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

DECISION ON ANNULMENT

ICSID Case No. ARB/03/4 - Annulment Proceeding

Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.

v.

The Republic of Peru

before the *Ad hoc* Committee composed of:

Justice Hans Danelius, *President*
Sir Franklin Berman, *Member of the Committee*
Prof. Andrea Giardina, *Member of the Committee*

Secretary of the Tribunal
Gabriela Alvarez Avila

Date of dispatch to parties: 5 September 2007

INDEX

DECISION rendered in Washington, D.C. in the annulment proceeding in Case No. ARB/03/4 between the following parties:

Claimants: Industria Nacional de Alimentos, S.A. (previously Empresas Lucchetti, S.A.) and Indalsa Perú, S.A. (previously Lucchetti Perú, S.A.), represented by Mr. Whitney Debevoise[1], Ms. Jean Kalicki, Ms. Annie Khalid Hussain, Ms. Suzana Medeiros and Mr. Jorge Alva (Arnold & Porter), and Mr. Edmundo Eluchans and Mr. Gonzalo Molina (Edmundo Eluchans y Cía)

Respondent: The Republic of Peru, represented by Mr. Miguel Talavera and Mr. Renzo Villa (Embassy of Peru in Washington D.C.), and Judge Stephen Schwebel, Mr. Daniel M. Price[2], Mr. Stanimir A. Alexandrov, Mr. Nicolás Lloreda, Ms. Sharon H. Yuan and Mr. Michael Smart (Sidley Austin).

Members of the *Ad hoc* Committee: Justice Hans Danelius (President), Sir Franklin Berman and Professor Andrea Giardina.

Secretaries of the *Ad hoc* Committee: Ms. Gabriela Alvarez Avila and Ms. Natalí Sequeira.

I. SUMMARY OF THE FACTS

1. The First Claimant, Industria Nacional de Alimentos, S.A., whose previous name was Empresas Lucchetti, S.A., is a Chilean company and owns the majority of the shares of the Second Claimant, Indalsa Perú, S.A., previously Lucchetti Peru, S.A. In this Decision, the two Claimants are treated as one unit, and the name *"Lucchetti"* is used indiscriminately to designate both or one of them, as the case may be.

2. Lucchetti was the owner of a property in the municipal district of Chorrillos in the City of Lima, where it constructed a plant for the manufacture and sale of pasta. The plant was constructed close to, but not within, a protected wetland called Pantanos de Villa.

3. On 18 August 1997, the Municipality of Chorrillos issued a stop work notice to Lucchetti. On 25 September 1997, the Council of the Municipality of Lima issued Decree 111 which ordered work on the construction of the plant to cease immediately. A Special Commission (known as *"the Somocurcio Commission"*) was set up to review the administrative formalities

[1] Counsel of record until 3 April 2007.
[2] Counsel of record until 9 July 2007.

observed by Lucchetti and to make recommendations to the Council of the Municipality for the improvement of the urban and environmental control of Pantanos de Villa.

4. On 17 October 1997, the Somocurcio Commission issued its report in which it found that the procedures for urban authorisation and granting of a construction licence for Lucchetti's plant infringed environmental rules and posed an imminent environmental threat to the Natural Protected Area of Pantanos de Villa. On 21 October 1997, the Council of the Municipality of Lima promulgated Decree 126 which established the Special Regulatory Zone of Pantanos de Villa and ordered the suspension of all procedures of urban authorisations, construction and other licences, whatever the stage reached, concerning applications to develop inside the Special Regulatory Zone of Pantanos de Villa.

5. On 2 January 1998, the Provincial Technical Commission of the Municipality of Lima issued Decree 01 in which Lucchetti's construction licence and all other acts authorising construction work on the industrial plant to be built by Lucchetti at the relevant site were declared null and void.

6. In January 1998, Lucchetti began legal proceedings by bringing an *amparo* action against the Provincial Council of the Municipality of Lima, the Mayor of the Municipality of Lima and the District Council of the Municipal District of Chorrillos. This action resulted in the following judgments:

(a) a decision of 19 January 1998 by which the Primer Juzgado Corporativo Transitorio Especializado en Derecho Público ("*First Transitory Corporate Court Specialised in Public Law*"), declared Lucchetti's request for precautionary measures well-founded and granted Lucchetti the relief sought, including the suspension of Decree 01, the relevant part of Decree 126 and the stop work notice relating to the construction of the plant,

(b) a judgment of 6 February 1998 in which the same Court of first instance allowed the complaint against the Provincial Council of the Municipality of Lima and the Mayor of the Municipality of Lima,

(c) a judgment in second instance issued by the Sala Corporativa Transitoria Especializada en Derecho Público ("*Transitory Corporate Court Specialised in Public Law*") on 4 March 1998 in which the judgment of 19 January 1998 was confirmed on appeal, and

(d) a judgment of 18 May 1998 in which the judgment of 6 February 1998, with a minor amendment, was confirmed on appeal.

7. On 16 March 1998, Lucchetti instituted an enforcement action. The claim for enforcement was granted in a judgment of 23 April 1998 and, on appeal, in a judgment of 11 September 1998.

8. An Ordinance 184, adopted by the Council of the Municipality of Lima on 4 September 1998, was declared in a court judgment of 9 December 1998 to be inapplicable in so far as it would have prevented the execution of the judgment of 11 September 1998.

9. Consequently, on 23 December 1998, the Municipality of Chorrillos issued a construction licence to Lucchetti. On 29 December 1998, it also issued an operating licence for the

manufacture and sale of pasta products at Lucchetti's plant. The plant was completed and in operation until August 2001.

10. On 16 August 2001, the Council of the Municipality of Lima issued Decrees 258 and 259 which were published on 22 August 2001.

11. Decree 258 charged the Mayor of Lima to present to the Peruvian legislature proposals for the legislative expropriation by reason of public necessity of all areas necessary for the permanent preservation, maintenance and protection of the Ecological Reserve of Pantanos de Villa.

12. Decree 259 specifically revoked Lucchetti's operating licence. It read in relevant parts as follows:

"Article 1. The municipal operating licence granted by Municipal Resolution No. 6856-98-MDCH to Lucchetti Perú S.A. for its industrial plant situated at an unnumbered location on Avenida Prolongación Defensores del Morro, 20.5 km along the Panamericana Sur highway, Chorrillos, for the manufacture and sale of pasta is hereby revoked.

Article 2. The industrial establishment referred to in the preceding article shall be closed and entirely removed; this shall be done within a maximum of twelve months from the day following the publication of this Decree."

13. The reasons were set out at some length in the preamble to the Decree. The preamble referred to Lucchetti's failure to observe zoning and environmental regulations applicable to the construction of the plant near Pantanos de Villa. It also referred to the court proceedings instituted by Lucchetti and noted revelations of illegalities in these proceedings which had resulted in judgments in Lucchetti's favour. The preamble stated that the operating licence of 29 December 1998 had been issued in compliance with the fraudulent judicial decisions rendered in the judicial proceedings.

14. In accordance with Decree 259, Lucchetti's establishment was closed and Lucchetti was forced to terminate its construction and business activities.

II. THE INVESTMENT TREATY

15. The Bilateral Investment Treaty between the Republic of Peru and the Republic of Chile (hereinafter called "*the BIT*") is dated 2 February 2000 and entered into force on 3 August 2001. It contains, *inter alia*, the following provisions (translation from Spanish):

"Article 1
Definitions

For the purposes of the present Convention:

1. The term 'investor' means, for each of the Contracting Parties, the following subjects which have made or make an investment in the territory of the other Contracting Party in accordance with the present Agreement:

(a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
(b) legal entities, including companies, corporations, business associations and other entities, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat together with their effective economic activities in the territory of that same Contracting Party;
(c) legal entities constituted under the law of any country, which are effectively controlled by investors referenced in (a) and (b) above.

2. The term ‘investment’ refers to any kind of asset, provided that the investment was made in accordance with the laws and regulations of the Contracting Party in whose territory the investment was made and shall include particularly but not exclusively:

(a) movable and immovable property and any other rights *in rem* such as easements, mortgages, usufructs and pledges;
(b) shares and any other form of participation in companies;
(c) loans, securities, rights in money and any other benefit of economic value;
(d) intellectual and industrial property rights, including copyright, patents, trademarks, technological processes and know-how, goodwill and other similar rights;
(e) commercial concessions granted by law or by contract, including concessions for the exploration, cultivation, extraction or exploitation of natural resources.

3. The term ‘territory’ means, in addition to the areas included within the terrestrial limits, the adjacent maritime zones and the air space over which the Contracting Parties exercise sovereign rights and jurisdiction in accordance with their own laws and international law.

Article 2
Scope

This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter’s territory. It shall not, however, apply to differences or disputes that arose prior to its entry into force.

Article 3
Promotion and Protection of Investments

1. (…)

2. Each Contracting Party shall protect within its territory the investments made in accordance with its laws and regulations by investors of the other Contracting Party, and shall not adversely affect the administration, maintenance, use, usufruct, expansion, sale or liquidation of such investments by unjustified or discriminatory measures.

Article 4
Treatment of Investments

1. Each Contracting Party shall guarantee fair and equitable treatment within its territory for investments of investors of the other Contracting Party. Such treatment shall be no less favourable than that granted by each Contracting Party to the investments of its own investors made within its territory or that granted by each Contracting Party to investments of investors of the most-favoured nation made within its territory, if the latter treatment is more favourable.

2. If a Contracting Party accords special advantages to investors of any third country by virtue of an agreement establishing a free trade area, a customs union or a common market, or by virtue of an agreement for the avoidance of double taxation, such Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

(…)

Article 6
Expropriation and Compensation

1. Neither of the Contracting Parties shall adopt any measure directly or indirectly depriving an investor of the other Contracting Party of an investment, unless the following conditions are met:

a) The measures are adopted in pursuance of the law and in accordance with the relevant constitutional rules.
b) The measures are not discriminatory.

c) The measures are accompanied by arrangements for the payment of immediate, adequate and effective compensation. Such compensation shall be based on the market value of the investments made on a date immediately prior to the date on which the measure is publicly announced. In the event of any delay in the payment of compensation, interest shall accrue, at a commercial rate established on the basis of the real market value, from the date of expropriation or loss until the date of payment. The legality of any such expropriations, nationalisations or similar measures and the amount of compensation shall be subject to revision in accordance with due legal process.

(…)

Article 8
Disputes between a Contracting Party and an Investor

1. The Parties involved shall hold consultations with a view to obtaining an amicable solution to disputes between a Contracting Party and an investor of the other Contracting Party,

2. If such consultations do not produce a solution within six months following the date of the request for settlement, the investor may refer the dispute to:

- the competent court of the Contracting Party in whose territory the investment was made, or
- international arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington on 18 March 1965.

Once the investor has referred the dispute to the competent court of the Contracting Party in whose territory the investment was made or to the arbitral tribunal, the choice of one or other procedure shall be final.

3. For the purposes of this Article, any juridical person constituted in accordance with the legislation of one of the Parties, in which investors of the other Contracting Party were majority share-holders prior to the occurrence of the dispute, shall be treated, in accordance with Article 25(2)(b) of the above-mentioned Washington Convention, as a juridical person of the other Contracting Party.

4. The arbitral award shall be final and binding on both Parties.

(…)"

III. THE TRIBUNAL'S AWARD

16. On 24 December 2002, Lucchetti, referring to the BIT, submitted to ICSID a request for arbitration against the Republic of Peru.

17. On August 1, 2003 the Arbitral Tribunal (hereinafter called "*the Tribunal"*) was deemed to have been constituted. It was composed of Judge Thomas Buergenthal, President, Mr. Jan Paulsson and Dr. Bernardo M. Cremades.

18. During the arbitral proceeding, Lucchetti argued before the Tribunal that the Republic of Peru was responsible under the BIT for the revocation of their licence and that the Republic of Peru was in breach of the following articles of the BIT:

(a) Article 3.2 which provides for the protection of investments in accordance with the law, and from unjust or discriminatory measures,

(b) Article 4.1 which guarantees investors a just and equitable, national and most-favoured nation treatment, and

(c) Article 6.1 which provides for protection from illegal, discriminatory or uncompensated expropriation.

19. The Republic of Peru argued that the Tribunal had no jurisdiction *ratione temporis*, *ratione materiae* and due to prior submission of the dispute to local courts.

20. The Tribunal rendered its Award on 7 February 2005. In this Award, the Tribunal found in essence as follows:

"48. The Tribunal notes that as a legal concept, the term dispute has an accepted meaning. It has been authoritatively defined as a 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,'[3] or as a 'situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance' of a legal obligation.[4] In short, a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that 'the claim of one party is positively opposed by the other'[5].

49. It is clear, and that does not appear to be in dispute between the parties, that by 1998, after Decree 01 was adopted and Claimants challenged that decree in the *amparo* proceedings, a dispute had arisen between Claimants and the municipal authorities of Lima. The Tribunal finds that at that point in time, the parties were locked in a dispute in which each side held conflicting views regarding their respective rights and obligations.

50. The parties disagree, however, as to whether the earlier dispute ended with the judgments rendered by the Peruvian courts in Claimants' favor or whether it continued and came to a head in 2001 with the adoption of Decrees 258 and 259. The Tribunal must therefore now consider whether, in light of other here relevant factors, the present dispute is or is not a new dispute. In addressing that issue, the Tribunal must examine the facts that gave rise to the 2001 dispute and those that culminated in the 1998 dispute, seeking to determine in each instance whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other.[6] According to a recent ICSID case, the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter.[7] The Tribunal considers that, whether the focus is on the 'real causes' of the dispute or on its 'subject matter', it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.

51. It is undisputed that the subject matter or origin of the 2001 dispute, if it was a new dispute, was the promulgation of Decrees 258 and 259. Decree 258 was designed to establish a regulatory framework for the permanent protection of the Pantanos de Villa as an ecological reserve. It authorized the municipal authorities of Lima to adopt measures necessary to achieve that objective. Decree 259 ordered the revocation of Claimants' operating license for the production of pasta and decreed the closing and removal of the factory. The lengthy preamble to Decree 259 lists the findings in justification of the decision. The list invokes Lucchetti's failure to comply, since 1997, with the legal rules applicable the construction of the plant near the Pantanos de Villa, thus endangering that ecological reserve. It makes reference to the litigation instituted by Lucchetti against the municipality's efforts to protect the region's environment and notes that the revelations contained in recently released videos and in testimony before a congressional committee indicate that there was corruption in the procurement of the judgments in Lucchetti's favor. The preamble then takes note of various relevant legislative and regulatory measures, including Decree No. 126-97-MML. This decree created the Zona de Reglamentación Especial Pantanos de Villa, which was declared of ecological interest to the municipality. The preamble also refers to Decree 01 of January 2, 1998 and notes that the decree declared null and void the construction license Lucchetti allegedly received due to administrative inaction as well as the approval of its architectural plans for

---

[3] Mavrommatis Palestine Concessions (Greece v. United Kingdom), Judgment of 30 August 1924 (Merits), 1924 P.C.I.J. (ser. A), No. 2, p. 11.

[4] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of March 1950, I.C.J. Reports 1950, p. 65 at 74.

[5] South West Africa, Preliminary Objections. Judgment, I.C.J. Reports 1962, p. 319, at 328.

[6] See Electricity Company of Sofia and Bulgaria (Preliminary Objection), 1939 P.C.I.J., p. 64 at 82.

[7] CMS Gas Transmission Co. v. Argentina, Case No. ARB/ 01/ 8, July 17, 2003, 42 ILM 788, para. 109 (2003).

the construction of the factory. Next, the preamble takes note of the *amparo* action instituted by Lucchetti to set aside Decree 01 and Article 4 of Decree 126-97 and to obtain authorization for the operation of the industrial plant. The preamble invokes Resolution No. 6856-98-MDCH of December 29, 1998 which, having been issued 'in compliance with the fraudulent judicial decisions rendered in the judicial proceedings in question,' granted Lucchetti a municipal operating license for its pasta factory and the sale of its product. Finally, the preamble points out that Resolution No. 6556-98 specified in its Article 2 that the license in question was granted on condition that there be full observance of the limitations and restrictions provided for in the applicable environmental impact study and that there be avoidance of other environmentally harmful activities such as, for example, the emission of noxious gases and fumes.

52. In setting out the administrative, legislative and judicial history of Claimants' efforts to obtain permission for and to operate their pasta factory in the vicinity of the environmental reserve of Pantanos de Villa, Decree 259 related the action it mandated directly to the measures the municipal authorities took in 1998 in order to force Claimants to comply with the environmental and zoning requirements applicable to the construction of their pasta factory. It also focuses on the failure of the municipal authorities to achieve their objective because of the judgments entered in Claimants' favor in 1998 that forced them to issue the licenses they had previously denied Claimants.

53. The reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute: the municipality's stated commitment to protect the environmental integrity of the Pantanos de Villa and its repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of that environmental reserve. The subject matter of the earlier dispute thus did not differ from the municipality's action in 2001 which prompted Claimants to institute the present proceedings. In that sense, too, the disputes have the same origin or source: the municipality's desire to ensure that its environmental policies are complied with and Claimants' efforts to block their application to the construction and production of the pasta factory. The Tribunal consequently considers that the present dispute had crystallized by 1998. The adoption of Decrees 258 and 259 and their challenge by Claimants merely continued the earlier dispute.

21. The Tribunal proceeded to examine Lucchetti's arguments:

(a) that Decree 259 had revoked their operating licence whereas Decree 01 had voided their construction licence and that the earlier dispute involved only Decree 01, which was concerned with construction issues rather than the environmental issue dealt with in Decrees 258 and 259,

(b) that their plant had been in operation for more than two years before Decree 259 was issued, and that there was therefore a substantial gap between the adoption of Decree 259 and the judgments of 1998 which had put an end to the earlier dispute, and had become *res judicata*, and

(c) that their claim before the Tribunal alleged a violation of the BIT, which was not yet in effect in 1998, and must therefore be seen as relating to a new dispute – a proceeding to enforce BIT rights and obligations that did not exist in 1998 – and that, as a BIT claim, it did not come within the provisions of the *ratione temporis* reservation set forth in Article 2 of the BIT.

22. The Tribunal's findings on these points were as follows:

"55. The Tribunal finds that the issues in dispute in 1998 did not concern only matters dealt with in Decree 01. The dispute involved a series of legal measures that addressed environmental matters, among them Decrees 01 and 126, and Official Letter 771-MML-DMDU, which formed the basis for Claimants' successful *amparo* action. Thereafter, moreover, the municipality enacted Ordinance 184, which established a comprehensive environmental regulatory scheme and required activities not in compliance with the plan to be brought into compliance therewith within a five-year period. Claimants successfully challenged that ordinance as applied to

them in the same court that granted their *amparo* action. That ruling compelled the municipal authorities to grant Claimants their construction and operating license. It is thus clear that the issues in dispute in 1998 dealt with the same environmental concerns reflected in Decrees 258 and 259 of 2001, and that those concerns did not only focus on the construction but also the operation of the plant.

56. As for the time that elapsed between the judgments rendered in Claimants' favor in 1998 and Decree 259, that fact alone will not transform an ongoing dispute into two disputes, unless the evidence indicates that the earlier dispute had come to an end or had not as yet crystallized into a dispute.[8] Here the municipality continued throughout to seek to apply its environmental regulatory scheme to Claimants' plant, only to be blocked in its efforts by the various judicial proceedings Claimants instituted and which the municipality vigorously contested and sought to circumvent. See, e.g., Ordinance 184. Moreover, the municipality adopted Decrees 258 and 259 as soon as it concluded that the disclosures about the manner in which the judgments had been procured enabled it to reassert its earlier position and to apply its environmental regulatory scheme to Claimants' operations. That the municipality never considered that its dispute with Claimant had ended with the judgments is further evidenced by the language of the preamble to Decree 259 which, as has been seen above, recounts and relies on the municipality's earlier efforts to force Claimants to comply with its environmental rules and regulations. Accordingly, the Tribunal is of the view that the lapse of two and half years between these judgments and the adoption of Decrees 258 and 259 does not in and of itself compel the conclusion that the earlier dispute had come to an end and that a new dispute arose in 2001. The Tribunal considers, moreover, that Decrees 258 and 259 did not generate a new dispute notwithstanding the fact that the 1998 judgments had become *res judicata* under Peruvian law. The *res judicata* status of these judgments, standing alone, does not compel that result since the facts before the Tribunal indicate, as has already been shown, that the original dispute continued. Moreover, the public controversy concerning these judgments, stimulated by the continuing judicial and parliamentary inquiries relating to them, further demonstrates that, as a practical matter, the *res judicata* status of the judgments was not deemed to have put an end to the dispute.

57. Turning now to the question concerning the alleged illegalities surrounding the manner in which the 1998 judgments were procured, the Tribunal is of the view that, if proved, they would provide an independent ground for holding that the judgments could not have had the effect of terminating the earlier dispute. However, since the Tribunal has already concluded on other grounds that these judgments did not end the dispute, it is unnecessary for it to address this issue.

58. Finally, Claimants contend that in these proceedings they invoke rights and obligations arising under the BIT and that they therefore are entitled to have the Tribunal adjudicate this claim. According to them, moreover, being a BIT claim, the present dispute is not and cannot be the same dispute as the one that existed prior to the BIT's entry into force.

59. It is true, of course, that Claimants are entitled to have this Tribunal adjudge rights and obligations set forth in the BIT. But this is so only if and when the claim seeks the adjudication of a dispute which, pursuant to Article 2 of the BIT, is not a dispute that arose prior to that treaty's entry into force. The allegation of a BIT claim, however meritorious it might be on the merits, does not and cannot have the effect of nullifying or depriving of any meaning the *ratione temporis* reservation spelled out in Article 2 of the BIT.[9] Further, a pre-BIT dispute can relate to the same subject matter as a post-BIT dispute and, by that very fact, run afoul of Article 2. That, as has been seen above, is the case here."

---

[8] *Cf.* Maffezini v. Spain (Decision on Jurisdiction), ICSID Case No. ARB/97/77, 16 ICSID Review 212, paras 90-98 (2001). Here the tribunal had before it a provision similar to Article 2 of the BIT in the present case. It found that the events leading to a dispute had been the subject of discussions between the parties for a number of years before the entry into effect of the BIT there in issue. These discussions did not produce "the conflict of legal views and interests" necessary to transform them into a dispute until after the entry into force of the BIT. Therefore, the challenged dispute was not barred by the BIT. *Id.*, para. 96. In the present case, "the conflict of legal views and interests" had crystallized prior to the entry into force of the BIT. Had that been the case in Maffezini, its tribunal would have reached the same conclusion as this Tribunal.

[9] See, *e.g.*, Asian Agricultural Products, LTD. (AAPL) v. Sri Lanka, ICSID Case No. ARB/ 87 /3, 6 ICSID Review 526 (1991), where the tribunal points out that "nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning." *Id.*, para. 40, Rule (E).

IV. PROCEDURE

23. On 6 June 2005, pursuant to Article 52 of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter called "*the ICSID Convention"*) and Rule 50 of the ICSID Arbitration Rules, Lucchetti submitted to ICSID a Request for Annulment of the Tribunal's Award of 7 February 2005. Pursuant to Rule 50(2)(a) of the Arbitration Rules, ICSID registered the application for annulment on 1 July 2005.

24. After consultation with the parties, ICSID appointed Sir Franklin Berman, Justice Hans Danelius and Professor Andrea Giardina to serve on the *Ad hoc* Committee set up for the annulment proceedings. In accordance with the Arbitration Rules, the *Ad hoc* Committee was deemed to be constituted and the annulment proceedings deemed to have begun on 17 November 2005. Mr. Danelius accepted to serve as President of the *Ad hoc* Committee.

25. Ms. Gabriela Alvarez Avila, Senior Counsel, and Ms. Natali Sequeira, Counsel, served as Secretaries of the *Ad hoc* Committee.

26. At its first session held in Washington, D.C. on 16 February 2006, the *Ad hoc* Committee adopted a time schedule and took other decisions relating to the annulment proceedings. In accordance with the time schedule, the parties filed,

(a) Lucchetti a Memorial on 18 May 2006,
(b) the Republic of Peru a Counter-Memorial on 17 August 2006,
(c) Lucchetti a Reply on 16 October 2006, and
(d) the Republic of Peru a Rejoinder on 15 December 2006.

27. The *Ad hoc* Committee held a pre-hearing conference by telephone with the parties on 9 January 2007.

28. The final hearing was held in Washington, D.C. on 20 and 21 February 2007.

V. CLAIMS AND ARGUMENTS

29. Both parties have presented extensive arguments in writing and orally before the *Ad hoc* Committee. The Committee has examined these arguments in their entirety. The arguments which have appeared to the Committee to be the most important ones are summarised below.

1. Lucchetti

30. Lucchetti claims the annulment of the Tribunal's Award on the following three grounds.

31. First, the Tribunal arrogated to itself an authority it did not properly possess, to determine that a government measure taken after an investment treaty's entry into force fell outside that treaty's coverage, simply because its "subject matter" was the same as earlier government measures which were formally, legally and irrevocably invalidated by the local courts, and because the government never ceased to resent this chapter of history and continued to stir the flames of public opinion. By deferring to public opinion and the government's subjective beliefs rather than recognised legal principles on *ratione temporis* and finality of judgments,

the Tribunal also failed to apply the proper law. In doing so, it also failed to exercise the jurisdiction that it properly possessed. All of these errors constitute manifest excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention.

32. Second, the Tribunal seriously departed from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention. It is accepted as a general principle in international proceedings that resolution of jurisdictional questions must be based on the claimant's factual allegations as pleaded, not on the respondent's counter-allegations of fact, unless a tribunal wishes to make evidentiary findings at the jurisdictional stage. The Tribunal seriously departed from this fundamental rule of procedure by deferring entirely to the Lima Council's stated motivations for its 2001 Decrees, rather than crediting, for purposes of jurisdiction, Lucchetti's offer to demonstrate that these motivations were mere pretexts. The Tribunal's deference to the Lima Council's one-sided explanations also led to a serious departure from the fundamental rule of procedure known as the "presumption of innocence", because it permitted the mere fact of corruption allegations regarding pre-Treaty events to eliminate an investor's access to ICSID, regardless of the truth or falsity of the allegations and in the face of the investor's express request that it be permitted to clear its name if the corruption allegations had any bearing on the jurisdictional analysis.

33. Finally, the Tribunal compounded its other errors by presenting genuinely contradictory reasons for its ruling, and by failing to deal with critical questions raised by Lucchetti, both of which constitute "failure to state reasons" within the scope of Article 52(1)(e) of the ICSID Convention.

a) Manifest excess of powers

34. The Lima Council tried to destroy Lucchetti's investment through illegal measures in late 1997 and early 1998 for reasons of political opportunism, but Lucchetti obtained relief from the courts and an operating licence. Lucchetti's facility was then operating unimpeded for two and a half years until August 2001 when Decree 259 was issued which destroyed Lucchetti's achievements without any due process, in clear discrimination vis-à-vis other investors and in gross violation of Peruvian law and the BIT. The explanations given for this act were merely pretexts for politically motivated action.

35. However, the Tribunal declined to exercise jurisdiction over Lucchetti's claims under the BIT by applying the *ratione temporis* exception in the BIT. This was not consistent with previous *ratione temporis* jurisprudence.

36. The Tribunal was wrong in equating the test in the BIT (whether the dispute arose prior to the entry into force of the BIT) with a different test, i.e. whether the dispute concerned the "same subject matter" or what was the "real cause" of the dispute. The relevant date is the date on which the government authorities took the actions that were alleged to have violated Lucchetti's rights and destroyed its investment. Those actions were the promulgation of Decrees 258 and 259. The fact that the dispute had historical antecedents does not matter.

37. The Tribunal opined that a "same subject matter" test would turn on whether the facts that gave rise to the 1997-1998 dispute "continued to be central" to the 2001 dispute. The Tribunal gave no explanation of what it means for a fact to "be central" to an ICSID dispute, but essentially assumed in its analysis that facts are central if they are relevant and necessary

history to later events, without asking whether such historical facts would be sufficient on their own to create the dispute with which ICSID is presented.

38. Having substituted a "same subject matter" test and "central fact" interpretative tool for the test actually dictated by the BIT, the Tribunal found determinative that the Lima Council explained its 2001 acts with reference to preceding events. The Tribunal concluded that the Council's explanation demonstrated that its 2001 acts "merely continued the earlier dispute" that predated the BIT's effective date, rather than constituting a "new" dispute arising after that effective date. The Tribunal disregarded for purposes of its jurisdictional review Lucchetti's offer to prove that the Council's stated reasons had been mere pretexts for new political action.

39. The Tribunal likewise gave no weight to the objective facts (a) that the Lima Council had taken new action to destroy Lucchetti's investment after the BIT's entry into force, (b) that the earlier dispute predating the BIT had been conclusively resolved in the Peruvian courts as a matter of Peruvian law by judgments which were *res judicata*, and (c) that neither the Lima Council nor the Republic of Peru had ever attempted to overturn or nullify the court rulings, preferring to rest on the Council's extra-legal self-help in the form of the new decrees. The Tribunal thus disregarded the legal principles that govern finality of disputes and the related principles of repose and vested rights in the country in question. It should be noted that Peruvian law allows otherwise final judgments to be nullified in cases of judicial corruption within a six-month period running from the date the judgments otherwise become *res judicata*, as opposed to the date of discovery of the underlying corruption. However, this was not done, which means that the judgments remained valid and should be respected by the administrative authorities.

40. The Tribunal also referred to the existence of "public controversy" about the 1998 judgments, meaning articles in the media and street demonstrations, as confirming as a "practical matter" that the earlier dispute had never really ended. The Tribunal thus substituted a "practical matter" test for recognised legal principles by referring to "public controversy" and to the lasting resentments of the authorities. The Tribunal failed to apply the proper law (international law with respect to treaty interpretation and Peruvian law regarding the finality of judgments) by resolving the questions as a "practical matter". The Claimants allege that the Tribunal's decision to give determinative weight to the Lima Council's stated motivations and to the existence of public controversy, rather than to objective factors grounded in Peruvian law and international jurisprudence, is ground for annulment in and of itself.

41. It is significant that the BIT Peru-Chile only excludes disputes having arisen before the entry into force ("single exclusion"), whereas some other treaties also exclude disputes over facts and acts that occurred prior to its entry into force ("double exclusion"). Under a single exclusion clause, the dispute cannot have arisen until after the contested government action which in this case was the promulgation of Decree 259.

42. The Tribunal also disregarded the fact that the dispute in 1998 was a dispute with the municipal authorities of Lima, whereas Decree 259 gave rise to a dispute with the Republic of Peru.

43. A tribunal's findings regarding jurisdiction are fully susceptible of review by an *ad hoc* committee. If the committee finds that the tribunal wrongly dismissed a case for lack of

jurisdiction, annulment is the proper remedy under Article 52(1)(b). Consequently, if, in this case, the *Ad hoc* Committee finds that the Tribunal had jurisdiction *ratione temporis*, the Committee must annul the Tribunal's Award.

44. Different views have been expressed as to the meaning of the term "manifest" in Article 52(1)(b) of the ICSID Convention. The more rational interpretation is that the excess of powers should have "serious implications"[10] and not that the excess is "obvious", but even if that latter criterion is chosen, there is ground for annulment in this case.

45. The Tribunal's resolution of core legal issues by deferring simply to one party's subjective motivations and the weight of public opinion was a manifest excess of powers, within the meaning of the ICSID annulment standard.

b) Serious departure from a fundamental rule of procedure

46. The Tribunal's approach also seriously departs from the fundamental rule of procedure in international cases under which jurisdiction is to be based on the claimant's formulation of its claims, not on the respondent's defence. Certainly, international tribunals are empowered to resolve contested issues of fact for purposes of jurisdictional determinations. But where they decline to do so, they must ask whether the claimant has made out a *prima facie* case, namely on the assumption that the claimant can prove its assertions of fact.

47. The Tribunal exceeded its power by disregarding Lucchetti's offer to prove that the stated reasons for Decree 259 were mere pretexts. The Tribunal gave determinative weight to these stated reasons rather than to objective factors and without leaving room for the possibility that Lucchetti might later prove the correctness of its assertions. Having decided not to test the facts in the course of the jurisdictional proceedings, the Tribunal did not have the authority to assume contested facts contrary to Lucchetti's pleading.

48. The consequence of this reasoning has even broader due process implications in this case, because much of the Lima Council's stated rationale stemmed from its assertions about purported corruption with respect to the 1998 judgments, while Lucchetti consistently denied that its representatives had engaged in any wrongdoing.

49. The Tribunal's decision-making technique flies in the face of universal notions about the presumption of innocence and requirements of due process. It allows government actors to destroy a foreign investment with impunity under an otherwise applicable international treaty, simply by declaring that the investor "deserved it" because of its supposed pre-treaty acts.

50. It is true that the Tribunal stated that it was unnecessary to address the issue of corruption, but it nevertheless based itself on the Lima Council's affirmation in Decree 259 that the 1998 judgments had been obtained by illegal means. This violates the presumption of innocence and the requirements of due process. Instead of letting the perception of Lucchetti's guilt permeate its reasoning, the Tribunal should have either taken evidence on the corruption

[10] ICSID Case of *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on Annulment of 2 July 2002.

issue, or deferred that issue for the merits. In any case, since the Tribunal stated that it did not consider the alleged corruption, the Award must stand or fall irrespective of these allegations.

c) Failure to state reasons

51. The Claimants allege that the Tribunal presented contradictory reasons for its Award by basing itself on different and inconsistent standards such as the "same subject matter" and the "same origin or source" of the disputes, whether certain elements were "central to the dispute", when the dispute "crystallised", and whether, "as a practical matter", it was the same dispute. These standards were contradictory and unclear, and they made the Award contradictory and unclear.

52. The Tribunal also failed to deal with Lucchetti's arguments:

(a) that the preamble to Decree 259 was merely a pretext and that the real reasons for the Decree were political,
(b) that the 1998 judgments were substantially correct, and
(c) that there was a distinction between the dispute with the municipal authorities and the dispute with the Republic of Peru.

2. The Republic of Peru

53. The Republic of Peru contests Lucchetti's application for annulment and requests that it be rejected on the following grounds.

a) Manifest excess of powers

54. The Tribunal did not err in its *ratione temporis* analysis and did not exceed its authority. The conclusion in regard to when a dispute arose depends on the circumstances of each case, and the Tribunal examined those circumstances fully. It examined whether the dispute regarding Decree 259 was the same dispute as before on the basis of different standards and reached the conclusion that it was the same dispute. The Tribunal's Award is consistent with previous jurisprudence, and its reasons are convincing.

55. In its examination, the Tribunal did consider the *res judicata* status of the 1998 judgments but found that the fact that they were *res judicata* under domestic law did not in itself lead to the conclusion that what happened thereafter was a new dispute.

56. The Tribunal did not apply a "practical matter" test. Instead, it analysed the facts and found that the dispute was a continuation of the dispute that had crystallised between the parties by 1998. It also examined whether any other of the parties' arguments would compel a finding that it was a new dispute, but found that this was not the case. Only then did the Tribunal add its observation on the "public controversy" and the "practical matter". The Tribunal did not decide the case *ex aequo et bono* but applied international law to the interpretation of the BIT.

57. However, even if the reasons in the Award were wrong, this would not justify annulment of the Award, because it is not within the province of an *ad hoc* committee to review a tribunal's finding that it lacked jurisdiction. Lucchetti's request for annulment is in reality an appeal against the Tribunal's decision that it did not have jurisdiction *ratione temporis* under Article 2 of the BIT. Appeals are not permitted, and the Committee may not review the Tribunal's findings of fact and law.

58. In any event, the Tribunal did not "manifestly" exceed its powers in this case. The requirement that excess shall be manifest is intended to preclude a searching review of a tribunal's reasoning. "Manifest" has been defined as "clear" or "self-evident". Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face, which is not the case here.

b) Serious departure from of a fundamental rule of procedure

59. According to the Respondent the Tribunal did not depart from any fundamental rule of procedure or even less commit a serious breach of such a rule.

60. The case-law according to which a tribunal shall, for purposes of jurisdiction, assume the facts alleged by the claimant to be true does not apply in this case where the alleged facts, i.e. the alleged pretextual character of the reasons in the preamble to Decree 259, do not relate to the merits of the case but to the question of jurisdiction itself. The Tribunal should therefore not assume as true the facts alleged by Lucchetti for purposes of jurisdiction but should itself determine whether the threshold jurisdictional requirements, including the *ratione temporis* limitation, were satisfied. Under Lucchetti's theory, the Tribunal had to accept Lucchetti's framing of the dispute as having arisen after the BIT's entry into force and decide whether it had jurisdiction on that basis alone, without any inquiry into the relevant facts. However, tribunals have routinely sought to satisfy themselves, as a matter of both fact and law, that all jurisdictional elements have been met. Lucchetti was never denied the opportunity to present its factual story.

61. There can be no question of a breach of the principle of presumption of innocence in view of the fact that the Tribunal explicitly stated in the Award that it was unnecessary to address the alleged illegalities. Consequently, the Tribunal did not examine the question of these illegalities, i.e. corruption and undue pressure on the courts, but based itself on other explanations given in the preamble to Decree 259.

c) Failure to state reasons

62. The Respondent states that the reasons in the Tribunal's Award are clear and coherent.

63. Even if the Tribunal had failed to address the three questions raised by Lucchetti, the Tribunal would not have committed an annullable offence. But in any case, the Tribunal dealt with the questions, the two first questions in determining whether the dispute was a new dispute and the last question – although it was not argued by Lucchetti – by the general finding that it did not have jurisdiction over Decrees 258 and 259.

VI. THE *AD HOC* COMMITTEE'S CONSIDERATIONS

64. In its Award of 7 February 2005, the Tribunal held that it had no jurisdiction *ratione temporis* to hear the merits of Lucchetti's claim. It based this conclusion on Article 2 of the BIT which provides as follows:

"This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter's territory. It shall not, however, apply to differences or disputes that arose prior to its entry into force."

65. Lucchetti requests the annulment of this Award, whereas the Republic of Peru contests this request. The parties have advanced before the *Ad hoc* Committee, at some length, their respective arguments why the Tribunal's Award should, or should not, be subject to annulment under three of the grounds listed in Article 52(1) of the ICSID Convention. The Committee will respond to these arguments and claims below.

66. Before doing so, however, the *Ad hoc* Committee finds it useful to make a few general reflections with regard to what appears to the Committee to be the central issues underlying these annulment proceedings, in particular because there are some aspects which, in the Committee's opinion, have not been sufficiently emphasised or developed by the parties.

67. The *Ad hoc* Committee begins with the fact that in this case the Tribunal, faced with a series of jurisdictional objections by the Republic of Peru, decided to rest its dismissal of Lucchetti's case on the single objection based on the *ratione temporis* clause in Article 2 of the BIT. That decision itself is not open to challenge, and has not been challenged; in the Committee's view, it lies well within the discretion with which an ICSID tribunal is vested.

68. The issue before the Tribunal thus came to turn on a discrete and relatively straightforward question of the interpretation and application of a bilateral treaty; the Tribunal was called upon to determine what a treaty provision meant, and then to apply it to the circumstances of the case before it. That is a process with which many international tribunals of various kinds have been confronted. The *Ad hoc* Committee makes however two general observations about the circumstances in which the Tribunal was to accomplish its task.

69. The first observation is that the question for interpretation did not, as so often, concern what could be called "boilerplate" provisions of the BIT (such as the standards for protection, or the meaning of "investment", or the nationality of individuals or companies) but concerned rather the scope of the clause which defined the consent to arbitration in this particular treaty. In this respect, the Tribunal had to take into account the specific intention of the two Contracting Parties, i.e. the Governments of Chile and Peru, for the purposes of the BIT, a task rendered more difficult by the fact that only one of the Contracting Parties, i.e. the Government of Peru, was a party to the proceedings before the Tribunal.

70. The second observation is that the outcome of the interpretative process, if it went against Lucchetti, would be conclusive, since it meant that Lucchetti would not be permitted to pursue its claims to a hearing on the merits. The interpretation that was made of the relevant clause in the BIT was therefore of crucial importance for Lucchetti as the investor.

1. The grounds for annulment

71. According to Article 52(1) of the ICSID Convention, a party may request annulment of an award on one or more of five specific grounds. Three of these grounds are at issue in the present case, i.e. *"(b) that the Tribunal has manifestly exceeded its powers"*, *"(d) that there has been a serious departure from a fundamental rule of procedure"*, and *"(e) that the award has failed to state the reasons on which it is based"*. These three grounds deal with different aspects of the award. While ground (b), in so far as the present case is concerned, concerns the extent of the powers conferred on the tribunal under the BIT, ground (d) is aimed to ensure that the parties enjoy their right to be heard in a fair manner. Ground (e) differs from the other two grounds in that it does not concern the tribunal's powers or the conduct of the proceedings but the manner in which its award is drafted.

72. The *Ad hoc* Committee notes that the three grounds are set out as separate in the ICSID Convention and considers that the facts of a case should in principle be examined separately in relation to each of these grounds. However, this is not to say that the grounds are entirely unrelated to each other. It may be that, in appropriate circumstances, one of those grounds could properly be seen as reinforcing another of them. For instance, a procedural defect, which is primarily to be examined under (d), might in some cases also be relevant as an element in the consideration of whether a tribunal has exceeded its powers under (b).

73. Before examining the present case in relation to grounds (b), (d) and (e), the *Ad hoc* Committee will state its view on certain general issues which are relevant to the consideration of the case as a whole.

2. The issue of alleged illegalities

74. In the proceedings before the Tribunal and in the annulment proceedings before the *Ad hoc* Committee, the parties have devoted a great deal of attention to allegations of corruption and undue influence on the Peruvian courts which gave judgments in Lucchetti's favour in 1998. The *Ad hoc* Committee finds it appropriate to make a few general remarks on this issue and its significance in the Committee's examination of the present case.

75. The *Ad hoc* Committee notes the Tribunal's unambiguous statement that it did not examine the issue of the "alleged illegalities". Having regard to this declaration in the Award, the Committee must accept that the Tribunal's findings were not influenced by the extensive evidence adduced by the Republic of Peru in support of its allegation that Lucchetti had induced Mr. Vladimiro Montesinos Torres, a senior Peruvian official, to take contact with Peruvian judges in order to make them give judgments in Lucchetti's favour.

76. Also at the final hearing before the *Ad hoc* Committee, the Republic of Peru showed excerpts of video recordings in order to sustain its argument that there had been illegal or inappropriate contacts between Lucchetti and Mr. Montesinos Torres and that the latter had exercised undue influence on the courts. However, in the circumstances of this case, the Committee cannot find this evidence to be relevant in the annulment proceedings.

77. An additional remark must be made, however. While the alleged illegalities did not affect the Tribunal's Award, it is true that they were referred to in the preamble to Decree 259 by

which Lucchetti's licence to operate the pasta plant was annulled. In that preamble, the Council of Lima stated, *inter alia*,

(a) that Lucchetti had "obtained undue injunctions and judgments" that were affirmed by the higher court,

(b) that the interference of Mr. Montesinos Torres in the judicial proceedings had become known through videos and audio tapes which showed that the judicial decisions had in fact been "dictated" by Mr. Montesinos Torres and that the presiding judges had "ruled under his influence and direction", thereby "depriving the Metropolitan Municipality of Lima, its Mayor, the members of the Technical Provincial Commission of Lima and the residents of Lima" of constitutional rights, and

(c) that "in compliance with the fraudulent judicial rulings" Lucchetti had been granted an operating licence.

78. It thus appears that the alleged undue influence on the courts was one of the elements on the basis of which the Council of Lima decided to withdraw Lucchetti's licence. Indirectly, therefore, the allegations of illegal acts, whether justified or not, played a certain role for the action taken against Lucchetti. The *Ad hoc* Committee will bear this in mind when examining the *ratione temporis* issue in this case.

3. The context of the ratione temporis exception

79. No specific information has been provided as to how the Governments of Chile and Peru, when concluding the BIT, intended the temporal exception in Article 2 to be applied. The Government of Chile was not a party to the BIT proceedings and there is only scarce information about its views on the interpretation of the BIT. Consequently, the Tribunal has to interpret the relevant clause according to general principles of international law, as set out primarily in the Vienna Convention on the Law of Treaties (*"the Vienna Convention"*). According to Article 31(1) of that Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It follows from Article 31(3) that other means of interpretation are subsequent agreements and practice and relevant rules of international law. Finally, Article 32 provides that there are supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

80. Having regard to the main rule in Article 31(1) of the Vienna Convention, the *Ad hoc* Committee finds that the second sentence of Article 2 of the BIT must be read in its context, i.e. together with the first sentence of the same Article which provides that the BIT shall apply to investments made both before and after the entry into force of the BIT. The main rule is therefore that the BIT shall be applicable also to previously made investments, and from this rule there shall be an exception according to the second sentence in regard to ongoing disputes or differences. The purpose of the exception must be assumed to be to prevent that, where a dispute or a difference had arisen at a time when the BIT did not exist, the investor would be provided with new ammunition as a result of the subsequent entry into force of the BIT. On the other hand, for the application of an exception of this kind, it should be required that the pre-existing dispute or difference can be clearly identified.

4. The res judicata issue

81. The measures taken by the municipal authorities in 1997 and 1998 in regard to Lucchetti's investment, in particular the stop work notice of 18 August 1997, Decrees 111 and 126 from 1997 as well as Decree 01 from 1998, were followed by *amparo* proceedings brought by Lucchetti against the Municipality of Lima and others. These proceedings resulted in judgments which were favourable to Lucchetti. As a consequence of these judgments, the Municipality of Chorrillos issued, on 23 December 1998, a construction licence to Lucchetti and, on 29 December 1998, an operating licence for the manufacture and sale of pasta at Lucchetti's plant. These licences were undoubtedly a valuable economic asset for Lucchetti and they must have appeared to Lucchetti as a solid basis for further investment in the factory and for future business based on production in the plant.

82. The BIT was concluded on 2 February 2000 and entered into force on 3 August 2001, i.e. thirty days after the Contracting Parties had notified each other that their respective legal requirements for entry into force had been fulfilled.

83. At the time of the entry into force of the BIT, Lucchetti's business had been in operation for two and a half years on the basis of the licences issued in December 1998. As far as the *Ad hoc* Committee is aware, the Peruvian authorities had not during this long period taken any new measures in order to prevent Lucchetti from pursuing its activities. In these circumstances, and since the BIT was to apply also to existing investments, the Committee can well understand that Lucchetti believed that its investment, and the considerable economic value it represented, would enjoy protection under the BIT from the time of its entry into force.

84. However, on 16 August 2001, i.e. less than two weeks after the entry into force of the BIT, the Council of the Municipality of Lima issued Decree 259 by which Lucchetti's operating licence from December 1998 was withdrawn. In the Decree it was alleged that Lucchetti had failed to comply with environmental regulations, i.e. matters that had essentially been examined and determined in previous judicial proceedings. As justification for the withdrawal of the licence despite the 1998 judgments, the Council of the Municipality stated in the preamble to the Decree that these judgments had been illegally obtained.

85. The judgments rendered by the Peruvian courts in the *amparo* proceedings had become *res judicata* under Peruvian law. Lucchetti attaches special importance to this fact, when arguing that the occurrences in 2001 gave rise to a new dispute. The Republic of Peru has objected that *res judicata* in this context is a matter of domestic law which should not be decisive for whether or not a new dispute has arisen within the meaning of the BIT. The Tribunal, in its Award, found that the *res judicata* status of the Peruvian judgments, standing alone, did not compel the result that the subsequent dispute was a new one, since the facts indicated that the original dispute continued.

86. The principle of *res judicata* is not only a characteristic feature of most domestic legal systems but is also an important principle of international law. In the recent judgment of the International Court of Justice (*"ICJ"*) in the *Case Concerning the Application of the*

Convention on the Prevention and Punishment of the Crime of Genocide,[11] the ICJ emphasised the fundamental character of that principle and pointed out that its underlying character and purposes are reflected in the judicial practice of the Court. However, the analysis in that judgment concerned the *res judicata* status of previous ICJ judgments and not of judgments rendered at national level.

87. The *Ad hoc* Committee considers that a clear distinction must be made between *res judicata* at international and at national level. While an international judgment which is *res judicata* will in principle constitute a legal obstacle to a new examination of the same matter, *res judicata* at national level produces its legal effects at national level and will in international judicial proceedings not be more than a factual element. This must be so, because it cannot be left to each individual State to create, through its own rules of *res judicata*, obstacles to international adjudication. The Committee refers in this respect to the Case of *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, in which the tribunal stated that the decision on the legality of an investment could not be left up to the courts of the host State, since that would give the possibility to redefine the scope and consent of its own consent to ICSID jurisdiction unilaterally and at its complete discretion.[12]

88. Thus, the *Ad hoc* Committee agrees in principle with the Republic of Peru and the Tribunal in considering that the fact that that the Peruvian judgments were *res judicata* cannot be decisive for the assessment under Article 2 of the BIT. While *res judicata* in respect of these judgments relates to finality under Peruvian law, the interpretation of the BIT is a matter of international law. Nevertheless, the *res judicata* character of the judgments under Peruvian law is one of several factual elements which should all be considered relevant to the application of the temporal exception in the BIT. Thus, the *res judicata* character of the 1998 judgments, while in no way decisive, should nevertheless be taken into account in the examination to be made under Article 2 of the BIT.

5. The wording of the ratione temporis exception

89. The exception in Article 2 of the BIT relates to "differences or disputes that arose prior to its entry into force". Consequently, the central issue for the Tribunal was to determine whether the dispute in 2001 was, or was not, the continuation of the dispute that arose in 1997-1998.

90. In the Award, the Tribunal, basing itself on previous international case-law,[13] found that "a dispute" could be defined as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" or as a "situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance" of a legal obligation. The Tribunal added that a dispute could be held to exist when the parties assert

[11] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Judgment of 26 February 2007, paras. 115-116.

[12] ICSID Case of *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Award of 2 August 2006, para. 213.

[13] *Mavrommatis Palestine Concessions*, Greece v. United Kingdom, Judgment (Merits), 30 August 1924, 1924 PCIJ (ser. A), No. 2, and *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Advisory Opinion of March 1950, ICJ Reports 1950, p. 74.

clearly conflicting legal or factual claims bearing on their respective rights or obligations or, as stated by the ICJ,[14] when "the claim of one party is positively opposed by the other".

91. The concept of "dispute" can clearly be defined in different ways depending on the context. However, the elements specified by the Tribunal to clarify the meaning of that concept for the purposes of the present case do not give rise to any remarks by the *Ad hoc* Committee.

92. As pointed out above, the context in which a specific term appears is an important element of interpretation according to Article 31(1) of the Vienna Convention. In this respect, it cannot be disregarded that Article 2 refers not only to "disputes" but also to "differences". Although the parties did not specifically rely on this aspect of the provision, Lucchetti did refer to the Case of *Helnan International Hotels v. Egypt*[15] and pointed out that in that case there was a *ratione temporis* clause virtually identical to Article 2 of the present BIT. In *Helnan*, the tribunal commented on the terms "divergence" and "dispute" and found that "they do not imply the same degree of animosity". The tribunal considered that there would be a divergence "when the parties hold different views but without necessarily pursuing the difference in an active manner", while, in the case of a dispute, "the difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise".

93. For the parties it was not necessary to base their arguments on the additional concept of "difference", since they agreed that there had clearly been a dispute both before and after the BIT entered into force and only disagreed on whether or not it was one and the same dispute. Nevertheless, the context in which the term "dispute" appears is an element which, to some extent, helps understanding the provision which, when read as a whole, has been given a wide scope. It also makes it clear that a "difference" can be considered to persist in some circumstances even after there has been a resolution of a "dispute" by legal or other means.

94. However, while the additional term "difference" widens the scope of Article 2 to a certain extent, the wording of the exception in the Article is in another respect more limited than the corresponding temporal clauses in many other treaties. While in the BIT an exception is made for disputes that arose prior to its entry into force (*"single exclusion"*), the exception in other treaties covers not only *disputes that arose* prior to the entry into force of the treaty but also *disputes over facts or situations that occurred* prior to its entry into force (*"double exclusion"*). This means that on this point the exception in the BIT is a narrow one in comparison with other treaties.

95. Where there is a double exclusion clause, jurisdiction can be denied even if the dispute arose after the entry into force of the treaty, provided that it related to events occurring prior to the entry into force.[16] Where there is a single exclusion clause, this is not possible. In the *Maffezini* Case,[17] the tribunal noted that events on which the parties disagreed had started before the entry into force of the BIT but that this did not mean that there was a legal dispute

---

[14] *South West Africa*, ICJ Judgment on Preliminary Objections, ICJ Reports 1962, p. 328.

[15] ICSID Case of *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision on Objections to Jurisdiction of 17 October 2006.

[16] See, for instance, *Phosphates in Morocco*, Italy v. France, Judgment (Preliminary Objections), 14 June 1938, 1938 PCIJ 4.

[17] ICSID Case of *Emilio Augustin Maffezini v. Spain*, Decision on Objections to Jurisdiction of 25 January 2000.

at that time. And in the *Jan de Nul* Case,[18] the tribunal stated that the purpose of the single exclusion clause was to exclude treaty disputes which had "crystallised" before the entry into force of the BIT.

96. In so far as Lucchetti argues that the Tribunal disregarded the fact that the dispute in 1998 was a dispute with the municipal authorities of Lima, whereas Decree 259 gave rise to a dispute with the Republic of Peru, the *Ad hoc* Committee notes that, while this distinction is one of the elements to be taken into account, it can in no way be conclusive for whether there were two disputes, since it is clear that the Republic of Peru is responsible under the BIT for the acts of all Peruvian public authorities and that, consequently, once the dispute was to be raised to the international level, a claim had to be brought against the Republic of Peru.

6. The Ad hoc Committee's assessment

97. The *Ad hoc* Committee considers that, once the Tribunal reached the decision to rest its Award on the issue of the interpretation and application of Article 2 of the BIT, the Tribunal took upon itself the task of applying the standard rules of treaty interpretation to the facts of the case before it. And in turn the task of the *Ad hoc* Committee is to consider whether the manner in which the Tribunal approached and accomplished that task opened its Award to annulment under the Convention, as Lucchetti argues, or adequately met the requirements of the Convention, as the Republic of Peru responds. The word "manner" is specifically used here in order to emphasise that it is no part of the Committee's functions to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal, but merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention.

98. The *Ad hoc* Committee is naturally conscious that the manner in which it has described the Tribunal's task does not correspond exactly to how the parties to the annulment proceedings have framed their respective cases before it. Nevertheless it believes that the reference to the standard rules of treaty interpretation and to the application of these rules to the facts of the case brings out more clearly what the essential issues are, and corresponds at the same time to the grounds for annulment listed in Article 52(1) of the ICSID Convention. It is widely accepted that a failure to apply the proper law may amount to an excess of powers by a tribunal, as referred to in Article 52(1)(b),[19] whereas serious procedural deficiencies in the proceedings before a tribunal may give rise to the application of Article 52(1)(d). The failure to state reasons according to Article 52(1)(e) is of a separate character, since it aims at ensuring the parties' right to ascertain whether or to what extent a tribunal's findings are sufficiently based on the law and on a proper evaluation of relevant facts. The Committee will address the various grounds for annulment advanced by Lucchetti accordingly.

a) Manifest excess of powers (Article 52(1)(b) of the Convention)

99. Where a tribunal assumes jurisdiction in a matter for which it lacks competence under the relevant BIT, it exceeds its powers. The same is true in the inverse case where a tribunal

[18] ICSID Case of Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, Decision on Jurisdiction of 16 June 2006.
[19] Christoph H. Schreuer, The ICSID Convention: A Commentary, paras. 167-170.

refuses or fails to exercise jurisdiction in a matter for which it is competent under the BIT. The *Ad hoc* Committee considers that these situations are analogous and should be assessed according to the same legal standards.

100. However, the requirement in Article 52(1)(b) of the ICSID Convention is not only that the Tribunal has exceeded its powers but that it has done so "manifestly". From the writings of legal scholars it appears that there are divergent views on the impact of this additional requirement of "manifestness". On the one hand, the view has been expressed that where an *ad hoc* committee finds that a tribunal has wrongly either exercised or failed to exercise jurisdiction, the award should be annulled, wholly or partly, without any further examination of whether the excess was manifest. On the other hand, it has been held by others that there should be no annulment when the tribunal has wrongly assumed, or failed to assume, jurisdiction, but its decision on this point was tenable, since in such a case the tribunal would not have manifestly acted contrary to the BIT.[20]

101. The *Ad hoc* Committee, for its part, attaches weight to the fact that the wording of Article 52(1)(b) is general and makes no exception for issues of jurisdiction. Moreover, a request for annulment is not an appeal, which means that there should not be a full review of the tribunal's award. One general purpose of Article 52, including its sub-paragraph (1)(b), must be that an annulment should not occur easily. From this perspective, the Committee considers that the word "manifest" should be given considerable weight also when matters of jurisdiction are concerned.

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

103. The *Ad hoc* Committee first notes that, in its analysis of whether or not the dispute arose prior to the entry into force of the BIT, the Tribunal found that it should examine the facts that gave rise to the 2001 dispute and those that culminated in the 1997-1998 dispute, seeking to determine in each instance whether and to what extent the subject matter or facts that were the real cause of the disputes differed from or were identical to the other. In this respect, the Tribunal referred to the *Electricity Company of Sofia and Bulgaria* Case.[21] The Tribunal also referred to the ICSID Case of *CMS Gas Transmission Co. v. Argentina*[22] in which it was stated that the critical element in determining the existence of one or two disputes was whether or not they concerned "the same subject matter". The Tribunal made the remark that, whether the focus was on the "real causes" of the dispute or on its "subject matter", the Tribunal would in each case have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.

104. Lucchetti argues that the Tribunal was wrong in equating the test in the BIT, i.e. whether the dispute arose prior to the entry into force of the BIT, with a different test, i.e. whether the dispute concerned the same subject matter as the previous dispute and what was the real cause of the dispute.

---

[20] As to this divergence of views, see, for instance, Christoph H. Schreuer, The ICSID Convention: A Commentary, paras. 137-146.

[21] *Electricity Company of Sofia and Bulgaria* (Preliminary Objection), 1939 PCIJ, p. 82.

[22] ICSID Case of *CMS Gas Transmission Co. v. Argentina*, Decision on Objections to Jurisdiction of 17 July 2003.

105. As pointed out by Lucchetti, the *CMS Gas Transmission* Case to which the Tribunal referred differed considerably from the present case, since it concerned the application of a specific provision in the ICSID Convention, i.e. Article 46, which allows a tribunal, on certain conditions, to determine in the same arbitral proceedings incidental or additional claims or counter-claims arising directly out of the subject matter of the dispute. The *Ad hoc* Committee shares the view that the purpose of this provision is different from that of the temporal exception in the BIT and that other considerations therefore apply to the present case.

106. However, the Tribunal also examined judgments and decisions more closely related to the present case[23] and found references to the source of the dispute, the real cause of the dispute or to the event at the root of dispute. The Tribunal then applied those criteria to the present case and found that the facts were such that the dispute that had existed in 1997-1998 was the same as that which had again come to the surface in 2001 after the entry into force of the BIT.

107. Lucchetti reproaches the Tribunal with having moved directly from a cursory look at the text of the second sentence of Article 2 to a conclusion about what test should be used to determine the existence of a "dispute" in that context, which, says Lucchetti further, is the wrong test. Lucchetti further argues that the Tribunal, by referring in its Award to a "public controversy" regarding Lucchetti's investment and to a resolution of the problems as a "practical matter", failed to apply the proper law.

108. In 1997-1998, i.e. before the entry into force of the BIT, the Municipality of Lima, when annulling Lucchetti's permits of construction, referred *inter alia* to environmental concerns, i.e. the necessity to protect Pantanos de Villa. When, in August 2001, the Municipality issued Decree 259 by which it revoked Lucchetti's operating licence, it again referred to the necessity of protecting Pantanos de Villa as one of the main reasons.

109. On the face of it, therefore, the reasons for the measures taken against Lucchetti were to a large extent the same or similar. However, Lucchetti contests that the reasons given in Decree 259 were the real reasons and asserts that in reality the operating licence was revoked for political reasons and not because of environmental concerns which in any case were not justified. In this respect the *Ad hoc* Committee notes that if Lucchetti is right in considering that the Municipality of Lima, in 2001, wished to terminate the operation of Lucchetti's plant not for environmental but for political reasons, it would seem likely that it had been for similar reasons that the Municipality of Lima had taken action against the plant in 1997-1998. Whether the reasons were environmental or political, there would thus seem to have been a certain link or similarity between the acts taken against Lucchetti in 1997-1998 and in 2001. This is one element which speaks in favour of the Tribunal's conclusion that the subject matter or the real cause had been the same in 2001 as in 1997-1998.

110. However, there are other elements speaking in the opposite direction. These elements are essentially the following:

---

[23] *Electricity Company of Sofia and Bulgaria*, Belgium v. Bulgaria, Judgment of 4 April 1939 (Preliminary Objection), 1939 PCIJ 64, *Right of Passage over Indian Territory*, Portugal v. India, Judgment of 12 April 1960 (Merits), 31 I.L.R. 23 (1996), and ICSID Case of *Goetz et al. v. Republic of Burundi*, Award of 10 February 1999.

(a) The dispute in 1997-1998 ended with a court judgment which became final (*res judicata*) and which appeared, and could be expected, to create, security for Lucchetti in respect of its investment.

(b) During a rather long period of some two and a half years, Lucchetti continued its activities, as it seems, undisturbed.

(c) When revoking Lucchetti's licence in 2001, the Municipality of Lima, i.e. an administrative authority, acted contrary to final court decisions, which was an action difficult to reconcile with the rule of law, including the right to judicial protection and respect for final judicial decisions. The fact that the Municipality did so on the basis of alleged illegalities which had not been proven in any judicial proceedings adds to the doubtful nature of the action.

111. It could well be argued that the facts and elements summarised in (a), (b) and (c) are sufficiently weighty to justify the conclusion that the dispute in 1997-1998 had ended and that a new and separate dispute arose when the Municipality of Lima took new action in 2001.

112. However, the *Ad hoc* Committee does not consider it to be its task to determine whether the test employed by the Tribunal and the weight given by the Tribunal to various elements were "right" or "wrong". In the Committee's view, treaty interpretation is not an exact science, and it is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several. It is no part of the Committee's function, as already indicated above, to purport to substitute its own view for that arrived at by the Tribunal. The interpretation of Article 2 adopted by the Tribunal is clearly a tenable one. Clearly also there are other tenable interpretations. The Committee is not charged with the task of determining whether one interpretation is "better" than another, or indeed which among several interpretations might be considered the "best" one. The Committee is concerned solely with the process by which the Tribunal moved from its premise to its conclusion.

113. The *Ad hoc* Committee notes on this point first that the Tribunal did not identify or describe in its Award the rules of interpretation it proposed to apply. The applicable "law" can be considered to have been the rules codified in Article 31 and subsequent Articles of the Vienna Convention. The question therefore arises whether the Tribunal applied these rules or whether there was a failure in this regard amounting to an excess of powers.

114. Indeed, there are some elements regarding the interpretation of Article 2 of the BIT which the *Ad hoc* Committee would have expected to find in an award applying international rules of treaty interpretation based on the Vienna Convention. It notes in this respect that the Award does not deal with the use of both "dispute" and "difference" in the second sentence of the Article and its significance for interpretation purposes. Nor is there in the Award an analysis of the two sentences in Article 2 and the relations between them (the first one having a retrospective reach and the second one being in the form of an exception) or any consideration of what might have been the joint intentions of the Contracting Parties. Further, the Award does not purport to examine the "object and purpose" of the BIT or its negotiating history in order to illuminate, if possible, what the Contracting Parties actually intended by including the second sentence in Article 2, and what they had specifically in mind when using the term "dispute" in that particular context.

115. Lucchetti has also criticised a remark in the Award about "public controversy" which Lucchetti considers inappropriate and irrelevant. The remark reads: *"Moreover, the public controversy concerning these judgments, stimulated by the continuing judicial and parliamentary inquiries relating to them, further demonstrates that, as a practical matter, the res judicata status of the judgments was not deemed to have put an end to the dispute."* The remark appears at the end of the legal reasoning in the Award and follows upon legal arguments in favour of the Tribunal's previous conclusion. The sentence essentially has the character of an *obiter dictum* and cannot in any case be regarded as the basis of the Tribunal's conclusions.

116. Although the Tribunal's interpretation of Article 2 of the BIT, as it appears in the Award, does not reflect all relevant aspects of treaty interpretation according to the Vienna Convention, the Committee has no basis for concluding that the Tribunal disregarded any significant element of the well-known and widely recognised international rules of treaty interpretation. In any event, the Committee, which has also carefully examined all other arguments put forward by Lucchetti, cannot find that the Tribunal's reasoning in the Award, although summary and somewhat simplified in relation to the Vienna Convention, constituted an excess – and even less a manifest excess – of the Tribunal's powers within the meaning of Article 52(1)(b) of the Convention.

b) Serious departure from a fundamental rule of procedure (Article 52(1)(d) of the Convention)

117. Lucchetti argues that the Tribunal seriously departed from fundamental rules of procedure in two respects, i.e., on the one hand, by not basing its decision regarding jurisdiction on Lucchetti's allegations but on the Republic of Peru's counter-allegations as to the facts and, on the other hand, by implicitly accepting the allegations regarding corruption in the preamble to Decree 259 in violation of Lucchetti's fundamental right to be presumed innocent of any criminal offence. The Republic of Peru contests that any fundamental rule of procedure was violated in these respects.

118. On the first point, Lucchetti refers to a rule of international law, reflected in Judge Higgins's opinion in the *Oil Platform Case*[24] and in several arbitral awards.[25] According to Judge Higgins's opinion, the only way in which it can be determined whether a claimant's claims are sufficiently plausibly based upon the facts is to accept *pro tempore* the facts as alleged by the claimant to be true and to see whether on the basis of these claims of fact there could occur a violation of one or more of the relevant legal provisions. The Republic of Peru contests, however, that this doctrine applies to the circumstances of the present case where the question is not whether claims of facts relating to the merits could give rise to a breach of international law but whether or not there are facts constituting jurisdiction.

---

[24] *Case Concerning Oil Platforms*, Islamic Republic of Iran v. United States of America, Judgment (Preliminary Objection), 12 December 1996, 1996 ICJ 803.

[25] ICSID Case of *Plama Consortium Ltd v. Bulgaria*, Decision on Jurisdiction of 8 February 2005, UNCITRAL Case of *Saluka Investments B.V. v. Czech Republic*, Decision on Jurisdiction over Counterclaim of 7 May 2004, ICSID Case of *Amco Asia Corp. et al. v. Indonesia*, Decision on Annulment of 16 May 1986, and ICSID Case of *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Objections to Jurisdiction of 6 August 2003.

119. On this point, the *Ad hoc* Committee shares the opinion of the Republic of Peru. The question as to whether or not the preamble to Decree 259 indicated the genuine reasons for the Decree or whether, as Lucchetti claims, the real reasons were of a political nature did not relate to the merits but to jurisdiction and could properly be examined at the stage of jurisdiction, provided that the parties were given the opportunity to present arguments and adduce evidence on the matter.

120. Before coming to any decision on this question, however, the *Ad hoc* Committee will first examine how the Tribunal proceeded to apply the interpretation it had adopted to the facts of the case. It is not necessary to rehearse at length the criticisms advanced by Lucchetti against the Tribunal's conclusion that, whatever the meaning of Article 2 of the BIT, the dispute brought before the Tribunal in 2003 was in effect a continuation of the dispute between Lucchetti and the Municipality of Lima in 1998. The Committee will concentrate its attention on what it finds to be the weightiest of those criticisms, namely that the Tribunal accepted on their face value the factual assertions contained in the preamble to Decree 259, despite Lucchetti's claim that these assertions were mere pretexts of a self-serving kind. Lucchetti claims further that it was deprived of a fair opportunity to demonstrate the untruthfulness of the Municipality of Lima's assertions, notably by the Tribunal's refusal to allow it to file a full Memorial on the Merits before the Tribunal proceeded to a decision on the Preliminary Objections.

121. This is a criticism of some weight. On the one hand, there is no doubt that what Lucchetti refers to as the Municipality of Lima's subjective assertions did become a crucial element in the Tribunal's ultimate decision. This appears from paragraph 53 of the Award, in which the Tribunal found as follows: "*The reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute (…). The subject matter of the earlier dispute thus did not differ from the municipality's action in 2001 which prompted Claimants to institute the present proceedings. In that sense, too, the disputes have the same origin or source (…).*" The Committee notes on the other hand that the Tribunal, in a provisional decision, refused Lucchetti's request to submit its full Memorial on the Merits.

122. Granted, therefore, that this factual element did become a crucial link in the chain of reasoning leading to the Tribunal's Award, the *Ad hoc* Committee is in no doubt that, if Lucchetti had in the event not been given a full opportunity to present its case on this issue, that would have amounted to a "serious departure from a fundamental rule of procedure" for the purposes of Article 52(1)(d) of the ICSID Convention. That being said, the Committee cannot find that the question turns in its entirety on whether the substantive Memorial was or was not filed before the proceedings on the Preliminary Objections. In the Committee's view an ICSID Tribunal is rightly vested with a wide margin of discretion as to how best to organise the proceedings in the particular case before it. Rule 41(3) of the Arbitration Rules provides that, on the formal raising of a jurisdictional objection, the proceedings on the merits shall be suspended and the parties be given a time limit within which to file observations on the objection, and the Committee cannot find that it was unreasonable in itself not to permit at a first stage the filing of a full Memorial on the Merits. More important is that it would appear that Lucchetti was allowed full freedom to advance whatever points it wished in opposing the Preliminary Objections, and there are many ways open to a Tribunal to investigate and decide on any issue relevant to a Preliminary Objection before it, including in the last analysis joining the Objection to the merits under Rule 41(4).

123. Lucchetti thus had the possibility, by presenting arguments and adducing evidence, to try to convince the Tribunal, at the jurisdictional stage, that the reasons in the preamble to Decree 259 were false, and there is no basis for finding that whatever Lucchetti argued or adduced, or might have argued or adduced, in regard to the motives behind Decree 259 was, or would have been, disregarded by the Tribunal. Consequently, in this regard the proceedings cannot be considered to have been unfair to Lucchetti. It is true that the Tribunal could also *ex officio* have called for documents or evidence under Article 43 of the ICSID Convention or, alternatively, have joined the preliminary issue to the merits in order to allow its factual basis to be further explored. However, the decision whether or not to proceed in either of these manners was within the Tribunal's discretion and the fact of not doing so does not constitute a violation of a fundamental rule of procedure.

124. As regards the further allegation that Lucchetti's right to presumption of innocence was violated, it is sufficient to point out that the Tribunal did not examine the issue of the alleged illegalities but founded its conclusions on other elements in the preamble to Decree 259. There can therefore be no question of a violation of Lucchetti's right to be presumed innocent of criminal offences.

125. For all these reasons and having regard also to Lucchetti's further argumentation on this point, the *Ad hoc* Committee finds that there has been no serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.

c) Failure to state reasons (Article 52(1)(e) of the Convention)

126. Lucchetti further alleges that the Tribunal's Award was contradictory and unclear, because the Tribunal had employed legal standards which were inherently contradictory. In Lucchetti's opinion, the reference to standards such as "real cause", "same subject matter", "crystallise" and "practical matter" rendered the Award inconsistent, and the use of such inconsistent standards amounted to a failure to state reasons according to Article 52(1)(e) of the ICSID Convention. Lucchetti also alleges that the Tribunal failed to deal with some of Lucchetti's contentions. The Republic of Peru contests that the Tribunal's Award was unclear or contradictory or that any of Lucchetti's arguments were left unheeded by the Tribunal.

127. A description of what the duty to state reasons requires, and what it does not require, is contained in the Annulment Decision in *MINE v. Guinea:*

"5.08 The Committee is of the opinion that the 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) because it almost invariably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.

5.09 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."[26]

128. From the Decision on Annulment in the *Vivendi* Case,[27] it also appears that annulment under Article 52(1)(e) should only occur in clear cases and that a failure to state reasons, in order to lead to annulment, must not only lack in any expressed rationale, but the relevant point must also be necessary to the tribunal's decision.

129. The *Ad hoc* Committee has found above that the Award does not give a full picture of the various elements which should be taken into account for treaty interpretation under the Vienna Convention. However, in order to establish whether it was the dispute from 1997-1998 that continued after the BIT had entered into force, the Tribunal did refer to various standards adopted in international case-law and doctrine and set out the elements which the Tribunal found conclusive. The Committee cannot find in the Tribunal's reasoning any contradiction or lack of precision such as to leave a doubt about the legal or factual elements upon which the Tribunal based its conclusion. Moreover, the Committee is satisfied that the Tribunal examined all Lucchetti's arguments and finds that it dealt with them in the Award to such an extent and in such a manner as could reasonably be required.

130. The *Ad hoc* Committee therefore finds that the Award did not fail to state the reasons on which it was based within the meaning of Article 52(1)(e) of the ICSID Convention.

7. Costs

131. In the circumstances of this case, the *Ad hoc* Committee considers that each of the parties shall bear its own costs for legal representation and expenses and pay half of the fees and expenses of the members of the *Ad hoc* Committee and of the administrative fees for the use of the Centre.

[26] ICSID Case of *Maritime International Nominees Establishment v. Republic of Guinea*, Decision of 22 December 1989.

[27] ICSID Case of *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on Annulment of 3 July 2002, para. 65.

VII. DECISION

I. The *Ad hoc* Committee rejects, pursuant to Article 52(1) of the ICSID Convention, the application for annulment of the Tribunal's Award of 7 February 2005.

II. Each Party shall bear its own costs for legal representation and expenses and pay half of the fees and expenses of the members of the *Ad hoc* Committee and of the administrative fees for the use of the Centre.

Sir Franklin Berman, Q.C.
Date: 13 August 2007

Professor Andrea Giardina
Date: 8th August 2007

Justice Hans Danelius
Date: 9 August 2007

Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru
Annulment

DISSENTING OPINION OF SIR FRANKLIN BERMAN

1. I can well understand, and indeed sympathise with, the decision of my colleagues that the present case does not meet the standard for annulment under the ICSID Convention. These are always matters of judgement, sometimes quite delicate judgement, and, if I find myself coming down on the other side of the line from them, I doubt whether the distance between us is all that great. Because, however, I take a sterner view than they do of the manifold shortcomings of the Tribunal's Award, I should explain why I do so, in the interests of the ICSID system as a whole, and as a pointer for future Tribunals.

2. There are two essential features to this case, the first being that the proceedings had been dismissed *in limine* on jurisdictional grounds, without the Claimant being allowed a hearing on the merits of its claims, and the second being that the ground for doing so was the reach *ratione temporis* of the consent to ICSID jurisdiction under the Bilateral Investment Treaty (BIT) which the Claimant had invoked.

3. The first of these two features is, to my way of thinking, fundamental. It plays itself out against the background of the well-recognized fact that the whole aim behind the Washington Convention which created ICSID – and indeed a principal aim behind the entire network of investment treaties of which the present BIT is one example – was to create a procedure for the settlement of disputes between investors and host States which would be entirely separate from and independent of the national courts of the host State. The question therefore is: what requirements does this state of affairs impose on an ICSID Tribunal faced with a claim by the host State, as Respondent before it, that that fundamental objective has not been achieved in the particular circumstances of a particular claim? What is a Claimant (one might say 'an ICSID Claimant') entitled to expect of the Tribunal, and what indeed are we all, as users of the ICSID system, entitled to

expect when that sort of claim is put forward? A further question is then (though subsidiary to the first): if the case is one under a BIT, what impact does the fundamental aim just described have on the assessment of the 'object and purpose' (to borrow a phrase from the Vienna Convention on the Law of Treaties) of the BIT itself, and hence on its interpretation?

4. There is obviously room for some discussion as to what the standard of 'manifestness' under Article 52(1) of the Washington Convention should be understood to mean in relation to jurisdictional error on the part of a Tribunal, and indeed the question is very properly addressed at paragraphs 99-101 of the ad hoc Committee's Decision. No doubt the Committee is right to say that there is no warrant for holding the notion of 'manifestness' to mean anything different for one head of annulment under the Article than for another. But that does not, to my mind, stand in the way at all of insisting that, when a Tribunal proposes to non-suit a Claimant at the initial stage, i.e. so as to preclude any airing of the claims on their merits (or demerits), the grounds for doing so must be clear and strong, and in particular that they must be clearly explained and justified, so as to enable the Claimant (not to mention other consumers of the ICSID system) to understand what the Tribunal has done and why. Where, on the other hand, the case is not sufficiently clear as to enable the issue to be convincingly determined in limine, the proper course is plainly that provided for in Article 41(2) of the Convention and in the Arbitration Rules, namely to join the preliminary objection to the merits, and determine it then on the basis of full and complete argument. The converse of this proposition is of course that, if a Tribunal chooses to decline jurisdiction at the preliminary stage without adequately explaining the reasons why, then one is at once within the area of annullable error – if not on the basis of an excess of powers, then at least on the basis of a failure to give reasons (though, as the ad hoc Committee correctly observes at paragraph 72 of the Decision, it is quite possible to conceive of circumstances in which two grounds for annulment should not be thought of as operating in isolation, but instead as reinforcing one another).

5. To determine whether the Tribunal did in fact adequately explain the reasons for its conclusion, I have to move to the second of the essential features identified in paragraph 2 above, i.e. that the ground on which the Tribunal chose[*] to decline jurisdiction was the reach *ratione temporis* of the consent to ICSID jurisdiction under the BIT. In making this choice the Tribunal (again I borrow from the Committee's Decision at paragraph 67) took upon itself the need first to determine what was meant by the term 'dispute' in the second sentence of Article 2 of the BIT, and then to decide whether the circumstances of the case before it met or did not meet that meaning. As the Committee rightly puts it, the first is a straightforward question of treaty interpretation, the second of its application, reflecting the pairing often found in dispute settlement clauses so that they cover disputes over 'the interpretation or application' of the treaty (as, for example, in Article 8 of the present BIT). The Committee also has my complete support when it says that the indisputable requirement, in respect of the first of these, treaty interpretation, is to apply the rules laid down in Article 31 and subsequent Articles of the Vienna Convention. The Committee goes on to say that, even while the Tribunal failed to describe what rules of treaty interpretation it was applying, it (the Committee) has no basis for concluding that the Tribunal disregarded any significant element of the well-known and widely recognised international rules of treaty interpretation. Indeed, one may add, that sort of failing would be surprising in the extreme in the case of a Tribunal of such distinction, and such wide experience specifically in the field of public international law.

6. But to suppose that the Tribunal must have applied the proper rules of treaty interpretation is not, to my way of thinking, the end of the matter. The real question, as I have suggested above, is whether they adequately explained what

[*] The term 'chose' refers to nothing more than that, as duly noted by the Committee in paragraph 67 of the Decision, the Tribunal, faced with a series of Preliminary Objections by the Respondent, elected to rest the entire weight of its decision on one of them alone – not in itself an objectionable course, though it would have been equally open to the Tribunal to have canvassed in its Award all of the grounds as argued before it, and to have adopted one or more of them in the alternative (assuming them to be well founded).

they were doing in the interpretative process, and did so specifically with the very particular care needed from a Tribunal proposing, on the basis of the interpretative outcome, to decline jurisdiction altogether. And the only way to answer that question, given that the Tribunal (somewhat surprisingly, I think) did neglect to tell us what they were doing, is to look to what the Tribunal actually did as evidence of what rules they were applying. It is precisely in that area that I part company with my colleagues, and find the Award so defective that I would be prepared to annul it.

7. To explain why, I need to go in some greater detail into the interpretation of Article 2 of the BIT, not in order to determine its 'correct' interpretation (as the Committee rightly says, that would amount to appeal, not annulment), but in order to bring out the elements that on any analysis must necessarily have formed part of a properly-conducted interpretative process.

8. The Vienna Convention tells us that the essence of treaty interpretation lies in extracting the ordinary meaning of the terms used, in their context, and in the light of the object and purpose of the treaty as a whole. It goes on to add that other indicators of the intention of the Treaty Parties may be admissible in defined circumstances for defined purposes. So when the issue was, as here, how the term 'dispute' was to be understood for the purposes of Article 2 of the BIT, one would have expected a number of straightforward enquiries to have been undertaken, including: a textual analysis of the provision in question and its purpose; an analysis of other connected provisions of the treaty; an examination of other places in the treaty where the same terms had been used, to see what light that might throw on the intentions behind Article 2; a discussion of the object and purpose of the treaty as a whole as a guide to the interpretation of Article 2; a search for whatever other material might be available to illuminate the precise intentions of the Treaty Parties in agreeing to Article 2; and so on and so forth. There is nothing special about this list; the items in it are simply the normal tools of treaty interpretation.

9. At this point a digression is however in order, to bring out an unusual, though not insignificant, aspect of the broader background against which the exercise in treaty interpretation was taking place. Every case of the interpretation of a BIT by an ICSID Tribunal shares this unusual feature, namely that the Tribunal has to find the meaning of a bilateral instrument, one of the Parties to which (the Respondent) will be a party before the Tribunal, while the other Treaty Party by definition will not. Or, to put the matter the other way round, one of the parties to the arbitration before the Tribunal (but not the other) will have been a stranger to the treaty negotiation (see paragraph 70 of the Committee's Decision). That circumstance surely imposes a particular duty of caution on the Tribunal: it can clearly not discount assertions put forward in argument by the Respondent as to the intentions behind the BIT and its negotiation (since that is authentic information which may be of importance), but it must at the same time treat them with all due caution, in the interests of its overriding duty to treat the parties to the arbitration on a basis of complete equality (since it is also possible that assertions by the Respondent may be incomplete, misleading or even self-serving). In other words, it must be very rarely indeed that an ICSID Tribunal, confronted with a disputed issue of interpretation of a BIT, will accept at its face value the assertions of the Respondent as to its meaning without some sufficient objective evidence to back them up.

10. The point can be put quite vividly in another way. At issue in the interpretation of Article 2 of the BIT was not Peru's consent to ICSID jurisdiction, taken as it were as a subject on its own; what was at issue was the mutual acceptance of ICSID jurisdiction by both of the Parties as part of the bargain they agreed to in the BIT. When it came to pre-treaty investment by their nationals in one another's territory, Peru was not accepting any less jurisdiction than Chile, nor was Chile accepting any more jurisdiction than Peru. So, although it may on the surface have appeared, in terms of the forensic situation before the Tribunal, that the question for determination was how far one of the two litigating parties before

it had consented to its jurisdiction, the underlying element of mutuality must surely have been obvious to a Tribunal of this eminence even if neither of the parties brought it out four-square in its argument.

11. That last consideration leads in turn to another particular feature of the present case. If what I have said in the last two paragraphs conjures up the image of the 'absent Contracting Party', it seems that that party (Chile) was not quite as absent as all that. The Committee says, in paragraph 79 of the Decision, that the information about Chile's views on Article 2 is scarce. This must surely rank as a considerable understatement. For we know that the Tribunal at an early stage in the proceedings turned down an application by the Respondent itself (Peru) to suspend the arbitration until the question of the correct interpretation of Article 2 in relation to Lucchetti's investment had been established in a State-to-State arbitration Peru was initiating under Article 8 of the BIT (see paragraph 9 of the Award). From this it must necessarily follow that there was a formal disagreement between the two Treaty Parties on this question, and that the Tribunal had been made fully aware at least of its existence, if not of the particular positions being advocated by each Treaty Party. Is that not in and of itself yet another reason for handling with extra caution, as suggested above, arguments on the question advanced before the Tribunal by the only Treaty Party that was in fact present before it?

12. It needs no lengthy analysis of the Tribunal's Award to discover that virtually none of the expectations set out in paragraph 8 above is fulfilled in it. As the Committee points out in paragraphs 92-94 of the Decision, there is no discussion of the fact that Article 2 refers equally in its second sentence to 'differences' on the same footing as 'disputes' (though that might be explained by the fact that neither of the parties made anything of this point). But there is virtually no discussion either of the fact that that sentence is in form an exception to the general principle of retroactivity expressly laid down in the first sentence, and of the implications of that for its interpretation; or of the fact that the term 'dispute'

is used elsewhere, in two Articles, Articles 8 & 9, either of which, on its face, would appear to cover Lucchetti's investment unless the exception in Article 2 applied; or of the object and purpose of the BIT and its possible significance for interpretative purposes. Therefore, applying the touchstone set out in paragraph 6 above, the only possible conclusion – whatever supposition one is inclined to make about the rules of interpretation the Tribunal 'must surely have' brought into play – is that the actual evidence of their Award does not sustain the supposition that the Tribunal did diligently and systematically apply the Vienna Convention rules at all, let alone with the particular care the situation would seem to have dictated.

13. I am tempted to leave the matter there, but duty dictates a more precise indication of how the Award fails to meet in this respect the accepted standard of reasoning. The key passages in this respect are paragraphs 48 and 59; they constitute the Tribunal's own findings on the *ratione temporis* exception, and follow on from a lengthy section summarizing the respective submissions of the parties, but their striking feature is that neither paragraph recapitulates the language of Article 2 or seeks to subject it to any form of analysis of any kind. Paragraph 48, more strikingly still, launches directly into a brief discussion of the 'accepted meaning' of 'dispute' as a 'legal concept' in international law without the slightest discussion to establish what the Treaty Parties may have intended in the specific context of Article 2, with its first sentence expressly making the BIT substantively retrospective. The ad hoc Committee must surely be close to the mark when it surmises (at paragraph 80) that the purpose behind the second sentence was "to prevent that, where a dispute or a difference had arisen at a time when the BIT did not exist, the investor would be provided with new ammunition as a result of the subsequent entry into force of the BIT", but of that surmise there is not a trace in the terms of the Award itself. Moreover, even if the surmise is shown to be correct, the story doesn't end there; it must necessarily presuppose some examination of whether the Treaty Parties, for the purpose of putting that common intention into effect, did or did not have in mind, beyond the subject

around which the 'dispute' revolved, some identity of parties, some identity of the legal obligations in play, some identity of the actions or omissions constituting the matters in dispute. Instead, more or less all that the reader finds, following the establishment in the abstract of what 'dispute' means (paragraph 48), is the ex cathedra assertion (paragraph 50) that what the Tribunal has to determine is whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute. No authority is given for this proposition arising out of the BIT itself; the only authority is a very old decision of the Permanent Court of International Justice (and a recent ICSID Award which the ad hoc Committee rightly finds to be out of context, and therefore irrelevant to the point at issue). Finally, when the reader does encounter at the end something approaching (though only very approximately) a textual analysis of Article 2 of the BIT (paragraph 59), it is in a form which treats the meaning of the second sentence of the Article as already having been conclusively determined, so that the assertion of a claim under the intervening BIT (retrospective though the BIT is) cannot be allowed to 'nullify' the second sentence or 'deprive it' of any (*sic*!) meaning.

14. None of this is of course to say that the Tribunal's reading of what Article 2 as a whole properly means is not a tenable one. But there are other tenable interpretations too. And between the premise (that 'dispute' has a given meaning), and the conclusion (that there is a given test to determine whether a particular dispute continues in being or not), and the confirmatory conclusion (that the application of this test to the premise can't be set aside by invoking the BIT), there lie a whole series of steps in the logical chain. Virtually none of these appears on the face of the Award; they have to be inferred by the educated reader; and in consequence the Award clearly fails to meet the accepted requirement (as enunciated in the Annulment Decision in MINE v. Guinea) that "…… the 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 … … the requirement to state

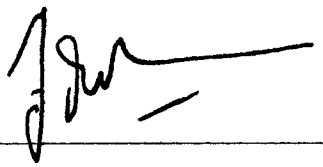
reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law."

15. That would be enough in itself, but I feel I must touch as well on another problem area which the ad hoc Committee deals with in its Decision, but too perfunctorily as I see it. I have referred above to the Tribunal's twofold task – of interpreting the BIT and then applying it; this problem area relates to the second of those. Whereas treaty interpretation can often be a detached exercise, it is virtually inevitable that treaty application will entail to some extent an assessment of the facts of the particular case and their correlation with the legal rights and obligations in play. So it is in this instance. The ad hoc Committee points out, referring to paragraph 53 of the Award, that "there is no doubt that what Lucchetti refers to as the Municipality of Lima's subjective assertions did become a crucial element in the Tribunal's ultimate decision", and goes on to discuss (in paragraph 122 of its Decision) whether Lucchetti was or was not given adequate opportunity to make its case against these assertions. With everything the Committee says in these two paragraphs I am in complete agreement. But for me the question does not stop there, the crucial issue being, not whether the parties had adequate opportunity to advance their factual cases, but what steps the Tribunal took to evaluate them, given that (as indicated) they became a 'crucial element' in its decision. To my mind, it is inescapable that every 'crucial element' in an ICSID Tribunal's decision has to be the subject of a finding by the Tribunal; that, if the element is a factual element which is in dispute between the parties, the finding has to be the result of a proper fact-finding procedure; and that the elements and steps in this procedure must be spelled out in the Award. When one looks at the text of the Award, however, all that can be discovered (the key passages are at paragraphs 51-53) is two paragraphs summarizing the recitals whose bona fides the Claimant was challenging, followed without a break by the conclusion that the dispute was therefore the 'same dispute' as the pre-BIT one.

16. The only conclusion I can draw is that the Tribunal simply failed to put to the proof by any recognized fact-finding process these factual assertions by the Respondent, and the challenge to them by the Claimant, and that this constitutes in the circumstances (i.e. because the facts in issue became a 'critical element' in the Award) a "serious departure from a fundamental rule of procedure" within the meaning of Article 52(1)(d) of the Washington Convention.

17. To be sure, the waters were muddied to a considerable extent, as the proceedings developed, by the introduction on the part of the Claimant of the argument that the Tribunal was somehow under an obligation provisionally to accept its (the Claimant's) version of the facts for the purpose of deciding whether the Tribunal did have jurisdiction or not. The ad hoc Committee disposes of this argument summarily, and is quite right to do so. It is one thing to say that factual matters can or should be provisionally accepted at the preliminary phase, because there will be a full opportunity to put them to the test definitively later on. But if particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved? However – and this is the essential point – the dismissal of that argument should not be converted into exactly the same mistake, but with the situation turned on its head. If the Claimant's facts can't simply be assumed for the purpose of upholding jurisdiction, then surely it follows that the Respondent's facts can't simply be assumed for the purpose of denying it.

18. For these reasons, I would set the annulment bar rather lower than my colleagues, and find that this case crosses it.



Sir Franklin Berman QC

13 August 2007