Continental Casualty Company
(Claimant)

v.

The Argentine Republic
(Respondent)

(ICSID Case No. ARB/03/9)
(Annulment Proceeding)

Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic

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Members of the *ad hoc* Committee

Dr. Gavan Griffith Q.C., President
Mr. Christer Söderlund, Arbitrator
Judge Bola A. Ajibola, Arbitrator

Assistant to the *ad hoc* Committee: Dr. Christopher Staker

Secretary of the *ad hoc* Committee:
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Date of dispatch to the parties: September 16, 2011

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

Other references

Argentina	The Argentine Republic
Argentina's Application	See paragraph 11
Award	The Award to which the Application for Annulment in

	the present proceedings relates: *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008
BIT	Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed November 14, 1991; entered into force October 20, 1994
CDs	See paragraph 51
Centre	International Centre for Settlement of Investment Disputes
CNA	See paragraph 44
CNA ART	See paragraph 44
Committee	See paragraphs 5, 6, 8-10 and 13-14
Continental	Continental Casualty Company
Continental's Application	See paragraph 1
Corralito	See paragraph 52
Corralón	See paragraph 54
Decree 1387	See paragraph 50
Decree 1735/04	See paragraph 63
Decree 214	See paragraph 55
Decree 260/02	See paragraph 56
Decree 471/02	See paragraph 57
Decree 644/02	See paragraph 59
Emergency Law	See paragraph 53
expropriation clause	See paragraph 64(d)
fair and equitable treatment clause	See paragraph 64(b)
First Rosen Report	See paragraph 238

GGLs	See paragraph 50
The Hearing	See paragraph 32
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159
ILC Articles	International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission, 2001,* vol. II (Part Two); annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4
LETEs	See paragraph 51
pesification	See paragraph 53
principle of necessity	See paragraphs 115-116
Second Rosen Report	See paragraph 159
transfers clause	See paragraph 64(c)
the Treaty	The BIT (*q.v.*)
Tribunal	The tribunal which rendered the Award (*q.v.*) to which the Continental's Application (*q.v.*) and Argentina's Application (*q.v.*) in the present annulment proceedings relate
umbrella clause	See paragraph 64(a)
USD, U.S. dollar, U.S.$	United States dollar
Vienna Convention	Vienna Convention on the Law of Treaties, Vienna, May 23, 1969; 1155 U.N.T.S. 331

I. INTRODUCTORY MATTERS

A. Introduction

1. On January 2, 2009, Continental Casualty Company ("**Continental**") filed with the International Centre for Settlement of Investment Disputes (the "**Centre**" or "**ICSID**") an application in writing ("**Continental's Application**") requesting the partial annulment of the Award of September 5, 2008 (the "**Award**"), rendered by the tribunal (the "**Tribunal**") in the arbitration proceeding between Continental and the Argentine Republic ("**Argentina**").

2. Continental's 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**").

3. On January 14, 2009, the Acting Secretary-General of ICSID registered Continental's Application and sent a copy to Argentina.

4. On March 13, 2009, the Centre informed the parties of the ensuing recommendation to the Chairman of the Administrative Council of the appointment of Dr. Gavan Griffith Q.C., from Australia, Judge Mohamed Shahabuddeen, from Guyana, and Mr. Christer Söderlund, from Sweden, to the *ad hoc* Committee, each of whom was designated to the ICSID Panel of Arbitrators by their respective countries.

5. By letter of March 19, 2009, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the parties were notified by the Centre that an *ad hoc* Committee (the "**Committee**") had been constituted, composed of Dr. Gavan Griffith Q.C., Judge Mohamed Shahabuddeen and Mr. Christer Söderlund. On the same date the parties were informed that Mr. Tomás Solís, Counsel, ICSID, would serve as Secretary of the Committee.

6. On March 20, 2009, the Centre informed the parties of the designation of Dr. Gavan Griffith Q.C. as President of the Committee.

7. On April 22, 2009, the Committee held a first session by telephone conference.

8. On May 13, 2009 the Centre informed the parties of the resignation of Judge Shahabuddeen for health reasons and notified the parties of the vacancy on the *ad hoc* Committee and of the suspension of the proceeding.

9. On May 20, 2009, the Centre informed the parties of the ensuing recommendation to the Chairman of the Administrative Council of the appointment of Judge Bola A. Ajibola of Nigeria designated by Nigeria to the ICSID Panel of Arbitrators.

10. By letter of June 3, 2009, the Centre informed the parties that the *ad hoc* Committee was reconstituted composed of Dr. Gavan Griffith Q.C. (Australian), President; Judge Bola A. Ajibola (Nigerian); and Christer Söderlund (Swedish).

11. On 5 June 2009, Argentina filed with the Centre an application in writing ("**Argentina's Application**") requesting the partial annulment of the Award and a stay of enforcement of the Award.

12. On June 8, 2009, the Acting Secretary-General of ICSID registered Argentina's Application, and notified the parties of the provisional stay of enforcement of the award.

13. By letter of June 9, 2009, the Centre informed the parties that the Chairman of the Administrative Council had appointed the same *ad hoc* Committee to consider Argentina's Application.

14. By letter of June 10, 2009, the Centre informed the parties that the *ad hoc* Committee was constituted composed of Dr. Gavan Griffith Q.C. (Australian), President; Judge Bola A. Ajibola (Nigerian); and Christer Söderlund (Swedish). The parties were further informed that the Committee would hear Argentina's application for partial annulment in conjunction with the pending Application for Annulment by the Claimant.

15. On June 29, 2009, Continental presented a submission on Argentina's application for stay of enforcement of the Award. On the same date, Argentina submitted its observations on the continued stay of enforcement of the Award.

16. On July 2, 2009, at the seat of the Centre in Washington, D.C., a procedural meeting was held in relation to both Continental's Application and Argentina's Application. In the case of Argentina's Application, this meeting constituted the Committee's first session. At the meeting, the Committee asked the parties whether they agreed to retain the services of an assistant, Dr. Christopher Staker, in addition to the Secretary of the Committee. Argentina and the Claimants agreed to Dr. Staker's appointment by letters dated October 19, 2009 and January 27, 2010, respectively.

17. In the course of presenting its arguments at the July 2, 2009 meeting, Continental raised a preliminary objection that Argentina's Application was not made within the time limit stipulated in Article 52(2) of the ICSID Convention and was therefore outside the jurisdiction of the Committee. It was agreed and decided that Continental was within 14 days from the July, 2 2009 meeting to file a written submission setting out its preliminary objection, that Argentina was to file its response within 30 days from receipt of Continental's submission, and that both parties reserved their right to request leave from the Committee for further procedures concerning Continental's submission on its preliminary objection.

18. On July 16, 2009, Continental filed an objection to Argentina's Application.

19. On August 21, 2009, Argentina submitted a response to Continental's objection to Argentina's Application.

20. Upon analysis of each party's position, on October 23, 2009, the Committee issued a decision on the Argentina's application for a stay of enforcement of the award, determining that the stay of enforcement of the Award would continue throughout the proceeding; and a decision on Continental's preliminary objection to the Argentina's Application, rejecting Continental's objections and reserving the issue of costs until the end of the annulment proceeding.

21. On October 30, 2009, Continental filed a memorial on annulment with regard to its application for partial annulment.

22. On December 22, 2009, Argentina filed a memorial on annulment with regard to its application for partial annulment.

23. On January 26, 2010, the parties were informed that Mr. Tomás Solís had accepted a position outside the Centre and that Ms. Anneliese Fleckenstein, , ICSID, would be appointed to serve as Secretary of the Committee.

24. On March 3, 2010, Argentina filed a counter-memorial on annulment with regard to Continental's Application.

25. On April 28, 2010, Continental filed a counter-memorial on annulment with regard to Argentina's Application.

26. On May 7, 2010, Continental filed a reply on annulment with regard to its application for partial annulment.

27. On July 2, 2010, Argentina filed a reply on annulment with regard to its application for partial annulment.

28. On July 16, 2010, Argentina filed a rejoinder on annulment with regard to Continental's Application.

29. On September 7, 2010, Continental filed a rejoinder on annulment with regard to Argentina's Application.

30. Pursuant to the Committee's directions, on November 1, 2010, each party provided a statement of the findings and orders sought by that party.

31. After consulting with the parties, the Committee determined the order of address by the parties at the hearing, which was communicated to the parties on November 2, 2010.

32. From November 8 to 10, 2010, a hearing for Continental's Application and Argentina's Application (the "**Hearing**") was held at the seat of the Centre in Washington, D.C. Present at the Hearing were:

(1) The Committee:

Dr. Gavan Griffith Q.C., President

Judge Bola A. Ajibola
Mr. Christer Söderlund;

Assistant to the Committee: Dr Christopher Staker

(2) ICSID Secretariat: Ms. Anneliese Fleckenstein, Secretary of the Committee

(3) Representatives of Continental:

Mr. Rick Ehlers, Vice-President & Associate General Counsel, Continental Casualty
Mr. Barry Appleton, Appleton & Associates International Lawyers
Mr. Martin Endicott, Appleton & Associates International Lawyers
Mr. Kyle Dickson-Smith, Appleton & Associates International Lawyers
Ms. Mona Devi Davies, Appleton & Associates International Lawyers
Mr. Ugljesa (Ugo) Popadic, Appleton & Associates International Lawyers
Ms. Sue Ki, Appleton & Associates International Lawyers
Mr. Martin Paul Kocandrle, Appleton & Associates International Lawyers
Ms. Juliet Rebecca French, Appleton & Associates International Lawyers
Ms. Ke-Ying Andrea See (Andrea See), Appleton & Associates International Lawyers
Ms. Evgheni Gusilic, Appleton & Associates International Lawyers

(4) Representatives of Argentina:

Dr. Horacio Diez, Deputy Treasury Attorney General
Dr. Gabriel Bottini, National Director of International Affairs and Controversies, Office of the Treasury Attorney General
Dr. Ignacio Torterola, Liason PTN/ICSID
Dr. Silvina González Napolitano, Counsel, National Direction of International Affairs and Controversies, Office of the Treasury Attorney General
Dr. Alejandro Turyn, Counsel, National Direction of International Affairs and Controversies, Office of the Treasury Attorney General

Dr. Verónica Lavista, Counsel, National Direction of International Affairs and Controversies, Office of the Treasury Attorney General

Dr. Mariana Lozza, Counsel, National Direction of International Affairs and Controversies, Office of the Treasury Attorney General

Mr. Nicolás Duhalde, Counsel, Office of the Treasury Attorney General

33. By letters dated December 8, 2010, Continental submitted a statement of its costs in the proceedings, as well as a document entitled "Issues before Continental Tribunal: Summary of References made by Continental at November 8-10, 2010 Annulment Hearing" and three decisions of the Tribunal in the *Pope & Talbot v. Canada* case.

34. By a communication dated December 9, 2010, Argentina submitted a statement of its costs in the proceedings.

35. By a communication to the Committee dated December 16, 2010, Argentina requested leave to file a response to Continental's submission dated December 8, 2010.

36. By a communication to the Committee dated December 16, 2010, Continental opposed Argentina's request.

37. By a communication to the Committee dated December 17, 2010, Argentina renewed its request for leave to file a reply to Continental's submission of December 8, 2010, on the basis that Continental's submission went beyond a mere list of references that had been requested by the Committee at the Hearing.

38. On December 21, 2010, the parties were advised that the Committee was of the view that Continental's request *en passant* at the Hearing to be permitted to give references to the Committee of issues relevant to its Application for Annulment and a copy of the *Pope & Talbot v. Canada* case may be characterized as limited leave for a post-hearing submission. The Committee took the view that procedural fairness accordingly demanded that Argentina be permitted to respond to those two issues within 14 days.

39. On January 4, 2011, Argentina filed its comments on the additional submissions of Continental dated December 8, 2010.

40. The Committee declared the proceedings closed on September 8, 2011.

41. During the course of the proceedings, the Members of the Committee deliberated by various means of communication and have taken into account all pleadings, documents and evidence before them.

B. The dispute

42. The nature of the dispute between Continental and Argentina that was the subject of the Award, as found by the Tribunal, was in summary as follows.

43. Continental is a company incorporated under the law of the State of Illinois, United States of America.

44. CNA Aseguradora de Riesgos del Trabajo S.A. ("**CNA ART**" or "**CNA**"), a company incorporated in Argentina in 1996, provides workers compensation insurance services in Argentina. Continental claimed[1] that with the privatisation in Argentina of the workers' accident insurance sector in 1996, Continental acquired a 70% interest in CNA, and subsequently increased its participation to virtually 100% in 2000.

45. Continental further claimed[2] that CNA, like other insurance companies, maintains a portfolio of investment securities in order to earn a return on its capital, consisting mainly of "low-risk assets such as cash deposit, treasury bills and government bonds", and that with minor exceptions, investments were required to be in Argentina. Continental additionally claimed[3] that Argentina's Superintendent of Insurance (SSN) lays down criteria for insurance companies such as CNA concerning the ratio of reserves they have to hold and the types of investment they may make.

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1 See Award ¶ 16.
2 See Award ¶ 16.
3 See Award ¶ 130.

46. In 2001-2002, Argentina suffered a severe economic crisis. The history of that economic crisis, and the measures adopted by the Government of Argentina to seek to address it, are described in the Award, in particular, at paragraphs 100 to 159. At paragraph 108 of the Award, the Tribunal said that "*Argentina's crisis of 2001-2002 has been described both as 'one of the worst economic crises in its history' and 'among the most severe of recent economic crises' worldwide*".

47. Continental's claim was that certain of the measures adopted by the Government of Argentina in response to this economic crisis caused loss to Continental in breach of Argentina's obligations under the bilateral investment treaty between Argentina and the United States of America (the "**BIT**").[4]

48. Prior to the economic crisis, under Argentina's Convertibility Law, the Argentine peso was freely convertible with the U.S. dollar at parity.[5]

49. According to Continental, from about 2001, CNA held a portfolio of low risk U.S. dollar denominated assets in Argentina to a value of U.S.$ 100,998,000.[6] This was said to be the result of a conscious decision by CNA's management to convert peso denominated assets into U.S. dollar denominated assets due to concerns about the possible devaluation of the peso,[7] and Continental claimed that "*CNA ART's policy of shifting its portfolio to U.S. dollar denominated assets involved a deliberate choice to forego the higher yields of peso-denominated assets in favor of the greater capital security of U.S. dollar assets*".[8]

50. With the developing economic crisis, Argentina adopted Decree 1387 on November 1, 2001 ("**Decree 1387**"). This provided *inter alia* for the voluntary swap of Government bonds for Government Guaranteed Loans ("**GGLs**"). CNA decided to take advantage of this offer. Although the GGLs had longer maturities and lower interest rates than the Argentine Government bonds held by CNA, there were a number of advantages associated with entering into a

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4 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed November 14, 1991; entered into force October 20, 1994.

5 See Award ¶¶ 105, 230.

6 See Award ¶ 18.

7 See Award ¶¶ 18, 131-132.

8 See Award ¶ 132, quoting Continental's Memorial in the proceedings before the Tribunal, para. 26 ff.

swap, in particular in relation to legal security. The GGLs were denominated in U.S. dollars and their governing law was Argentinean law.[9]

51. Following this swap, CNA's investment portfolio included GGLs totalling USD 17,295,320 at market value, Argentine Government Treasury Bills ("**LETEs**") totalling USD 2,805,000 at market value, term deposits ("**CDs**") held at full branch international banks and subsidiaries of international banks totalling USD 63,510,278, and a U.S. dollar cash account at Citibank also used for operational purposes. According to the Claimant, 92% of its portfolio of investments was expressed in U.S. dollar denominated assets.[10]

52. The next significant measure adopted by Argentina was Decree 1570 of December 1, 2001, known as the "***Corralito***". This decree limited cash withdrawals from bank accounts and prohibited transfers of funds out of the country with the exception of certain current transactions.[11]

53. The following month Argentina adopted Public Emergency Law 25.561 of January 6, 2002 (the "**Emergency Law**"). This proclaimed a public emergency under Article 76 of the Argentine Constitution. It provided for the abolition of the convertibility regime, and for the abolition of the pegging of the peso to the U.S. dollar, and for forced conversion into pesos of all U.S. dollar denominated financial instruments, indebtedness and contracts ("**pesification**"). It also granted extensive extraordinary powers in the above matters to the Government.[12]

54. Resolution 6 of January 9, 2002, known as the "***Corralón***", rescheduled maturity dates and reduced interest rates for all demand term deposits within the banking system (both in pesos and U.S. dollars). CNA's term deposits with various banks were subject to this measure.[13]

55. Decree 214 of February 3, 2002 ("**Decree 214**") provided for the conversion into pesos of "all obligations to pay money expressed in dollars" (compulsory

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9 See Award ¶¶ 121, 133-135.
10 See Award ¶ 135.
11 See Award ¶¶ 100, 124, 126, 137-140.
12 See Award ¶¶ 100, 137, 141.
13 See Award ¶¶ 137, 139, 143.

pesification). Contracts between private persons and debts owed to financial institutions were converted at the rate of 1:1. U.S. dollar deposits within the banking system were converted at the rate of 1.40 peso for each dollar ("asymmetric" pesification), and granted an indexation to compensate for future inflation ("CER"). CNA's cash deposits with its banks were also subject to this measure.[14]

56. Decree 260/02, effective February 11, 2002 ("**Decree 260/02**"), abolished this dual system of pesification. On the date it came into force, the exchange rate depreciated to 1.8 peso per U.S. dollar. The peak devaluation was reached on June 25, 2002 (almost 4 pesos to a dollar). Later, the exchange rate stabilized around three pesos for one U.S. dollar.[15]

57. On March 8, 2002, Decree 471/02 ("**Decree 471/02**") converted all U.S. dollar denominated government debt, "the law applicable to which is only Argentine law," into pesos (pesification) at the rate of 1 U.S. dollar to 1.4 pesos. The U.S. dollar denominated LETEs and GGLs held by CNA were thereby converted into pesos. The pesified instruments were to be indexed at the CER rate and would earn a reduced interest.[16]

58. One effect of this particular measure was that, since the peso value of these holdings had increased by 40%, the balance sheet of CNA showed a capital gain, as was the case of all companies in the same situation. This capital gain was taxed at the statutory rate.[17]

59. Decree 644/02 of April 18, 2002 ("**Decree 644/02**") requested the holders of GGLs to accept their conversion in pesos and a reduction in their original security in order to receive payment. Holders that did not accept these conditions would receive back the bonds they had handed in for the swap. CNA opted to continue to hold the GGLs as the bonds they had swapped for them were in default.[18]

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14 See Award ¶¶ 137, 144.
15 See Award ¶¶ 137, 142.
16 See Award ¶¶ 137, 145.
17 See Award ¶ 145.
18 See Award ¶¶ 137, 146.

60. Resolution 73 of April 25, 2002 deferred payment of the public debt of the national Government to December 31, 2002 "or until financing thereof has been completed if the latter is completed before that date." Although GGLs were not subject to the deferral, interest payments due in April, May, June and July 2002 were only made on August 8, 2002.[19]

61. Decree 905 of May 31, 2002 offered U.S. dollar denominated bonds (BODEN 2012) in exchange for the term deposit dollars that had been pesified by Decree 214. It also provided a choice as to the receipt of BODEN 2012 for depositors in financial institutions in distress, including a bank where CNA held term deposits. CNA opted for converting these deposits into USD 4,470,900 worth of BODEN 2012.[20]

62. Decree 739 of March 28, 2003 provided for an elaborate scheme of "partial thawing" of the bank freeze, involving amongst other matters the distribution of further bonds. Continental complained that these bonds were not issued on the due dates and that payments of the initial interest were delayed.[21]

63. Decree 1735/04 of December 2004 ("**Decree 1735/04**") offered a swap of the LETEs and several other securities in default, against newly issued securities. CNA did not accept this conversion, since it would have received in exchange "only U.S.$ 0.30 per dollar and would have been required to waive its rights" and to accept long maturities on bonds from a Government "that had demonstrated its willingness to repeatedly default on its debt".[22]

64. In January 2003, Continental commenced ICSID arbitration proceedings against Argentina, alleging that measures taken by Argentina in respect of Continental's investment in CNA breached Continental's rights as investor under the BIT. Continental invoked in particular the provisions in the BIT that:

    (a) each Party shall observe any obligation it may have entered into with regard to investments (Article II(2)(c) of the BIT) (the "**umbrella clause**");

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19 See Award ¶ 147.
20 See Award ¶ 149.
21 See Award ¶ 150.
22 See Award ¶ 151, quoting Continental's Reply Memorial in the proceedings before the Tribunal, para 78.

(b) investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law (Article II(2)(a) of the BIT) (the "**fair and equitable treatment clause**");

(c) each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory (Article V of the BIT) (the "**transfers clause**"); and

(d) investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization except, amongst other conditions, upon payment of prompt, adequate and effective compensation (Article IV of the BIT) (the "**expropriation clause**").

65. Continental claimed compensation for the damages said to have been suffered in consequence of these breaches of the BIT.

66. In the Award, the Tribunal considered that measures taken by Argentina to deal with the 2001-2002 economic crisis were capable of falling within the scope of Article XI of the BIT, which provides that:

> *This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests*.

Specifically, the Tribunal found, at paragraph 179 of the Award, that the crisis which Argentina faced in the latter part of 2001, and which continued into 2002, was covered by the application of Article XI, and that "*Measures that would have been otherwise in breach of the Treaty could be lawfully implemented by Argentina in that crisis, provided that all other requirements are respected, first of all that of actual 'necessity'*".

67. The Tribunal considered that each of the measures taken by Argentina complained of by Continental satisfied the requirements of Article XI, other than Decree 1735/04 of December 2004 (paragraph 63 above).

68. The Tribunal found that there was no breach of the transfers clause in Article V of the BIT because the transfers that Continental claimed that it was prevented from making were not transfers of a kind to which Article V applied.[23]

69. The Tribunal found that the imposition of capital gains tax on the increase in the peso value of assets following their pesification (paragraphs 57-58 above) did not breach either the fair and equitable treatment clause or the expropriation clause. The Tribunal found that the currency of Argentina was the peso and that CNA's corporate accounts were expressed in pesos, and that the increase in peso value was properly considered a capital gain, subject to the general applicable tax regime.[24]

70. Except in relation to Decree 1735/04, the Tribunal found that there had been no violation of the fair and equitable treatment clause by virtue of Article XI of the BIT.[25]

71. In relation to Decree 1735/04, the Tribunal found that there had been a breach of the fair and equitable treatment clause in relation to the *restructuring* of the LETEs.[26] It found that there was no such breach in relation to the *pesification* of the LETEs because the pesification was covered by Article XI of the BIT.[27] The Tribunal reached this conclusion in respect of Decree 1735/04 in the light of its late date when Argentina's financial conditions were evolving towards normality, the reduced percentage of the original value of the debt that Argentina unilaterally offered to recognise, and the condition that any other rights including those under the BIT would be waived.[28] The Tribunal found that the loss sustained by Continental to be made good by Argentina in relation to the restructuring of the LETEs was USD 2.8 million.[29]

72. Except in relation to Decree 1735/04, the Tribunal found that there had been no violation of the expropriation clause, by virtue of Article XI of the BIT. In relation to Decree 1735/04, the Tribunal considered that having already decided the

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23 See Award ¶¶ 237-245.
24 See Award ¶¶ 267-270.
25 See Award ¶¶ 246-266.
26 See Award ¶¶ 220-222.
27 See Award ¶ 265.
28 See Award ¶ 221.
29 See Award ¶ 265.

claim under Article II(2)(a) of the BIT, there was no need to pronounce further on the alternative claim under Article IV of the BIT.[30]

73. The Tribunal found that there had been no breach of the umbrella clause. The Tribunal considered that except as regards the GGLs, the obligations which Continental alleged to have been breached were not covered by the umbrella clause. In so far as the GGLs might have been covered by the umbrella clause, the Tribunal found that Article XI of the BIT was applicable.[31]

74. The Tribunal accordingly found that the only claim of breach of the BIT on which Continental prevailed was that referred to in paragraph 71 above. The Tribunal awarded Continental damages of USD 2.8 million with interest.

75. Both parties now apply for partial annulment of the Award.

76. In their November 1, 2010 statements (see paragraph 30 above) the parties requested the Committee to make the following findings and orders.

77. In respect of Continental's Application, Continental requests that the Committee:

(1) pursuant to Articles 52(1)(b) and 52(1)(e) of the ICSID Convention, annuls the finding of the Tribunal and associated reasoning that the Argentine Republic may rely on Article XI of the Treaty to preclude its liability and obligation to compensate Continental;

(2) pursuant to Articles 52(1)(b), 52(1)(d), and 52(1)(e) of the ICSID Convention, annuls the finding of the Tribunal and any possible associated *[sic]* in relation to Continental's claim for compensation for unfair treatment and breach of the terms of its financial instruments and other assets (other than the LETEs) after the period in which Article XI was held to apply;

(3) pursuant to Articles 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention, annuls the finding of the Tribunal and associated reasoning that, as regards the application of Art. XI of the Treaty, Continental bore

[30] See Award ¶¶ 271-285.
[31] See Award ¶¶ 286-303.

the burden of proving that the Argentine Republic had alternative measures reasonably available and was required to do so beyond reasonable doubt;

(4) pursuant to Articles 52(1)(b) and 52(1)(e) of the ICSID Convention, annuls the finding of the Tribunal and associated reasoning in relation to Continental's claim under Article V of the Treaty;

(5) pursuant to Articles 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention, annuls the finding of the Tribunal and associated reasoning in relation to Continental's claim in respect of the LETEs under Article IV of the Treaty;

(6) consequently to (1)-(5) above, annuls the decision of the Tribunal in paragraphs 320 (A), (C) and (D) of the Award;

(7) confirms that the decision of the Tribunal in paragraph 320(B) of the Award is not affected by the annulment of paragraph 320(A);

(8) decides that the Argentine Republic shall bear all of the expenses incurred by the Centre in connection with this annulment proceeding, including the fees and expenses of the members of the Committee;

(9) decides that the Argentine Republic shall bear Continental's litigation costs and expenses with respect to this annulment proceeding, including Continental's costs of legal representation.

Argentina for its part requests that the Committee find that:

(1) the Tribunal did not fail to decide Continental's claim for loss after the "State of Necessity" was over;

(2) the Tribunal did not fail to apply the right principle of burden of proof;

(3) the Tribunal did not fail to determine Continental's expropriation claim in relation to the LETEs;

(4) the Tribunal did not fail to state reasons in relation to the alleged breach of Article V (Transfer of Funds) of the Treaty.

78. In respect of Argentina's Application, Argentina requests that the Committee find that:

(1) the Tribunal manifestly exceeded its powers and failed to state the reasons on which the Award was based regarding the restructuring of the Argentine Republic's (domestic and foreign) sovereign debt;

(2) the Tribunal manifestly exceeded its powers in deciding on an extremely complex issue without relying upon any evidence and without stating the reasons why it reached its conclusions;

(3) the fact that the Tribunal, without evidence, has described and decided on Argentina's payment capacity, the "unilateral" nature of the swap offer, the amount offered to the holders by means of the swap, and the limitation on future claims, and the fact that such completely unfounded descriptions have been used as grounds to state that Argentina violated the BIT entail such arbitrariness that it amounts to a manifest excess of powers;

(4) in addition, the Tribunal failed to state the reasons on which the Award was based in considering that Argentina violated Article II(2)(a) of the BIT by restructuring the LETEs (Award paragraphs 264-265) and that the Argentine Republic could not invoke the defence provided for by Article XI of the BIT or the state of necessity under customary international law;

(5) the Tribunal clearly contradicted itself and manifestly exceeded its powers in stating that the default is protected under Article XI of the BIT, but then determining that the solution to such default entailed a substantive loss, without providing any reason why the offer made by Argentina to escape default was unreasonable;

(6) such lack of evidence caused the Tribunal to manifestly exceed its powers and fail to state the reasons on which the Award and the

Decision on Rectification were based regarding Claimant's uninterrupted holding of the LETEs as from their acquisition until the time of the alleged collection;

(7) the Tribunal also exceeded its powers when making unfounded determinations regarding the LETEs in respect of which the parties did not discuss during the hearing or the proceeding, and even an alert reader would not be able to understand the manner in which the Tribunal arrived at the conclusions drawn regarding the restructuring of the LETEs;

Argentina therefore requests the Committee to find:

(1) that the Tribunal failed to state reasons and manifestly exceeded its powers in relation to its conclusions regarding Argentina's debt restructuring;

(2) that pursuant to Article 52 of the ICSID Convention and ICSID Arbitration Rule 50, the Award rendered on September 5, 2008 in this case be partially annulled, in particular paragraphs 220-222, 264-266 and 320(B), exclusively with regard to the determination that Argentina's restructuring of the LETEs was in breach of the BIT, and that Argentina could not avail itself of the defence based on Article XI of the BIT or on the state of necessity in customary international law, and the subsequent decision to award a compensation on that basis (together with the relevant portion of the Decision on Jurisdiction);

(3) that the other provisions and paragraphs of the Award remain unchanged; in effect, as the Tribunal was right in finding that Argentina's actions were protected under Article XI of the BIT, the severable parts of an Award which are not annulled shall remain in full force, as expressly provided in Article 52(3) of the ICSID Convention;

(4) that Continental Casualty Company pay all the expenses and costs arising out of this annulment proceeding, plus any interest accrued thereon.

Continental for its part requests that the Committee find and order that:

(1) the Argentine Republic's Application for Annulment is dismissed in its entirety;

(2) the Argentine Republic shall bear all of the expenses incurred by the Centre in connection with this annulment proceedings, including the fees and expenses of the members of the Committee;

(3) the Argentine Republic shall bear Continental's litigation costs and expenses with respect to this annulment proceeding, including Continental's costs of legal representation;

(4) pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3), the stay of enforcement of the Award ordered by the Committee is its decision of October 23, 2009 is terminated.

C. The grounds for annulment

(a) Introduction

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

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

80. In the present annulment proceedings, both parties invoke the grounds in Article 52(1)(b) and (e) in their applications, and Continental additionally invokes the ground in Article 52(1)(d).

(b) The role of an *ad hoc* annulment committee

81. An ICSID award is not subject to any appeal or to any other remedy except those provided for in the ICSID Convention.[32] In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1).[33]

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

> *… cannot substitute its determination on the merits for that of the tribunal. Nor can it direct a tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a* res judicata *but on a question of merits it cannot create a new one. A more interventionist approach by committees on the merits of disputes would risk a renewed cycle of tribunal and annulment proceedings of the kind observed in* Klöckner *and* AMCO.[34] [footnote omitted]

83. The Committee is also in agreement with the *MCI* Annulment Decision that:

> *... the role of an ad hoc committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness. ... The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They*

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32 ICSID Convention, Article 53(1).

33 *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No ARB/03/6 (Annulment Proceeding), Decision on Annulment, October 19, 2009 ("***MCI* Annulment Decision**") ¶ 24; *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12 (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, September 1, 2009 ("***Azurix* Annulment Decision**") ¶ 41; *Republic of Kazakhstan v. Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S.,* ICSID Case No ARB/05/16 (Annulment Proceeding), Decision of the *ad hoc* Committee, March 25, 2010 ("***Rumeli* Annulment Decision**") ¶¶ 70-73, 96; *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No ARB/01/3 (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, July 30, 2010 ("***Enron* Annulment Decision**") ¶ 63; *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru,* ICSID Case No ARB/03/28 (Annulment Proceeding), Decision of the *ad hoc* Committee, March 1, 2011 ("***Duke* Annulment Decision**") ¶¶ 89, 96, 165, 213-214, 216(b).

34 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007 ("***MTD* Annulment Decision**") ¶ 54; quoted in *Enron* Annulment Decision ¶ 64. See also *Sempra Energy International v. Argentine Republic*, ICSID Case No ARB/05/16 (Annulment Proceeding), Decision on the Argentine Republic's Application for Annulment of the Award, June 29, 2010 ("***Sempra* Annulment Decision**") ¶ 73.

> *are assisted in their task by the development of a common legal opinion and the progressive emergence of "*une jurisprudence constante*" ...*[35]

84. Notwithstanding this, in relation to matters which fall within the competence of an *ad hoc* committee to decide, it is in the Committee's view to be expected that the *ad hoc* committee will have regard to relevant previous ICSID awards and decisions, including other annulment decisions, as well as to other relevant persuasive authorities. Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term the emergence of a *jurisprudence constante* in relation to annulment proceedings may be a desirable goal.

85. It has been observed that while it has been a frequent feature of ICSID annulment applications to submit that one and the same aspect of an award constitutes a manifest excess of powers, a serious departure from a fundamental rule of procedure and a failure to state reasons, Article 52(1) is carefully divided into separate clauses, each dealing with a separate ground for annulment. Thus, if a party wishes to contend that a single aspect of an award constitutes simultaneously more than one ground for annulment under Article 52(1), "*it must identify separately how the very different considerations involved in each of these enquiries are nevertheless provoked by the same aspect of an impugned award*".[36]

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

86. This ground of annulment will exist where the tribunal lacked jurisdiction, for instance because the dispute is not covered by the arbitration agreement. This ground of annulment may also exist where the tribunal disregards the applicable law or bases the award on a law other than the applicable law under Article 42 of the ICSID Convention.[37]

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35 *MCI* Annulment Decision ¶ 24.
36 *Duke* Annulment Decision ¶¶ 91-92.
37 *Azurix* Annulment Decision ¶¶ 45-46, 136, and the earlier case law there cited; *Enron* Annulment Decision ¶ 67; *Rumeli* Annulment Decision ¶ 78.

87. Additionally, it is an express requirement of Article 52(1)(b) of the ICSID Convention that:

> *the error must be "manifest", not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.*[38]

88. In the present case, the submissions of Continental on the scope of this ground of annulment included the following:

> *Another basic requirement is that the Tribunal must exercise its power properly. Its power must be exercised in good faith and for the purpose intended, taking into account all relevant considerations while ignoring all irrelevant considerations; and with a demonstrable rational connection between those considerations and the Tribunal's determination of each of the questions submitted to it. To fail to do so is an abuse of power and thereby to manifestly exceed its power.*[39]

89. Continental further submitted that where the applicable law is an investment treaty, it amounts to a failure to apply the applicable law for the Tribunal to apply one provision of the treaty, but to fail to apply or to consider the application of other relevant provisions of the treaty.[40] Continental also contended that it amounted to a failure in this case for the Tribunal to apply a provision of the applicable BIT (in this case, Article XI), but to fail to consider relevant principles of public international law.[41] An additional submission of Continental was that it amounts to a manifest error of law for the Tribunal to fail to have regard to the different legal effect of two different provisions of the BIT.[42] Indeed, Continental

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38 *MTD* Annulment Decision ¶ 47 quoted in *Azurix* Annulment Decision ¶ 48; also *MCI* Annulment Decision ¶¶ 49, 51, 55; *Azurix* Annulment Decision ¶¶ 64-69; *Rumeli* Annulment Decision ¶ 78; *Enron* Annulment Decision ¶ 69; *Duke* Annulment Decision ¶¶ 98-99, 160, 182.

39 Hearing transcript, November 8, 2010, p. 24.

40 For instance, Hearing transcript, November 8, 2010, pp. 29-32 (contending that the Tribunal in this case failed to apply Article X of the BIT), p. 59 (contending that the Tribunal failed to apply Article II(1) of the BIT). Continental submitted in this respect: "… [the Tribunal] was required to apply all of the Treaty. It was not allowed to pick and choose like a bit of a smorgasbord. You can't just go to the buffet and pick what you like. You have to apply the whole Treaty." (*ibid*., p. 55). Also Hearing transcript, November 9, 2010, p. 261: "Did the Tribunal fail to apply the law that it was required to apply? That is the simple test of annulment. And in this case, it is clear that the Tribunal failed to apply Article X of the Treaty".

41 For instance, Hearing transcript, November 8, 2010, pp. 32-33 (contending that the Tribunal failed to apply "well-known principles of international law such as proportionality, duration and reasonableness", p. 34 (contending that it "cannot be an application of Article XI when [the Tribunal has] missed an integral part of the test that is required in its application"), pp. 38-40 (contending that the Tribunal failed to take any position on the relationship between Article XI of the BIT and the customary international law principles reflected in Articles 25, 27, 30 and 31 of the ILC Articles).

42 For instance, Hearing transcript, November 8, 2010, pp. 65-66 (contending, in relation to what Continental submitted was the different basis for calculating damages for breaches of the

goes further to suggest that if the Tribunal, in interpreting a provision of the BIT, refers by analogy to a provision of the GATT regime, it will be a manifest excess of powers for the Tribunal to refer to the inappropriate GATT provision.[43]

90. It appears to the Committee that these contentions overstate the effect of Article 52(1)(b) of the ICSID Convention to the extent that, if accepted, an annulment proceeding would be reconstituted as an appellate proceeding. In any event, the Committee considers that Continental's submission reaches beyond a proper construction of the effect of Article 52(1)(b). For instance, although Continental acknowledged that "*it is not for this annulment Committee to decide whether the Tribunal was right or wrong*",[44] at one point counsel for Continental submitted that: "*The Tribunal got the test wrong. They got the law wrong and that is the test. That's what they did wrong*".[45] Counsel for Continental also argued, for instance, that "*the Tribunal failed to properly address the international law rules on treaty interpretation including the Vienna Convention*", in that the Tribunal "*took into account irrelevant provisions in its interpretation while completely ignoring the mandatory provisions of the Treaty*".[46] The Committee considers that erroneous application of principles of treaty interpretation is also in itself an error of law, rather than a manifest excess of powers, at least where the error relates to the substantive issue before the Tribunal for decision, rather than to an issue of the Tribunal's jurisdiction.

91. In the Committee's view, it will amount to a non-application of the applicable law for a tribunal to apply, for instance, the law of State X to determine a dispute when the applicable law is in fact the law of State Y or public international law. However, if the applicable law is the law of State X, and if the tribunal in fact applies the law of State X, it is not the role of an annulment committee to determine for itself whether the tribunal correctly identified all of the provisions

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expropriation clause and fair and equitable treatment clause respectively, that the Tribunal "flagged, in fact, the difference, and then … just ignored it").

43 For instance, Hearing transcript, November 8, 2010, pp. 42-45 (contending that "the Vienna Convention principles do not permit reference to irrelevant materials like GATT Article XX", that the relevant GATT provision analogous to Article XI of the BIT is GATT Article XXI rather than GATT Article XX, and that "[b]y relying on [GATT] Article XX, the Tribunal simply applied the wrong legal standard addressing a very different legal context and in a very different Treaty").

44 Hearing transcript, November 8, 2010, p. 40.

45 *Ibid*., p. 74,

46 *Ibid*., p. 87,

of the law of State X that were relevant to the case before it, or whether the tribunal gave adequate consideration to each of those specific provisions and to the relationship between them, since this would be to venture into an enquiry into whether the tribunal applied the law correctly. Questions as to the relevance of particular provisions of the applicable law, and of their legal effect and interaction with other provisions of the applicable law, go to the substantive legal merits of the case and are within the power of a tribunal to decide. A tribunal's decision on such questions cannot amount to a manifest excess of power.

92. Where a tribunal fails to give any consideration *at all* to a particular provision of the applicable law, the logical inference is that the tribunal implicitly did not consider it to be relevant. For the tribunal to take such a view, rightly or wrongly, even merely by implication, is an exercise of the tribunal's power, and not an excess of power. Provided that the tribunal:

(a) applies the applicable law (be it a treaty, or general international law, or the law of a particular State), and

(b) gives reasons for its decision on all of the questions presented to it for decision,

the tribunal is not required to deal expressly with every provision of the applicable law that a party has invoked in its argument, and *a fortiori*, provisions that the parties did not invoke in their arguments before the tribunal.[47]

93. In some cases it may be an annullable error if a tribunal fails to consider a specific provision of the applicable law. For instance, suppose that a claimant brings a claim for damages under provision A of an investment treaty, and the respondent State specifically pleads in response that it has a defence to the claim under provision B of the treaty. In this case, it may well be an annullable error for the tribunal to find that there has been a breach of provision A, and to

[47] Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn 2009) ("**Schreuer Commentary**"), p. 964 ¶ 226: "... the inadvertent oversight of a detail in the law is one of the most common legal errors. A *pars pro toto* argument holding that disregard of one provision amounts to non-application of the law does not appear tenable. Partial non-application and erroneous application are indistinguishable." See also *Duke* Annulment Decision ¶ 144.

award damages to the claimant, without giving any consideration at all to the potential application of the defence in provision B.

94. However, in such a case the annullable error most appropriately would be characterised as either a serious departure from a fundamental rule of procedure (if it is determined that the tribunal allowed the claimant's claim without even considering the defence raised by the respondent), or a failure to state reasons for the decision (if it can be determined that the tribunal rejected the defence invoked by the respondent but failed to give reasons for doing so). The failure to consider provision B would be unlikely of itself to constitute a manifest excess of power by reason of failure to apply the applicable law, as the tribunal has nonetheless applied the investment treaty, which is the law that it was required to apply.

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

95. As was stated in the *Vivendi* First Annulment Decision:

> *… [u]nder Article 52(1)(d), the emphasis is clearly on the term "rule of procedure," that is, on the manner in which the Tribunal proceeded, not on the content of its decision.*[48]

96. For this ground of annulment to be established, the rule of procedure in question must be "fundamental".[49] Furthermore, the departure from that rule of procedure must be "serious" in the sense that it "*must have caused the Tribunal to reach a result substantially different from what it would have awarded had*

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[48] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 ("***Vivendi* First Annulment Decision**") ¶ 83, quoted in *Azurix* Annulment Decision ¶ 49, *Enron* Annulment Decision ¶ 70.

[49] *Azurix* Annulment Decision ¶ 50; *Enron* Annulment Decision ¶ 70; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989 ("***MINE* Annulment Decision**") ¶¶ 5.05 and 5.06; *MTD* Annulment Decision ¶ 49. It has been said that not all rules of procedure contained in the ICSID Arbitration Rules would fall under this concept, which is "intended to denote procedural rules which may properly be said to constitute 'general principles of law', insofar as such rules concern international arbitral procedure": *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No ARB/03/25 (Annulment Proceeding), Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, December 23, 2010 ("***Fraport* Annulment Decision**") ¶¶ 186-187.

such a rule been observed",[50] or in the sense that it was "*such as to deprive a party of the benefit or protection which the rule was intended to provide*".[51]

97. The Committee agrees with the statement in the *Azurix* Annulment Decision that "*it is not a serious departure from a fundamental rule of procedure for a tribunal to decline to consider an issue that it considers to be irrelevant, merely because one of the parties considers it to be important*".[52] As observed above, a failure by a tribunal to consider one of the *questions* submitted to it for decision, such as a specific defence raised by the respondent, may in certain circumstances amount to a serious departure from a fundamental rule of procedure. However, no fundamental rule of procedure requires a tribunal to give express consideration to *every* argument or issue advanced by a party in support of its position in relation to a particular question.

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

98. Failure to deal with *questions* submitted to the tribunal has been considered by previous *ad hoc* annulment committees to be a failure to state reasons for purposes of this provision. On the other hand, while a tribunal has a duty to deal with each of the *questions* submitted to it (Article 48(3) of the ICSID Convention), it is not required to comment on all arguments of the parties in relation to each of those questions.[53] It was said in the *Enron* Annulment Decision that "*It is not the role of an annulment committee to examine meticulously the reasoning of the tribunal on a given issue to check that every point raised by a party has been given a clear answer*",[54] and that:

> *... the tribunal is required only to give reasons for its decision in respect of each of the* questions*. This requires the tribunal*

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50 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002 ("***Wena Hotels* Annulment Decision**") ¶ 58; quoted in *Azurix* Annulment Decision ¶ 51. *Enron* Annulment Decision ¶ 71.

51 *MINE* Annulment Decision ¶ 5.05; quoted in *Azurix* Annulment Decision ¶ 52. Also *Enron* Annulment Decision ¶ 71.

52 *Azurix* Annulment Decision ¶ 244.

53 *MCI* Annulment Decision ¶¶ 66-67; *Enron* Annulment Decision ¶¶ 72, 222. Also *Helnan International Hotels A/S v. Arab Republic of Egypt,* ICSID Case No ARB/05/19 (Annulment Proceeding), Decision of the *ad hoc* Committee, June 14, 2010 ("***Helnan* Annulment Decision**") ¶¶ 36-37.

54 *Enron* Annulment Decision ¶ 110.

> *to state its pertinent findings of fact, its pertinent findings as to the applicable legal principles, and its conclusions in respect of the application of the law to the facts. If the tribunal has done this, the award will not be annulled on the basis that the tribunal could have given more detailed reasons and analysis for its findings of fact or law, or that the tribunal did not expressly state its evaluation in respect to each individual item of evidence or each individual legal authority or legal provision relied upon by the parties, or did not expressly state a view on every single legal and factual issue raised by the parties in the course of the proceedings. The tribunal is required to state reasons for its* decision*, but not necessarily reasons for its* reasons*.*[55]

99. Furthermore, even in cases where a tribunal has failed to deal with a question submitted to it, the appropriate remedy may not be an application for annulment, but rather, an application to the tribunal for a supplementary decision, pursuant to Article 49(2) of the ICSID Convention.[56]

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

> *[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e)…*
>
> *In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*[57]

101. Furthermore, the tribunal's reasons "*may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred*

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55 *Enron* Annulment Decision ¶ 222.
56 *MCI* Annulment Decision ¶¶ 68-69; *Enron* Annulment Decision ¶ 73.
57 *MINE* Annulment Decision ¶¶ 5.08-5.09, quoted in *Azurix* Annulment Decision ¶ 53 and *Enron* Annulment Decision ¶¶ 74, 221.

from the terms used in the decision".[58] In the *Wena Hotels* Annulment Decision, it was further said that:

> *It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the* ad hoc *Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the* ad hoc *Committee itself.*[59]

102. The Committee agrees with the *ad hoc* committee in the *Vivendi* First Annulment Decision, which stated that:

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

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[58] *Wena Hotels* Annulment Decision ¶ 81, quoted in *Azurix* Annulment Decision ¶ 54; also *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007 ("***CMS* Annulment Decision**") ¶ 127, quoted in *Azurix* Annulment Decision ¶56 and *Enron* Annulment Decision ¶ 75. See also *Rumeli* Annulment Decision ¶ 83, stating that "if reasons are not stated but are evident and a logical consequence of what is stated in an award, an *ad hoc* committee should be able to so hold", but that "if such reasons do not necessarily follow or flow from the award's reasoning, an *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal".

[59] *Wena Hotels* Annulment Decision ¶ 83, quoted in *Azurix* Annulment Decision ¶ 54 and *Enron* Annulment Decision ¶ 77. However, an annulment proceeding cannot cause an entire reopening of a case, and it is not for an *ad hoc* committee "to intrude into the legal and factual decision-making of the Tribunal": *Fraport* Annulment Decision ¶ 272.

> *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.*[60] [footnote omitted]

103. The Committee adds that for genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision. An example might be where the basis for a tribunal's decision on one question is the existence of fact A, when the basis for its decision on another question is the *non-existence* of fact A. In cases where it is merely arguable whether there is a contradiction or inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument. Nor is it the role of an annulment committee to express its own view on whether or not the reasons given by the tribunal are logical or rational or correct.

II. CONTINENTAL'S APPLICATION FOR ANNULMENT

A. Failure to decide Continental's claim for loss after the state of necessity was over

(a) Introduction

104. The Tribunal rejected all but part of one claim made by Continental on the basis that the measures adopted by Argentina that caused the claimed losses were within the scope of Article XI of the BIT.[61]

105. The first ground on which Continental seeks partial annulment of the Award is that:

> *The Tribunal failed to apply the governing law of the dispute by holding that the applicability of Article XI of the Treaty meant that Argentina was not required to pay compensation*

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60 *Vivendi* First Annulment Decision ¶¶ 64-65, quoted in *Azurix* Annulment Decision ¶ 55 and *Enron* Annulment Decision ¶ 76. See also *Rumeli* Annulment Decision ¶ 82.

61 See paragraphs 42-74 above.

> *to the Applicant for measures taken during the economic difficulties, even after the economic difficulty was over.*[62]

106. Continental contends that in the proceedings before the Tribunal, Continental had argued that even if the Tribunal were to find that Article XI of the BIT were applicable, Argentina was still required to compensate Continental and cease its actions in breach of the BIT once any threat to Argentina's essential security interests or public order had passed, and once continuation of those measures could no longer be justified under Article XI of the BIT.[63]

107. Continental contends that:

> *Despite having jurisdiction to do so, the Tribunal failed to determine this claim in manifest excess of their powers within the meaning of Article 52(1)(b) of the ICSID Convention and/or failed to give reasons for any determination of this claim within the meaning of Article 52(1)(e) of the ICSID Convention.*[64]

(b) Arguments of the parties

108. Continental argues, *inter alia*, that:

(a) Relevant international law establishes that an exceptions provision cannot continue to justify breaches of a treaty commitment when the required situation or condition no longer exists.[65]

(b) The Tribunal made a specific factual finding that Argentina's economic emergency was over on December 9, 2004, and, as a result, Argentina was from that time no longer able to rely upon a state of necessity to justify actions that would otherwise violate its Treaty obligations. The Tribunal further stated that Argentina's return to international financial

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62 Continental's Application, paragraph 2(b).

63 Continental's Memorial on Annulment, paragraphs 57-59, referring to Continental's Reply Memorial in the proceedings before the Tribunal, paragraphs 360-364.

64 Continental's Memorial on Annulment, paragraph 60.

65 Referring to *United States - Import Prohibition on Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)* (2001), WT/DS58/RW (Panel Report) at paras. 6.1-6.2; *US-Tuna* (1982) GATT ¶ 4.6; *United States - Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R (Report of the Appellate Body) p. 22; *Phillips Petroleum Co. Iran v. Iran, Iran - United States Claims Tribunal*, Case No. 39, Award 425-39-2, 29 June 1989, 21 Iran-US CTR 79, 78-82; *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Award, May 12, 2005) ¶¶ 382, 392.

markets occurred in September 2004.[66] As a result, the Tribunal ruled that Argentina's actions with respect to its LETEs were not consistent with its Treaty obligations.[67] However, the Tribunal failed to address the resumption of normal economic conditions on the remaining investments in the Continental's portfolio.

(c) Argentina's refusal to pay the amounts due under the original terms of the financial instruments is a continuing breach that could not be justifiable after the state of necessity has passed.[68]

(d) The Tribunal has thus rendered an Award that has allowed the emergency conditions to continue in perpetuity with respect to the majority of the Applicant's investments, which is an absurd and unfair result at odds with international jurisprudence on exceptions clauses such as Article XI.[69]

(e) The Tribunal itself found that "*None of the measures reinstated the 'status quo ante'*" and that measures introduced by Argentina to reestablish normal conditions in the financial market "*failed to give any sufficient satisfaction to CNA or Continental; on the contrary, certain of these Measures are challenged by the Claimant as having caused further damage to its subsidiary in breach of the BIT*".[70]

(f) Nothing in the Tribunal's reasoning suggests that Argentina established that it could not, within a certain time frame, fully restore the value of Continental's investment that had been impaired by measures adopted during the "state of necessity" period. There is no doubt that Argentina

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66 Referring to Award ¶ 159 and footnote 335.

67 Referring to Award ¶ 221.

68 Referring to International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), pp. 138-145; *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, ¶ 167; *Philis v. Greece* (18989/91) (European Commission on Human Rights) (October 12, 1994), at section title "The Law", ¶ 1; *J. Dierckx v. Belgium* (11966/86) (European Commission on Human Rights), Sur la Recevabilite de la requête (December 8, 1988) at p.7; *United Parcel Service v. Canada*, UNCITRAL Arbitration Rules, Award, May 24, 2007, ¶ 28.

69 Continental argues by way of analogy that if an exception like Article XI justified the State in requisitioning an investor's factory during an insurgency, the continuation of that situation could not be justified under the exception once the insurgency is over.

70 Referring to Award ¶ 148.

has the power and fiscal capacity to honour the original terms of the financial instruments now that the emergency period has passed, nor is there any doubt that Argentina continues to refuse to pay on the basis of unilateral measures imposed during the state of necessity.

(g) Continental's claim for its continuing post-"state of necessity" period loss (including its claim based on customary international law as reflected in Article 27 of the ILC Articles[71]) merited serious and detailed consideration but received none whatsoever.

(h) The Tribunal reasoned that Article XI was to be understood in the context of Article XX GATT 1947, but failed to acknowledge that there is a *lex specialis* in the GATT concerning exceptions for economic crisis-based measures (Article XII). The Tribunal also failed to consider that while Article XI refers to security interests, these are dealt with not under Article XX of the GATT but Article XXI. In determining whether a particular measure was necessary, the Tribunal failed to consider the legal standard in the GATT applicable to balance-of-payments-based measures.[72]

(i) The Tribunal failed to apply general principles of treaty interpretation, including the principle of effectiveness, notwithstanding Continental's specific submissions on this issue. The Tribunal took no position on the relationship between Article XI of the BIT and Article 25 of the ILC Articles, except in the case of the LETEs. The Tribunal did not consider the principles of customary international law reflected in Articles 27, 30 and 31 of the ILC Articles, which are essential legal elements that need to be applied in conjunction with Article XI. Article XI of the BIT does not itself state that its effect is to exempt Argentina totally from all responsibility for any breach under the BIT, and Article XI does not permit the Tribunal to ignore other provisions of the BIT. In general international law, "necessary" is understood as incorporating a need for proportionality,

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71 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4 ("ILC Articles").

72 Referring to General Agreement on Tariffs and Trade (1947), Article XII(2)(b).

and the Tribunal failed to consider whether the measures affecting Continental were being eased or removed promptly, as they were no longer necessary because of the abatement of the crisis. The Tribunal was required to apply the customary international law test of proportionality at various points in time.

(j) Applying the correct onus and standard of proof are fundamental legal requirements of a valid award. It is established international law that the party relying on an exceptions clause bears the onus of proving that it applies. The Tribunal apparently understood[73] the proposition that measures need not be indispensable in order to be "necessary" within the meaning of an exception clause as placing the onus on Continental to prove that Argentina's measures were not necessary. This amounts to a reversal of the burden of proof under international law which places a burden on Argentina to prove on a balance of probabilities the elements of the defence it was invoking. The Tribunal's analysis of whether Argentina's measures were necessary consists of the Tribunal assessing and rejecting Continental's arguments,[74] and the Tribunal nowhere suggests that Argentina has met the burden of proof on necessity.

(k) The Tribunal's failure to apply the correct burden of proof was of material significance because there was expert evidence that suggested a difference of expert views on what was or was not in fact a reasonably available alternative.

(l) The manner of the Tribunal's reasoning suggests that it also applied the wrong *standard* of proof, requiring Continental to prove that there were reasonably available alternatives beyond a reasonable doubt. The mere existence of some evidence that put in question whether the alternatives suggested were reasonably available was apparently sufficient for the Tribunal to conclude that Argentina's chosen measures were necessary.

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[73] Referring to Award ¶ 193ff.
[74] Referring to Award ¶ 200ff.

(m) The Tribunal either failed to consider Continental's claim for its post-"state of necessity" period loss and associated arguments, or if it did consider them, failed to give "reasons for its rejection as an indispensable component of the statement of reasons on which its conclusion was based", and ignored a decisive argument that it was required to address.[75]

(n) The Award in this case is inconsistent with the *LG&E* Award, which found that under Article XI of the BIT, once the emergency situation has been overcome, "*the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately*".[76]

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

(a) The Tribunal never applied the state of necessity doctrine, so there was no reason for the Tribunal to determine what happened upon termination of the state of necessity. The Tribunal said that it would first analyse Article XI as its application "may be such as to render superfluous a detailed examination of the defense of necessity".[77] That ultimately proved to be the case.

(b) The Tribunal clearly distinguished between the doctrine of state of necessity and Article XI of the Treaty,[78] which shows that the Tribunal did not confuse the two concepts.[79]

(c) The Tribunal concluded that each of the measures complained of by Continental were within the scope of Article XI,[80] except for the restructuring of Treasury Bills (LETEs),[81] which the Tribunal expressly

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75 Referring to *MINE* Annulment Decision ¶ 6.101; Schreuer Commentary at 1020.

76 Referring to *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, ("***LG&E* Award**") ¶¶ 228, 261, 265, 266.

77 Referring to Award ¶ 162.

78 Referring to Award, Part IV.A, especially ¶¶ 163-168.

79 Distinguishing *Enron Corporation and Ponderosa Assets L.P.,* ICSID Case No. ARB/01/3, Award, May 22, 2007 and *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, which, Argentina argues, did confuse the two concepts.

80 Referring to Award ¶¶ 231-233.

81 Referring to Award ¶ 220.

stated also did not fall within the scope of the customary international law doctrine of state of necessity.[82]

(d) Continental's argument is misplaced, since the application of Article XI entails that there is no breach of the Treaty whatsoever, whereas the application of the state of necessity doctrine *presupposes* the existence of a Treaty violation.

(e) An ICSID Tribunal is not bound to follow the decisions of Tribunals in other cases, and failure to do so does not mean that it has failed to decide on the matters on which it had to. The Award is in any event consistent with the *CMS* Annulment Decision.[83]

(f) It was not the case that the Tribunal required Continental to prove its case without demanding that Argentina meet its burden of proof. Argentina presented a great deal of evidence to the Tribunal indicating that Article XI was applicable to the facts, and Argentina ultimately proved that it was.

(g) The Award explained and applied in an accurate and correct fashion the standard of proof in relation to Article XI of the BIT.[84] Because Argentina's position was that there was no other alternative measures that it could have taken, the Tribunal had to analyse the issues by reference to the alternative measures that Continental claimed could have been taken by Argentina. The Award first correctly established that Argentina discharged its obligation to prove that it was acting under the protection of Article XI after considering that each of the requirements set forth in the BIT had been met, and subsequently analyzed the arguments and evidence provided by Continental, which were deemed to be insufficient. The Tribunal took into consideration and rendered a decision on each of the alleged alternatives, bearing in mind the evidence produced.[85] Continental cannot specifically identify any part of the Award

82 Referring to Award ¶ 222.
83 Referring to *CMS* Annulment Decision ¶¶129-131.
84 Referring to Award ¶196.
85 Referring to Award ¶¶ 220-222.

in which the Tribunal has incorrectly applied the principles governing the burden of proof—which would not in any event amount to a ground for annulment.

(h) The Tribunal determined, in application of Article XI, that the pesification of the economy and the other related measures were valid and lawful measures which produced their effects at the time when they were adopted. The measures had their effects at the time when implemented, notwithstanding the survival of the legal relationships arising out of those contracts. They are not continuing acts, in the same way as the continuing detention of a hostage.

(i) Article XI of the BIT does not require measures to be temporary in nature, unlike the provisions of article 27(1) of the Draft Articles of the ILC with respect to the situations which preclude wrongfulness, such as the state of necessity.

(j) The cases relied on by Continental refer to facts which are very different from those upon which the Tribunal had to render its decision in the Award.

(c) The Committee's views

110. In this ground for annulment, Continental refers to an argument that it advanced in the proceedings before the Tribunal, in paragraphs 360 to 364 of its Reply Memorial, dated 17 August 2006. Continental's argument is, in essence, that the Tribunal failed to consider or decide upon this argument at all, and that this failure amounted to an annullable error.

111. The relevant paragraphs of Continental's Reply Memorial read as follows:

> ***5. In the Alternative, Any Threats To Argentina's Essential Security Interests or To Public Order Have Passed***
>
> *360. Even if Article XI does disrupt the BIT parties' obligation to compensate, Argentina must still compensate the Investor*

and cease its actions in breach of the Treaty because any threat to Argentina's essential security interests or public order has passed. In rejecting Argentina's argument that Argentina could rely on Article XI of the US-Argentina BIT to avoid compensating the Claimant, the CMS *Tribunal found that "[e]ven if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present."*[362]

361. Indeed, the CMS *Tribunal states that Professor Slaughter confirmed this view during her cross-examination before that Tribunal.*[363]

362. The view of Argentina's expert and the CMS *Tribunal on this point is consistent with the ordinary meaning of Article XI. The Article preserves the application of measures necessary for the maintenance of public order or to protect essential security interests; the Article says nothing about the application of measures no longer necessary for the maintenance of public order or to protect essential security interests.*

363. The view of Argentina's expert and the CMS *Tribunal on this point is also consistent with "relevant rules of international law applicable in the relations between the parties." Article 27(a) of the ILC Articles captures the customary international law rule, supported by the ICJ in the* Rainbow Warrior *and* Gabčíkovo-Nagymaros *cases, that a state must comply with its international obligation as soon as the circumstances precluding wrongfulness no longer exist.*[364] *The Edwards Report confirms that the economic circumstances on which Argentina relies to invoke Article XI no longer exist.*[365]

364. Argentina has accepted that its economy has improved. The Commentary to Article 27 of the ILC Articles *clarifies that states invoking the defense of necessity must fulfill their obligations to the extent that the circumstances giving rise to the defense have changed.*[366] *Article 27 of the ILC Articles, therefore, obliges Argentina to pay compensation in light of the improvement in Argentina's economy.*

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[360] *See Part Two, Section V(C) above.*

[361] *See Part Two, Section VI(B)(4) above.*

[362] CMS v. Argentina*, Award at para. 382. (Claimant's Book of Authorities, Tab CLA 85).*

[363] CMS v. Argentina*, Award at para. 392: "The answer to this question by the Respondent's expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is*

difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events." (Claimant's Book of Authorities, Tab CLA 85).

[364] *See section V of this Reply Memorial.*

[365] *Edwards Report at paras. 143-146 and para. 147: "The crisis situation created in late 2001 and early 2002, is now past history. Indeed, with the relaxation of restrictions on deposit withdrawals during the first half of 2003, the crisis was over."*

[366] *J. Crawford,* The International Law Commission's Articles on State Responsibility *at 189. The Commentary says the "words 'and to the extent' [in Article 27(a)] are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation." (Claimant's Book of Authorities, Tab CLA 132).*

112. Continental does not refer to any other part of the proceedings before the Tribunal where Continental advanced this argument. However, the Committee notes that the argument does appear to have been reflected in at least two other paragraphs of Continental's Reply Memorial:

> *Argentina's Counter-Memorial acknowledges that the economy has now recovered and that the conditions that Argentina relies upon to justify its measures no longer prevail. Yet, Argentina fails to draw the logical conclusion from this state of affairs - that its default on its public debt should be cured and deposit holders should be fully compensated for the confiscatory pesification of their deposits.* (Continental's Reply Memorial, para 106 (footnote omitted).)

> *The Argentine economy has now recovered from its former condition. The defences invoked by Argentina, even if they were properly made out, would still require compensation to be paid in these circumstances* (Continental's Reply Memorial, para 407).

113. The only specific reference in the Award to this particular argument of Continental appears to be in the final sentence of paragraph 64, where the Award refers to paragraph 106 of Continental's Reply Memorial (quoted above) and paraphrases Continental's argument as follows: "*Since Argentina's economy has now fully recovered, the Claimant concludes in this respect that 'deposit holders should be fully compensated for the confiscatory pesification of their deposits*'".

114. The Tribunal's main findings on the legal effect of Article XI of the BIT are contained in paragraphs 160 to 169 of the Award. In these paragraphs, the Tribunal made findings of law in respect of the differences between Article XI of the BIT and the principle of necessity under customary international law. In the proceedings before the Tribunal, it was not disputed by either party that Article 25 of the ILC Articles codified the customary international law principles,[86] and the Tribunal proceeded on this basis.[87]

115. Article XI of the BIT is quoted in paragraph 66 above. Article 25 of the ILC Articles provides as follows:

> *1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
>
> *(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril;*
>
> *and*
>
> *(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
>
> *2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
>
> *(a) The International obligation in question excludes the possibility of invoking necessity; or*
>
> *(b) The State has contributed to the situation of necessity*[88]

The principle of customary international law which this provision was accepted as codifying is referred to below for convenience as the "principle of necessity". Article 27 of the ILC Articles then adds as follows:

> *The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:*

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86 Award ¶ 165, footnote 238.

87 Award ¶ 165 (although the Tribunal's comments in footnote 238 may suggest that the Tribunal itself refrained from expressly pronouncing on the point).

88 Award ¶ 303.

> *(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;*
>
> *(b) the question of compensation for any material loss caused by the act in question.*

116. The Tribunal found two main differences between Article XI of the BIT and the principle of necessity.

117. First, the Tribunal found that the principle of necessity can be invoked in any context against any international obligation (other than a norm *ius cogens*). Because of this, the Tribunal considered that the principle of necessity is of an "exceptional nature",[89] and "can only be accepted on an exceptional basis",[90] and that its application is subject to "*strict conditions*".[91] On the other hand, Article XI of the BIT was considered to be a specific provision which could potentially apply only to the particular investment protection obligations in the bilaterally agreed BIT itself.[92] Because of this, the Tribunal considered that Article XI of the BIT "*is not necessarily subject to the same conditions of application as the plea of necessity under general international law*".[93]

118. It is clearly implicit from this that the Tribunal was contemplating that the potential application of Article XI of the BIT was not necessarily subject to the same "strict conditions" as the application of the principle of necessity. However, the Tribunal did go on to say that the customary international law principle of necessity might nonetheless be relevant to its interpretation.[94]

119. Secondly, the Tribunal considered that the *effect* of the application of Article XI of the BIT was different to the effect of the principle of necessity. The Tribunal described the effect of Article XI of the BIT as follows:

> *The consequence would be that, under Art. XI, such measures would lie outside the scope of the Treaty so that the party taking it would not be in breach of the relevant BIT provision. A private investor of the other party could therefore*

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89 Award ¶¶ 167, footnote 244, quoting the ILC Commentary to Article 25 of the ILC Articles.
90 Award ¶¶ 167, footnote 244, quoting *Gabčikovo-Nagymaros Project (HungarylSlovakia), Judgment, I.C.J. Reports 1997,* p. 7, at p. 40, para. 51.
91 Award ¶¶ 166 and 167.
92 Award ¶ 167.
93 Award ¶ 167.
94 Award ¶ 168.

> *not succeed in its claim for responsibility and damages in such an instance, because the respondent party would not have acted against its BIT obligations since these would not be applicable, provided of course that the conditions for the application of Art. XI are met. In other words, Art. XI restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met. In fact, Art. XI has been defined as a safeguard clause; it has been said that it recognizes "reserved rights," or that it contemplates "non-precluded" measures to which a contracting state party can resort.*[95]

120. The difference in this effect of the application of Article XI of the BIT and of the application of the principle of necessity was explained by the Tribunal in footnote 236 of the Award as follows:

> *This Tribunal is thus minded to accept the position of the* Ad Hoc *Annulment Committee in the ICSID case* CMS v. Argentina*, where it states: "Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations" (*CMS Annulment Decision*, para. 129). On the one hand, if Art. XI is applicable because the measure at issue was necessary in order to safeguard essential security interest, then the treaty is inapplicable to such measure. On the other hand, if a State is forced by necessity to resort to a measure in breach of an international obligation but complying with the requirements listed in Art. 25 ILC, the State escapes from the responsibility that would otherwise derive from that breach.*

121. Subsequently, in footnote 241 of the Award, the Tribunal quoted from one of the reports of the Special Rapporteur produced in the course of the ILC's work on the ILC Articles, to the effect that "*when a State invokes the state of necessity, it has full knowledge of the fact that it deliberately chooses a procedure that does not abide an international obligation*". The Tribunal then added that "*This is an argument that would not be applicable to the invocation of Art. XI*".

122. At footnote 242 of the Award, the Tribunal again proceeded to state that it agreed with paragraphs 129 to 134 of the *CMS* Annulment Decision. Paragraph 129 of the *CMS* Annulment Decision was already referred to in footnote 236 of the Award, quoted above. The full text of that paragraph is as follows:

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[95] Award ¶ 164 (footnotes omitted).

> *The Committee observes first that there is some analogy in the language used in Article XI of the BIT and in Article 25 of the ILC's Articles on State Responsibility. The first text mentions "necessary" measures and the second relates to the "state of necessity". However Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.*

123. At footnote 242 of the Award, the Tribunal then proceeded further to state that it disagreed with the position taken at paragraph 55 of the *Mitchell* Annulment Decision. In the latter, it was stated in relation to a similarly worded provision in a different bilateral investment treaty that:

> *Article X(1) of the Treaty is a provision relating to the causes for exemption from liability, or, in other words, a provision which precludes the wrongfulness of the behavior of the State in certain exceptional circumstances, and not a provision which delimits the scope of application of the Treaty [footnote omitted].*

By expressly disagreeing with this paragraph of the *Mitchell* Annulment Decision, the Tribunal in the present case by necessary implication took the position that Article XI of the BIT *does* delimit the scope of application of the BIT.

124. The Committee considers it abundantly clear from the Award that the Tribunal considered that where the host State takes a measure of the kind referred to in Article XI of the BIT, the substantive obligations under the BIT simply do not apply to that measure. The logical consequence of this conclusion is that the measure cannot amount to a violation of any provision of the BIT.

125. The Tribunal found that Article XI applied to relevant measures taken by Argentina in this case because they were taken "*in the face of the social and economic crisis*",[96] and found that they "*were sufficient in their design to address the crisis and were applied in a reasonable and proportionate way at the end of*

[96] Award ¶ 233.

2001-2002".[97] However, while the Tribunal reached this conclusion in respect of the measures taken by Argentina in 2001-2002, it reached a contrary conclusion in relation to the restructuring of the LETEs through Decree 1735/04, a measure that was adopted in December 2004. One of the reasons for finding that Article XI did not apply to Decree 1735/04 was that by that time "*Argentina's financial conditions were evolving towards normality*".[98]

126. It is true that the Tribunal does not *expressly* address the question of whether Argentina could have any responsibility under the BIT in respect of the 2001-2002 measures once the economic crisis was over. However, the Committee is satisfied that the Tribunal's position on this issue is sufficiently implicit from a reading of the Award as a whole, and in the particular light of the passages referred to above. As the Tribunal found that the BIT was simply inapplicable to the 2001-2002 measures by virtue of Article XI, due to the crisis then prevailing, it must be understood as implicit that the Tribunal was of the view that Argentina was under no obligation to compensate Continental for having taken those measures, once the crisis was over. If it is the case, as the Tribunal found, that the BIT was simply inapplicable to the 2001-2002 measures by virtue of Article XI, due to the crisis then prevailing, then it would follow that those measures cannot be a violation of the BIT, even if their *consequences* continue to be felt after the crisis is over. Whether the measures were temporary or permanent, and in either case, whether the temporary or permanent effects continued to be felt after the period of crisis was over, was considered by the Tribunal not to be material. If, as the Tribunal found, those measures were within the scope of Article XI, the logical conclusion would be that the BIT did not apply to the continuing consequences of those measures even after the end of the economic crisis.

127. The argument advanced in paragraphs 360 to 364 of Continental's Reply Memorial in the proceedings before the Tribunal, quoted at paragraph 111 above, relies primarily on Article 27 of the ILC Articles. However, the Tribunal expressly found, as set out above, that the effect of the application of Article XI of the BIT is different to the effect of the application of Article 25 (and by logical

[97] Award ¶ 232.
[98] Award ¶ 221(a).

implication, of Article 27) of the ILC Articles. The argument in Continental's Reply Memorial also relies on paragraphs 382 and 392 of the *CMS* Award.[99] However, the findings of the tribunal in the *CMS* Award were subsequently criticised by the *ad hoc* committee in the *CMS* Annulment Decision. The *ad hoc* committee in that case said with reference to the *CMS* Award that:

> *... the Tribunal evidently considered that Article XI was to be interpreted in the light of the customary international law concerning the state of necessity and that, if the conditions fixed under that law were not met, Argentina's defense under Article XI was likewise to be rejected*.[100]

The *CMS* Annulment Decision also went on to criticise the *CMS* Award for "*simply assuming that Article XI and Article 25 are on the same footing*",[101] and for failing to recognise that "*Article XI and Article 25 are substantively different*".[102] As set out above, the Tribunal in the present case expressly agreed with paragraphs 129 to 134 of the *CMS* Annulment Decision.

128. It may have been preferable for the Tribunal to deal with this argument expressly. However, its failure to do so might be explained by the fact that the only part of the proceedings before the Tribunal that Continental has referred to in which this argument was advanced consisted of several relatively brief paragraphs in its Reply Memorial. On the basis of the material before it, it does not appear to the Committee that this was a major argument of Continental in the proceedings before the Tribunal. Continental's Reply Memorial was some 155 pages long, of which this argument occupied some two pages. Continental's initial Memorial in the proceedings before the Tribunal, dated 27 April 2004, which was some 70 pages long, does not appear to raise this argument at all.

129. It has not been suggested to the Committee that the argument was raised in Continental's original request for arbitration. Continental has not provided the

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[99] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 ("***CMS* Award**").

[100] *CMS* Annulment Decision ¶ 124. The *ad hoc* committee said that the tribunal "evidently considered" this, because although the tribunal's reasoning had been "inadequate" and "could certainly have been clearer", both parties had understood the award in this sense, and the tribunal's reasoning was found to be sufficiently implicit (*ibid*, at ¶¶ 124-127).

[101] *CMS* Annulment Decision ¶ 131 (and see ¶¶ 128-136 generally).

[102] *CMS* Annulment Decision ¶ 130.

Committee with transcripts of oral argument before the Tribunal in which this argument is advanced. The Tribunal's failure to address the argument more directly might therefore well be a result of the limited degree of prominence with which this argument was advanced by Continental in the proceedings before the Tribunal.

130. Furthermore, some of the authorities relied on by Continental in relation to this ground of annulment appear not to have been cited by Continental in its Memorial or Reply Memorial in the proceedings before the Tribunal.[103] Other authorities appear to have been cited by Continental before the Tribunal in relation to different arguments.[104] In any event, the Tribunal is not required to cite or expressly deal with every authority cited to it in relation to a particular argument. It certainly cannot be expected to consider authorities that have not been cited to it in relation to a particular argument.

131. Whatever the reasons for the Tribunal's omission to deal with this argument more directly, the Committee is satisfied that the Tribunal's reasons for rejecting the argument are "*implicit in the considerations and conclusions contained in the award*" (see paragraph 102 above). The Committee rejects the contention that the Tribunal failed to state reasons, within the meaning of Article 52(1)(e) of the ICSID Convention, for not accepting the argument in paragraphs 360 to 364 of Continental's Reply Memorial.

132. The Committee also considers that the Tribunal, in reaching the conclusion that it did, did not fail to apply the applicable law. The Committee is of the view that the law applicable to the Claimant's claims was the ICSID Convention, the BIT and applicable international law,[105] and that this is the law that the Tribunal applied.

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103 For instance, *United States - Import Prohibition on Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)* (2001), WT/DS58/RW (Panel Report); *United States - Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R (Report of the Appellate Body).

104 For instance, *Phillips Petroleum Co. Iran v. Iran, Iran - United States Claims Tribunal*, Case No. 39, Award 425-39-2, 29 June 1989, 21 Iran-US CTR 79, 78-82, which is cited in paragraph 245 of Continental's Memorial before the Tribunal in support of the proposition that the assessment of damages by a tribunal can take into account opportunity loss.

105 See *Enron* Annulment Decision ¶¶ 139, 225 and 246 and the authorities there cited.

133. Continental argues that the Tribunal erred in its analysis of the law of the GATT-WTO. However, the Tribunal was clearly not purporting to apply that body of law, but merely took it into account as relevant to determining the correct interpretation and application of Article XI of the BIT.[106] Even if it could be established by Continental that the Tribunal reached an erroneous interpretation of Article XI of the BIT based on an erroneous understanding of GATT-WTO law, that would amount only to an error of law, which is not a ground of annulment (see paragraphs 88 above).

134. Continental also argues that the Tribunal applied the incorrect burden of proof and standard of proof.[107] Thus, in paragraph 67 of Continental's Memorial on Annulment it is argued:

> *Furthermore, following its review of WTO case law, the Tribunal apparently understood the proposition that measures need not be indispensable in order to be "necessary" within the meaning of an exception clause as placing the onus on Continental to prove that Argentina's measures were not necessary. This amounts to a reversal of the burden of proof under international law. It was for Argentina to prove on the balance of probabilities the elements of the defence it was invoking. The Tribunal's analysis of whether Argentina's measures were necessary consists of the Tribunal assessing and rejecting Continental's arguments. At no point does the Tribunal ever suggest or state that Argentina has met the burden of proof on necessity; the question for the Tribunal is whether Continental proved that the measures are not necessary. At paragraph 204 of the Award, for example, the Tribunal's statement that "[t]he evidence does not permit the Tribunal to conclude" is a clear indication that it had reversed the applicable burden of proof. This is in itself a ground for annulment amounting to a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) and/or the manifest excess of power within the meaning of Article 52(1)(b).* [Footnotes omitted.]

135. The Committee notes that the ICSID Convention and the Arbitration Rules contain no provisions with respect to the burden of proof or standard of proof. Accordingly, there cannot be any requirement that a tribunal expressly apply a

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[106] See especially Award ¶¶ 192-195.

[107] This argument was not raised in Continental's Application. In Continental's Memorial on Annulment, this argument was raised in connection with Continental's ground of annulment that the Tribunal failed to decide Continental's claim for loss after the state of necessity was over, and the argument is dealt with in that context in the present decision. In Continental's Reply Memorial on Annulment, it was presented as a separate ground of annulment.

particular burden of proof or standard of proof in determining the dispute before it. Indeed, the tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms, as opposed simply to making findings of fact on the basis of the evidence before it.

136. In any event, the Committee does not accept Continental's suggestion that "*The Tribunal's analysis of whether Argentina's measures were necessary consists of the Tribunal assessing and rejecting Continental's arguments*" or that "*the question for the Tribunal is whether Continental proved that the measures are* not *necessary*."[108] Even if it could be argued to be an annullable error, such as a serious departure from a fundamental rule of procedure, for a tribunal to place the burden on a claimant to disprove the applicability of a defence, rather than on the respondent to establish the defence, the Committee is not persuaded that this is what occurred in the present case.

137. The Tribunal dealt with the applicable legal standard for determining whether a measure was "necessary" within the meaning of Article XI of the BIT in paragraphs 189-195 of the Award. The Tribunal reached its initial conclusion of fact in paragraphs 196-197 of the Award, in which it found that:

> *... According to these principles, the next step for us is to assess whether the Measures contributed materially to the realization of their legitimate aims under Art. XI of the BIT, namely the protection of the essential security interests of Argentina in the economic and social crisis it was facing. More specifically, whether the Measures were apt to and did make such a material or a decisive contribution to this end.*
>
> *... In light of the analysis we have carried out above, we believe that this was the case. In general terms, within the economic and financial situation of Argentina towards the end of 2001, the Measures at issue (the* Corralito*, the* Corralon*, the pesification, the default and the subsequent restructuring of those debt instruments involved here) were in part inevitable, or unavoidable, in part indispensable and in any case material or decisive in order to react positively to the crisis, to prevent the complete break-down of the financial system, the implosion of the economy and the growing threat to the fabric of Argentinean society and generally to assist in overcoming the crisis. In the Tribunal's view, there was*

[108] Continental's Memorial on Annulment, para 67.

> *undoubtedly "a genuine relationship of end and means in this respect."* [Footnotes omitted.]

138. That conclusion was clearly based on all of the findings of the Tribunal in Part V of the Award (paragraphs 100 to 159), which in turn were based on the Tribunal's assessment of the evidence in the case as a whole.

139. The Tribunal then said at paragraph 198 that it would proceed specifically to consider the further questions:

(a) whether there were alternatives to the measures taken by Argentina, not in breach of the BIT, that might have been available when the Measures challenged were taken and that would have yielded equivalent results/relief; and

(b) whether Argentina could have adopted at some earlier time different policies, that would have avoided or prevented the situation that brought about the adoption of the measures challenged.

These further questions were then considered by the Tribunal at paragraphs 200 to 222, and 223 to 230, of the Award respectively. In these paragraphs (especially paragraphs 200 to 205 of the Award), the Tribunal deals with certain specific alternative measures that Continental claimed could have been adopted by Argentina to deal with the crisis, and (especially paragraph 223) with specific measures that Continental claimed could have been adopted by Argentina to have prevented the crisis. These alternatives having been specifically raised by Continental, they were unsurprisingly expressly considered by the Tribunal. The Committee does not see any basis for suggesting that by doing so, the Tribunal thereby placed the burden of proof on Continental.

140. The Committee is not persuaded that the Tribunal applied a standard of proof of "beyond reasonable doubt", as Continental contends. No particular standard of proof is prescribed by the ICSID Convention or the Arbitration Rules, and the Tribunal did not articulate any particular standard of proof that it was applying. The Committee is not persuaded that the Tribunal made its finding otherwise than upon its own evaluation of the evidence in the case as a whole. That was consistent with the ICSID Convention and Arbitration Rules. Even if there was,

as Continental contends, "*a difference of competent views on what was or was not in fact a reasonably available alternative*", that difference was one for the Tribunal to resolve on the evidence. Dissatisfaction with the Tribunal's finding of facts in this respect cannot amount to an annullable error.

141. Finally, the argument that the Award is inconsistent with the *LG&E* Award clearly cannot establish an annullable error. The Tribunal was not bound by previous decisions of other ICSID Tribunals. Even if it were assumed that another ICSID Award were correct on a particular issue of law and that the Award was wrong, that would be merely an error of law. Error of law is not a ground of annulment, and it is therefore not for the Committee to determine whether the Tribunal applied the law correctly.

142. The Committee finds it unnecessary to express any view on whether "*a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers*",[109] since even if it may, the Committee is not persuaded that there has been any such manifest error in this case.

143. The Committee concludes that this ground of annulment must therefore be rejected.

B. Failure to determine Continental's expropriation claim in relation to the LETEs

(a) Introduction

144. As has been observed, while the Tribunal reached the conclusion that the measures taken by Argentina in 2001-2002 were outside the scope of the BIT by virtue of Article XI, it reached a contrary conclusion in relation to the December 2004 measures for the restructuring of the LETEs.[110]

145. Having found that Article XI was not applicable to these December 2004 measures, the Tribunal then proceeded to consider whether those measures violated any of the substantive provisions of the BIT which had allegedly been

[109] See paragraph 88 above.
[110] See paragraphs 42-74 above.

invoked by Continental. At paragraphs 264 and 265 of the Award, the Tribunal found that the December 2004 measures for the restructuring of the LETEs were in breach of the fair and equitable treatment clause of the BIT (Article II(2)(a)).

146. In relation to this part of its request for annulment, Continental argued that in the proceedings before the Tribunal it claimed that the December 2004 measures for the restructuring of the LETEs were a breach not only of the fair and equitable treatment clause, but also of the expropriation clause of the BIT (Article IV). In relation to this latter claim, the Tribunal said at paragraph 285 of the Award as follows:

> *Before concluding, we recall that we have found above that the restructuring of the LETEs held by CNA was not covered by the defense of necessity both under the BIT and the principles of customary international law and caused substantial loss to the Claimant. This has led the Tribunal to hold that the restructuring as concerns CNA was in breach of the Fair and Equitable Treatment of Art. II (2)(a) of the BIT and that Claimant is entitled to indemnification for that loss in the form of damages. Continental has claimed that the restructuring and its implementation constitute at the same time an expropriation and has asked indemnification under either provision of the BIT in an amount corresponding to the original dollar nominal value of those LETEs. Having already decided the same issue under Art. II(2)(a) BIT, we do not need to pronounce further on the alternative claim of violation of Art. IV submitted by the Claimant.*

147. The second ground on which Continental seeks partial annulment of the Award is that:

> *After finding that Argentina had breached its obligation to provide fair and equitable treatment with respect to the Applicant's investment in Argentine Government Treasury Bills (known as "LETEs"), the Tribunal refused to answer the Applicant's question of whether Argentina owed the Applicant compensation for its expropriation of the same investments even though the amount of compensation mandated by the Treaty for such an expropriation would have been different than the standard applied for a breach of fair and equitable treatment under the Treaty.*[111]

148. Continental contends that:

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[111] Continental's Application, paragraph 2(c).

> *In its Award, the Tribunal wrongly construed the Article II(2)(a) and Article IV(1) claims as made in the alternative. The Tribunal's consequent failure to apply Article IV(1) and to determine the expropriation claim in relation to the LETEs placed before it by Continental is a manifest excess of powers within the meaning of Article 52(1)(b) and/or a failure to state reasons within the meaning of Article 52(1)(e). This failure had a very significant impact because Article IV(1) provides a specific formula for the calculation of damages for expropriation. This formula would have led to Continental being awarded significantly higher damages.*[112]

(b) Arguments of the parties

149. Continental argues, *inter alia*, that:

(a) At paragraph 272 of the Award, the Tribunal sets out its understanding that Continental claimed that its property had been expropriated by (1) the pesification of [CNA's] U.S. dollar denominated deposits and securities at a much below market exchange rate; (2) the restructuring of the GGLs at terms that did not reflect their acquisition value; and (3) the fact that the LETEs have been deprived of their value after CNA had not accepted the "unreasonable" terms of their restructuring offered by Argentina on May 31 and September 16 of 2002.[113] The Tribunal rejected the first two of these claims by virtue of its interpretation of Article XI of the BIT,[114] and this ground of annulment relates principally to the Tribunal's finding in relation to the third.

(b) In the proceedings before the Tribunal, Continental accepted that compensation due for breaches of Article IV and Article II(2)(a) would not be cumulative. However, Continental made clear that it sought the higher amount of compensation due under the expropriation clause (Article

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112 Continental's Memorial on Annulment, paragraph 79 (footnote omitted).
113 Referring to Award ¶ 272.
114 Referring to Award ¶ 275.

IV).[115] Continental argued that damages for expropriation are measured at the date of expropriation, without the benefit of hindsight.[116]

(c) Continental claimed that the compensation due in the event that Argentina was found to have expropriated the LETEs to be some USD 633,000 more than that which would be due if Argentina was found to have breached the fair and equitable treatment provision in respect of the LETEs (USD 4,126,000 as against USD 3,493,000).[117]

(d) Article IV of the BIT establishes a standard of compensation for expropriation, which is different to other types of compensatory damages. Under the BIT, the Tribunal was required to fix the date of the expropriation, and determine its value at that time using information only available at that time. The Tribunal did not do this.

(e) Although the question of the different basis of assessing damages for expropriation contrary to the BIT was expressly before the Tribunal, it simply ignored the question and failed to consider or apply the BIT.

(f) At paragraph 285 of the Award, the Tribunal stated that Continental was seeking indemnification "*under **either** provision of the BIT in an amount corresponding to the original dollar nominal value of those LETEs*" (emphasis added), and that having decided the issue under the fair and equitable treatment clause, the Tribunal did "*not need to pronounce further on the **alternative** claim*" under the expropriation clause.

(g) However, Continental did not plead or otherwise argue the Article II(2)(a) and Article IV(1) claims in the alternative, but on the contrary asked the Tribunal to declare that Argentina breached both provisions individually.[118]

(h) Continental was entitled to make independent claims in respect of the LETEs under both the fair and equitable treatment clause and under the

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115 Referring to Award ¶¶ 22, 77, 275; Continental's Reply Memorial, paragraph 380.
116 Referring to paragraphs 17 of the Second Rosen Report.
117 Referring to Continental's Reply Memorial, paragraph 379.
118 Referring to Continental's Reply Memorial, paragraphs 379, 380, 408.

expropriation clause. A finding on the former does not render a finding on the latter unnecessary, especially as Continental claimed a significantly higher amount of damages in respect of the latter.

(i) The Tribunal's consequent failure to determine the expropriation claim in relation to the LETEs is a manifest excess of powers within the meaning of Article 52(1)(b) and/or a failure to state reasons within the meaning of Article 52(1)(e).[119]

(j) The Tribunal's failure to determine the expropriation claim is also a serious departure from a fundamental rule of procedure.

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

(a) The Award analysis should be interpreted as a whole, complementary to the rest of the decision. Continental bases its argument solely on paragraph 285 of the Award, isolating it from the rest of the content of the Award and distorting the findings of the Tribunal with respect to this issue.

(b) At paragraph 265, the Tribunal found that the breach of the fair and equitable treatment clause related only to the restructuring of the LETEs, and that the pesification of the LETEs generally fell within Article XI of the BIT.

(c) In the proceedings before the Tribunal, Continental's expropriation claim related to the pesification of the LETEs and the default on the LETEs; Continental did not claim before the Tribunal that the expropriation claim related to the restructuring of the LETEs.[120] The Tribunal found that Article XI of the BIT applied to the pesification of the LETEs and the default on the LETEs. Thus, the expropriation claim was basically covered by Article XI.

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[119] Referring to *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, November 1, 2006 ("*Mitchell* Annulment Decision") ¶ 21; *CDC Group plc v. Republic of Seychelles,* ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005 ("*CDC* Annulment Decision") ¶ 70.

[120] Referring to Continental's Memorial on Annulment, quoting paragraph 188 of Continental's Memorial on the Merits.

(d) At paragraphs 276 and 284, the Tribunal distinguished between types of measures that amount to expropriation and types of measures that do not.

(e) The Tribunal found that the restructuring of the LETEs was inconsistent with the fair and equitable treatment clause,[121] but did not find that there was any expropriation, which finding would have been inconsistent with its previous finding that the pesification of the LETEs was permitted under Article XI.

(f) It is evident that the Tribunal found that there had been no expropriation of the LETEs in terms of Article IV, which always continued being held by Continental's subsidiary. Paragraph 285 refers to "the restructuring of the LETEs held by CNA". It is inconceivable that the Tribunal would accept the validity of a measure adopted by a State with regard to an investor's asset, while considering, at the same time, that such asset has been expropriated by another of the measures under consideration.

(g) Paragraph 254 considered the difference between an expropriation and a breach of the fair and equitable treatment standard. The restructuring of the LETEs involved an offer to start repaying the debt securities in default. Regardless of any assessment of such restructuring which might be carried out, that measure could have never amounted to expropriation in accordance with the Tribunal's analysis.

(h) In paragraph 285 of the Award, the Tribunal found it unnecessary to examine again the issue of the restructuring of the LETEs, as the issue had already been dealt with in the treatment of the fair and equitable treatment clause.

(i) Even if Continental did not argue the Article II(2)(a) and Article IV(1) claims in the alternative, it was open to the Tribunal itself to regard the claims as alternative *per se*.

[121] Referring to Award ¶¶ 220-222.

(j) The Tribunal's conclusions on this matter are fully grounded and any attentive and *bona fide* reader could understand them. There has been no manifest excess of power or departure from a fundamental rule of procedure or failure to state reasons.

(k) The Committee should reject *in limine* Continental's contention that there was a serious departure from a fundamental rule of procedure, as this contention was raised for the first time in Continental's Reply Memorial in the annulment proceedings. Continental does not even state what the rule of procedure that has allegedly been departed from is, let alone provide reasons for such claim.

(l) Continental did not argue before the Tribunal that the standard of compensation for expropriation is different to the standard of compensation under the fair and equitable treatment clause. Rather, Continental argued that the principle in the *Chorzów Factory* case[122] applied to both.[123] This is the principle that the Tribunal applied in assessing damages for breach of the fair and equitable treatment clause in respect of the restructuring of the LETEs. Continental itself acknowledged that it was not asking for an accumulation of damages under both the fair and equitable treatment clause and the expropriation clause.

(m) In Article IV of the BIT there is a reference to "fair market value", but that is a condition for an expropriation being legal, rather than a standard of compensation for illegal expropriation.

(n) In Continental's Memorial on the Merits, the damages it claimed for expropriation of the LETEs was in fact a smaller amount than the damages claimed for breach of the fair and equitable treatment clause in respect of the LETEs. In the second round of submissions before the Tribunal, the damages claimed in respect of expropriation became greater than the damages claimed for breach of the fair and equitable

[122] Referring to Permanent Court of International Justice, *Chorzów Factory* case, Merits, 1928, Series A No. 17, p. 47.

[123] Referring to Continental's Memorial on the Merits, paragraph 236.

treatment clause, but this was only because of the calculation of interest. In Continental's claim, the interest rate was applied from an assumed date of expropriation of 8 March 2002. However, calculating interest from this date is inconsistent with the Tribunal's finding that the pesification and default were covered by Article XI, and that there was no breach of the BIT until November-December 2004.

(o) The Tribunal had a discretion, which it exercised, to apply an interest rate different to the rate requested by Continental.

(p) The Tribunal thereby gave detailed consideration to the expropriation claim.

(c) The Committee's views

151. The Committee considers that the Award must be understood in the light of what was argued before the Tribunal by the parties.

152. Paragraph 369 of Continental's Merits Reply Memorial stated the following, with respect to the amount of damages Continental was claiming:

> *Calculation of the Claimant's damages from Argentina's breaches of the Treaty is straightforward. But for Argentina's actions in breach of the Treaty, the Claimant would have received the value of the principal and interest payable on CNA ART's financial securities in accordance with their terms. The Claimant would have received the value of its US dollar deposits and the value of its government loans at the agreed rate of interest.*

153. Paragraph 371 stated:

> *The Claimant's damages are simply the value of CNA ART's financial securities but for Argentina's actions in breach of the Treaty minus the value of those securities given Argentina's actions.*

154. At paragraph 375, Continental stated that Argentina had not challenged the principle that "*an award of damages must compensate the Investor so that the Investor is in the position it would have enjoyed "but for" Argentina's unlawful acts*", and cited the *Chorzów Factory* case as one authority for that principle.

155. Paragraph 376 stated:

> *For the purposes of the Investor's claims for breaches of the BIT's fair and equitable treatment, free transfers and obligations observance articles, events occurring since Argentina's unlawful actions influence the value of CNA ART's assets but for those actions. For example, in assessing the interest that the Investor would have earned on its matured certificates of deposit, but for Argentina's breach of the fair and equitable treatment obligation, Mr. Rosen applies actual interest rates since the breach.*

156. Paragraph 377 added:

> *Article IV(1) of the US-Argentina BIT prevents this Tribunal from applying such subsequent information by requiring that compensation on expropriation "shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ..." Accordingly, Article IV(1) of the BIT requires the Tribunal to assess the value of expropriated investments using only information available immediately before the expropriation.* [Footnote omitted.]

157. Paragraph 380 further added:

> *... if the Tribunal finds that both of these expropriation and fair and equitable treatment/full protection and security obligations have been violated for a given asset, it should award only the higher of the two calculations.* [Footnote omitted.]

158. The damages sought by Continental, and the basis on which they were calculated, were set out in a "Reply Report" of Howard N. Rosen, dated August 14, 2006 (the "**Second Rosen Report**"),[124] which was submitted to the Tribunal by Continental,[125] and which relevantly stated as follows:

    (a) Paragraphs 80 and 85 indicated that it proceeded on the basis that as at December 31, 2001, CNA held USD 3.3 million in U.S. dollar denominated LETEs, and that but for the "Events",[126] by March 31, 2006 they would have earned an additional USD 192,400, such that their value on the latter date would have been approximately USD 3.5 million.

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[124] "Reply Report" of Howard N. Rosen, dated August 14, 2006.
[125] See, e.g., Award ¶¶ 76, 77 and footnote 357.
[126] On the meaning of the "Events", see further paragraphs 238 and 240 below.

(b) Paragraph 86 explained that it was considered that the value of the LETEs on March 31, 2006, given the Events, was USD 2.78 million.

(c) Paragraph 87 then explained that the claimed loss due to pesification was the difference between the "expected value" that the LETEs would have had but for the Events, and the "expected value" given the Events (USD 3.5 million minus USD 2.78 million, which was said to be approximately USD 716,000). It was further explained that the claimed loss due to default was USD 2.78 million, being the "current defaulted value".

(d) Schedule 3 set out in tabular form the "Calculation of Loss on Treasury Bills (LETEs)". It accordingly stated that the total loss from pesification (rounded) was USD 716,000, and that the loss due to default (rounded) was USD 2,777,000. The total loss on the LETEs was stated to be the sum of these two figures, USD 3,493,000.

159. Schedule 9 of the Second Rosen Report set out in tabular form a "Calculation of Investment Loss Due to Expropriation".

160. In relation to the LETEs, this schedule indicated that the amount expropriated was USD 3.3 million, and indicated that this figure was "per Schedule 3". That amount was stated in the Second Rosen Report to be the value of the US dollar denominated LETEs held by CNA as at December 31, 2001. Schedule 3 indicated that this was the "Maturity value of T-bills at date of pesification".

161. Paragraph 54 of the Second Rosen Report stated that "We have assumed that CNA-ART's ... Treasury Bill assets [LETEs] were expropriated on March 8, 2002 being the dates that these assets were first impacted by Argentina's measures". March 8, 2002 was the date of pesification of the LETEs by Decree 417.

162. Schedule 9 of the Second Rosen Report indicated that the claimed damages for expropriation of the LETEs included, in addition to their claimed USD 3.3 million value as at March 8, 2002, an additional amount of USD 825,937, stated in footnote (1) to represent interest at 5.6 per cent from March 8, 2002 to March 31, 2006.

163. The Committee considers it important to note that the damage calculations presented in the First and Second Rosen Reports are based on the "Events" undertaken by Argentina in 2001 and 2002, and that they do not take into account any economic implications of the adoption of Decree 1735/04 (quite on the contrary, as is indicated below: the swap constituted by Decree 1735/04 was expressly disregarded).

164. At paragraph 272 of the Award, the Tribunal sets out its understanding that Continental claimed that its property had been expropriated by (1) the pesification of [CNA's] U.S. dollar denominated deposits and securities at a much below market exchange rate; (2) the restructuring of the GGLs at terms that did not reflect their acquisition value; and (3) the fact that the LETEs have been deprived of their value after CNA had not accepted the "unreasonable" terms of their restructuring offered by Argentina on May 31 and September 16 of 2002.

165. At paragraph 275 of the Award, the Tribunal said that it:

> *... notes that most of the allegations brought by the Claimant under the heading of expropriation (breach of Art. IV of the BIT) are substantially the same and are addressed to the same Measures impugned as breaches of the fair and equitable standard of Art. (II)(2)(a) of the BIT. We have already found that the defense of necessity under the BIT is available to Argentina as concerns most claims of breach that Continental has raised against the Measures, namely the pesification of dollar-denominated deposits and the restructuring of the GGL's.* [Footnote omitted.]

166. The Committee considers it sufficiently implicit from the Award, as a whole, that the Tribunal was of the view that even if there had been an expropriation of the LETEs within the meaning of the expropriation clause, that expropriation would have occurred either on March 8, 2002 (pesification) as claimed by Continental, or, additionally or alternatively, on April 25, 2002 (default), and that this took place at a time when Argentina could avail itself of the Article XI exception in the BIT. This is reinforced, for instance, by paragraph 266 of the Award, where the Tribunal says that "*save for the LETEs, the Tribunal considers that the invocation of necessity by Argentina under Art. XI of the BIT is applicable to all*

other claims by the Claimant for breach of the Fair and Equitable Treatment standard by Argentina's Measures".

167. Having reached that conclusion in paragraph 275, the Tribunal followed the logical consequence of holding that this was covered by Article XI at the time when any expropriation action was undertaken: "*Having already decided the same issue under Art. II(2)(a) BIT, we do not need to pronounce further on the alternative claim of violation of Art. IV submitted by the Claimant*".

168. The Tribunal ultimately found that the pesification was not contrary to the BIT by virtue of Article XI, but found in relation to the LETEs that Article XI was not applicable to "*the conditions of their restructuring in December 2004*"[127] (that is, Decree 1735/04). At paragraph 305 of the Award, the Tribunal stated:

> *The Claimant submits it has suffered as to LETEs losses amounting to U.S$700,000 due to pesification and to U.S$2,800,000 "due to the further default and revocation of contractual rights." For the reason stated above, the Claimant is entitled to be compensated only for the latter amount that corresponds to its capital loss. The Claimant is accordingly entitled to payment of compensation in the principal sum of U.S.$2,800,000.* [Footnote omitted.]

169. Thus, the amount of damages ultimately awarded by the Tribunal was the amount claimed by Continental to be, following the pesification, the "expected value" or "current defaulted value" of the LETEs on March 31, 2006.

170. Continental's ground of annulment focuses particularly on paragraph 285 of the Award, in which the Tribunal states that:

> *... Continental has claimed that the restructuring and its implementation constitute at the same time an expropriation and has asked indemnification under either provision of the BIT in an amount corresponding to the original dollar nominal value of those LETEs. Having already decided the same issue under Art. II(2)(a) BIT, we do not need to pronounce further on the alternative claim of violation of Art. IV submitted by the Claimant.*

171. Continental contends that this sentence assumes that the Claimant asked for identical amounts of damages in respect of the alleged breach of the fair and equitable treatment clause and in respect of the alleged breach of the

[127] Award ¶ 264.

expropriation clause. Continental argues that in fact it had sought higher damages in respect of the alleged breach of the expropriation clause, and that it had claimed before the Tribunal that if there had been a breach of both clauses, the Tribunal "should award only the higher of the two calculations".[128] Thus, according to Continental, even after the Tribunal found that there had been a breach of the fair and equitable treatment clause by virtue of Decree 1735/04, the Tribunal still had to consider whether there had been a breach of the expropriation clause, in order to determine whether Continental was entitled to the higher level of damages claimed in respect of the latter.

172. However, if, as the Committee considers to be implicit from the Award, the Tribunal found that any expropriation would have occurred in 2002 at a time when Article XI applied to the measures in question, that provides an answer to the question whether Decree 1735/04 was a measure amounting to an expropriation. If the LETES had already been expropriated in 2002, they could not be expropriated again in 2004 by Decree 1735/04. It follows that any expropriation in 2002 was not a breach of the expropriation clause, by virtue of Article XI, and that there was no expropriation in 2004. It was thus immaterial whether higher damages would have been awarded for a breach of the expropriation clause had there been any such breach, and the Tribunal did not need to decide this question.

173. In view of this reading of the Award, the reference to "an amount corresponding to the original dollar nominal value of those LETEs" in paragraph 285 of the Award cannot be given an independent reading that would call for an examination also of Argentina's liability under Article IV in the context of Decree 1735/04, which liability, as the Tribunal, found, was precluded by operation of Article XI of the BIT.

174. Furthermore, even though it is not necessary to decide this question, the Committee considers it apparent from the Award that even if the Tribunal had hypothetically found Decree 1735/04 itself to amount to an expropriation (in addition to a breach of the fair and equitable treatment clause), it would not

[128] Paragraph 380 of Continental's Reply on the Merits.

have awarded any higher damages for the breach of the expropriation clause than it did for the breach of the fair and equitable treatment clause.

175. The fact that the Second Rosen Report claimed higher damages for the former than for the latter cannot have been material. As explained above, the quantification of the claimed damages in the Second Rosen Report was premised on Continental's view that expropriation occurred in 2002. That analysis would not apply to an expropriation occurring in 2004.

176. In considering the interest on the damages awarded for the breach of the fair and equitable treatment clause, at paragraph 315 of the Award, the Tribunal said that "*As regards the commencement date for compound interest, since Decree 1735/04 restructuring the LETEs was issued in December 2004, the Tribunal fixes January 1, 2005 as the initial date to this purpose*". In the Committee's view, it is sufficiently implicit from the Award that the Tribunal considered that if it had found Decree 1735/04 to constitute a breach also of the expropriation clause, it would have found the date of expropriation to be January 1, 2005.

177. The damages awarded by the Tribunal in respect of the breach of the fair and equitable treatment clause was the amount claimed by Continental to be the "expected value" or "current defaulted value" of the LETEs in March 2006. No reason has been advanced to suggest that this amount was lower than the "expected value" or "current defaulted value" on January 1, 2005. To this the Tribunal added interest from January 1, 2005.

178. The Committee regards it as sufficiently implicit from the Award, as a whole, that the Tribunal was of the view that even if Decree 1735/04 were to be found to be an expropriation of the LETEs in addition to a breach of the fair and equitable treatment clause in respect of the LETEs, the amount of damages in respect of each breach would have been the same. As the Tribunal said at paragraph 285, it was therefore logically the case that "*Having already decided the same issue under Art. II(2)(a) BIT, we do not need to pronounce further on the alternative claim of violation of Art. IV submitted by the Claimant*".

179. Hence, the Committee is satisfied that the Tribunal thereby sufficiently dealt with the issue of expropriation. When the Award is read as a whole in the light of the submissions made to the Tribunal, the reasoning in the Award is sufficiently clear.

180. It follows that the Committee is satisfied that the Tribunal thereby applied the applicable law (in particular, the provisions of the BIT itself). In the circumstances, the Committee considers that the error contended for by Continental is merely an alleged error of law, or a disagreement with the findings of the Tribunal, which does not constitute an annullable error.

181. For these reasons, this ground of annulment must be rejected.

C. Alleged breach of Article V of the BIT

(a) Introduction

182. This ground of annulment relates to the claim made by Continental in the proceedings before the Tribunal under Article V of the BIT, which provides as follows:

> *Article V*
>
> *1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.*
>
> *2. Except as provided in Article IV paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. The free transfer shall take place in accordance with the procedures established by each Party; such procedures shall not impair the rights set forth in this Treaty.*

> *3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.*

183. As has been referred to at paragraph 52 above, one of the measures adopted by Argentina to deal with the economic crisis was Decree 1570 of December 1, 2001 (referred to as the "*Corralito*"), which limited cash withdrawals from bank accounts and prohibited transfers of funds out of the country with the exception of certain current transactions.[129]

184. In the proceedings before the Tribunal, one of the claims of Continental was as follows:

> *The Claimant complains that CNA was prevented from transferring to the U.S. at par free funds amounting to U.S.$19,000,000 by Decree 1570 of 2001 (*Corralito*) which forbade withdrawals from banks and transfers of funds (which CNA had converted in dollars) out of Argentina. The amount of damages it claims as the loss from devaluation of those funds equivalent to U.S.$14,631,000. Continental claims that this prohibition breached its right as an investor to effect "all transfers related to an investment" provided for by Art. V of the BIT. According to Continental, the proposed transfer concerned "proceeds from the sale or liquidation of all or any part of an investment" (Art. V(1) (e)), based on the following reasoning: "Continental's shares in CNA ART are definitely an investment protected under the BIT. The transfer of the asset of an investment is a transfer related to an investment. Transfers of U.S. dollar term deposits on maturity are also 'proceeds from the liquidation of…part of an investment.'"*[130]

185. This claim was rejected by the Tribunal in paragraphs 237 to 245 of the Award. The Tribunal found that the transfer that Continental claimed it would have made if the *Corralito* had not prevented it was not a transfer "related to an investment" of the kind to which Article V of the BIT applied, and then concluded:

> *As a consequence Argentina has committed no breach of Art. V of the BIT to the detriment of the Claimant, so that the*

[129] See Award ¶¶ 100, 124, 126, 137-140.
[130] Award ¶ 237 (footnotes omitted).

> *latter's claim in this respect must be and is rejected by the Tribunal. This conclusion makes it unnecessary for the Tribunal to examine the subordinate arguments of the Parties: namely (a) whether in view of the acute foreign exchange crisis Argentina was encountering, Argentina was allowed, notwithstanding its obligations under Art. V BIT to introduce the exchange restrictions of Decree 1570, based on Art. XI of the BIT, on the IMF Agreement or under customary international law; (b) whether the Claimant cannot invoke Art. V because neither itself (Continental) nor CNA ever decided to make, or asked to be authorized to effect the transfers at issue; and (c) whether the derogations allowed under the* Corralito *would have made those transfers possible.*[131]

186. Continental seeks annulment of the Tribunal's rejection of this claim under Article V of the BIT, contending that the Tribunal both manifestly exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention in rejecting this claim, and failed to state reasons for its Award within the meaning of Article 52(1)(e) of the ICSID Convention. Specifically, Continental claims that:

(a) "… *[t]he Tribunal failed to apply the governing law with respect to Argentina's obligations to protect transfers of foreign investors under Article V of the Treaty, and, as a result, the Tribunal failed to properly apply the terms of the Treaty*";[132] and

(b) "… *the Tribunal ignored the express provisions of the Treaty which afford protection to transfers essential for the 'maintenance' of investments. In addition, instead of focusing on the Treaty requirement of whether the transfer at issue was "related to" an investment, the Tribunal also based its analysis on an irrelevant consideration, the fact that capital movements are not investments in-and-of-themselves. As a result, not only did the Tribunal totally ignore the express wording of the governing Treaty, but again it also failed to provide any coherent reasoning to explain its approach*".[133]

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131 Award ¶ 245 (footnotes omitted).
132 Continental's Application ¶ 2(d).
133 Continental's Application ¶ 23.

(b) Arguments of the parties

187. Continental argues, *inter alia*, that:

(a) The Tribunal failed to provide comprehensible reasons for its conclusion that the transfer at issue did not "relate to an investment" and fell outside the protection of Article V.[134] Nowhere in Article V of the BIT is it required that a transfer be an investment in itself. Rather, Article V requires merely that the transfer be "*related to* an investment", which the transfer in question undoubtedly was.

(b) There is nothing in the language of the BIT, nor of any other relevant legal instrument including the Articles of the IMF and related IMF norms or the GATS, that limits directly or indirectly the transfers covered under Article V to transfers required to satisfy "*a payment obligation of CNA, commercial, financial or other, or involve a transfer of funds to some different entity*".[135]

(c) These novel and unexplained restrictions introduced by the Tribunal are contradicted by paragraph 240 of the Award, where the Tribunal says that Article V is for the protection of transfers "*essential for, or typical to the [inter alia] … maintenance … of investments*" and for the "*protection … of property of all kinds*", and paragraph 241 of the Award, where the Tribunal says that the funds in question in this particular case were "*part of [the] investor's existing investment"* and that the purpose of the transaction was to *"protect them from the impending devaluation*", as well as the finding in paragraph 242 that the transfer was "*clearly a legitimate operation from a business point of view*". On the basis of these findings, the Tribunal had no choice in law or logic but to conclude that Argentina had breached Article V of the BIT.

(d) The statement in paragraph 241 of the Award that the transfer in question does not fall within any of the categories referred to in paragraph 240 of the Award is a bland assertion and a bare postulate, without any

[134] Referring to Award ¶ 244.
[135] Referring to Award ¶ 242.

supporting reasoning.[136] The key statement in paragraph 241 contradicts and does not follow from that in paragraph 240.

(e) The reasons given by the Tribunal are "*so inadequate that the coherence of the reasoning is seriously affected*",[137] and are incomprehensible and contradictory,[138] and incoherent, and the Tribunal refers to nothing to support its assertions.

(f) The Tribunal was required to apply the whole of the BIT. Article V was modified by a Protocol to the BIT, and Article XIV(4) of the BIT provides that the Protocol is an integral part of the BIT. Article 10 of the Protocol[139] is a most favoured nation (MFN) clause with respect to transfers. Despite the evidence before the Tribunal about the better treatment for transfers of investments of other nationals,[140] nowhere in the Award did the Tribunal apply this part of the governing law to the less favourable treatment of Continental with respect to transfers.

(g) The Argentina-Chile BIT provides that transfers cannot be held up for more than two months, and the Argentina-United Kingdom BIT contains no exception at all in respect of the essential security interests of the host State. This was the treatment that the Tribunal had to consider under the governing law of the arbitration. The Tribunal failed to apply Article 10 of the Protocol to the BIT which was an annullable manifest excess of power, and gave no reason for its failure to apply the governing law.

(h) The same question was raised by Continental as a violation of the MFN provision in Article II(1) of the BIT.[141]

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136 Referring to *Vivendi* First Annulment Decision ¶¶ 64-65; *Klöckner Industrie-Anlagen GmbH et al v. United Republic of Cameroon & Société Camerounaise des Engrais*, Decision on Annulment, May 3, 1985 ("*Klöckner* Annulment Decision") ¶ 144.

137 Referring to *Mitchell* Annulment Decision ¶ 21.

138 Referring to *CDC* Annulment Decision ¶ 70.

139 The text of Article 10 of the Protocol to the BIT is set out in paragraph 215 below.

140 Continental says that it made reference in the proceedings before the Tribunal to the better treatment provided to investors from Chile under the terms of the Argentina-Chile BIT, and to investors from the United Kingdom under the terms of the Argentina-United Kingdom BIT.

141 Referring to Argentina's Merits Memorial paras 5 and 6.

(i) Continental did assert MFN obligations in the proceedings before the Tribunal, and the Tribunal failed to consider or rule on the evidence of better treatment given to investors of other States, and failed to give reasons for not doing so.

(j) There was evidence before the Tribunal that Continental did intend to make the transfer in question.[142] The evidence was that Continental intended to sell certificates of deposit and transfer the proceeds out of Argentina. The certificates of deposit were an "investment" within the meaning of Article I of the BIT. The Tribunal failed to apply Article I of the BIT to the certificates of deposit indirectly held by Continental, and this failure to apply the BIT is an annullable error.

(k) The Tribunal's finding in paragraph 205 of the Award, that Article XI of the BIT justified the *Corralito*, must be limited to aspects of the *Corralito* other than those which restricted Continental's ability to make the transfer, since the Tribunal expressly stated at paragraph 245 of the Award that it was not deciding whether or not the exchange rate restriction in the *Corralito* was justified by Article XI.

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

(a) Continental attempts to turn this application for annulment into an appeal against the Award.

(b) Continental seeks to challenge the Tribunal's conclusion that the transfer in question did not entail a "transfer related to an investment", and even suggests other criteria on the basis of which the Tribunal should have reached a different conclusion, but does not and cannot state that the Tribunal failed to interpret and apply the standard set by the BIT (whether or not there was a "transfer related to an investment"). An annulment proceeding is not open to any party who merely disagrees with a Tribunal's way of interpreting and applying a provision of the applicable

[142] Referring to a witness statement of Mr Sametier, chief financial officer of Continental's Argentine subsidiary.

law. Continental's arguments are mere disagreements, even over factual conclusions.

(c) Continental takes out of context a statement made by the Tribunal. The Tribunal explained in detail when a transfer is considered to be related to an investment, and why this specific requirement was not met in this particular case.[143]

(d) Continental also cites out of context paragraphs of the *Vivendi* First Annulment Decision,[144] which provide precisely the contrary of what Continental contends, and which were used in the *Azurix* Annulment Decision[145] where it was stated that Article 52(1)(e) of the ICSID Award "*concerns a failure to state any reasons with respect to all or part of an award, not a failure to state correct or convincing reasons*".

(e) The Tribunal's reasons for rejecting Continental's claim under Article V of the BIT are contained not only in paragraphs 237 to 245 of the Award, but also in other paragraphs including paragraphs 54, 82, 124, 131, 132, 138 to 140, 202 and 205. In particular, in paragraph 205 of the Award, the Tribunal concluded that the *Corralito* was justified under Article XI of the BIT. This finding renders this ground of annulment moot, because even if the Committee were to annul the part of the Award rejecting Continental's claim under Article V, it would have no practical effect.

(f) Article V of the BIT applies to "*transfers related to an investment*". If there is no "*transfer related to an investment*", Article V is inapplicable, and everything else becomes moot, including Continental's arguments in respect of MFN provisions. The Tribunal applied the correct law (Article V of the BIT), interpreted that provision to determine what transfers were covered by that provision, and stated the reasons for its decision (that there was no "*transfer related to an investment*" and that the provision therefore did not apply). What the Tribunal subsequently said in paragraphs 243-244 of the Award concerning IMF, GATT or GATS

143 Referring to Award ¶¶ 241-242.
144 Referring to *Vivendi* First Annulment Decision ¶¶ 64-65.
145 Referring to *Azurix* Annulment Decision ¶ 55.

provisions was merely confirmatory of what the Tribunal decided, and did not form the basis of the decision, such that this could have no effect on the rest of the Award.[146]

(g) There was no contradiction between the Tribunal's finding in paragraph 240 of the Award as to the kind of transfers to which Article V applies, and its finding that the transfer in this case was not "*related to an investment*". The Tribunal did not find that the transfer was necessary to protect the funds from the impending devaluation. The Tribunal expressly stated that "*As Argentina correctly points out, there is no cogent evidence in the evidential record that the Claimant intended actually to shift its funds out of Argentina at the time of the* Corralito".[147] In annulment proceedings, Continental cannot request the Committee to revise the evidence put before and considered by the Tribunal.

(h) In the proceedings before the Tribunal, Continental relied on the MFN provision in relation to the word "delay" in Article V of the BIT, claiming that while the BIT did not define "delay", the Argentina-Chile BIT contained an obligation to permit transfers within two months. However, the issue of delay does not arise if, as the Tribunal found, Article V of the BIT is inapplicable on the ground that there has been no transfer "*related to an investment*".

(i) Apart from this, Continental did not rely on MFN obligations in relation to the scope of operation of Article V of the BIT.

(j) The Tribunal's Award with regard to the issue of Article V of the BIT is perhaps the most thorough and complete analysis to have ever been made in relation to the subject. The Tribunal did not fail to state reasons, and it is possible to follow the Tribunal's reasoning. The Tribunal's assertions in paragraphs 240 and 241 of the Award are not contradictory, but contain a logical and consistent reasoning.

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146 Referring to *Helnan* Annulment Decision.
147 Referring to Award footnote 367.

(k) In any event, there was no evidence on record that Continental actually intended or wanted to transfer anything out of Argentina.

(c) The Committee's views

189. The Tribunal explicitly distinguished in its reasons between two different effects of the *Corralito*, namely the introduction of bank deposit freezes, and the introduction of a prohibition of the transfer of funds abroad and their exchange in freely convertible and transferable currencies.[148]

190. The Committee considers that the Tribunal did not make any finding that the second effect of the *Corralito*, preventing the transfer of funds abroad, was justified by Article XI of the BIT. This is abundantly clear from a number of paragraphs of the Award.

191. Paragraphs 201 to 205, under a heading "*In respect of the Corralito (the imposition of the bank freeze in December 2001)*" (emphasis added), found that the *bank freeze* introduced by the *Corralito* was justified by necessity under Article XI of the BIT. Paragraph 205 stated that separate consideration would be given subsequently to the question of the *restrictions on transfers* imposed by the *Corralito*.

192. In paragraph 245, the Tribunal ultimately concluded that it did not have to consider whether the restrictions on *transfers* imposed by the *Corralito* were justified by Article XI, in view of the Tribunal's rejection of Continental's Article V claim on other grounds.

193. Paragraph 319 noted that in contrast to most of Continental's claims, the dismissal of the Article V claim was not on Article XI grounds.

194. The Committee therefore cannot accept Argentina's submission that even if the Tribunal's rejection of the Article V claim was tainted by annullable error, this would make no practical difference because the Tribunal concluded in any event that the *Corralito* was justified under Article XI of the BIT. The Tribunal

[148] In particular, Award ¶ 137(i) and (ii); also for instance ¶¶ 100, 124.

did not decide this question one way or the other, and this is not a question that can be considered or decided by the Committee in annulment proceedings.

195. The Tribunal also said, at paragraph 245, that in view of the basis on which it had dismissed the Article V claim, it did not need to examine the question "*whether the Claimant cannot invoke Art. V because neither itself (Continental) nor CNA ever decided to make, or asked to be authorized to effect the transfers at issue*", or the question "*whether the derogations allowed under the* Corralito *would have made those transfers possible*".[149] These two questions arose from arguments made by Argentina in response to the Article V claim, as referred to for instance in paragraphs 52, 84 and 238 of the Award. These questions also cannot now be determined by the Committee in annulment proceedings.

196. As the Tribunal did not decide these questions, and as they cannot be determined by the Committee in annulment proceedings, they are not directly relevant to the present annulment proceedings. Rather, the issue for the Committee is whether the way in which the Tribunal *did* reject the Article V claim was tainted by annullable error. The decision by the Tribunal not to decide questions that were unnecessary for it to decide is not itself an annullable error. In the event of the annulment of the Tribunal's rejection of the Article V claim, these questions might need to be decided by a Tribunal in any resubmission proceedings, but that would be a matter for the Tribunal in that event.

197. The Tribunal's particular reasons for rejecting Continental's claim under Article V of the BIT are set out in particular in paragraphs 237 to 245 of the Award.

198. After setting out the parties' positions in relation to the Article V claim at paragraphs 237 and 238, at paragraph 239, the Tribunal then said that:

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[149] It is noted that although the Tribunal did not decide these two issues, it did state at footnote 367 as follows: "As Argentina correctly points out, there is no cogent evidence in the evidential record that the Claimant intended actually to shift its funds out of Argentina at the time of the *Corralito*. Up to then, the Claimant had made the deliberate choice of keeping its funds in Argentina (see above para. 132), converting them from pesos into dollar-denominated instruments.. CNA thus acted as "a good corporate citizen" of Argentina and did not participate in the capital flight of the second part of 2001 which lead to the imposition of the *Corralito.*" It also stated at footnotes 197 and 368 as follows: "The Central Bank (BCRA) was empowered to authorize certain other transactions with the exterior and did so in the following months. From September 2002 onwards, exports of funds under certain ceilings have been gradually admitted (Claimant's Memorial, para. 34)".

> *The first issue here is to determine whether the transfer that Continental claims it would have made if the* Corralito *had not prevented it, falls within those "transfers related to an investment" which the Parties to the BIT undertook in Art. V to permit "freely and without delay into or out of its territory."*

The Tribunal then went on to state that "*This type of provision is a standard feature of BITs*", and that:

> *… the guarantee that a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain, in case of sale or liquidation, is fundamental to the freedom to make a foreign investment and an essential element of the promotional role of BITs.* [Footnote omitted.]

The Tribunal then added that:

> *This explains moreover the detailed list of permitted transfers that most BITs set forth. On the other hand, the Treaty terms show that such freedom is not without limit.* [Footnote omitted.]

199. The Tribunal's reference to "*the detailed list of permitted transfers that most BITs set forth*" was clearly intended to apply to the BIT in the present case. The "detailed list" in the BIT is in Article V(1), which states, in relation to the "transfers" to which it applies, that:

> *Such transfers include: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.*

The words "*Such transfers include*" suggest that the list that follows those words is non-exhaustive. However, at paragraph 239, the Tribunal considered that this list of permitted transfers nonetheless indicates that the freedom of transfer "*is not without limit*". In the last sentence of paragraph 242, the Tribunal also stated that although the BIT is not limited to transfers made by the investor itself and may include transfers made by a subisidiary, that "*does not mean that any trans-border movement of funds by such subsidiary is 'related to an investment'*".

200. The Committee considers it logical for the Tribunal to begin its consideration of the Article V claim by determining the types of "transfers related to an investment" to which Article V applies, and this is what the Tribunal did in paragraphs 239 and 240 of the Award. At paragraph 240, the Tribunal said:

> *The first issue is to determine which transfers are "related to the investment." This is important since in respect of those transfers the U.S. BITs "prohibit virtually all restrictions," thus limiting the Parties' prerogatives under customary international law to impose currency exchange restrictions. Guidance is to be found in the detailed (though non-exclusive) list in Art. V(1) and the purpose identified above of this kind of provision. Protected transfers are those essential for, or typical to the making, controlling, maintenance, disposition of investments, especially in the form of companies; or in the form of debt, service and investment contracts, including the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds, including intellectual and industrial property rights; and the borrowing of funds, to name the kind of investments and associated activities mentioned in Art. I of the BIT more relevant to this issue.* [Footnote omitted.]

201. The wording of this long last sentence is derived from the definitions of "investment" and "associated activities" in Article I(a) and (e) of the BIT. The use of the word "including" before the wording taken from the definition of "associated activities" indicates that the Tribunal regarded such "associated activities" as included within the more general expression "*making, controlling, maintenance, disposition of investments*". In essence, in this paragraph the Tribunal finds that "*Protected transfers are those essential for, or typical to the making, controlling, maintenance, disposition of investments*". The remaining wording of that paragraph is illustrative of what is meant by that expression.

202. In following paragraphs 241 to 245, the Tribunal considered the application of this interpretation to the circumstances of this case:

> *241. The type of transfer at issue here does not fall into any of these categories, nor specifically does it represent the "proceeds from the sale or liquidation of all or any part of an investment." It was merely a change of type, location and currency of part of an investor's existing investment, namely a part of the freely disposable funds, held short term at its banks by CNA, in order to protect them from the impending*

devaluation, by transferring them to bank accounts outside Argentina.

242. The transfer did not correspond to, nor was it required to satisfy any payment obligation of CNA, commercial, financial or other; nor would it involve the transfer of ownership of the funds involved to some different entity. It was clearly a legitimate operation from a business point of view, permissible under the convertibility regime of Argentina until the Corralito*. This does not mean that it would fall within the "transfers related to an investment" under Art. V. The fact that the BIT does not limit these transfers to those made by the foreign investor itself and that these transfers may be made by the local subsidiary, in favor of its parent company as well of other entities (thus in case of payment of royalties, payments related to loans received etc.), does not mean that any trans-border movement of funds by such subsidiary is "related to an investment."*

243. Both parties have relied also on the IMF provisions and the connected principles of the multilateral regulation of international payments in support of their position. As is well known, the IMF distinguishes between current transactions and capital movements. The "avoidance of restrictions on current payments" (Art. VIII), except with the approval of the Fund, is a "general obligation" of IMF members, adhered to by their vast majority that do not avail themselves of the transitional regime of Art. XIV. It reflects one of the key purposes of the Fund, "to assist in the establishment of a multilateral system of payments in respect of current transactions" as stated in Art. I (iv), as was the case of Argentina when its currency was freely convertible. On the other hand, capital movements may be subject to exchange controls by individual members, inter alia *in view of their possible speculative nature and destabilizing effects on national economies.*

244. The above distinction is of limited assistance here, because transfers "related to an investment" listed in and allowed by Art. V of the BIT includes both current transactions and capital movements: Art. V may be considered a lex specialis *in respect of the IMF regime and more liberal than the latter. In any case, capital movements are defined* a contrario *by the definition of "current transactions" in Art. XXX of the Fund. Not all capital movements are in themselves "investments," such as direct investments or portfolio investments listed in Art. V of the BIT. In the IMF terminology and classification, widely accepted beyond the Fund's ambit, the movement of capital at issue here was or would have been more specifically a short-term deposit abroad, a*

> *transaction which may be subject to tighter controls than direct or portfolio investment transactions. This confirms the Tribunal in its conclusion that the transfer which the Claimant complains it could not carry out because of the* Corralito*, namely a short-term placement out of Argentina of the equivalent of $19,000,000, was not a transfer related to an investment protected by Art. V of the BIT.*
>
> *245. As a consequence Argentina has committed no breach of Art. V of the BIT to the detriment of the Claimant, so that the latter's claim in this respect must be and is rejected by the Tribunal. This conclusion makes it unnecessary for the Tribunal to examine the subordinate arguments of the Parties: namely (a) whether in view of the acute foreign exchange crisis Argentina was encountering, Argentina was allowed, notwithstanding its obligations under Art. V BIT to introduce the exchange restrictions of Decree 1570, based on Art. XI of the BIT, on the IMF Agreement or under customary international law; (b) whether the Claimant cannot invoke Art. V because neither itself (Continental) nor CNA ever decided to make, or asked to be authorized to effect the transfers at issue; and (c) whether the derogations allowed under the* Corralito *would have made those transfers possible.* [Footnotes omitted.]

203. These paragraphs are to be read in the light of preceding paragraphs 130 to 132 that set out the relevant facts of this case, based on Continental's memorial:

> *130. As explained by the Claimant,[184] CNA ART, like other insurance companies, maintains a portfolio of invested securities in order to earn a return on its capital, reserves and other funds. CNA has a history of making conservative investments, so that its "portfolio consists mainly of low-risk assets, such as cash deposits, treasury bills and government bonds." These investments derive from its business activity, its capital, reserves and undistributed profits. The proceeds of its insurance business drive from the underwriting of its policies; the clients of CNA are business companies that satisfy their statutory and contractual obligations to cover their employees against worker's risks. CNA's insurance operations are regulated by two Argentine state agencies: the Superintendent of Insurance (SSN), which regulates the financial aspects of the business, while the handling of workers' compensation claims and services (such as medical treatment, etc.) is regulated by the Superintendent of Workers Compensation of the Ministry of Labor (SRT). More specifically, SSN lays down criteria for insurance companies such as CNA concerning the ratio of reserves they have to hold and the types of investment they may make.*

131. The business of CNA was successful. As explained by Claimant, its premiums "have consistently been among the highest in the market. CNA ART also maintained the highest reserves and investments per insured worker in the market."[185] *Furthermore, "[p]rior to March 2001, CNA ART's investment portfolio was primarily in assets denominated in Argentinean pesos. At the time, pesos were fully convertible to U.S. dollars at a one to one exchange rate. However, CNA ART's management was concerned about the risk of devaluation. As a result, CNA ART's senior management prepared an analysis of the options available to CNA ART to hedge the risk of devaluation. These options consisted of:*

i) maintaining the portfolio in peso denominated assets, which were earning a much higher return than comparable dollar denominated assets;

ii) transferring all of CNA ART's assets in excess of minimum capital requirements out of Argentina to be held by CNA; and

iii) moving CNA ART's investment portfolio to lower return U.S. dollar assets with greater credit worthiness."[186]

132. As to the option of moving capital out of Argentina, "CNA ART's management made a recommendation to its American controlling shareholder that it should not transfer assets out of Argentina at that time, but that it should choose to invest assets within Argentina in low risk U.S. dollar denominated assets."[187] *CNA management accepted this recommendation so that its investment agent CADISA (*Citicorp Administradora de Inversiones S.A.*) "was then instructed to liquidate peso denominated cash deposits, treasury bills and bonds as they matured and to reinvest the proceeds in U.S. dollar denominated assets."*[188] *Thus, "CNA ART's policy of shifting its portfolio to U.S. dollar denominated assets involved a deliberate choice to forego the higher yields of peso-denominated assets in favor of the greater capital security of U.S. dollar assets."*[189] *As against capital flight, this was of course a socially responsible policy by Continental and CNA.*

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184 Claimant's Memorial, para.15 ff.

185 Claimant's Post-Hearing Brief, para. 16, footnote 33.

186 Claimant's Memorial, paras. 19-20.

187 Claimant's Memorial, para. 21.

188 Claimant's Memorial, para. 22. The Claimant explains further that, in addition, CADISA was instructed to move cash deposits out of Argentinian owned banks and into either the local subsidiaries of international banks or, preferably, into full branches of international banks. These steps were meant to improve the credit worthiness of its investment portfolio

> *and to protect it from currency risk and credit risk. Cash deposits at full branch banks earned a lower return than at other banks but there was little credit risk associated with them (Claimant's Memorial, paras. 22-24).*
>
> *189 Claimant's Memorial, para. 24.*

204. At paragraphs 133 to 136, the Tribunal added, again with reference to what was claimed in Continental's pleadings, that CNA decided to take advantage of Argentina's offer through Decree 1387 of November 1, 2001, to exchange certain bonds for GGLs, that instructions were given to CADISA on November 29, 2001 for the swap of certain bonds for GGLs, and that by early December 2001, CADISA had "*largely completed the re-balancing of CNA ART investment portfolio*", following which it held "*a conservative portfolio of investments*", 92 % of which was expressed in USD denominated assets (as compared to 21 % in July 2001).

205. In this context, Continental's Article V claim before the Tribunal was expressed in paragraphs 65-66 of its Reply Memorial in the proceedings before the Tribunal:

> *By late 2001, CNA ART had approximately $19.8 million in its portfolio in excess of capital requirements. It had considered transferring these funds back to the United States, but kept them in the country, re-invested in US dollar securities. In particular, by December 2001, the funds available for transfer were all in term deposits in Argentine banks. These deposits were to mature between mid-December 2001 and early February 2002. … Had CNA ART been free to transfer these assets, it would have avoided the pesification of deposits that occurred on February 3, 2002.*

206. The Committee does not consider that the first sentence of paragraph 241 and first sentence of 242 may be read as necessarily suggesting that Article V would apply to the transfers only if they "*correspond[ed] to*" or were "*required to satisfy any payment obligation of CNA, commercial, financial or other*" or if they "*would … involve the transfer of ownership of the funds involved to some different entity*", or if they were *"proceeds from the sale or liquidation of all or any part of an investment".* It appears to the Committee that the Tribunal here was merely giving examples of the main types of transfers that could be said to be "*transfers … essential for, or typical to the making, controlling, maintenance, disposition of investments*". It contrasted this type of transfer to what it considered to be the

appropriate characterisation of the transfer in the present case, namely a mere "*change of type, location and currency of part of an investor's existing investment, namely a part of the freely disposable funds, held short term at its banks by CNA*".

207. In the Committee's view, it is sufficiently clear from paragraph 241 of the Award that the Tribunal considered that Article V of the BIT, properly interpreted, did not apply to a mere "*change of type, location and currency of part of an investor's existing investment*", and it is clear, from paragraphs 241 and 242, that the Tribunal considered this to be so, on the proper construction of the Treaty, regardless of whether the "*change of type, location and currency of part of an investor's existing investment*" was "*a legitimate operation from a business point of view",* and regardless of whether its purpose was *"to protect them from … impending devaluation, by transferring them to bank accounts outside [the host State]*".

208. Hence, on first impression, the Committee considers it apparent that the Tribunal applied the applicable law, and gave reasons for its decision. It determined what it considered to be the scope of protection afforded by Article V and it found that even if the facts as claimed by Continental were correct, the transactions that it claimed to have been prevented from making would not have fallen within any of the categories of transactions protected by Article V as correctly interpreted. It therefore gave a reasoned rejection of the Article V claim, without the need to consider whether or not the facts claimed by Continental were established.

209. Continental also argues, on annulment, that the proposed transfer concerned funds that were "*proceeds from the sale or liquidation of all or any part of an investment*", within the meaning of Article V(1)(e).

210. This argument was expressly referred to in paragraph 237, and was expressly rejected in paragraph 242. The Tribunal clearly considered that a "*change of type, location and currency of part of an investor's existing investment*" was not a transfer of *"proceeds from the sale or liquidation of all or any part of an investment"* for purposes of Article V.

211. Continental also argues that the Tribunal found, in paragraph 244 of the Award, that a transfer protected by Article V must "in itself" be an investment, when there is nothing in the wording of Article V itself to support this conclusion.

212. In this regard, paragraphs 243 and 244 in fact deal with arguments of the parties[150] in relation to the Article V claim that had relied on "*IMF provisions and the connected principles of the multilateral regulation of international payments in support of their position*". The Tribunal noted that under IMF provisions there was an obligation of "avoidance of restriction on current payments" but that "capital movements" may be subject to exchange controls. The Tribunal said that it found the distinction in IMF provisions between "current payments" and "capital movements" to be of limited assistance since transfers protected by Article V of the BIT could include both. It noted that in that respect, the BIT was "lex specialis *in respect of the IMF regime and more liberal than the latter*". It added that "*Not all capital movements are in themselves 'investments', such as direct investments or portfolio investments listed in Art. V of the BIT*".

213. The Committee considers that this last sentence cannot be read as suggesting that the Tribunal found that a transfer protected by Article V must "in itself" be an investment. The Tribunal addressed directly the types of transfers to which Article V applies in paragraphs 240 and 241, and they contain no such suggestion. By paragraph 242, the Tribunal had determined that the transfer in issue in the present case did not fall within any of the categories to which Article V applied, and paragraphs 243 and 244 were concerned with explaining, additionally, why the distinction in IMF provisions between "current transactions" and "capital movements" was of limited assistance to determining the scope of application of Article V. This was said to be because Article V could apply to both "current transactions" and "capital movements", and because a capital movement was not necessarily an investment within the meaning of the BIT.

214. On any rational reading of the Award as a whole, the Committee considers that it could not be concluded that the Tribunal rejected the Article V claim on the ground that the transfer in question was not in itself an investment. Furthermore, even if the Tribunal had rejected the claim on this basis, and even

[150] Referred to in Award ¶ 82, 238.

if it were assumed that the Tribunal erred in so doing, this would be an error of law within the Tribunal's jurisdiction, and not an annullable error.

215. Continental also refers to paragraph 242 of the Award, in which the Tribunal said that the transfer in this case "*did not correspond to, nor was it required to satisfy a payment obligation of CNA, commercial, financial or other; nor would it involve the transfer of ownership of the funds to some different entity*".[151] Continental argues that there is nothing in the language of the BIT, nor of any other relevant legal instrument, that limits directly or indirectly the transfers covered under Article V to transfers required to satisfy "*a payment obligation of CNA, commercial, financial or other, or involve a transfer of funds to some different entity*".[152]

216. In addition to its observations above on this issue, the Committee does not consider that this sentence, in paragraph 242, of itself may be considered the basis of the Tribunal's decision. It is clear to the Committee on reading the relevant paragraphs of the Award as a whole that the Tribunal considered Article V to be inapplicable because the transfer in question was "*merely a change of the type, location and currency of part of an investor's existing investment, namely a part of the freely disposable funds, held short term at its banks by CNA*" (paragraph 241). Despite finding concepts in the IMF regime to be of limited assistance, at paragraph 244, the Tribunal considered that the transfers in this case, in IMF terms, would be "*a short-term deposit abroad, a transaction which may be subject to tighter controls than direct or portfolio investment transactions*". In support of this proposition, it cited in footnote an IMF publication for the proposition that "*When States commit themselves to allow capital investments, they focus especially on direct investments and reserve the right not to liberalise short term monetary placements abroad of the type discussed here*".

217. Hence, the Tribunal found that Article V did not apply to a mere change of type, location and currency of part of an existing investment, such as a short term monetary placement abroad. The rationale for interpreting Article V in this way

[151] Referring to Award ¶ 242.
[152] Referring to Award ¶ 242.

is found in paragraph 239, which explains that the freedom of transfer is not without limit, and that ultimately the rationale of the provision can be summed up as being "*to ensure that at the end of the day, a foreign investor will be able to enjoy the financial benefits of a successful investment*". In the subsequent paragraph 240, the Tribunal indicated that in interpreting the words "related to the investment" in Article V, "*Guidance is to be found in … the purpose identified above for this kind of provision*".

218. The Tribunal plainly considered that the transfer in the present case was not the kind of transfer that needed to be protected to give effect to this rationale. It distinguished such transactions which were excluded from the operation of Article V from other transactions that were within the scope of Article V, such as a transfer "*to satisfy a payment obligation …, commercial, financial or other*" or a "*transfer of ownership of the funds to some different entity*" (paragraph 242) or the transfer of the proceeds of sale or liquidation of all or part of an investment (paragraph 241), or the kinds of transactions referred to in paragraph 240.

219. The Committee considers it sufficiently clear what the Tribunal decided, and the basis on which it so decided, and that the decision was based on the Tribunal's view of the correct interpretation of Article V of the BIT, which was the governing legal provision.

220. Continental further argues that on the basis of the Tribunal's findings in paragraphs 240 and 242 of the Award, "*the Tribunal had no choice in law or logic but to conclude that Argentina had breached Article V of the BIT*". Continental argues that in paragraph 240, the Tribunal says that Article V protects transfers for the "*protection … of property of all kinds*", and that in paragraph 241, the Tribunal found that the funds in question in this case were "*part of [the] investor's existing investment"*, and that the intended purpose was to *"protect them from the impending devaluation*". In effect, Continental argues that it is inconsistent for the Tribunal to find in paragraph 240 that protected transfers include those for the "*protection … of property of all kinds*", but to find that it did not include the transfer in this case which the Tribunal expressly found, in paragraph 242, to have the purpose to *protect* funds forming part of the investment from devaluation.

221. As has been observed above, the phrase "*the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights*" is taken from the definition of "associated activities" in Article I(1)(e) of the BIT. The Tribunal said in paragraph 240 that protected transfers are those "*essential for, or typical to*", *inter alia*, "*the acquisition, use, protection and disposition of property of all kinds*". In finding that the transfer in this case was not a transfer "related to the investment" for purposes of Article V, it is evident that the Tribunal considered that, even if its purpose was to protect funds forming part of the investment from impending devaluation, this was not a transfer *essential for, or typical to* "*the … protection ... of property*" within the meaning of that phrase as used by the Tribunal in paragraph 240. The Committee sees no inherent contradiction between paragraphs 240 and 242 in the way claimed by Continental.

222. Continental claims that the statement in paragraph 241 (to the effect that the transfer in question does not fall within any of the categories referred to in paragraph 240 of the Award) is a bland assertion and a bare postulate by the Tribunal, without any supporting reasoning.[153] For the reasons stated, the Committee disagrees. The Committee is satisfied that the rationale of the Tribunal's decision is sufficiently discernible from a reading of the relevant paragraphs of the Award, as indicated above. It considers that the Award "*enables one to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion*" and that the reasons are not "*contradictory or frivolous*",[154] or incoherent as claimed by Continental.

223. Continental also claims that the Tribunal failed to apply the applicable law in failing to apply Article 10 of the Protocol to the BIT that provides:

> *10. The Parties note that the Argentine Republic has had and may have in the future a debt-equity conversion program under which nationals or companies of the United States may choose to invest in the Argentine Republic through the purchase of debt at a discount.*
>
> *The Parties agree that the rights provided in Article V, paragraph 1, with respect to the transfer of returns and of*

[153] Referring to *Vivendi* First Annulment Decision ¶¶ 64-65; *Klöckner* Annulment Decision ¶ 144.
[154] See paragraph 101 above.

> *proceeds from the sale or liquidation of all or any part of an investment, remain or may be, as such rights would apply to that part of an investment financed through a debt-equity conversion, modified by the terms of any debt-equity conversion agreement between a national or company of the United States and the Government of the Argentine Republic, or any agency or instrumentality thereof.*
>
> *The transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favorable than those accorded, in like circumstances, to nationals or companies of the Argentine Republic or any third country, whichever is more favorable.*

224. It is the last paragraph of this article that is relevant to this argument of Continental.

225. Unlike the preceding paragraph, this final paragraph does not state expressly whether it contains an agreement between the parties on the interpretation of Article V of the BIT, or whether it establishes a free-standing obligation, *additional to* Article V.

226. To the extent that this provision establishes a free-standing obligation, *additional to* Article V, any consideration of the application of this provision would be separate to the consideration of the application of Article V. It does not appear that Continental ever made a claim in the arbitration proceedings for damages for breach of Article 10 of the Protocol. If it did, and if the Tribunal failed to consider it, Continental's remedy would have been to request the Tribunal under Article 49(2) of the ICSID Convention to give an additional decision, dealing with the Article 10 claim. The Tribunal's failure to decide one claim could not be a ground for annulling its decision with respect to a separate Article V claim which it did decide.

227. To the extent that the third paragraph of Article 10 of the Protocol establishes the parties' agreement of the interpretation of Article V of the BIT, it can logically only be of relevance in circumstances where Article V itself applies. In effect, the Tribunal found that Article V applies to "*all transfers related to an investment*", that the transfer that Continental claimed to have been prevented from making was not a "*transfer related to an investment*", and that Article V

was therefore inapplicable. In these circumstances it is not apparent to the Committee how Article 10 of the Protocol could have been of relevance.

228. Even if Continental did rely on Article 10 of the Protocol in its arguments before the Tribunal in respect of the Article V claim, the Committee is not persuaded that this reliance was such a prominent or fundamental basis of Continental's Article V claim that the Tribunal's failure to mention Article 10 made it impossible to see how the Tribunal "*proceeded from Point A. to point B. and eventually to its conclusion*".

229. While a tribunal has a duty to deal with each of the *questions* ("*pretensiones"*) submitted to it, it is not required to comment on all arguments of the parties in relation to each of those questions.[155] The question submitted to the Tribunal was whether there had been a breach of Article V. The Tribunal's failure to comment on any arguments of Continental based on Article 10 of the Protocol, or on claims of more favourable treatment under BITs between Argentina and other States, did not in the Committee's view mean that there was a failure of the Tribunal to state reasons for its decision on the Article V point.

230. The Committee is not persuaded that the Tribunal failed to apply the applicable law, or failed to give reasons for its decision, in respect of Continental's claim under Article V of the BIT.

231. In relation to this ground of annulment, Continental argued in its Application for Annulment that "*the Tribunal failed to properly apply the terms of the Treaty*", and that "*the Tribunal ignored the express provisions of the Treaty*" and that "*Tribunal totally ignore[d] the express wording of the governing Treaty*". The Committee recalls that alleged error of fact or alleged error of law are not grounds of annulment under Article 52 of the Convention. The applicable law was the BIT, the ICSID Convention, and international law generally. The Tribunal applied Article V of the BIT to determine Continental's claim under that provision, and gave reasons for its decision. Whether or not the Tribunal decided the claim correctly is not a matter to be determined by an annulment committee.

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155 See paragraph 99 above.

232. For these reasons, the Committee concludes that this ground of annulment is rejected. As a consequence, the Committee denies Continental's application for annulment of all parts of the *dispositif* of the Award with the exception of para. 320(b), and all of Continental's requests for annulment of findings of the Tribunal and associated reasoning referred to in paragraph 77 above.

III. ARGENTINA'S APPLICATION FOR PARTIAL ANNULMENT

A. Background

233. Argentina seeks annulment of the part of the Award that was adverse to Argentina, namely that the finding that Argentina's restructuring of the LETEs effected by Decree 1735/04 was in breach of the BIT.

234. In its application for partial annulment, Argentina invokes the grounds in Article 51(1)(b) – manifest excess of powers – and Article 51(1)(e) – failure to state reasons – respectively, of the ICSID Convention.

B. Arguments of the parties

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

Alleged manifest excess of powers

(a) The Tribunal manifestly exceeded its powers in failing to explain why it concluded (i) that the swap offer in Decree 1735/04 was "late"; (ii) that the original value of the LETEs was "reduced" by the swap offer; (iii) that the offer was "unilateral", and (iv) that the condition that any other right should be waived if the swap offer was accepted was unreasonable.[156]

(b) Argentina's was the largest sovereign debt restructuring in history, involving a swap of over USD 100 billion comprising more than 152 types of securities held by hundreds of thousands of creditors around the world,

[156] Referring to Award ¶ 221 (citations omitted).

and the fairness of that process could not be resolved in a mere two paragraphs in the Award.

(c) The Tribunal's conclusion that the swap offer was "late" implies that, due to the characteristics of the operation, the offer should have been made earlier, or that Argentina was in a position to make it earlier. Such a conclusion would involve extremely challenging assessments of the complexity of the operation which had to be carried out in order to determine whether it was feasible to conduct it within a shorter term, the evolution of Argentina's situation at both an economic and a political-institutional level in order to determine whether the country would have been in a position to make an offer before it actually did, and so forth. The Award does not deal with these issues or with any other issue which might serve as basis for the conclusion that the date of the swap was "late".

(d) The Tribunal's conclusion that the original value of the debt that Argentina offered to recognize was "reduced" implies that, under similar circumstances of debt restructuring, the offer should have been better or that Argentina was in a position to make a better offer. Again, such a conclusion would involve extremely complex assessments of Argentina's actual payment capacity throughout a considerable number of years, the situations experienced in other comparable debt restructuring processes and the offers made therein, and so forth. The Award again fails to address these issues or any other issue which might serve as basis for the conclusion that the value of the offer made by Argentine was "reduced".

(e) The Tribunal's conclusion that the December 2004 swap offer in Decree 1735/04 was "unilateral" would require an analysis of the complex swap process, which lasted for approximately three years, in order to determine the steps involved in the preparation of the offer, the measures taken by the Government, the degree of participation of the creditors, and other critical factors.

(f) The Award provides no explanation why requiring the waiver of other claims as a condition for accepting the swap offer was unreasonable.

(g) The Tribunal determined in an arbitrary and groundless manner that the restructuring of the LETEs violated the BIT, and was not protected by Article XI of the BIT or by the defence of necessity, by simply postulating that Article XI and the defence of necessity were inapplicable due to (i) the late date in which the swap was offered, when Argentina's financial conditions were evolving towards normality; (ii) the reduced percentage of the original value of the debt that Argentina unilaterally offered to recognize; and (iii) the condition that any other rights would be waived, which entailed also waiving the protection of the BIT.[157]

(h) By holding that the restructuring of its public debt violated the BIT "*where they implied a waiver of all rights by the holders, who were being subjected to a substantial loss of their investment, in addition to having been previously subjected to losses due to pesification*", the Tribunal clearly contradicted itself and manifestly exceeded its powers, in finding that the restructuring entailed a substantial loss of Continental's investment (a matter which was not even raised in the proceeding), and in linking this conclusion to an occurrence that was already protected under Article XI of the BIT. The Tribunal also contradicted itself in stating that the default was protected under Article XI of the BIT[158] and the defence of necessity, but then determining that the solution to such default entailed a substantial loss without discussing or providing any reason why the restructuring of the LETEs to escape default was unreasonable.

Alleged failure to state reasons

(i) The Tribunal failed to state reasons for its three main conclusions relating to the LETEs, namely "(a) the late date in which the swap was offered, when Argentina's financial conditions were evolving towards normality;

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157 Referring to Award ¶ 221 (citations omitted).
158 Referring to Award ¶ 217.

(b) the reduced percentage of the original value of the debt that Argentina unilaterally offered to recognize; and (c) the condition that any other rights would be waived, which entailed also waiving the protection of the BIT."[159]

(j) The Tribunal did not provide reasons for stating that Argentina's financial conditions were evolving towards normality or explain the manner in which they affected the restructuring (conducted in a situation of default which, on the contrary, had been declared as protected by the BIT as a non-precluded measure pursuant to Article XI). Neither did the Tribunal explain how Argentina's restructuring offer was evaluated nor why such offer was determined to be unilateral or why "the condition that any other rights [regarding the restructuring] would be waived" entailed a violation of the BIT.

(k) The Tribunal failed to deal with substantial questions submitted by Argentina in this regard, such as the argument in its Counter-Memorial that:

> *Under the debt restructuring, the Argentine Government offered to swap all Argentine government debt securities issued before 31 December 2001, on default for new bonds with an extended term and for a minor principal and/or interest value but adjusted to Argentina's payment capacity. The offer was accepted by the holders of 76.1% of bonds eligible for the swap. It should be noted that Section 32 of Decree No. 905/02 provided that the holders of Argentine Treasury bonds outstanding by 3 February 2002, denominated in US dollars, governed by Argentine law and pesified (as in the case of LETEs) would be allowed to convert those bonds into the original currency at the exchange rate applicable to the conversion into pesos (under the same conditions as those in effect as of February 3, 2002) in the event that they took part in any invitation made by Argentina to swap their debt securities or loans. It is noteworthy that, on the one hand, Continental believes that it has sustained damages because CNA ART has not received any payments on the LETEs, when in fact the payment deferral was announced for the entire government debt issued*

[159] Referring to Award ¶ 221.

before 31 December 2001, and not only for the debt securities held by CNA ART.[160]

It was also Argentina's argument that "[f]or swap purposes, the holders of LETEs could select an instrument denominated in Argentine pesos. The foreign exchange rate to be used to determine the nominal value of the new bond was fixed at ARS/USD 2.9175, equivalent to the market rate. The new securities included the capital adjustment per the consumer price index".

(l) The Tribunal not only failed to deal with all these questions but also failed to deal with other questions which were not addressed during the hearing or otherwise in the proceeding,[161] yet it made unfounded determinations regarding the LETEs. The Tribunal reached these conclusions without providing any reason for them. Not even an attentive reader of the Award would be able to understand, even through inference, the manner in which the Tribunal arrived at the conclusions drawn regarding the December 2004 Offer.

Continental's title to the LETEs

(m) The LETEs are registered in an electronic account and Continental should have provided evidence that the securities concerned were not transferred at any time from their acquisition. Such lack of evidence caused the Tribunal to manifestly exceed its powers and fail to state the reasons on which the Award and the Decision on Rectification were based in respect of the Claimant's uninterrupted ownership of the LETEs.

Non ultra petita

(n) The Tribunal concluded that the restructuring of the LETEs constituted a breach of the fair and equitable standard and awarded Continental damages on that basis. However, Continental never asked the Tribunal

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160 Referring to Argentina's Counter-Memorial, paras 721-725. Argentina claims that the Tribunal similarly failed to deal with and appreciate the importance of other aspects of its position, such as its Counter-Memorial, paras 51, 398, 717, 400, 401 and 419.

161 Referring to Argentine Republic's Memorial on the Merits: Counter-Memorial (Exhibit AR 5), Rejoinder (Exhibit AR 7), First and Second AGM Report (Exhibit AR 6 and 8, respectively) and Stenographic Transcripts of the Hearing in both languages (A RA 90).

to conclude that the restructuring of the LETEs was contrary to the fair and equitable treatment clause. Indeed, Argentina raised the issue of the restructuring as a *defence*.

(o) Continental only ever claimed that the default and pesification of the LETEs were a breach of the BIT. Decree 1735/04 which provided for the restructuring of the LETEs was adopted after the proceedings before the Tribunal had commenced and after Continental's Memorial on the merits before the Tribunal had been filed. Even after Decree 1735/04 had been adopted, Continental did not seek to argue that the restructuring of the LETEs was a breach of the BIT. Even if, procedurally, it might have been possible for Continental to add a new claim during the course of the proceedings before the Tribunal to allege that the restructuring was a breach of the BIT, it did not do so. Argentina never defended itself against this claim, because Continental never put it forward.

(p) The decision on the restructuring of Argentina's sovereign debt was *ultra petita*, as it was never put forward by Continental, and was never responded to by Argentina. This constitutes a manifest excess of powers as well as a failure to provide reasons.

(q) Continental never filed a claim under the BIT related to the Argentine debt restructuring carried out in 2004 and 2005; it never raised before the Tribunal the question of whether that claim was included in the claim brought with the Tribunal, and Argentina never defended itself or explained its position on whether the debt swap violated the BIT or not, simply because that claim had not been made. The granting of a claim that had never been made by the Claimant was a manifest excess of powers and a failure to state reasons.

(r) The case of *Pope & Talbot v. Canada* does not assist Continental.

236. Continental argues, *inter alia*, that:

Alleged manifest excess of powers and alleged failure to state reasons

(a) The Award is well-founded insofar it deals with the restructuring of the LETEs and fully explains the Tribunal's finding that Argentina could not rely on Article XI of the BIT or the necessity defence under customary international law in this respect. The Tribunal's conclusions were clearly reasoned and based on the evidence. The Tribunal did not engage in any excess of powers, let alone any manifest excess, nor did it fail to state reasons for its conclusions.

(b) The Tribunal accepted Continental's submission that the restructuring of the LETEs constituted a breach of the fair and equitable standard,[162] having regard to the fact that Argentina offered only USD 0.30 per dollar, that Continental would have been required to waive its rights and that Continental would have also been required to accept long maturities on bonds from a government that had demonstrated its willingness to repeatedly default on its debt.

(c) The Tribunal rightly rejected the defences raised by Argentina based on Article XI of the BIT and necessity under customary international law in respect of the December 2004 Offer, by reason of the late date on which it was offered, the reduced percentage of the original value of the debt, and the condition that any other rights would be waived.

(d) The Tribunal clearly explained its conclusion that the offer was made at a "late date" by reference to its finding that by that time "Argentina's financial conditions were evolving towards normality".[163] It further explained this finding by referring to its earlier findings that Argentina had "re-entered the international financial market by filing a prospectus concerning the future issuance of debt securities up to more than U.S.$ 12 billion."[164] This finding was consistent with the Tribunal's related findings that Argentina's financial situation "*improved slowly but progressively from the end of 2002*", that "*[t]he regular functioning of the democratic institutions was re-established with the general elections held*

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[162] In Continental's own application for partial annulment, Continental maintains that the Tribunal should have considered whether it also constituted unlawful expropriation.

[163] Referring to Award ¶ 221.

[164] Referring to Award ¶ 159 and footnote 336.

on May 25, 2003 when Nestor Kirchner was duly elected president of Argentina", and that "*the improved balance of payment situation enabled Argentina to repay in a short time-span all of the sizeable amounts outstanding to the IMF, in 2005 (SDR 2,417 billion) and January 2006 (SDR 6,655 billion)*".[165] The Tribunal logically and reasonably concluded that by December 2004, Argentina could not rely on either Article XI of the Treaty or the customary international law defence of necessity because financial conditions in the country were normalizing.

(e) The Tribunal also assessed Continental's evidence that it did not accept the restructuring of the LETEs since it would have received "only U.S.$ 0.30 per dollar".[166] This is consistent with the Tribunal's earlier indication that "*the new instruments offered in exchange were worth only about 30% of the original securities in dollar terms*."[167] The Tribunal also contrasted the fact that Argentina repaid the amounts due to the IMF with the fact that "*the swap finally offered to foreign bondholders entailed a 'haircut,' that is a reduction of the face value of thir bonds, of about 70%, if not more*."[168]

(f) The Tribunal rightly held that the restructuring of the LETEs was "unilateral" in that it was imposed by Argentina, rather than the product of balanced negotiations. On the basis of the evidence before it, including the terms of the restructuring of the LETEs itself, the Tribunal accepted Continental's position that the offer to restructure was a "*coercive, take-it-or-leave-it offer*".

(g) Argentina cannot raise new arguments in the annulment proceeding that it failed to raise before the Tribunal.

(h) The Tribunal concluded that the terms of the restructuring of the LETEs were unreasonable, "*notably where they implied a waiver of all rights by the holders, who were being subjected to a substantial loss of their*

165 Referring to Award, ¶¶ 152, 157 and 159.
166 Referring to Award ¶ 220.
167 Referring to Award ¶ 159.
168 Referring to Award footnote 231.

investment, in addition to having been previously subjected to losses due to pesification".[169] Considering the substantial losses incurred by the bondholders, the Tribunal found it unreasonable to require them to waive all rights of action in return for a swap worth only USD 0.30 per dollar of their original LETEs holding.

(i) The Tribunal held the waiver requirement to be unreasonable because: (i) there was no risk of double recovery by December 2004; (ii) the investors were being subjected to a substantial loss of their investment, in addition to having been previously subjected to losses due to pesification; and (iii) the term did not meet the requirements of either Article XI or the customary international law defence of necessity.

Continental's title to the LETEs

(j) The Tribunal found that CNA bought the first LETEs on 25 September, 2001 and the second LETEs on 18 October 2001. The LETEs had been issued under Resolution 4/5 of January 2001.[170] This finding alone confirms Continental's title to the LETEs.

Non ultra petita

(k) The Tribunal acted entirely within its powers and clearly put forth its reasons by identifying "*the issue as being whether Argentina's default and subsequent restructuring of the Claimant's investment was fair and equitable*".[171] Thus, the Tribunal found,[172] correctly, that Argentina's treatment of the LETEs was unfair and inequitable.

(l) The restructuring offer was just another symptom of the unfair and inequitable treatment. It was a declaration that holders of LETEs either could accept 30 percent of the value of their LETEs or would never receive anything. That was what the Tribunal fixed upon in terms of making its decision. The attempted restructuring in December 2004

169 Referring to Award ¶ 264.
170 Referring to Award footnote 195.
171 Referring to Award ¶ 256.
172 Referring to Award ¶¶ 263 and 264.

brought Argentina's modification of the terms of the LETEs into even sharper relief. Continental's original complaint in its Merits Memorial was sufficient to encompass further treaty-inconsistent actions taken by Argentina, as well as breaches that were ongoing. The restructuring of the LETEs thus formed part of Continental's claims.

(m) In *Pope & Talbot v Canada* case, the Tribunal found that new actions taken by Canada after the investor had filed its statement of claim, while not specifically pleaded, were covered by the broad wording of the original claim as pleaded. The fairness and reasonableness of the restructuring of the LETEs was an issue placed before the Tribunal by Continental in its pleadings.

C. The Committee's views

237. Argentina's complaints as developed in its submissions have focused on the Tribunal's conclusion that Argentina could not rely on Article XI of the BIT or the defence of necessity under customary international law to preclude Argentina's liability under the fair and equitable treatment clause in relation to the LETEs.

238. Argentina contends that its invocation of Article XI and the customary international law principle of necessity was summarily dismissed by the Tribunal in paragraph 221 of the Award, with cursory references to the "late date" of the offer in Decree 1735/04, the "reduced percentage" of the original value of the LETEs and the "waiver requirement" as a condition of the offer.

239. Argentina invokes two annulment grounds in relation to this challenge, namely manifest excess of powers (Article 52(1)(b) of the ICSID Convention) and failure to state reasons (Article 52(1)(e)).

240. In relation to Article 52(1)(b) Argentina contends that the Tribunal determined this matter in an arbitrary and groundless manner by simply postulating the non-application of Argentina's defences rather than satisfying the minimum requirement for the Tribunal's exercise of its powers that it bases its conclusions on the parties' arguments. Argentina contends that the Tribunal failed to

appreciate the exceptional complexity of the Argentinean financial crisis and the country's efforts to come to grips with this extremely difficult situation with its far-reaching repercussions for the welfare of the entire population and the threats posed to the fabric of the Argentine society. Argentina contends that this involved exceedingly complex issues, and that matters could not be determined by the Tribunal without an in-depth review of all pertinent factors.

241. In relation to Article 52(1)(e), Argentina's objection is that the summary references in paragraph 221 of the Award to the offer to restructure the LETEs in December 2004 being "late", "reduced" and "unilateral", lack any satisfactory rationale and are therefore deficient in conveying any reasoned content.

242. In the course of the Hearing, Argentina also raised a further argument, to the effect that the Tribunal's decision on this point was *ultra petita*. Argentina maintains that Continental never requested the Tribunal to find that the offer to restructure the LETEs made in Decree 1735/04 was a breach of the BIT. In the circumstances, Argentina maintains that the Tribunal manifestly exceeded its powers by awarding damages on a basis other than that which was claimed by the Claimant.

243. Argentina additionally contends that the Award is illogical, in that Argentina's default on the LETEs had occurred in 2002, at a time when the Tribunal found that Article XI of the BIT applied to the measures taken by Argentina to deal with its economic crisis. Thus, it is said, the Tribunal found that Argentina's default on the LETEs in 2002 was not a breach of the BIT. Argentina argues that it therefore flies in the face of logic for the Tribunal to find that the subsequent adoption of Decree 1735/04 in 2004 could be a breach of the BIT, given that this Decree *improved* the position of LETEs holders by offering them a restructuring that provided them with 30% of the original value of the LETEs on which they would otherwise have received nothing.

244. The Committee considers that the starting point in addressing these arguments is to identify what it was that Continental claimed, and what the Tribunal decided.

245. It is relevant that Continental's Memorial in the proceedings before the Tribunal was filed in April 2004, prior to the adoption of Decree 1735/04. In relation to the LETEs, Continental's claim in the proceedings before the Tribunal had two aspects.[173] The first related to the pesification of the LETEs in March 2002 by Decree 471. The second related to the default on the LETEs. According to Continental's Memorial, "*The LETEs matured on March 15, 2002, but CNA ART did not receive any payment on that day. The default of these LETEs continues to this day*".[174]

246. Continental provided an expert report of Mr. Howard Rosen dated April 27, 2004 (the "**First Rosen Report**"), which quantified the losses claimed by Continental as a result of the actions taken by Argentina complained of by Continental. These actions of Argentina are referred to in that report as the "Events", which are defined in paragraph 9 of that report to begin with Decree 1570 in December 2001, and to end with Decree 644 in April 2004. The definition of the "Events" did not of course extend to Decree 1735/04, which had not yet been adopted at the time of the First Rosen Report.

247. Decree 1735/04 had been adopted by the time Continental's Reply Memorial was filed in August 2006. At paragraphs 78-79 of the Continental's Reply Memorial, reference was made to Decree 1735/04, but only for the purpose of refuting Argentina's argument that Continental should have accepted the offer contained in that Decree.[175] However, Continental's claim in respect of the LETEs remained in effect a complaint as to the pesification of the LETEs,[176] and the default on the LETEs since March 2002.[177] Continental claimed that as a result of the default on the LETEs, it had received "nothing at all",[178] and that the value of the LETEs was "nothing".[179]

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173 Continental's Memorial in the proceedings before the Tribunal, paragraphs 44-45.
174 Quoted in Award footnote 207.
175 Referred to in Award ¶ 151 and footnote 219.
176 Continental's Reply Memorial in the proceedings before the Tribunal, paragraph 224.
177 Continental's Reply Memorial in the proceedings before the Tribunal, paragraphs 229-230.
178 Continental's Reply Memorial in the proceedings before the Tribunal, paragraph 370, quoted in Award ¶ 76.
179 Continental's Reply Memorial in the proceedings before the Tribunal, paragraph 389, referred to in Award footnote 437.

248. Continental subsequently submitted the Second Rosen Report dated August 14, 2006 (see paragraph 159 above), updating the quantification of losses claimed by Continental. (The quantification of the loss in relation to the LETEs as set out in the Second Rosen Report has already been set out in paragraph 159 above.) This report set out what it claimed would have been the value of the LETEs but for the "Events", and the "expected value" or "current defaulted value" of the LETEs given the "Events". Paragraph 1 of this report defined "Events" to have the same meaning as in the First Rosen Report (such that it did not include Decree 1735/04). It set out separately the losses arising as a result of the pesification of the LETEs, and the losses arising as a result of the default on the LETEs.

249. The Tribunal found that the pesification of the LETEs was a measure that fell within the scope of Article XI of the BIT, and that Argentina was therefore not liable under the BIT to compensate Continental for losses arising as a result of the pesification. The Tribunal therefore concluded, in relation to Continental's claim in respect of the LETEs, as follows:

> *The Claimant submits it has suffered as to LETEs losses amounting to U.S$700,000 due to pesification and to U.S$2,800,000 "due to the further default and revocation of contractual rights." For the reason stated above, the Claimant is entitled to be compensated only for the latter amount that corresponds to its capital loss. The Claimant is accordingly entitled to payment of compensation in the principal sum of U.S.$2,800,000.*[180]

250. It is apparent that the Tribunal was granting Continental's claim in part. It did not award the claimed losses in respect of pesification, but did award the claimed losses in respect of "*further default and revocation of contractual rights*".

251. However, even in respect of the claimed losses in respect of "*further default*", the Tribunal allowed the claim in part only. Continental claimed that the default

[180] Award ¶ 305 (footnote omitted).

occurred in March 2002, when the LETEs matured. The Tribunal found on the other hand that the date of default was the later date of January 1, 2005.[181]

252. In the course of reaching this conclusion, the Tribunal considered the significance of Decree 1735/04.

253. In paragraphs 220-222 and 264-266 and footnote 350 of the Award, the Tribunal found that Article XI of the BIT did not apply to Decree 1735/04, on the basis that by the time of its adoption in December 2004, "Argentina's financial situation was evolving towards normality". This meant that Argentina could not rely on Decree 1735/04 as a justification for its subsequent failure to observe the original terms of the LETEs.

254. The Committee notes in this respect that the Award does not specify a date on which Argentina's economic crisis ended. That is understandable, because an economic crisis of this nature does not normally have an abrupt termination on a particular day. Paragraphs 152 to 159 of the Award deal with the evolution of the situation from the apogee of the crisis in the second half of 2002, until January 2006 when repayment of all sizable amounts outstanding to the IMF had been completed. On the Committee's reading of the Award, the Tribunal did not find that Argentina's economic crisis had necessarily "ended" by December 2004, when Decree 1735/04 was adopted. Rather, its finding was that by December 2004, the economic situation had sufficiently evolved "towards normality" that the particular measures contained in Decree 1735/04 could not in all of the circumstances then prevailing be considered "necessary" for purposes of Article XI of the BIT.

255. In paragraphs 265 and 285 of the Award, the Tribunal indicates that the restructuring of the LETEs provided for in Decree 1735/04 was itself a breach of the fair and equitable treatment clause. From a reading of the Award as a whole, it is clear that the reasons for this were the same as reasons for concluding that Article XI did not apply, namely that in circumstances where it was no longer necessary to do so in order to deal with the economic crisis, the

[181] Award ¶ 315.

Decree unilaterally offered to recognise only 30 percent of the value of the LETEs, and only on condition that rights under the BIT were waived.

256. Argentina argues that this finding is illogical, since Argentina was absolved of liability for its default on the LETEs in 2002 by virtue of Article XI of the BIT, such that the offer in Decree 1735/04 in 2004 *improved* the position of LETEs holders. Even were this one possible reading of the Award, where it is merely arguable whether an award contains an inconsistency, it is not for an annulment committee to determine that the correct reading of the award is one which contains an annullable error.[182] If two possible readings of an award are fairly open, where one would contain an annullable error and the other would not, the latter reading should be assumed to be what a tribunal intended.

257. The Committee considers that it is implicit in the Award that the Tribunal considered that prior to Decree 1735/04 the LETEs had not already been rendered worthless by measures to which Article XI applied. If the obligations under the LETEs had been restructured by a permanent measure to which Article XI applied, then such measure would continue to apply even after the economic crisis had ended, as the Tribunal for instance found in relation to the pesification of the LETEs. However, as Article XI was found not to apply to Decree 1735/04, it is implicit in the Tribunal's decision that if Decree 1735/04 had never been adopted, at some point Continental would have had a BIT claim in respect of default on the LETEs if the default had continued indefinitely, since not all rights under the LETEs had been permanently abrogated by a measure to which Article XI applied.

258. It is implicit that the Tribunal regarded Decree 1735/04 as having effectively abrogated the remaining rights of LETEs holders who, like Continental, did not accept the offered restructuring. The result was that Decree 1735/04 itself was found by the Tribunal to constitute a breach of the BIT, for which Argentina was liable to pay damages.

259. The Committee therefore does not consider that there is any inherent contradiction in the reasoning of the Tribunal.

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[182] See paragraph 104 above.

260. Argentina complains further that the Tribunal's reasons for finding that Article XI of the BIT did not apply to Decree 1735/04 were too brief. Argentina argues that the question of what measures were "necessary" to deal with the economic crisis is enormously complex, and that the Tribunal dealt with it in a brief two paragraphs of the Award. It is said that this was arbitrary, amounting to a manifest excess of powers, or a failure to give reasons for the decision.

261. The fact that reasons may have been short is not in the Committee's view a meaningful criterion for determining whether the discussion offered by a tribunal falls short of its duty to state reasons.[183] Furthermore, in determining whether the reasons given for a conclusion on a particular question are sufficient, is it necessary not to look in isolation at the particular paragraphs of the award dealing specifically with that question. Those paragraphs must always be read together with the award as a whole. In the present case, the Award contained a long discussion of the factual background to the Argentinean economic crisis, detailing the course of events from the late 1990s to the middle of the first decade of the 21st century.[184] The Tribunal's conclusions specifically relating to the default on the LETEs and Decree 1735/04 must be understood in the light of the circumstantial framework which the Tribunal obviously took into consideration when reaching its conclusions.

262. The Tribunal could only decide the questions before it on the basis of the evidence and submissions placed before it by the parties. On the basis of that evidence and those submissions, the Tribunal was required to determine whether Article XI of the BIT applied to various measures that were taken by Argentina from the beginning of the economic crisis. On the basis of that evidence and those submissions, the Tribunal held that Article XI applied in relation to various of those measures taken in 2001 and 2002, but was satisfied that it did not apply to Decree 1735/04. The Committee considers that the Award, when read as a whole, *"enables one to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion*". The Committee is not persuaded that this is a *"clear case*" of reasons that *"leave the decision on a particular point essentially lacking in any expressed rationale*".

183 See paragraphs 99-102 above.
184 Award ¶¶ 100-159.

Even if the reasons are stated succinctly and even if Argentina may not be persuaded by them, there has been no failure to state reasons.

263. At the Hearing before the Committee, Argentina for the first time raised a further argument as the basis for annulment of the Tribunal's finding in respect of the LETEs, namely that the Tribunal had awarded damages *ultra petita*, that is to say, on a ground which had not been invoked by Continental. Argentina says that this is because Continental never advanced a claim before the Tribunal that Decree 1735/04 amounted to a breach of the BIT.

264. In respect of this argument, the Committee observes that even where a Tribunal does grant a claim which is *ultra petita*, this will only amount to an annullable error where one of the grounds of annulment in Article 52(1) of the ICSID Convention is applicable. In its Application for Annulment in these proceedings, the only grounds of annulment invoked by Argentina were failure to state reasons and serious departure from a fundamental rule of procedure. Argentina's Memorial on Annulment similarly invoked these two grounds only, as did Argentina's Reply on Annulment. At the Hearing, Argentina ultimately relied on the same two grounds.[185]

265. For the reasons given above, the Committee is satisfied that the Tribunal did give sufficient reasons for its decision in this respect.

266. Furthermore, even if it is assumed that it is an excess of powers for a tribunal to decide a claim *ultra petita*, this will only be a ground of annulment under Article 52(1)(b) of the ICSID Convention if the excess of powers is "manifest".

267. It has been said that "It is generally understood that exceeding one's powers is 'manifest' when it is 'obvious by itself' simply by reading the Award, that is, even prior to a detailed examination of its contents",[186] and that this ground of annulment requires that the excess of power should be "textually obvious".[187] The Committee considers that even if it were to be accepted that the Tribunal

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185 Hearing transcript, November 9, 2010, pp. 222-224.

186 *Repsol YPF Ecuador SA v. Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, *Decision on the Application for Annulment*, 8 January 2007 ¶. 36.

187 *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, *Decision of the Ad hoc Committee on the Application for Annulment of Mr. Soufraki*, 5 June 2007 ¶¶. 38-40.

exceeded its powers in this case by finding a breach of the BIT on an *ultra petita* basis, the excess of powers was not "manifest" in this sense. In order to establish whether there was any excess of powers in this case it is necessary to engage in a careful review of the arguments that have been advanced by the parties in the underlying arbitral proceedings. Even if there were said to be an excess of powers, the Committee does not consider that it is "obvious by itself", or "textually obvious".

268. Argentina did not expressly argue that the making of an *ultra petita* determination by a tribunal amounts to a serious departure from a fundamental rule of procedure, within the meaning of Article 52(1)(d) of the ICSID Convention. The Committee has nonetheless considered whether it is empowered, under the principle of *jura novit curia*, to determine whether Argentina's *non ultra petita* argument establishes a ground of annulment under Article 52(1)(d).

269. The Committee considers that in its consideration of this issue, it must have regard to the stage at which Argentina raised the *non ultra petita* argument. At the Hearing, Continental expressed its view that Argentina had not presented this argument in its written submissions and that, for this reason, the argument raised by Argentina at the Hearing was "technically inadmissible". Argentina contended for its part that the matter of *ultra petita* had, in fact, been raised in Argentina's written submissions.[188] Argentina referred to the following passages in its submissions:

> *In the Award, the Tribunal reached severe conclusions regarding the restructuring of the Argentine debt without taking into consideration the evidence and arguments presented by the parties, which were merely not mentioned as grounds for such conclusions.*[189]

> *The Tribunal failed to state the reasons for its decision on this matter as regards certain questions submitted by the parties and, particularly, by the Argentine*

[188] Hearing transcript, November 9, 2010, pp. 346-347.
[189] Argentina's Memorial on Annulment, para 24.

> *Republic, and failed to deal with other questions which were not addressed at the hearing or during the course of written proceedings, yet it made unfounded determinations concerning the restructuring of the LETES.*[190]

270. Continental, for its part, argued that these references in Argentina's written annulment pleadings were merely "some obscure and oblique passages"[191] which were so subtle that they could not possibly be said to have raised the *non ultra petita* argument before the Hearing. Continental therefore took the view that the *non ultra petita* argument was "technically inadmissible".[192]

271. Notwithstanding that position, Continental proceeded to argue why the Tribunal's dealing with the December 2004 Offer did not constitute a manifest excess of powers or a failure to state reasons. No request for dismissal was made by Continental, and no ruling on the matter was rendered by the *ad hoc* Committee.

272. The Committee agrees with Continental's view that Argentina cannot be said to have invoked properly the *non ultra petita* argument prior to the Hearing. The Committee was in the circumstances ultimately prepared to consider the argument. However, in the circumstances, the Committee is not prepared to go further, and to consider of its own motion, under the principle of *jura novit curia*, whether there may have been a serious departure from a fundamental rule of procedure.

273. For the sake of completeness it may be added that the Parties at the Hearing discussed the implications of invoking events taking place after the commencement of proceedings on the basis of an earlier investment arbitration case, *Pope & Talbot v Canada*. However, as Argentina did not reject the possibility that such subsequent events could be taken into account on condition that they were properly argued, there is no reason for the Committee to discuss the Parties' argument in relation to this prior NAFTA case.

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190 Argentina's Reply Memorial on Annulment, para 30.
191 Hearing transcript, November 10, 2010, p. 425.
192 Hearing transcript, November 10, 2010, p. 425.

274. Based on the above, the Committee finds no basis to annul the Award (to the extent requested by Argentina) on the basis of Argentina's *ultra petita* argument.

275. The Committee therefore finds no annullable error in the Tribunal's decision partially to allow Continental's claim in respect of the LETEs.

276. Argentina raised an additional issue in its application for partial annulment. In the Award, Argentina was declared liable to compensate Continental "subject to the Claimant first procuring the surrender of all LETEs held by its subsidiary, not previously tendered to and accepted by Argentina". This provision of the dispositive part of the Award was later the object of an application for rectification of the Award by Continental, pointing out that the securities in question were "*maintained by the Argentine Ministry of Finance in an electronic register*" and that it was not, therefore, feasible to surrender any physical certificates.

277. The Tribunal, in dealing with Continental's request for rectification, noted that "*the Claimant did not supply any evidence that 'the LETEs acquired on 25 September and 18 October [2001] remained uninterruptedly in possession of Claimant's subsidiary up to the present date'*".[193] However, the Tribunal held that such evidence would not be necessary as the LETEs were clearly identified. Argentina argues that this finding was a manifest excess of powers or a failure to state reasons, as Continental "*should have demonstrated, by means of the relevant account statement, that the LETEs concerned were not transferred at any time as from their acquisition*".

278. The Committee is satisfied that the Tribunal's conclusion that "*additional evidence of such continuous possession would be superfluous*" was a conclusion that the Tribunal was entitled to make and it does not attest to any manifest excess of powers or failure to state reasons.

279. Consequently, the Committee denies Argentina's request for annulment of paragraph 320(b) of the Award, and all of Argentina's requests for annulment of

[193] Rectification of the Award of 23 February 2009, para 10.

findings of the Tribunal and associated reasoning referred to in paragraph 78 above.

IV. COSTS

280. For the reasons given above, the Committee has rejected the respective applications for annulment of Continental and Argentina in their entirety. It follows that the Tribunal's ruling in the Award on the costs of the proceedings before the Tribunal stands.

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

282. The Committee notes that there are suggestions in some decisions on applications for annulment that the normal practice in annulment proceedings, regardless of the outcome,[194] is to order that each party shall bear its own costs[195] and to order that the parties shall bear equally the costs of the annulment proceedings.[196]

283. A different approach was taken in the *Azurix* Annulment Decision. The *ad hoc* committee in that case did follow the practice of ordering that each party should

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194 *Azurix* Annulment Decision ¶¶ 369-370 and *Enron* Annulment Decision ¶¶ 419-420, giving references; *Rumeli* Annulment Decision ¶ 183. This general rule has been said to be subject to a possible exception in cases where the annulment application was "*fundamentally lacking in merit*".

195 Other recent decisions adopting this practice include *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, August 20, 2010 ("*Vivendi* Second Annulment Decision") ¶ 268; *Fraport* Annulment Decision ¶¶ 283-285; *Helnan* Annulment Decision, *dispositif*; *Rumeli* Annulment Decision ¶ 184; *Duke* Annulment Decision ¶¶ 266-268.

196 Other recent decisions adopting this practice include *Vivendi* Second Annulment Decision ¶ 269; *Fraport* Annulment Decision ¶ 286; *Helnan* Annulment Decision, *dispositif*;.

bear its own litigation costs and expenses.[197] However, in relation to the expenses incurred by the Centre in connection with the proceedings, including the fees and expenses of the members of the *ad hoc* committee, it was concluded that the normal rule should be for a wholly unsuccessful applicant for annulment carry the burden of the whole of the costs, but that this normal rule could be departed from where exceptional circumstances so justify.[198] In the circumstances of that case, a departure from the general rule was found not to be justified.[199] A similar approach was taken in the *MCI* Annulment Decision[200] and the *Duke* Annulment Decision.[201]

284. In the *Enron* Annulment Decision, a case where an annulment application succeeded only in part, it was considered that it would be appropriate, in the circumstances and in the light of previous annulment decisions, for the costs of the proceedings to be borne equally by the parties,[202] and for each party to bear its own litigation costs.[203]

285. In the present case, applications for partial annulment of the Award were made by both parties. Each party has been entirely unsuccessful in their applications, and no part of the Award has been annulled. Whilst inclined to the approach noted in paragraph 283 above, in these circumstances the Committee concludes that it is appropriate, in the light of previous annulment decisions, for the costs of the proceedings to be borne equally by the parties, and for each party to bear its own litigation costs.

286. During these annulment proceedings, the Committee ordered pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(1) and (2) that the stay of enforcement of the Award will continue in effect for the duration of these annulment proceedings.[204] Pursuant to ICSID Arbitration Rule 54(3) that stay

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197 *Azurix* Annulment Decision ¶ 380. *Rumeli* Annulment Decision ¶ 184

198 *Azurix* Annulment Decision ¶¶ 371-378.

199 *Azurix* Annulment Decision ¶ 379.

200 *MCI* Annulment Decision ¶ 88.

201 *Duke* Annulment Decision ¶¶ 263 and 265 (on the basis that Peru, the party unsuccessfully applying for annulment, had stated that it was not requesting to be reimbursed for any portion of the ICSID costs that it had already advanced).

202 *Enron* Annulment Decision ¶ 424.

203 *Enron* Annulment Decision ¶ 425.

204 See the Committee's "Decision on Argentina's Application for a Stay of Enforcement of the Award" of October 23, 2009.

automatically terminates on the date on which the present decision on the respective applications for annulment of Continental and Argentina is rendered.

V. DECISION

For the reasons given above, the Committee:

(1) dismisses in its entirety the application for annulment of Continental Casualty Company;

(2) dismisses in its entirety the application for partial annulment of the Argentine Republic;

(3) decides that each Party shall bear one half of the costs incurred by the Centre in connection with these annulment proceedings, including the fees and expenses of the members of the Committee;

(4) decides that each Party shall bear its own litigation costs and expenses incurred with respect to these annulment proceedings, including its costs of legal representation;

(5) decides pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3) that the stay of enforcement of the Award ordered by the Committee in its decision of 23 October 2009 is terminated.

[signed]

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

[signed]

Judge Bola Ajibola
Member of the *ad hoc* Committee

[signed]

Mr. Christer Söderlund
Member of the *ad hoc* Committee