In seeking in the alternative the annulment of the jurisdictional portion of the Award, the Respondent was not making a late annulment application by way of a counterclaim – a procedure which, as Claimants correctly asserted, is not contemplated by Article 52 of the ICSID Convention. Rather it was arguing that if Claimants’ position on the merits were to be upheld, either under Article 52 (1) (b) or 52 (1) (e), the effect must necessarily be to bring down the whole Award. That position was entirely open to the Respondent. It in no way entailed what would have been an inadmissible counterclaim for annulment on new grounds.

(3) The Grounds of Annulment

71. The Committee accordingly turns to the grounds for annulment themselves. Since, as explained above, the grounds validly pleaded by the Respondent extend to the Tribunal’s holding on jurisdiction, it is appropriate to consider first the issue of the Tribunal’s jurisdiction.

⁵⁹ Application, para. 3; see also para. 2 of the present decision.

(a) The Tribunal's Jurisdictional Finding

72. The Committee has already summarised the grounds on which the Tribunal upheld its jurisdiction. The Tribunal gave extensive reasons for doing so, and these reasons are not in themselves contradictory.⁶⁰ It is true that Respondent argued, in the alternative, that there was a contradiction between those reasons and the reasons given by the Tribunal concerning the merits. But Argentina also argued that the Tribunal lacked jurisdiction in any event. If this is right, it was a manifest excess of power for the Tribunal to proceed to consider the merits, and the whole Award must be annulled. Accordingly, the question of failure to give reasons, including possibly contradictory reasons, does not arise so far as the Tribunal's jurisdictional finding is concerned.

73. For its part, however, the Committee has no difficulty accepting each of the four propositions, summarised in paragraph 14 above, on the basis of which the Tribunal held that it had jurisdiction and that its jurisdiction extended to the Tucumán claims.

74. In particular, the Committee agrees with the Tribunal in characterising the present dispute as one "relating to investments made under this Agreement" within the meaning of Article 8 of the BIT. Even if it were necessary in order to attract the Tribunal's jurisdiction that the dispute be characterised not merely as one relating to an investment but as one concerning the treatment of an investment in accordance with the standards laid down under the BIT, it is the case (as the Tribunal noted) that Claimants invoke substantive provisions of the BIT.

75. The Committee likewise agrees that the fact that the investment concerns a Concession Contract made with Tucumán, a province of Argentina which has not been separately designated to ICSID under Article 25 (1), does not mean that the dispute falls outside the scope of the BIT, or that the investment ceases to be one "between one Contracting Party and an investor of the other Contracting Party" within the meaning of Article 8 (1) of the BIT.

⁶⁰ With the possible exception of the matter concerning Dycasa's shares, referred to above, para. 48.

76. This being so, the fact that the Concession Contract referred contractual disputes to the contentious administrative courts of Tucumán did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT. Article 16 (4) of the Concession Contract did not in terms purport to exclude the jurisdiction of an international tribunal arising under Article 8 (2) of the BIT; at the very least, a clear indication of an intention to exclude that jurisdiction would be required.

77. The *Lanco* decision, cited by the Tribunal, supports its finding of jurisdiction.⁶¹ In that case the contract at issue, which involved an agency of the federal government of Argentina, contained an exclusive jurisdiction clause referring contractual disputes to a federal contentious administrative tribunal. The *Lanco* Tribunal held:

[T]he stipulation of Article 12 of the Concession Agreement, according to which the parties shall submit to the jurisdiction of the Federal Contentious-Administrative Tribunals of the City of Buenos Aires, cannot be considered a previously agreed dispute-settlement procedure. The Parties could have foreseen submission to domestic or international arbitration, but the choice of a national forum could only lead to the jurisdiction of the contentious-administrative tribunals, since administrative jurisdiction cannot be selected by mutual agreement.⁶²

78. But in any event the *Lanco* Tribunal denied that an exclusive jurisdiction clause could exclude ICSID jurisdiction, relying in particular on Article 26 of the ICSID Convention. It said:

§39 A State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made (i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause. The ARGENTINA-U.S. Treaty does not provide at any point for the exhaustion of domestic remedies, and the Argentine Republic, for its part, has not alleged that there is any such domestic legislation. The only requirement that the ARGENTINA-U.S. Treaty does provide for is the period of six months that is required for turning to ICSID arbitration.

§40 In our case, the Parties have given their consent to ICSID arbitration, consent that is valid, there thus being a presumption in favor of ICSID arbitration, without having first to exhaust domestic remedies. In effect, once valid consent to ICSID arbitration is established, any other forum called on to

⁶¹ 40 ILM 457 (2001), cited by the Tribunal in its Award, para. 53.

⁶² 40 ILM 457 (2001), p. 466 (§ 26).

decide the issue should decline jurisdiction. The investor's consent, which comes from its written consent by letter of September 17, 1997, and its request for arbitration of October 1, 1997, and the consent of the State which comes directly from the ARGENTINA-U.S. Treaty, which gives the investor the choice of forum for settling its disputes, indicate that there is no stipulation contrary to the consent of the parties... In effect, the offer made by the Argentine Republic to covered investors under the ARGENTINA-U.S. Treaty cannot be diminished by the submission to Argentina's domestic courts, to which the Concession Agreement remits.⁶³

79. Indeed, *Lanco* was a stronger case on the facts than the present, as regards the effect of an exclusive jurisdiction clause, since the foreign claimant in *Lanco* was actually a party to the exclusive jurisdiction clause at issue, unlike CGE here.⁶⁴

80. For all these reasons, the Respondent's request that the Tribunal's jurisdictional finding be annulled must be rejected.

(b) The Tribunal's Findings on the Merits

81. Claimants relied on three grounds set out in Article 52 of the ICSID Convention as supporting its request for partial annulment. The Committee will deal with these in turn.

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

82. The first of these grounds concerns the claim that "there has been a serious departure from a fundamental rule of procedure" (Article 52 (1) (d)). Claimants argued that the Tribunal had departed from a fundamental rule of procedure in that its eventual decision, notably as to the

⁶⁶ Ibid, §§ 39-40.

⁶⁴ See also *Salini Costruttori SpA v. Kingdom of Morocco*, ICSID, jurisdictional decision, 23 July 2001, reported in [2001] *Journal de droit international* 196, with note by Gaillard, *ibid.*, p. 209. This was a construction dispute focusing on the amount payable under a contract with a local jurisdiction clause. The Tribunal held that provisions in the BIT concerning measures of expropriation or nationalization "ne saurait être interprétée dans le sens d'une exclusion de tout grief d'origine contractuelle du champ de l'application de cet article" (p. 209, para. 59), and further that, notwithstanding the local jurisdiction clause, "le Tribunal arbitral demeure compétent pour les violations du contrat qui constituerait en même temps, à la charge de l'Etat une violation de l'Accord bilatéral" (p. 209, para. 62).

dismissal of the Tucumán claims on grounds related to Article 16 (4) of the Concession Contract, concerned a question not adequately canvassed in argument.

83. The Committee cannot find in the record of the arbitration, including the Award, any basis for Claimants' allegations in this regard. Under 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. In the opinion of the Committee, the Tribunal proceeded with abundant care. It considered the issue of jurisdiction first, and it decided, in the exercise of its discretion, to join that issue to the merits of the dispute. It then considered the merits at length and rendered a densely reasoned award.

84. Claimants contend the Tribunal's decision came unannounced, and that they had no opportunity to present arguments on the decision to dismiss their claim on the merits on grounds related to Article 16 (4) of the Concession Contract. It may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52 (1) (d) of the ICSID Convention. In fact, the Tribunal had already determined that the questions of jurisdiction and merits were closely linked, and it had joined the two. Moreover, in its questioning and especially its request for post-hearing briefs, the Tribunal clearly indicated that it had concerns as to how to reconcile Article 8 of the BIT and Clause 16 (4) of the Concession Contract.

85. From the record, it is evident that the parties had a full and fair opportunity to be heard at every stage of the proceedings. They had ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing itself was meticulously conducted to enable each party to present its point of view. The Tribunal's analysis of issues was clearly based on the materials presented by the parties and was in no sense *ultra petita*. For these reasons, the

Committee finds no departure at all from any fundamental rule of procedure, let alone a serious departure.

(ii) *Manifest excess of powers: Article 52 (1) (b)*

86. It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.⁶⁵ One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52 (1) (b).

87. 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. In the present case, Claimants contend that, far from considering their claims concerning breach of the BIT prior to purportedly dismissing them, the Tribunal actually declined to decide Claimants' allegations since it considered that, in order to do so, it would have had to address issues which, according to the Concession Contract, fell within the exclusive jurisdiction of the Tucumán courts. Claimants argue that if the Tribunal was wrong as regards this approach – that is, if the Tribunal erred in finding that it could not consider the BIT claims, in the circumstances – it failed to exercise its treaty jurisdiction, a jurisdiction which it had itself upheld. On that assumption, its failure to do so could also be said to be manifest.

⁶⁵ Schreuer, pp. 937-938.

88. With these preliminary comments in mind, the Committee turns to the substance of Claimants' request for partial annulment of the Award on the ground of manifest excess of powers. In doing so, it is necessary to distinguish between the Tribunal's treatment of the federal claims and the Tucumán claims.

The federal claims

89. An initial point concerns Claimants' argument that there was a breach of the BIT by reason of the actions and omissions of ministers and officers of the federal government of the Argentine Republic – the so-called “federal claims”. As the review of the Tribunal's reasoning set out at paragraphs 18-22 above demonstrates, the Award clearly evidences a certain reliance on Article 16 (4) of the Concession Contract even as to the federal claims; and the Tribunal's interpretation of the obligations incumbent on the federal authorities under the BIT emerges more by implication from its treatment of the facts than as a result of any detailed analysis. However, in the opinion of the Committee, it is nonetheless clear that the Tribunal carefully considered the federal claims on the facts, and that it rejected those claims. The Tribunal committed no excess of power, manifest or other, so far as the federal claims are concerned.

90. Claimants submit that, even if the Tribunal could be said to have considered the federal claims on their merits, its consideration was vitiated in that the Tribunal's handling of the federal and Tucumán claims was interdependent. Specifically, Claimants argue that if Tucumán's actions did in truth constitute a breach of the BIT, then Respondent was under a far more stringent obligation to respond and to correct the situation than the Tribunal found applied to it. Claimants contend that the Tribunal – always with its mind set on Article 16 (4) – failed to consider this alternative. In the opinion of the Committee, it is true, as mentioned in the preceding paragraph, that Article 16 (4) did obtrude into the Tribunal's analysis of the federal claims to some degree. However, the Tribunal did not suggest that Claimants were in any sense obliged to pursue their federal claims in any domestic court or tribunal. It held, rather, that the federal authorities could reasonably have regarded the dispute as contractual in character,⁶⁶ and

⁶⁶ Award, para. 87; 40 ILM 426 (2001), p. 445.

that the extent of any federal obligation to react could reasonably have been influenced by this perception.

91. As to the Tribunal's findings of fact, there is no basis under Article 52 of the ICSID Convention for this Committee to disagree. The Tribunal found that the Argentine federal authorities responded to Claimants' initiatives, that they sought to resolve the problem and in fact took reasonable steps to do so, that they did not fail to do anything requested of them and that they were never themselves charged, directly, with any breach of the BIT. As to the Tribunal's findings of law, it may be that the Award lacks a detailed analysis of the relevant BIT provisions, as Claimants contend. Yet the gist of the Tribunal's reasoning is clear enough. On its face, Article 3 of the BIT imposes no more than an obligation on the Argentine Republic to take appropriate care. And the Tribunal's findings, taken together, are more than sufficient to provide a basis for the Tribunal's clear conclusion that the federal claims were not sustainable, and that there had been no breach of Article 3 as a result of any federal act or omission. Moreover the Committee does not consider that the Tribunal's dismissal of Claimants' federal claims was so intimately linked to its decision regarding the Tucumán claims, and to its alleged failure to exercise its jurisdiction with respect to the latter, that the Tribunal's determination of the federal claims must fall in the event that its decision on the Tucumán claims is annulled.

92. For these reasons, Claimants' request for partial annulment of the Award in relation to the Tribunal's determination of the federal claims is rejected.

The Tucumán claims

93. The second question in relation to Article 52 (1) (b) is whether the Tribunal, having validly held that it had jurisdiction over the Tucumán claims, was entitled nonetheless to dismiss them as it did. Claimants, for their part, submit that the Tribunal did not so much dismiss the Tucumán claims as decline to address them. They argue that the only reason those claims were dismissed was that they were held to be substantially identical with claims against Tucumán under the Concession Contract, which the Tribunal found it could not determine, and that the

Tribunal's refusal to decide the Tucumán claims on this basis was a manifest excess of powers. The Respondent argues that, assuming the Tribunal had jurisdiction over these claims, it acted correctly in dismissing them on the basis of Article 16 (4) of the Concession Contract, but that in any event this was not the only reason for dismissal since the Tribunal did consider the Tucumán claims on their merits.

94. In dealing with these issues, it is necessary first to consider the relationship between the responsibility of Argentina under the BIT and the rights and obligations of the parties to the Concession Contract (especially those arising from Article 16 (4), the exclusive jurisdiction clause); and secondly, to consider precisely what the Tribunal decided with respect to the Tucumán claims.

95. 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.

96. 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.⁶⁷ 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.

97. The distinction between the role of international and municipal law in matters of international responsibility is stressed in the commentary to Article 3 of the ILC Articles, which reads in relevant part as follows:

(4) The International Court has often referred to and applied the principle. For example in the *Reparation for Injuries* case, it noted that “[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible... the Member cannot contend that this obligation is governed by municipal law”. In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

‘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. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.’

Conversely, as the Chamber explained:

‘...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.’

...

(7) 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,

⁶⁷ See above, paras. 16, 23-33, 43.

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.⁶⁸

98. In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.⁶⁹ For example in the *Woodruff* case,⁷⁰ a decision of an American-Venezuelan Mixed Commission in 1903, a claim was brought for breach of a contract which contained the following clause:

Doubts and controversies which at any time might occur in virtue of the present agreement shall be decided by the common laws and ordinary tribunals of Venezuela, and they shall never be, as well as neither the decision which shall be pronounced upon them, nor anything relating to the agreement, the subject of international reclamation.

99. The Commission in that case held that Woodruff was bound by this clause not to refer his contractual claim to any other tribunal. At the same time, the exclusive jurisdiction clause did not and could not preclude a claim by his government in the event that the treatment accorded him amounted to a breach of international law:

[W]hereas certainly a contract between a sovereign and a citizen of a foreign country can never impede the right of the Government of that citizen to make international reclamation, wherever according to international law it has the right or even the duty to do so, as its rights and obligations can not be affected by any precedent agreement to which it is not a party;

⁶⁸ Commentary to Article 3, paras. (4), (7) (footnotes omitted). The passages from the *ELSI* case, quoted in para. (4) of the commentary, are to be found at ICJ Reports 1989 at p. 51, para. 73, and p. 74, para. 124.

⁶⁹ That is, unless the treaty in question otherwise provides. See, e.g., Article II (1) of the Claims Settlement Declaration of 19 January 1981, 1 *Iran-U.S. Claims Tribunal Reports* p. 9, which overrode exclusive jurisdiction clauses concerning United States courts but not Iranian courts: see the cases cited by C.N. Brower & J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998) pp. 60-72. The Committee does not need to consider whether the effect of Article 8 of the BIT is to override exclusive jurisdiction clauses in contracts underlying investments to which the BIT applies.

⁷⁰ *Reports of International Arbitral Awards*, vol. IX, p. 213.

But whereas this does not interfere with the right of a citizen to pledge to any other party that he, the contractor, in disputes upon certain matters will never appeal to other judges than to those designated by the agreement, nor with his obligation to keep this promise when pledged, leaving untouched the rights of his Government, to make his case an object of international claim whenever it thinks proper to do so and not impeaching his own right to look to his Government for protection of his rights in case of denial or unjust delay of justice by the contractually designated judges;...⁷¹

100. The Commission accordingly dismissed the claim “without prejudice on its merits, when presented to the proper judges”, on the ground that “by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this Commission”.⁷²

101. On the other hand, where “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.⁷³ At most, it might be relevant – as municipal law will often be relevant – in assessing whether there has been a breach of the treaty.

102. 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.

⁷¹ Ibid., p. 222.

⁷² Ibid., p. 223.

⁷³ It is not necessary for the Committee to pronounce on the content of the standard laid down in the BIT, in particular Article 3. It may be that “mere” breaches of contract, unaccompanied by bad faith or other aggravating circumstances, will rarely amount to a breach of the fair and equitable treatment standard set out in Article 3. The Tribunal did not, however, offer any interpretation of Article 3, nor seek to base itself on this consideration.

103. Moreover the Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16 (4) of the Concession Contract could have prevented its characterisation as such. A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.

104. The Respondent argues that, even if the Tribunal had jurisdiction, and even if it could not decline to exercise that jurisdiction by reference to the exclusive jurisdiction clause in the Concession Contract, this was not what the Tribunal did. According to the Respondent, it emerges clearly from the Award that the Claimants had no arguable case for a breach of Articles 3 or 5 of the BIT and that, at best, their claim was one for breach of contract: the issue of a treaty claim could only arise in the event that the contentious administrative tribunals of Tucumán denied Claimants justice, substantively or procedurally.

105. The question thus becomes how to characterize the Tribunal's decision. In considering that question, the Committee does not believe that it is material either that CGE was not a party to the Concession Contract or that the parties to the Concession Contract were CAA and the Province of Tucumán, as opposed to CAA and the federal government. If the Tribunal was right in saying that it could not consider any allegation of breach of treaty which required it to interpret or apply the Concession Contract, then it is arguable that CGE could be in no better position than CAA. It is also arguable that this conclusion should apply even though CAA's contractual commitment was to a province, since the acts of that province form the nub of the claim. But it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT.

106. Claimants made a series of allegations as to the conduct of Tucumán, much of which, they claim, involved measures taken in bad faith. Such action included alleged instances of: acts of the Ombudsman and other regulatory authorities; incitement of consumers, by legislators and

others, not to pay their water bills; unauthorized tariff changes; the incorrect imposition of fines (never in fact collected) for allegedly deficient water quality; incorrect invoicing for municipal and provincial water taxes; conduct relating to the “black water” problem, which was blamed on CAA, but which CAA denied was its fault; unilateral changes by the provincial Governor to the second renegotiated agreement; and various post-termination conduct. This conduct, they contend, amounted on the whole to concerted action by the Tucumán authorities to frustrate the concession.

107. The Tribunal expressed views on some of these allegations, but by no means all. For example, in paragraph 82 of the Award, the Tribunal took the view that the unilateral changes to the renegotiated agreement did not amount to a breach of the BIT because there was no legal duty to revise the concession contract.⁷⁴ In paragraph 91, under the general heading “Failure of the Argentine Republic to Respond to Actions of Tucumán Officials”, the Tribunal concluded that “the record... does not establish a factual basis for attributing liability to the Argentine Republic under the BIT for the alleged actions of officials of Tucumán”.⁷⁵ In its context the latter passage is not unequivocal; it suggests that the Tribunal had in mind earlier discussion of the “strict liability standard of attribution”, and the reference to “alleged action” is troublesome: it is in the end unclear whether the Tribunal rejected the Claimants’ allegations of fact or whether they held that the allegations, though potentially made out, were not sufficient to “attribute liability” to the federal government.

108. But however this may be, it is clear from the core discussion of the Tucumán claims, at paragraphs 77-81 of the Award, that the Tribunal declined to decide key aspects of the Claimants’ BIT claims on the ground that they involved issues of contractual performance or non-performance. The Tribunal itself characterised these passages, in paragraph 81, as embodying its “decision” with respect to the Tucumán claims.

109. A key passage in this regard is found in paragraph 79, where the Tribunal said:

⁷⁴ Award, para. 82; 40 ILM 426 (2001), p. 444.

[G]iven the nature of the dispute between Claimants and the Province of Tucumán, it is not possible for this Tribunal to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract considering, in particular, that much of the evidence presented in this case has involved detailed issues of performance and rates under the Concession Contract.⁷⁶

110. This passage calls for two remarks. First, it is couched in terms not of decision but of the *impossibility* of decision, the impossibility being founded on the need to interpret and apply the Concession Contract.⁷⁷ Yet under Article 8 (4) of the BIT the Tribunal had jurisdiction to base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT. Second, the passage appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, *a priori*, have breached the BIT. However, there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.⁷⁸

111. For these reasons, and despite certain passages of the Award in which the Tribunal seems to go further into the merits, the Committee can only conclude that the Tribunal, in dismissing

⁷⁵ Award, para. 91; 40 ILM 426 (2001), p. 446.

⁷⁶ Award, para. 79; 40 ILM 426 (2001), p. 443.

⁷⁷ See also the Tribunal's summary, cited in para. 11 above, where the Tribunal said it was "impossible... to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement".

⁷⁸ See ILC Articles, commentary to Article 4, para. (6), commentary to Article 12, paras. (9)-(10). See also C. Amerasinghe, "State Breaches of Contracts with Aliens and International Law", *American Journal of International Law*, vol. 58 (1964), p. 881, at pp. 910-912: "The general proposition that, where a state performs an act which is prohibited by a treaty to which it is a party, it will be responsible for a breach of international law to the other party or parties to the treaty requires no substantiation. In accordance with the same principle, an act which constitutes a breach of contract would be a breach of international law, if it is an act which that state is under an obligation not to commit by virtue of a treaty to which it and the national state of the alien are parties"; R. Jennings & A. Watts, *Oppenheim's International Law* (9th edn.) (Harlow, Longman, 1992), p. 927: "It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes *per se* a breach of an international obligation, unless there is some such additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility".

the Tucumán claims as it did, actually failed to decide whether or not the conduct in question amounted to a breach of the BIT. In particular, the Tribunal repeatedly referred to allegations and issues which, it held, it could not decide given the terms of Article 16 (4) of the Concession Contract, even though these were adduced by Claimants specifically in support of their BIT claim.⁷⁹ Moreover, it offered no interpretation whatsoever either of Article 3 or of Article 5 of the BIT, something which was called for if the claims were to be dismissed on their merits.

112. It is not the Committee's function to form even a provisional view as to whether or not the Tucumán conduct involved a breach of the BIT, and it is important to state clearly that the Committee has not done so. But it is nonetheless the case that the conduct alleged by Claimants, if established, *could* have breached the BIT. The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina. It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT. In the Committee's view, the Tribunal, faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it. Although the Tribunal expressed conclusions on certain aspects of the claim, it never expressed a conclusion as to the claim as a whole, still less did it assess Claimants' case against the requirements of Article 3 or 5 of the BIT.

113. In the light of Article 8 of the BIT, the situation carried risks for Claimants. Having declined to challenge the various factual components of its treaty cause of action before the administrative courts of Tucumán, instead choosing to commence ICSID arbitration – and having thereby, in the Committee's view, taken the “fork in the road” under Article 8 (4) – CAA took the risk of a tribunal holding that the acts complained of neither individually nor collectively rose to the level of a breach of the BIT. In that event, it would have lost both its treaty claim and its contract claim. But on the other hand it was entitled to take that risk, with its

⁷⁹ Award, paras. 65, 66, 67, 68, 69, 74, 75, 76, 77, 78, 79, 80, 81; 40 ILM 426 (2001), pp. 440-444.

associated burden of proof. A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard. The availability of local courts ready and able to resolve specific issues independently may be a relevant circumstance in determining whether there has been a breach of international law (especially in relation to a standard such as that contained in Article 3). But it is not dispositive, and it does not preclude an international tribunal from considering the merits of the dispute.

114. It should be stressed that the conduct complained of here was not more or less peripheral to a continuing successful enterprise. The Tucumán conduct (in conjunction with the acts and decisions of Claimants) had the effect of putting an end to the investment. In the Committee's view, the BIT gave Claimants the right to assert that the Tucumán conduct failed to comply with the treaty standard for the protection of investments. Having availed itself of that option, Claimants should not have been deprived of a decision, one way or the other, merely on the strength of the observation that the local courts could conceivably have provided them with a remedy, in whole or in part. Under the BIT they had a choice of remedies.

115. For all of these reasons, the Committee concludes that the Tribunal exceeded its powers in the sense of Article 52 (1) (b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims. Given the clear and serious implications of that decision for Claimants in terms of Article 8 (2) of the BIT, and the surrounding circumstances, the Committee can only conclude that that excess of powers was manifest. It accordingly annuls the decision of the Tribunal so far as concerns the entirety of the Tucumán claims.

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

116. In view of the foregoing conclusion, it is unnecessary to consider the further ground of annulment relied on by Claimants, viz., that in dismissing the claim the Tribunal failed to state the reasons on which its decision was based. As to the federal claims, the Committee has already

concluded that reasons for the dismissal of those claims were given. As to the Tucumán claims, in the Committee's view the Tribunal gave very full reasons for the step it took, viz., the dismissal of those claims without any overall consideration of their merits. The question of failure to state reasons would only arise if one took the view that the Tribunal actually did reach a conclusion adverse to Claimants under Articles 3 and 5 in respect of the Tucumán claims as a whole – a view the Committee has already rejected. Accordingly, nothing more needs to be said on this ground of annulment.

D. COSTS

117. The Tribunal made no order for costs, and required Claimants and Respondent to share equally the costs of ICSID. It observed that the dispute raised “a set of novel and complex issues not previously addressed in international arbitral precedent relating to the interplay of a bilateral investment treaty, a Concession Contract with a forum-selection clause and the ICSID Convention”.⁸⁰ It noted that both parties had prevailed to some extent. These considerations apply equally to the present phase of the proceedings. Claimants have succeeded in part, but only in part. Moreover, Argentina was entitled to take the position it took, which itself raised a difficult and novel question of public importance concerning ICSID and the operation of investment protection agreements on the model of the BIT.

118. In the light of the importance of the arguments advanced by the parties in connection with this case, the Committee considers it appropriate that each party bear its own expenses incurred with respect to this annulment proceeding, and that the parties bear equally all expenses incurred by the Centre in connection with this proceeding, including the fees and expenses of the members of the Committee.

⁸⁰ Award, para. 95; 40 ILM 426 (2001), p. 447.

E. DECISION

119. For the foregoing reasons, the Committee DECIDES:

- (a) The Tribunal rightly held that it had jurisdiction over the claims.
- (b) The Tribunal committed no annullable error in its rejection of the federal claims (claims concerning the conduct of federal authorities) on the merits, and that rejection is accordingly *res judicata*.
- (c) The Tribunal manifestly exceeded its powers by not examining the merits of the claims for acts of the Tucumán authorities under the BIT and its decision with regard to those claims is annulled.
- (d) Each party shall bear its own expenses, including legal fees, incurred in connection with this annulment proceeding.
- (e) Each party shall bear one half of the costs incurred by the Centre in connection with this annulment proceeding. Accordingly, the Argentine Republic shall reimburse the Claimants one half of the total costs incurred by the Centre in connection with this annulment proceeding once the amount has been determined by the Secretariat of the Centre.

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

L. YVES FORTIER, C.C., Q.C.
President of the Committee
Date:

PROFESSOR JAMES R. CRAWFORD
Member
Date:

PROFESSOR JOSÉ CARLOS FERNANDEZ ROZAS
Member
Date:

