ICSID Case No. ARB/03/28

DUKE ENERGY INTERNATIONAL PERU INVESTMENTS NO. 1, LIMITED

and

REPUBLIC OF PERU

(Annulment Proceeding)

DECISION OF THE *AD HOC* COMMITTEE

Members of the *ad hoc* Committee

Professor Campbell McLachlan QC (President)
Judge Dominique Hascher
Judge Peter Tomka

Secretary to the Committee

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Date of dispatch to the parties: 1 March 2011

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I. INTRODUCTION

1. On 15 December 2008, the Republic of Peru (**'Peru'**) made a timely application for annulment of the Decision on Jurisdiction rendered in favour of Duke Energy Investments Peru No. 1 Limited (**'DEI Bermuda'**) in ICSID Case No. ARB/03/28, and in the alternative partial annulment of the Award in that case.

A. The Tribunal's Decision on Jurisdiction and Award

2. The Decision on Jurisdiction was rendered on 1 February 2006. The Award was rendered on 18 August 2008. The Tribunal comprised L. Yves Fortier, C.C., Q.C. (President, a national of Canada), Dr. Guido Santiago Tawil (a national of Argentina) and Dr. Pedro Nikken (a national of Venezuela).[1]

3. The proceedings concerned an investment, made by Duke Energy International Investments No. 1 Ltd (**'DEI Bermuda'** a company organized under the laws of Bermuda), which is ultimately owned by Duke Energy International LLC (**'Duke Energy'** (a company organized under the laws of the United States) through several acquisitions and reorganisations, of privatised interests in Egenor S.A.A., a Peruvian electricity corporation, which eventually became Duke Energy International Egenor S.A.A. (**'DEI Egenor'**). In an effort to encourage investment in privatised industries, the Peruvian Government concluded a number of Legal Stability Agreements (**'LSAs'**) with investors. These included the **'Egenor LSA'**, which applied from 1996 to 2006. The Peruvian Government had also passed the Merger Revaluation Law (**'MRL'**) on 10 January 1994, which guaranteed that corporate reorganisations would not incur tax liability. In order to benefit from this law, DEI Egenor merged with Power North S.A. in December 1996.

4. Following DEI Bermuda's acquisition of privatised interests in DEI Egenor, DEI Bermuda entered into the **'DEI Bermuda LSA'** with Peru on 24 July 2001. The **DEI Bermuda LSA** applied for a term of ten years from the date of its execution. Pursuant to it, DEI Bermuda agreed to make a capital contribution to Duke Energy

[1] Dr Tawil and Dr Nikken each lodged a partial dissenting opinion to the Award on different issues. The Decision on Jurisdiction, Award and partial dissenting opinions are published at 15 ICSID Rep 100.

International Peru Holdings SRL (**'DEI Peru Holdings'**) of US$200 million (clause 2) and Peru in return agreed to guarantee legal stability for DEI Egenor in relation to various matters, including income tax (clause 3(1)). By clause 9, the parties agreed that *'any dispute, controversy or claim between them, relative to the interpretation, performance or validity of this Agreement, shall be submitted'* to ICSID arbitration.

5. On 26 November 2001, the Peruvian tax authority (*Superintendencia Nacional de Administración Tributaria,* **'SUNAT'**) assessed a tax liability of approximately US$48 million (including interest and penalities) against DEI Egenor in respect of tax years 1996 – 1999 (**'the Tax Assessment'**).[2]

6. In the Arbitration, DEI Bermuda claimed, *inter alia*, that this Tax Assessment constituted a violation of its rights under the DEI Bermuda LSA. Peru objected to the jurisdiction of the Tribunal and to the admissibility of the claims. The Tribunal decided to hold a separate hearing on issues of jurisdiction and admissibility.

7. In a reasoned Decision on Jurisdiction dated 1 February 2006, the Tribunal held that *'[t]he dispute submitted by DEI Bermuda is within the jurisdiction of the Centre and the competence of the Tribunal.'*[3] It rejected some of Peru's objections to admissibility, and joined others to the merits.

8. By its Award dated 18 August 2008, the Tribunal found that Peru was not liable to DEI Egenor on one major limb of the latter's claims.[4] However, it concluded, as to the claim concerning the Merger Revaluation Assessment (**'MRA'**), that SUNAT had violated the guarantee of tax stabilisation for DEI Egenor and in turn for DEI Bermuda.[5] In addition, a majority of the Tribunal was of the opinion that the MRA constituted a breach by Peru of the implied duty of good faith owed to DEI Bermuda under the DEI Bermuda LSA.[6] By way of compensation for breach of the DEI Bermuda LSA, the Tribunal ordered Peru to pay DEI Bermuda US$18,440,746 plus simple interest.[7]

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[2] Decision on Jurisdiction [61].

[3] *Ibid Dispositif* [168(1)].

[4] E.g. the Depreciation Assessment claim, Award [307], [323].

[5] *Ibid* [345] – [366].

[6] *Ibid* [442].

[7] *Ibid Dispositif* [501].

B. The Application for Annulment

9. By its Application, Peru seeks primarily annulment of the Decision on Jurisdiction in its entirety, which would have the consequence that the Award as a whole would be annulled.[8] In the alternative, it seeks partial annulment of *'the portions of the Award concerning (1) the effect of the Tax Amnesty; (2) the Merger Revaluation Assessment (specifically, the conclusions regarding tax stabilization and* actos propios*); and (3) the calculation of damages.'*[9]

10. Peru's Application for Annulment of the Decision on Jurisdiction is based primarily on Article 52(1)(b) of the ICSID Convention (manifest excess of powers). Peru submits that the Tribunal asserted a jurisdiction *ratione materiae* which exceeded the scope of the parties' consent as set out in the instrument of their consent, namely the DEI Bermuda LSA.[10] Further, Peru asserts that, in going beyond the plain words of the DEI Bermuda LSA, the Tribunal failed to apply the applicable law.[11] The Tribunal also exceeded its jurisdiction *ratione personae* by asserting its jurisdiction over claims which were those of DEI Egenor not DEI Bermuda; and exceeded its jurisdiction *ratione temporis* by asserting jurisdiction over claims based on events occurring prior to the execution of the DEI Bermuda LSA.[12] Peru seeks in addition annulment under Article 52(1)(e) of the ICSID Convention, alleging that the Tribunal failed to state reasons for its decision not to apply the plain words of the DEI Bermuda LSA;[13] and under Article 52(1)(d) of the ICSID Convention on the ground that failure to abide by the scope of the parties' consent to arbitration and to apply the applicable law is a failure to observe a fundamental rule of procedure.[14]

11. Peru's application for partial annulment of the Award relies compendiously on Articles 52(1)(b), (d), and (e) to challenge the above-noted portions of the Award to which it objects.[15]

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[8] Transcript, Day 2, 366/2-9 (Peru), 408/17-409/1 (DEI Bermuda).

[9] Application [101].

[10] *Ibid* [36].

[11] *Ibid* [39].

[12] *Ibid* [40] – [41].

[13] *Ibid* [43] – [44].

[14] *Ibid* [45] – [46].

[15] *Ibid* [79] – [100].

12. By paragraph 102 of its Annulment Application, Peru requested that the *ad hoc* Committee stay enforcement of the Award pending its decision (**'the Stay Request'**).

C. Summary of Annulment Proceedings

13. On 24 December 2008, the Acting Secretary-General of ICSID registered Peru's Annulment Application. In accordance with Rule 54(2) of the ICSID Arbitration Rules, enforcement of the Award was provisionally stayed pending the *ad hoc* Committee's decision.

14. On 27 February 2009, the Chairman of the Administrative Council appointed Judge Dominique Hascher (a national of France), Professor Campbell McLachlan QC (a national of New Zealand) and Judge Peter Tomka (a national of Slovakia) as members of the *ad hoc* Committee, which was properly constituted on 4 March 2009. The parties were informed on 16 March 2009 that the members of the *ad hoc* Committee had appointed Professor McLachlan as its President. Also on that date, the Committee invited the parties to agree on a timetable for filing of written pleadings on Peru's Stay Request, and proposed that oral argument on the Stay Request be heard at its First Session. It suggested that the First Session be held on 27 or 28 April 2009 at the Permanent Court of Arbitration in The Hague.

15. At the First Session, which was held in the Permanent Court of Arbitration in The Hague on 27 April 2009, the parties confirmed that they had no objections to the proper constitution of the Committee or to any of its members. The parties reached agreement with the *ad hoc* Committee on the establishment of a procedural timetable and various other procedural directions for the further conduct of the annulment proceeding. It was provided that the languages of the proceedings would be English and Spanish. Simultaneous interpretation would be provided at the hearing. The Committee would render its Decision in English and Spanish, the Spanish translation being provided by the Secretariat. The hearing was scheduled for 12 and 13 April 2010 at the headquarters of ICSID in Washington, DC.

16. The parties submitted simultaneous briefs on Peru's Stay Request on 17 April 2009, and oral argument was heard on the Stay Request on 27 April 2009. By letter from its Secretary dated 5 May 2009, the *ad hoc* Committee confirmed that the provisional stay of enforcement was to continue until the Committee issued its Decision.

17. The *ad hoc* Committee released its Decision on Peru's Stay Request on 23 June 2009. The Committee decided that the stay of enforcement would only continue if, within 30 calendar days of the notification of the Decision by the ICSID Secretariat, Peru provided an official written assurance that it would effect full payment of its liability under the Award within 30 calendar days of the Decision on Annulment, to the extent that the Award was not annulled.

18. Peru duly provided a written assurance on 17 July 2009, by letter from the Special Committee in charge of the representation of the Peruvian State in international investment disputes.

19. Peru filed its Memorial on Annulment on 31 July 2009. DEI Bermuda filed its Counter-Memorial on 20 November 2009. Peru filed its Reply on 22 January 2010, accompanied by an Opinion on the Question of Annulment, prepared by Professor W. Michael Reisman, dated 20 January 2010. DEI Bermuda filed its Rejoinder on 19 March 2010, together with an Opinion of Professor Rudolf Dolzer dated 14 March 2010.

20. A hearing was held in Washington D.C. on 12 and 13 April 2010. The parties agreed, by joint letter dated 26 March 2010, the schedule for that hearing. It was attended by counsel for the parties, together with Mr Fernando Quirós and Ms Yesenia Cabezas of the Embassy of the Republic of Peru in Washington D.C. and Ms Pat Smith of Duke Energy.

21. The majority of documents referred to in the parties' pleadings were lodged in electronic form with the pleadings. By letter dated 9 April 2010, the President requested the parties to lodge lists of any documents referred to in the annulment proceedings and not already filed, and to lodge copies of any documents so listed. This the parties did at the conclusion of the hearing.

22. At the conclusion of the hearing, the President closed the oral phase of the proceedings, and indicated that the *ad hoc* Committee would notify the parties through the Secretariat when it had reached its Decision.

23. The *ad hoc* Committee then deliberated by various means of communication, including at meetings in Washington D.C. on 14 April 2010, in Paris on 28 July 2010 and in The Hague on 7 September 2010. On 18 November 2010, pursuant to Arbitration Rule 28, the Committee invited the parties to submit their respective statements of costs by 1 December 2010. The parties did so. DEI Bermuda also filed

a written submission as to costs on the same date. Accordingly, the *ad hoc* Committee afforded Peru an opportunity to file any written submissions as to costs in reply by 10 December 2010.

24. On 14 December 2010, the proceeding was declared closed pursuant to Rule 38(1) of the ICSID Arbitration Rules.

II. THE PARTIES' SUBMISSIONS

25. As set out above, Peru makes a wide-ranging challenge to the Tribunal's Decision on Jurisdiction and to certain portions of the Award. The arguments on each of these issues were fully developed by the parties in their written pleadings. At the hearing, whilst maintaining all of the grounds set out in writing, Peru helpfully placed particular emphasis on certain of those grounds. These included in particular:

(a) Its objection to the Decision on Jurisdiction based upon manifest excess of powers, specifically:

(i) the Tribunal's approach to its jurisdiction *ratione materiae* (including the law applicable to determination of that question); and,

(ii) the Tribunal's assumption of jurisdiction *ratione temporis* (including Peru's allegation that the Tribunal had exceeded its powers by failing to decide on the objection *ratione temporis* actually taken by Peru); and

(b) Its objection that the Tribunal had failed to state reasons for that part of its Award which set out its 'threshold analysis', namely *'the Tribunal's conclusion that claims for breach of the Egenor LSA could be raised by DEI Bermuda thanks to its so-called link found in Article 23(a).'*[16]

26. This section of the Decision will summarise the parties' arguments on each of these issues, followed by the additional arguments in relation to each of the Decision on Jurisdiction and the Award.

27. Before doing so, however, it is necessary also to mention the parties' submissions as to the scope of the annulment standards under Article 52(1). As noted above, Peru supported its Reply with an Opinion of Professor Reisman, which contained a discussion of the annulment standards. In response, DEI Bermuda filed an Opinion of

[16] Transcript, Day 1, 55/5-8.

Professor Dolzer. The Committee is obliged to both eminent experts for their views. It will have occasion to refer to certain aspects of the interpretation of Article 52(1) to the extent relevant and necessary to its analysis in Part III below. However, despite the apparent difference of emphasis on some issues of construction and approach between the experts, the Committee finds that it is not necessary to deal with all of these questions in the abstract, in view of the confirmation provided by Peru in oral submissions that:[17]

> *Article 52, we submit must be read and applied on its terms in order to maintain the balance struck by the states parties to the ICSID Convention. And that is what we are asking this ad hoc committee to do….*
>
> *[T]he question before this committee is not whether the law of annulment is trending in one direction or another or whether cases embrace or caution against annulment….*
>
> *It is an exercise in case specific analysis within the framework of Article 52 itself.*

A. Submissions on the Decision on Jurisdiction

28. Peru argues that the Decision on Jurisdiction should be annulled for manifest excess of powers, departure from a fundamental rule of procedure and failure to state reasons. This Decision adopts the structure followed by the parties, and is therefore structured to follow the objections raised by Peru to the Tribunal's jurisdiction. In effect, in its Application for Annulment, Peru repeats the objections to the Tribunal's jurisdiction that it raised before the Tribunal itself, but now does so on the basis that the Tribunal's conclusions on those issues warrant annulment pursuant to Article 52(1) of the ICSID Convention.

29. Peru thus argues that:

(a) The Tribunal's conclusion that it had jurisdiction *ratione materiae* is to be annulled under Article 52(1)(b), (d) and (e);

[17] *Ibid* 120/17-21, 121/12-16, 122/1-3.

(b) The Tribunal's conclusion that it had jurisdiction *ratione temporis* is to be annulled under Article 52(1)(b), (d) and (e); and

(c) The Tribunal's improper arrogation to itself of jurisdiction vested in other fora under other LSAs requires annulment under Article 52(1)(b).

30. The parties' submissions on each of these points are summarised in turn.

1. *Jurisdiction* ratione materiae

(a) Peru's argument

31. Clause 3 of the DEI Bermuda LSA guaranteed legal stability *'in connection with the investment referred to in CLAUSE TWO'*. Under clause 2.1, DEI Bermuda was obliged to contribute capital of US$200,000,000 to DEI Peru Holdings. The other obligations imposed on DEI Bermuda under clause 2 were ancillary to that obligation.

32. Peru argues that DEI Bermuda's protection under the LSA was constrained to that investment of $200,000,000 *only*, and did not protect DEI Bermuda's investment in Peru generally, notwithstanding that the capital contribution was a stage in DEI Bermuda's acquisition of Egenor.[18] In its Reply, it stresses the background to the LSAs, and the recognition of, among others, DEI Bermuda, that multiple LSAs were required to protect indirect investments.[19] Peru argues that the Tribunal failed to apply the proper law in interpreting the LSA, and consequently reached an incorrect interpretation.[20] In the face of the DEI Bermuda's argument to the contrary, it maintains that Clauses Two and Three *are* crucial to jurisdiction, because they circumscribe the matters referred to in Clause Nine.[21]

33. Peru states that it was accepted before the Tribunal that, as a Peruvian legal instrument, the LSA had to be interpreted according to Peruvian civil law.[22] Peru submits that Peruvian law is also applicable if Article 42(1) of the ICSID Convention is applied, and that the Tribunal identified no gap in Peruvian law, or inconsistency

[18] Memorial [116].

[19] Reply [60]-[61].

[20] Memorial [117].

[21] Reply [75], [79].

[22] Decision on Jurisdiction [31]; Memorial [120]; Reply [73].

between its provisions and those of international law, that justified reference to supervening principles of international law.[23]

34. Peru points out that the Tribunal did not refer to any of the applicable provisions of the Peruvian Civil Code in its Decision on Jurisdiction,[24] or discuss the appropriate approach to contractual interpretation.[25] Nor did it, as DEI Bermuda suggests, indicate that its approach was based on a 'good faith' interpretation as mandated by Peruvian law.[26] It simply concluded that it was entitled to go beyond the narrow literal meaning of Clauses Two and Three of the DEI Bermuda LSA to consider four extrinsic factors.[27] Peru contends that the Tribunal's failure to engage with the relevant provisions of the applicable law is evidence of its failure to apply the proper law at all.[28]

35. Peru contends that if the Tribunal had applied Peruvian law, it would have found that it was not entitled to go beyond the 'plain meaning' of the LSA. It would have thus found that only DEI Bermuda's capital contribution was protected.[29] It further argues that the Tribunal so transparently and consciously departed from the approach advocated by Peru that its error must be manifest.[30]

36. Peru lastly contends that the Tribunal actually misapplied the four extrinsic factors it relied upon, and that a proper application of those factors would have lead it to decline jurisdiction.[31]

(b) DEI Bermuda's argument

37. DEI Bermuda begins by arguing that Peru mischaracterised the terms of the LSA as the 'applicable law', when in fact the only provisions that governed jurisdiction were Article 25 of the ICSID Convention and clause 9 of the DEI Bermuda LSA.[32] The Tribunal saw its central task as construing clause 9, *'taking account of the*

[23] Memorial [122]; Reply [82].
[24] Memorial [134]; Reply [80] – [81].
[25] Memorial [137].
[26] Reply [85], [89].
[27] Memorial [140].
[28] *Ibid* [135].
[29] Memorial [131]; Reply [70].
[30] Reply [66].
[31] Memorial [143] ff.
[32] Counter-Memorial [102].

consequences of [the parties'] commitments which the parties must be considered to have reasonably and legitimately contemplated.'[33] It then concluded that the dispute before it concerned *'the interpretation, performance or validity'* of the LSA.[34] DEI Bermuda submits that clauses 2 and 3 form no part of the applicable law for the purpose of the jurisdictional determination, and were essentially irrelevant to the issue of whether the Tribunal had jurisdiction under clause 9.[35]

38. DEI Bermuda submits that, in order for the Tribunal to have committed a manifest excess of powers then, having reached that conclusion, it would have to have made a finding that it would be impossible for the DEI Bermuda to substantiate its claims at the merits phase.[36] The Tribunal made no such finding. Furthermore, DEI Bermuda argues that Peru's argument must fail because (a) the Tribunal did in fact find a breach at the merits phase, and (b) Peru conceded during the merits phase that its conduct was capable of constituting a breach.[37]

39. Lastly, DEI Bermuda argues that the Tribunal did not fail to state the reasons on which its conclusions were based.[38] DEI Bermuda notes that the Tribunal invoked the Peruvian requirement that contracts be negotiated, executed and performed in good faith.[39] It notes that, according to its experts, actual intention must prevail over 'literality'[40] and that, were Peruvian law different on this point, the international law principle of *pacta sunt servanda* would intervene.[41] In DEI Bermuda's view, Peru fails to substantiate its allegation that the Tribunal decided the dispute *ex aequo et bono.*[42] DEI Bermuda argues that the Tribunal did not ignore clause 2 and 3 of the LSA, but set out its reasons '*in extenso*' for adopting the interpretation it did and thus provided reasons for its decision.[43] DEI Bermuda maintains that Article 25 of the ICSID Convention and clause 9 of the DEI Bermuda

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[33] *Ibid* [109], citing Decision on Jurisdiction [77].
[34] *Ibid* [111], citing Decision on Jurisdiction [82].
[35] *Ibid* [119].
[36] *Ibid* [122].
[37] *Ibid* [124].
[38] *Ibid* [132].
[39] *Ibid* [133].
[40] *Ibid* [135].
[41] *Ibid* [136].
[42] *Ibid* [140].
[43] *Ibid* [144] – [147].

LSA sufficed as 'authority' for the Tribunal's interpretation and that it was well within its mandate to consider contextual factors.[44]

2. ***Jurisdiction* ratione temporis**

(a) Peru's argument

40. Peru submits that it was accepted before the Tribunal that the DEI Bermuda LSA was the sole source of DEI Bermuda's rights claimed in the arbitration.[45] That LSA applies from 24 July 2001 until 24 July 2011. The SUNAT assessment which the DEI Bermuda alleged violated the LSA was issued in November 2001.

41. Peru maintains that there are two aspects of jurisdiction *ratione temporis*, and that the Tribunal considered only one of them. First, the 'dispute' between the parties must arise during the period specified in the instrument of consent.[46] Peru never disagreed that the dispute – which was crystallised by SUNAT's unfavourable audit assessment – arose during the period specified in the LSA. Its complaint is that the Tribunal failed to address the second aspect of jurisdiction *ratione temporis*: that *'the substantive provisions of the relevant instrument must temporally cover the events on which the claim is based.'*[47]

42. Peru argues that clause 3(1) of the LSA only guarantees stability for the tax legislation which is in force on the date the agreement is signed.[48] It thus argues that *'[a]ny claims based on factual or legal predicates falling outside that 10-year period are beyond the scope of the LSA's tax stability provision'*.[49] It argues that the SUNAT assessment enforced tax rules that had applied to Egenor from 1996 to 1999 – rules that were not the subject of the DEI Bermuda LSA. The Tribunal did not engage with this aspect of temporal jurisdiction, satisfying itself with the conclusion that the dispute arose during the term of the LSA.[50] Peru disputes DEI Bermuda's

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[44] *Ibid* [150] – [151].

[45] Decision on Jurisdiction [146]; Memorial [105].

[46] Memorial [107].

[47] Memorial [107]; Reply [44]. In this respect Peru relies on *Salini v Jordan*, which held that 'one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal (*i.e.*, the existence of a dispute) and applicability *ratione temporis* of the substantive obligations contained in a BIT': *Salini Costruttori SpA and Italstrade SpA v Jordan* ICSID Case No. ARB/02/13, 9 November 2004 (Decision on Jurisdiction),[176].

[48] Memorial [109].

[49] *Ibid* [110].

[50] Decision on Jurisdiction [148]; Memorial [112].

argument that, in addressing the first aspect of *ratione temporis* jurisdiction, the Tribunal implicitly rejected Peru's actual *ratione temporis* objection. It argues that the Tribunal could have addressed Peru's argument, but failed to do so.[51]

43. Applying Article 52(1) of the ICSID Convention, Peru submits that the Tribunal:

(a) manifestly exceeded its powers by exercising jurisdiction that it did not have, and failing to consider an issue put to it by a party;

(b) departed from a fundamental rule of procedure by failing to consider an issue put to it by a party; and

(c) failed to provide reasons for its decision, by omitting the reasoning required to move from Point A (Peru's actual *ratione temporis* argument) to Point B (the Tribunal's conclusion that it had temporal jurisdiction).[52]

(b) DEI Bermuda's argument

44. DEI Bermuda's central response is that the Tribunal did address Peru's *ratione temporis* argument when it held, in paragraph 148, that the crucial time was when the dispute arose, *'not the point in time during which the factual matters on which the dispute is based took place'*.[53] According to DEI Bermuda, the Tribunal was entitled to define the *ratione temporis* issue for itself.[54] Having made that decision, the Tribunal was entitled to consider all the relevant factual background to that dispute, as it did.[55] Addressing Peru's argument that the DEI Bermuda LSA only stabilised tax laws in effect from 2001, DEI Bermuda argues that the Tribunal held this question over until the merits phase.

45. DEI Bermuda maintains that the Tribunal properly explained its decision, rejecting the first argument and ruling the second irrelevant, citing authority for its approach. According to DEI Bermuda, the principle of non-retroactivity of treaties has no role to play here because the act complained of occurred in November 2001.[56]

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[51] Reply [47] – [51].

[52] Memorial [114] – [115].

[53] Decision on Jurisdiction [148]; cited in Counter-Memorial [87].

[54] Counter-Memorial [90].

[55] Counter-Memorial [89], citing Decision on Jurisdiction [149] – [150].

[56] *Ibid* [94] – [95].

3. Jurisdiction vested in other tribunals

46. By this additional head of challenge to the Decision on Jurisdiction, Peru seeks to support its two specific objections above with an over-arching point that the Tribunal exceeded its powers by assuming a jurisdiction properly vested in other tribunals under other LSAs.[57]

(a) Peru's argument

47. Peru begins with the argument that the Tribunal failed to take account of all the other LSAs Peru signed, each concluded with a different party, in respect of a different investment and in force for a different period.[58] This argument provides context for Peru's argument that the entire approach to jurisdiction followed by DEI Bermuda – and largely adopted by the Tribunal – was designed to circumvent the shortcomings of individual causes of action available to the Duke Energy group as a whole. Duke's particular problem was that only the DEI Bermuda LSA (and not, for example, the Egenor LSA) contained a reference to ICSID arbitration. But the DEI Bermuda LSA only applied from 2001, after the tax years in respect of which SUNAT issued the assessment that Duke claimed violated the LSA. [59] In other words, Peru argues, the Tribunal took jurisdiction over a matter that really arose under a different LSA, namely the Egenor LSA, and not the DEI Bermuda LSA.

48. In terms of the grounds of annulment under Article 52(1) of the Convention, Peru maintains that the Tribunal was motivated, in refusing to treat the DEI Bermuda LSA as an independent instrument with carefully-circumscribed boundaries, by a *'misguided concern for Duke Energy's ability to seek relief in a single arbitration for a full range of claims*.'[60] Peru maintains that this decision was made on the basis of equity rather than law, and therefore constitutes a manifest excess of powers.

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[57] Memorial [104].

[58] Memorial [92] ff; Reply [93] ff.

[59] Memorial [94], [99]; Reply [38].

[60] Memorial [93], [95].

(b) DEI Bermuda's argument

49. DEI Bermuda's primary response to this argument is that the Tribunal was right to decide that the particular dispute brought before it under the DEI Bermuda LSA belonged in no other forum. It argued that the Tribunal properly rejected the Peru's admissibility and *ratione personae* objections because the three criteria for 'concurrent jurisdiction' were not met. [61]

50. In DEI Bermuda's view, Peru's argument that the Tribunal should have declined jurisdiction in favour of a 'hypothetically available' forum (under another LSA) provides no basis for a claim of manifest excess of powers,[62] especially when there are no rules for stipulating when ICSID tribunals must decline jurisdiction, but simply principles derived from general international law. Indeed, DEI Bermuda suggests, the *Vivendi* annulment Committee confirmed that an investment arbitral tribunal was *prohibited* from declining jurisdiction that it enjoyed in favour of a domestic forum.[63]

B. Submissions on the Award on the Merits

51. Peru also seeks partial annulment of the Award.[64] Although the parties organised their arguments in slightly different ways, their submissions were directed at the following issues:

(a) The effect of the tax stability guarantee, and in particular (i) the relationship between the Investment Regulations and the tax stability guarantee;[65] (ii) the meaning of legal stability under the LSA;[66] and (iii) whether the MRA breached the guarantee of tax stability;[67]

(b) The effect of DEI Bermuda's decision to invoke the amnesty procedure;[68]

(c) The Tribunal's finding on the good faith/*actos propios* issue;[69] and

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[61] Counter-Memorial [66], [68].

[62] Counter-Memorial [69].

[63] *Ibid* [72], citing *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux/Vivendi Universal ('Vivendi') v Argentina* (First Decision on Annulment) (2002) 6 ICSID Rep 327.

[64] Peru did not seek annulment of the Tribunal's conclusions in respect of the Depreciation Assessment, a point on which the DEI Bermuda places some reliance below.

[65] Memorial VI.C.1; Counter-Memorial V.B.

[66] Memorial VI.C.2; Counter-Memorial V.C.

[67] Memorial VI.C.3; Counter-Memorial V.D.

[68] Memorial VI.B; Counter-Memorial V.A.

(d) The question of damages.[70]

The parties' submissions on each of these issues are summarised in turn.

1. Tax stability

52. Peru makes two arguments under this head: first, that the Tribunal failed to state reasons for its conclusion that Article 23(a) of the Regulations of the Regime to Guarantee Private Investment, approved by Supreme Decree No. 162-92-EF ('**Investment Regulations**') 'linked' the DEI Bermuda LSA and the Egenor LSA; and second that the Tribunal failed to state reasons and exceeded its powers in concluding that the Peruvian Civil Code overrode Article 23(a)'s limitation on remedy.

53. In order to advance these arguments, Peru criticises four steps in the Tribunal's reasoning in its Award: (i) its treatment of the linkage between the Egenor LSA and the DEI Bermuda LSA pursuant to Article 23(a);[71] (ii) its decision to supplement the specific remedy in Article 23(a) with remedies from the Civil Code;[72] (iii) its determination that the guarantee of tax stability in the DEI Bermuda LSA included both the tax laws and official interpretations of them;[73] and (iv) its decision that the stable interpretation of the MRL allowed companies to obtain tax advantages from a reorganisation even when conducted solely in order to secure those advantages.[74] The arguments of the parties on each of these steps can be conveniently taken in turn.

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[69] Memorial VI.D; Counter-Memorial V.E.

[70] Memorial VI.E; Counter-Memorial V.F.

[71] Award [201].

[72] *Ibid* [208].

[73] *Ibid* [219].

[74] *Ibid* [363].

(i) Linking of DEI Bermuda LSA and Egenor LSA

(a) Peru's argument

54. Peru submits that DEI Bermuda's position before the Tribunal was that the effect of Article 23(a) of the Investment Regulations was that the DEI Bermuda LSA preserved the position in effect in 2001, which included the tax regime stabilised by the Egenor LSA.[75] Peru contested this, arguing that neither the LSAs themselves nor the relevant Peruvian Regulations[76] allowed the holder of one LSA to take benefits under another, and that it was inconsistent with the terms of the LSA itself.[77] Peru's essential complaint is that, having acknowledged the parties' difference of opinion on the issue, the Tribunal only addressed the dispute in one sentence and implied that Peru accepted the DEI Bermuda's position on the effect of Article 23(a). It provided no further reasons for its conclusion, and did not address Peru's argument that Article 23(a) was a stand-alone regulatory mechanism, not a means of expanding existing LSAs.

55. Peru disagrees with the submission of DEI Bermuda that Peru's counsel accepted the linkage effect of Article 23(a).[78] Peru also argues that the Tribunal's conclusion was inconsistent with its decision to award damages extending to 2011, when the Egenor LSA – which it determined was incorporated into the DEI Bermuda LSA – only extended to 2006.

(b) DEI Bermuda's argument

56. DEI Bermuda simply disagrees with Peru's depiction of the record. It argues that Peru did, in fact, agree that in some circumstances Article 23(a) of the Investment Regulations could have the 'linkage' effect contended for by the DEI Bermuda.[79] DEI Bermuda argues that when counsel for the DEI Bermuda pointed this out, and Peru had an opportunity to deny it, it did not do so.

57. DEI Bermuda also maintains that Peru is deliberately attempting to obfuscate the issue by introducing unrelated arguments – such as whether DEI Bermuda can claim

[75] Memorial [201].

[76] Peruvian Law No. 27342 on Regulation of Legal Stability Agreements.

[77] *Ibid* [203] – [204].

[78] Reply [123] – [127].

[79] Counter-Memorial [191], [194], [198].

for a breach of the Egenor LSA *itself* – when discussing the linkage issue. DEI Bermuda maintains that the Tribunal's analysis was simple: (1) DEI Bermuda can only claim for a breach of its LSA; (2) DEI Bermuda relies on Article 23(a) to link its LSA with the Egenor LSA; (3) The parties agree that Article 23(a) can have this effect; and (4) DEI Bermuda has a claim if the stabilisation granted to Egenor in 1996 was breached after 24 July 2001.[80]

(ii) Supplementing Investment Regulations with Civil Code

(a) Peru's argument

58. Peru argues that the remedy provided by Article 23(a) of the Investment Regulations was a reduction in the withholding tax rate charged on dividends paid to DEI Bermuda. This remedy had no effect, however, because DEI Bermuda already paid zero withholding tax.[81] The Tribunal failed to apply Article 23(a)'s plain meaning because it did not provide a sufficient basis on which to establish a limitation of liability and relied upon Article 1322 of the Civil Code, which guaranteed damages for breach of an obligation.[82] Peru argues that this constituted a failure to apply the proper law, which was Article 23(a). By fashioning its own remedy, the Tribunal exceeded its powers. This also constituted a failure to state reasons, because the Tribunal did not expressly identify how it was reconciling the clash between Article 23(a) and Article 1322 of the Civil Code. Peru finally argues that the Tribunal's reasoning was contradictory, because it did not consider the effect of other Civil Code Articles on its linkage interpretation of Article 23(a). Peru also argues that the reasoning was contradictory because, having adopted the offset mechanism in Article 23(a), the Tribunal then decided that the offset mechanism in that Article was inapplicable to calculating compensation.

[80] Counter-Memorial [207], citing Award [184], [194], [201] & [209].

[81] Memorial [214].

[82] Memorial [216], citing Award [205] – [209].

(b) DEI Bermuda's argument

59. DEI Bermuda identifies a number of inconsistencies and illogicalities in Peru's argument.[83] Substantively, it argues that the Tribunal simply determined that Article 23(a) of the Investment Regulations did not provide a definitive limitation of liability, and therefore left open subsidiary bases of compensation. There was no clash between Article 23(a) and the Civil Code; the Civil Code simply supplied a supplementary basis of compensation. DEI Bermuda further argues that its Post-Hearing Brief provided an *'ample basis in Peruvian law'* for invoking the Civil Code in this manner.[84]

(iii) The meaning of tax stability

(a) Peru's argument

60. One of the major disputes between the parties before the Tribunal was whether the tax stability preserved not only the tax laws themselves (Peru's argument) but also certain interpretations of them (DEI Bermuda's argument). Peru maintains that in adopting DEI Bermuda's argument, the Tribunal committed annullable errors.

61. Having referred to provisions in the Investment Regulations that guaranteed the stability of the *legislation* in force,[85] the Tribunal went on to adopt DEI Bermuda's argument. Peru argues that this step was wholly unaccompanied by reasons or explanation and thus breached Article 52(1)(e) of the ICSID Convention.[86] It rejects DEI Bermuda's submission that the reasoning is apparent from elsewhere in the Award and disputes DEI Bermuda's suggestion that there was more convergence between the parties than Peru recognised.[87] Peru also rejects DEI Bermuda's argument that its decision not to challenge another part of the Award prevents it challenging this part.

62. Peru further argues that the absence of any reference to applicable Peruvian law leads to the conclusion that the Tribunal's approach to legal stability was developed

[83] Counter-Memorial [210] ff.

[84] *Ibid* [222].

[85] Award [212] – [213].

[86] Memorial [225] – [226]; Reply [142] – [143].

[87] Reply [145] – [153].

'from whole cloth', and not by the application of law.[88] It finally argues that a failure to apply the proper law is necessarily violation of a fundamental rule of procedure.

(b) DEI Bermuda's argument

63. DEI Bermuda's response is that if the Tribunal's reasoning on this point is read in the context of the Award as a whole, then no annullable error is apparent. After reciting the parties' submissions and the evidence of the experts, DEI Bermuda argues, first, that Peru and its expert agreed that stabilised standards had to be applied in a manner that was not *'illegitimate, unreasonable, or manifestly incorrect.'*[89] Secondly, they accepted that government agencies were required to apply those standards *'such as* [they had been] *applied'*.[90] Finally, the parties differed on whether a new interpretation had to be 'radically different' to constitute a breach.[91]

64. According to DEI Bermuda, the Tribunal first determined that there had to be a stable interpretation when the LSA was signed for DEI Bermuda to rely upon. The Tribunal's conclusions, according to DEI Bermuda, were based on the proper law, Article 10 of the Investment Regulations,[92] and were consistent with general principles of law, in particular the doctrine of good faith. Lastly, the Tribunal concluded that *'all interpretation of law must be undertaken subject to basic principles of reasonability'*.[93] Thus, DEI Bermuda argues that the Tribunal's conclusion was necessitated by the arguments of the parties and the applicable law, as recited by the Tribunal.

65. Lastly, DEI Bermuda argues that if the Tribunal's conclusions on this point should be annulled for the reasons advanced by Peru, then so too should the Tribunal's conclusions as to the Tax Depreciation Assessment (of which Peru does not seek annulment) that were wholly dependent upon that same determination.[94]

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[88] Memorial [227].

[89] Counter-Memorial [248].

[90] *Ibid* [249].

[91] *Ibid* [250].

[92] Supreme Decree No 162-92-EF (October 9, 1992).

[93] Counter-Memorial [260], referring to Award [226].

[94] *Ibid* [263].

(iv) Interpretation of the Merger Revaluation Law

(a) Peru's argument

66. Peru submits that DEI Bermuda presented three propositions, all of which the Tribunal accepted: (i) that the regime stabilised for Egenor in 1996 included a stable interpretation of the MRL; (ii) that that interpretation allowed companies to gain tax advantages from a reorganisation even when the reorganisation was conducted solely for that purpose; and (iii) that the MRA's view of the Power North merger was inconsistent with that stable interpretation.

67. Peru criticises the Tribunal's adoption of the second proposition. First, it argues that the Tribunal failed to apply the proper law in determining the criteria for a stable interpretation. Secondly, its application of these criteria was ambiguous and contradictory, because it only relied on well-established practice but did not explain whose practice qualified, and it thus failed to state the reasons for its conclusion.[95] Thirdly, the Tribunal failed to address Peru's argument that government input is required for a stable interpretation to be formed. Fourthly, the Tribunal contradicted itself in finding, first, that there may not have been a single stable interpretation of the 1994 MRA in 1996, but second, that it did have a stable interpretation in 1996.

(b) DEI Bermuda's argument

68. DEI Bermuda maintains that Peru's arguments under this head constitute no more than a request for the Committee to analyse the Tribunal's assessment of the evidence, a task that is beyond the Committee's remit.

69. First, DEI Bermuda argues that there can be no failure to apply the proper law, because the *content* of the law – the meaning of stability – had already been identified. The Tribunal's task was to *apply* the law to the factual circumstances; there was no further standard to be determined. According to DEI Bermuda, there is no basis to review the assessment the Tribunal reached on the basis of the evidence. Secondly, DEI Bermuda argues that–even if the Committee could examine that

[95] Memorial [234]; and see further Reply [164] – [172].

issue–the Tribunal's evaluation of the evidence was not ambiguous or contradictory.[96]

70. Thirdly, DEI Bermuda maintains that the Tribunal was not obliged to consider any particular form of evidence (in this case as to the need for government input in forming a stable interpretation) and, in any case, did consider the relevance of government practice.[97] Finally, DEI Bermuda argues that the reasons given for the Tribunal's conclusion that there was a stable interpretation of the MRL in 1996 were not contradictory.[98]

2. Tax Amnesty

(a) Peru's argument

71. Peru submits that it made two arguments to the Tribunal. First, it argued that, by invoking the amnesty procedure, Egenor accepted that the SUNAT assessment was substantively valid and that it did not violate any of Egenor's rights, thus barring any argument by Egenor to the contrary.[99] Secondly, it argued that by invoking the amnesty procedure Egenor waived its rights to challenge the assessment. It disputes DEI Bermuda's suggestion that it did not make this distinction before the Tribunal.[100] It argues, finally, that if Egenor was barred from challenging the assessment so too was DEI Bermuda.

72. Peru argues that the Tribunal failed to address the first argument, regarding what it calls the '*substantive* effect of tax amnesty'.[101] This failure, Peru argues, contributed to the ultimate finding against it and constitutes a failure to state reasons and a manifest excess of powers, as the Tribunal failed to decide an issue put to it.

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[96] Counter-Memorial [276] – [285].
[97] *Ibid* [286] – [290].
[98] *Ibid* [292] – [294].
[99] Memorial [188].
[100] Reply [107].
[101] Memorial [192].

(b) DEI Bermuda's argument

73. DEI Bermuda's first argument is that Peru never presented two arguments – procedural and substantive – to the Tribunal, but simply made one 'monolithic' claim that accepting amnesty prevented the tax debt from being challenged, relying on two bases: the terms of the *Sistema Especial de Actualización y Pago de Deudas Tributarias* ('**SEAP**') itself and the principle of equitable estoppel.[102] DEI Bermuda argues that at no point did Peru distinguish the two alleged arguments.

74. DEI Bermuda's second argument is that, even if the Tribunal had explicitly acknowledged the two separate arguments, it would have made no difference to the outcome. DEI Bermuda suggests that the substantive waiver argument is an attempt to repackage Peru's argument that the DEI Bermuda's claims were 'in fact tax claims'.[103] The Tribunal rejected the suggestion that the claims were for breach of Peruvian tax law in the Decision on Jurisdiction and the Award, and therefore any estoppel in relation to the substance of the assessments was irrelevant, because the claims were founded on a breach of the tax stabilisation guarantee in the LSA, not a breach of Peruvian tax law.[104] DEI Bermuda finally notes that tribunals are not obliged to consider every argument put to them, nor provide reasons for rejecting every argument unless it is necessary to their decision.[105]

*3. Good faith/*actos propios (estoppel)

(a) Peru's argument

75. Peru submits that the Tribunal developed its own test for the application of the obligation of good faith embodied in the Peruvian *actos propios* (estoppel) doctrine.[106] It then concluded that the State had effectively represented that Egenor would be permitted to claim tax benefits under the MRL as a result of the merger

[102] Counter-Memorial [168].

[103] *Ibid* [177].

[104] Award [179].

[105] Counter-Memorial [184], citing *MCI Power Group LC v Ecuador* (Decision on Annulment) ICSID Case No ARB/03/6 (19 October 2009), [67] ; and *Empresas Lucchetti SA (sub nom. Industria Nacional de Alimentos SA) v Peru* (Decision on Annulment) ICSID Case No ARB/03/4 (5 September 2007), [128].

[106] Award [249] – [250].

with Power North, and that the subsequent MRA contradicted that representation.[107]

76. First, Peru argues that the Tribunal failed to provide reasons for its conclusion that DEI Bermuda could 'stand in the shoes' of, and take the benefit of, representations made to Egenor and Dominion.[108] Secondly, the Tribunal did not explain why DEI Bermuda could, in 2001, take the benefit of representations made in 1996 while ignoring contrary representations that had been made in the interim (notably SUNAT's unfavourable opinion in 1999).

77. Peru then argues that the Tribunal failed to apply Peruvian law to determine the content of the *actos propios* doctrine. Instead it applied international law principles when it had already explained that no gap or inconsistency justifying the application of international law existed. Nor did it, in Peru's submission, explain why it ignored Peruvian law or, in particular, why it used international law[109] to adopt the final limb of its test, which effectively reversed the burden of proof on the question of reliance.

78. Peru also argues that the Tribunal failed to state the reasons for which it relied on the statements and actions of certain agencies and officials other than SUNAT, when Peru argued at length that only SUNAT's representations counted.[110] Lastly, Peru argues that the Tribunal never explained how it resolved the contradiction between its finding that Pedro Sánchez Gamarra, the Chairman of Electroperú, never denied receiving instructions from the Peruvian Government, and Peru's claim that he *did* deny receiving such instructions. According to Peru, both of these failures provide a ground for annulment under Article 52(1)(e).

79. Responding to DEI Bermuda's argument that Tribunal's finding on *actos propios* is unreviewable because it was *obiter*, Peru disputes whether the finding was in fact irrelevant to the decision.[111] It argues that if the Tribunal spent more than 20 pages on the issue, it must be relevant. Lastly, if the *ad hoc* Committee annuls the Tribunal's primary findings, then the Tribunal's secondary findings on *actos propios* may in fact determine whether Peru is liable.

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[107] Memorial [244], citing Award [436] – [442].

[108] *Ibid* [247].

[109] Specifically Article 46 of the Vienna Convention of the Law on Treaties, cited at [248] of the Award.

[110] *Ibid* [256] – [258].

[111] Reply [181] – [183].

(b) DEI Bermuda's argument

80. DEI Bermuda argues that the Tribunal's findings on this point were *obiter dicta*, and therefore cannot provide a basis for annulment.[112] The Tribunal made it clear that its findings on the point were distinct from its finding on liability.[113]

4. Damages

(a) Peru's argument

81. The parties each presented expert reports that quantified the effect of the allegedly wrongful MRA: DEI Bermuda a report from Navigant Consulting, and Peru a report from Macroconsult. The Tribunal noted that it found Navigant's report easier to follow, and that Macroconsult's report lacked supporting data that the Tribunal required to properly verify its conclusions.[114]

82. Peru argues that the Tribunal did not explain what data were missing from Macroconsult's report. This failure to provide explanation amounts, according to Peru, to a failure to give reasons and thus provides a ground for annulment under Article 52(1)(e) of the ICSID Convention. Furthermore, it never gave Peru an opportunity to amend the report, and nor did it call Macroconsult's lead expert as a witness to be cross-examined. This, Peru claims, denied it a fair opportunity to put its case in breach of a fundamental rule of procedure, thus providing a ground for annulment under Article 52(1)(d).[115]

(b) DEI Bermuda's argument

83. First, DEI Bermuda maintains that Peru had ample opportunity to present its case, submitting two expert reports, cross-examining DEI Bermuda's witness, making supplemental submissions on damages on 1 June 2007 and devoting seven pages of its Post-Hearing Submission to the question. DEI Bermuda maintains that the Tribunal simply assessed the evidence as Peru acknowledged it was entitled to do

[112] Counter-Memorial [296], citing *Vivendi supra* n 63, [65] and [86].

[113] *Ibid* [297], citing Award [379].

[114] Award [481] – [483].

[115] Memorial [270] – [272]; Reply [185] – [188].

and adequately explained why it rejected Peru's evidence, thus providing reasons. According to DEI Bermuda, Peru essentially expects the Tribunal to have assisted it in making out its case. DEI Bermuda suggests that it is a 'self-evident' proposition that a tribunal has no duty to assist a party in determining what evidence is sufficient to make out its case.[116]

III. THE *AD HOC* COMMITTEE'S ANALYSIS

A The scope of review under Article 52 ICSID Convention

84. Peru seeks annulment of the Decision on Jurisdiction and, in the alternative, a partial annulment of the Award under three heads of Article 52(1) of the ICSID Convention, namely:[117]

> *(b) that the Tribunal has manifestly exceeded its powers;*
>
> *…*
>
> *(d) that there has been a serious departure from a fundamental rule of procedure; or*
>
> *(e) that the award has failed to state the reasons on which it is based.*

85. It is not necessary, for the purposes of this Decision, to restate compendiously all of the principles applicable to the construction of the scope of the powers of an *ad hoc* committee to annul an award under Article 52. The *ad hoc* Committee agrees with the submission made by Peru that Article 52 is to be *'read and applied on its terms in order to maintain the balance struck by the state parties to the ICSID Convention'* and that this is a *'case specific analysis within the framework of Article 52 itself.'*[118] But that is not to say that Article 52 is to be interpreted in a vacuum. On the contrary, the customary international law rules of interpretation (which have consistently been held to be accurately stated and codified in Articles 31 – 32 of the

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[116] Counter-Memorial [303] – [310]; citing *Wena Hotels Ltd v Egypt* (Decision on Annulment) (2002) 6 ICSID Rep 129, [72].

[117] *Supra* [10] – [11].

[118] Transcript, Day 1, 120/17-20, 122/1-3.

Vienna Convention on the Law of Treaties 1969[119]) are as applicable to Article 52 of the ICSID Convention as they are to other treaty obligations.

86. Article 31(1) of the Vienna Convention sets the application of ordinary meaning within a larger matrix of good faith, context (as more particularly defined in Article 31(2)) and object and purpose, in providing that:

> *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.*

87. To this central exercise, Article 31(3) adds other matters to be taken into account. These include *'any relevant rules of international law applicable in the relations between the parties '*(Article 31(3)(c)), a reference which itself denotes all applicable sources of international law, including general principles of law.[120] Article 31(4) further permits a special meaning to be ascribed to a term if it is established that the parties so intended. Article 32 then also permits reference to the *travaux préparatoires* of the ICSID Convention in order to confirm a meaning arrived at by applying Article 31 or to determine the meaning when the application of Article 31 leaves the meaning ambiguous or obscure or manifestly absurd or unreasonable.

88. In carrying out this task of interpretation, an *ad hoc* committee may legitimately refer to decisions of other annulment committees, not because they are formally binding on it (which they are not); nor to determine whether, and to what extent, there may exist some trend of decisions. Rather, the decisions of other committees may help to illuminate specific aspects of the interpretative process which the Committee is charged to undertake, just as, in appropriate cases, reference to wider sources of jurisprudence may help to determine the existence of a general principle of law applicable to the interpretation of the content of Article 52, or indeed other relevant provisions of the Convention.

89. The analysis of any particular tribunal decision or award which an annulment committee is required to carry out under Article 52(1) must perforce be case-specific, since the committee's task is to review the conduct of a particular tribunal: its constitution; its powers; the conduct of its members; its procedure and the

[119] Vienna Convention on the Law of Treaties ('Vienna Convention') (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, [41]; *Mondev International Ltd v United States of America* (Award) 6 ICSID Rep 192, [43].

[120] Article 38(1)(c) Statute of the International Court of Justice.

reasons given in its award. But this is not, of course, to say (and Peru does not contend otherwise) that the Committee may consider the objections taken by a party to the decision or award of a tribunal in isolation from the grounds specified in Article 52(1). To do so would amount to an appeal – a remedy which the Contracting States decided by Article 53(1) should not be available. Thus, where a party objects to any particular aspect of a tribunal's process or decision, it must relate that objection to a specific ground for annulment under Article 52(1), explaining how and why the objection falls within the specific ground invoked.

90. In the present case, two further general observations are germane: (a) as to the relationship between the various grounds of annulment under Article 52(1); and (b) as to the requirement of manifest excess of powers under Article 52(1)(b).

91. Peru bases its Application for Annulment compendiously on Articles 52(1)(b), (d) and (e). As set out in more detail in Part II of this Decision, Peru often invokes all three heads of Article 52(1) in relation to the same subject-matter. This practice is entirely permissible within the framework of Article 52(1), which permits a party to request annulment *'on one or more of the following grounds.'* It has been a frequent feature of ICSID annulment applications to submit that one and the same aspect of an award constitutes a manifest excess of powers, a serious departure from a fundamental rule of procedure and a failure to state reasons.[121]

92. However, Article 52(1) is carefully divided into separate clauses, each dealing with a separate ground for annulment. Reference to the *travaux préparatoires* confirms that the framers of the Convention took particular care to avoid any elision of different concepts in drafting Article 52, separating, for example, the ground in clause (e) from clause (d).[122] Each of the grounds identified by the Contracting States in Article 52 as sufficient for the annulment of an award has a different object and purpose. Thus, an assessment of whether the scope of the powers conferred upon a tribunal has been exceeded involves quite different considerations to whether, in the exercise of those powers, it has failed to observe a fundamental rule of procedure. So, too, an examination of the procedure adopted by the tribunal involves distinct considerations to an analysis of its statement of reasons for a decision or award. While, therefore, the possibility that the same aspect of an

[121] Schreuer et al *The ICSID Convention: A Commentary* (2ed, 2009) 933.

[122] *History of the Convention*, Documents Concerning the Origin and the Formulation of the Convention (*'History'*) Vol I, 230, 232.

award may constitute several grounds for annulment under Article 52 cannot be excluded, if a party wishes to advance such a case, it must identify separately how the very different considerations involved in each of these enquiries are nevertheless provoked by the same aspect of an impugned award.

93. In its Application for Annulment of the Decision on Jurisdiction, Peru (whilst referring in addition to Articles 52(1)(d) & (e)) places the primary emphasis of its complaint on manifest excess of powers under Article 52(1)(b). Peru also relies on Article 52(1)(b), together with clauses (d) & (e), in its application for Partial Annulment of the Award.

94. Article 52(1)(b) plays an important role in the control of awards under the annulment process, since it is directly related to principle of mutual consent which, as is expressly recognised in the Preamble to the ICSID Convention and in the Report of the Directors of the World Bank on it, is fundamental to the operation of the obligations assumed under the Convention and to the jurisdiction of the Centre.[123]

95. The question whether an ICSID arbitral tribunal has exceeded its powers is determined by reference to the agreement of the parties. It is that agreement or *compromis* from which the tribunal's powers flow, and which accordingly determines the extent of those powers. In the case of a claim under an investment agreement, the powers of the tribunal are determined by reference to the arbitration agreement included in or in respect of the investment agreement and by the ICSID Convention (which the agreement to arbitrate incorporates by reference). Read together, these two elements constitute the arbitration agreement and therefore prescribe the parameters of the tribunal's powers.[124] As the International Law Commission put it in formulating its seminal Draft Rules on Arbitral Procedure from which Article 52 was derived, an excess of powers: [125]

> *…is a question which is to be answered by a careful comparison of the award or other contested action by the tribunal with the relevant provisions of the* compromis*. A departure from the terms of*

[123] Preamble to the ICSID Convention, recitals (6) & (7); Report of the Executive Directors, [23] – [25], which begins: *'Consent of the parties is the cornerstone of the jurisdiction of the Centre.'*

[124] Accord Schreuer *supra* n 121, 938.

[125] International Law Commission, 'Commentary on the Draft Convention on Arbitral Procedure' UN Doc A/CN.4/92, 108.

submission or excess of jurisdiction should be clear and substantial and not doubtful and frivolous.

96. The concept of the 'powers' of a tribunal goes further than its jurisdiction, and refers to the scope of the task which the parties have charged the tribunal to perform in discharge of its mandate, and the manner in which the parties have agreed that task is to be performed. That is why, for example, a failure to apply the law chosen by the parties to the determination of the dispute (but not a misapplication of it) was accepted by the Contracting States of the ICSID Convention to be an excess of powers,[126] a point also accepted by other annulment committees.[127] In considering annulment on this basis, it is necessary to bear in mind the point made on annulment in *Wena* that:[128]

> *The Committee is mindful of the views expressed in* Klöckner I, Amco I *and* MINE *to the effect that the failure to apply the proper law may constitute a manifest excess of power and a ground for annulment. It is also mindful of the distinction between failure to apply the proper law and the error* in judicando *drawn in* Klöckner I*, and the consequential need to avoid the reopening of the merits in proceedings that would turn annulment into appeal.*

97. Further, a failure to decide a question entrusted to the tribunal and requiring its decision may also constitute an excess of powers, since the tribunal has also in that event failed to fulfil the mandate entrusted to it by virtue of the parties' agreement.[129]

98. An *ad hoc* committee must also be satisfied that the tribunal's excess of powers is manifest.[130] As the committee in *MCI* put it, Article 52(1)(b) *'suggests a somewhat*

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[126] *History* Vol II, Part 1, 518.

[127] *E.g. Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) (Decision on Annulment), June 5, 2007, ('*Soufraki v UAE'*), [85].

[128] *Wena supra* n 116, [22].

[129] *Ibid* paragraph 44; *Vivendi v Argentina supra* n 63, [86].

[130] *Wena supra* n 128, [25]. See also *CDC Group PLC v Republic of the Seychelles* (Decision on Annulment) (2005), 11 ICSID Rep 237, [41]; *Maritime International Nominees Establishment (MINE) v Guinea* (Decision on

higher degree of proof than a searching analysis of the findings of the Tribunal.'[131] No distinction is to be drawn in this regard between the standard to be applied to determining an excess of power based on an alleged excess of jurisdiction and any other excess of power. In both cases, the excess must be manifest.[132]

99. An *ad hoc* committee will not therefore annul an award if the tribunal's disposition on a question of law is tenable, even if the committee considers that it is incorrect as a matter of law.[133] The existence of a manifest excess of powers can only be assessed by an *ad hoc* committee in consideration of the factual and legal elements upon which the arbitral tribunal founded its decision and/or award based on the parties' submissions. Without reopening debates on questions of fact, a committee can take into account the facts of the case as they were in the record before the tribunal to check whether it could come to its solution, however debatable. Is the opinion of the tribunal so untenable that it cannot be supported by reasonable arguments? A debatable solution is not amenable to annulment, since the excess of powers would not then be 'manifest.'

100. The Committee will have to return to the standard under Article 52(1)(b) in more detail when it comes to apply it to the facts of the present case. But it is first necessary to summarise the essential elements of the Tribunal's Decision on Jurisdiction. This, to adopt the language of the International Law Commission, is the first contested action of the Tribunal, which must then be compared with the relevant provisions of the *compromis* and then tested against the requirement of manifestness.

Annulment) (1989) 4 ICSID Rep 79, [4.06]; *Mitchell v. The Democratic Republic of Congo*, (Decision on Annulment) ICSID Case No. ARB/99/7 (1 November 2006), [20].

[131] *Supra n* 105, [49].

[132] *Rumeli Telekom A/S v Kazakhstan* (Decision on Annulment) ICSID Case No ARB/05/16 (25 March 2010), [96].

[133] *Klöckner Industrie-Anlagen GmbH and others v Republic of Cameroon* Case No. ARB/81/2, (Decision on Annulment) (1985) 2 ICSID Rep 95, [52]; and see, to like effect, *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* ICJ Rep. 1991, 53, [47]–[48]; *Government of Sudan v Sudan People's Liberation Movement/ Army (the 'Abyei' arbitration)* (PCA, 22 July 2009), [508]–[510], followed in *Rumeli ibid*.

B Decision on Jurisdiction

1. The Tribunal's Approach

(a) Procedure

101. The Tribunal established the following procedure for dealing with Peru's objections to the Tribunal's jurisdiction and admissibility of claims:

(a) At its first session held on July 28, 2004, the Tribunal decided to suspend proceedings on the merits pursuant to ICSID Arbitration Rule 41(3) and to bifurcate the proceedings. It invited each party to plead the questions of jurisdiction and admissibility, stating that it would decide at a later stage whether to deal with these objections as a preliminary question or join them to the merits of the dispute.[134]

(b) The parties submitted respectively a Memorial, Counter-Memorial, Reply and Rejoinder on Jurisdiction and Admissibility.[135]

(c) The Tribunal held a hearing on jurisdiction at the seat of the Centre in Washington on March 29-30, 2005. At the hearing, the Tribunal heard oral pleading on behalf of both parties. Further, and following the Tribunal's request, the Tribunal heard evidence of one witness nominated by each party on the history of the negotiations between the parties in connection with the issues relevant to jurisdiction.[136]

(d) Following deliberations, the Tribunal delivered its Decision on Jurisdiction on February 1, 2006. It unanimously decided that:

> *The dispute submitted by DEI Bermuda is within the jurisdiction of the Centre and the competence of the Tribunal.*[137]

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[134] Decision on Jurisdiction, [10].

[135] *Ibid* [11] – [12]. Each of these pleadings is exhibited in the record of these annulment proceedings.

[136] *Ibid* [20] – [21].

[137] *Ibid Dispositif,* [168]. Peru's objections to admissibility were joined to the merits.

(b) Reasons

102. The Tribunal began its analysis of the issues of jurisdiction by setting out the factual background, observing in summary that:[138]

(a) LSAs were provided for within the legislative framework adopted by Peru in the early 1990s, which was designed to attract and promote investment.[139] Such LSAs had a distinct juridical character within the Peruvian legal system, being governed by the Civil Code and not subject to unilateral modification by the State.[140]

(b) Egenor was established by Peru to hold state-owned energy generating assets which were to be privatised. Initially, a controlling interest in Egenor was acquired by Dominion Energy Inc (**'Dominion'**). However, in 1999, Duke Energy set about acquiring Egenor through a series of transactions, which led, by the end of that year, to it owning some 90% of Egenor for which it had paid US$288 million.[141] On December 18, 2002, Duke Energy, through DEI Bermuda, made a US$200 million capital contribution to DEI Peru Holdings, which used the funds to acquire the interests already held by other Duke companies in Egenor.[142]

(c) Peru had entered into LSAs with each of Egenor, Dominion, and Dominion's locally-incorporated wholly-owned subsidiary.[143] The Dominion LSA, but none of the other LSAs, included an ICSID arbitration agreement.

(d) Duke Energy *'sought to obtain the same investment protection, through LSAs, as Dominion had obtained.'*[144] This could not be done through assignment of the Dominion LSA. The parties therefore explored alternative structures to achieve the same result that would have been achieved, if the Dominion LSA had been assignable.[145] Duke Energy's proposal, submitted in February 2000, involved an application for a DEI Bermuda LSA, which

[138] *Ibid* Part II.
[139] *Ibid* [24] – [27].
[140] *Ibid* [28] – [31].
[141] *Ibid* [32] – [40].
[142] *Ibid* [45].
[143] *Ibid* [46] – [49].
[144] *Ibid* [50].
[145] *Ibid* [54].

application was made on June 20, 2000. Peru provided a draft of this on April 3, 2001. Duke Energy requested the inclusion of an ICSID arbitration agreement. The DEI Bermuda LSA was finally executed on July 24, 2001, effective immediately. It included an ICSID arbitration agreement in exactly the same terms as the Dominion LSA.[146]

103. The Tribunal then dealt with each of Peru's objections to jurisdiction, *ratione materiae, ratione personae,* and *ratione temporis,* in turn.

104. Dealing with jurisdiction *ratione materiae,* the Tribunal approached the question on the basis that the arbitration agreement was to be interpreted in good faith, without adopting an *a priori* strict or broad construction.[147] The parties had agreed by clause 9 of the DEI Bermuda LSA to submit to arbitration *'any dispute, controversy or claim between them, concerning the interpretation, performance or validity of this Agreement.'* Accordingly, the Tribunal interpreted its task as being to determine whether the dispute before it did indeed concern those matters.[148]

105. The Tribunal turned to the Claimant's Request for Arbitration to determine the scope of the dispute. It enumerated the claims of DEI Bermuda as follows: [149]

> *1. breach of the guarantee of non-discrimination and equal treatment of DEI Bermuda's investment in Peru, in violation of Clause Three, Section 5 of the DEI Bermuda LSA;*
>
> *2. breach of the guarantee of tax stabilization with respect to DEI Bermuda's investment in Peru, in violation of Clause Three, Section I of the DEI Bermuda LSA;*
>
> *3. breach of the guarantee regarding the free repatriation of DEI Bermuda's investment in Peru, in violation of Clause Three, Section 3 of the DEI Bermuda LSA; and*
>
> *4. breach of the obligation of good faith and fair dealing and the* Doctrina de los actos propios *in connection with DEI Bermuda's investment in Peru,*

[146] *Ibid* [55] – [58].

[147] *Ibid* [76] – [78], citing *Société Ouest Africaine des Bétons Industriels v Senegal* (Award) (1988) 2 ICSID Rep 164, [4.10] and *Amco Asia Corp v Indonesia* (Decision on Jurisdiction) (1983) 1 ICSID Rep 389, 394, [14].

[148] *Ibid* [82].

[149] *Ibid* [83], citing Request for Arbitration [42] – [56].

obligations that are implied under the Peruvian Civil Code *in all contracts, and here specifically in the DEI Bermuda LSA*.

106. The Tribunal then set out the terms of Clauses Two and Three of the DEI Bermuda LSA. By Clause Three, Peru makes a number of specific guarantees of legal stability for DEI Bermuda *'in connection with the investment referred to in CLAUSE TWO.'* Clause Two describes DEI Bermuda's obligation as being to make capital contributions to DEI Peru in the amount of US$200 million.[150]

107. Observing that it must not prejudge the merits of the claim, the Tribunal held that it task was *'simply [to] examine whether the merits dispute, as stated by Claimant, is within its jurisdiction.'*[151] Citing prior ICSID jurisprudence, the Tribunal considered that it was only required to be satisfied that *'*prima facie *the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.'*[152]

108. Holding, contrary to Peru's submission, that such a *prima facie* case had been established, the Tribunal found that the merits of the claims under Clause 3 (and under Peruvian law) were not to be limited by a literal reading of Clause 2 which would restrict its application to DEI Bermuda's US$200 million capital investment in DEI Peru.[153] This was so for four reasons:[154]

> *1. the capital contribution, without more, would not appear to satisfy the requirement, under Peruvian law, that an "investment" in relation to which an LSA is granted contribute to economically productive activity (i.e., that it be an "active" investment);*
>
> *2. the capital contribution was not an isolated transaction, but was rather one of many transactions deliberately concluded as part of the privatization of Egenor;*
>
> *3. a narrow focus on the wording of Clause Two of the DEI Bermuda LSA as an indication of the "investment" elevates form over substance, by ignoring the purpose of the capital contribution, which was described in the*

[150] *Ibid* [85].

[151] *Ibid* [86].

[152] *Ibid* [87], citing *Amco Asia supra* n 147, 405, [38].

[153] *Ibid* [88] – [92].

[154] *Ibid* [92].

application DEI Bermuda submitted for the DEI Bermuda LSA referred to in Clause One thereof; and

4. in determining their jurisdiction, ICSID tribunals have recognized the unity of an investment even when that investment involves complex arrangements expressed in a number of successive and legally distinct agreements.

109. The Tribunal then proceeded to develop each of these four reasons in detail.[155] But it concluded its analysis by observing that the fact that the Tribunal was entitled to take into consideration the overall investment did not affect the scope of the claims which could be permissibly advanced:[156]

> *Claimant will need to substantiate its claims, during the merits phase, by reference solely to the guarantees contained in the DEI Bermuda LSA, and not those contained in any of the other LSAs. This is a function of the specific wording of Clause Nine of the DEI Bermuda LSA, and of the legal basis of the Claimant's claims as formulated in the Request for Arbitration, namely the alleged breach of the protections contained in the DEI Bermuda LSA, and not in any of the other LSAs.*

110. Dealing with jurisdiction *ratione personae,* the Tribunal decided that Peru's objections in this regard, *i.e.* that the claims were those of Egenor or other entities who had not submitted to ICSID arbitration, were in reality subject-matter objections to the Tribunal's jurisdiction. There was no doubt that the Tribunal had jurisdiction *ratione personae* in respect of a dispute between DEI Bermuda and Peru and the objections relating to subject-matter had already been dealt with.[157]

111. Finally, the Tribunal turned to jurisdiction *ratione temporis.* Peru had contended that the claims were outside the Tribunal's jurisdiction because they were addressed to matters arising before the DEI Bermuda LSA entered into force on July 24, 2001, being concerned in particular with Egenor's tax liability for the tax years 1996 to 1999.[158] DEI Bermuda argued that the relevant time decisive of the Tribunal's jurisdiction was when the parties' legal dispute arose.

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[155] *Ibid* [94] – [134].

[156] *Ibid* [132].

[157] *Ibid* [136] – [138].

[158] *Ibid* [146].

112. The Tribunal decided that *'[w]hat is decisive of the Tribunal's jurisdiction* ratione temporis *is the point in time at which the instant legal dispute between the parties arose, not the point in time during which the factual matters on which the dispute is based took place.'*[159]

113. It then explained:[160]

> *Here, the legal dispute arose only after the Respondent imposed the Tax Assessment on DEI Egenor, on November 22, 2001, several months after the effective date of the DEI Bermuda LSA. It was in the Tax Assessment, and not before, that SUNAT decreed a tax liability of approximately US$48 million against DEI Egenor for what SUNAT determined, at that time, were tax underpayments in 1996 through 1999.*
>
> *Naturally, during the merits phase, the Tribunal will have full jurisdiction to consider all of the factual matters related to the dispute, including those that preceded the effective date of the DEI Bermuda LSA, for the purposes of determining whether the Respondent violated the DEI Bermuda LSA through conduct which took place or reached its "consummation point" after its entry into force (i.e., the Tax Assessment).*

114. Having determined in this Decision that the dispute was within its jurisdiction, the Tribunal then proceeded to the merits of the claim, and did not revisit the jurisdictional issues in its Award.

2. The character of the Decision on Jurisdiction

115. Before proceeding to consider *seriatim* each of Peru's arguments that, in assuming jurisdiction, the Tribunal has manifestly exceeded its powers, it is necessary to consider at the outset the character of the Tribunal's Decision on Jurisdiction, which the Committee is called upon to annul. This occasioned some discussion at the annulment hearing in response to a question from the Committee.[161] It is important

[159] *Ibid* [148], citing *Maffezini v Spain* (Decision on Jurisdiction) (2000) 5 ICSID Rep 387, [95].
[160] *Ibid* [149] – [150], citing *Técnicas Medioambientales Tecmed SA v Mexico* (Award) (2004) 43 ILM 133, [66].
[161] Transcript, Day 2, 336-342 (Peru); 453/19-454/14 (DEI Bermuda).

to be clear about the matter, since the manner in which the Tribunal exercised its powers necessarily impacts upon the Committee's review.

116. As noted above,[162] the Tribunal proceeded on the basis that its task was *'simply [to] examine whether the merits dispute, as stated by Claimant, is within its jurisdiction.'*[163] The Tribunal, referring to prior ICSID case-law and to Peru's Reply, characterised this as a requirement to establish a 'prima facie *case'*.[164] It found that:[165]

> *Claimant has made a* prima facie *case that the dispute falls within its jurisdiction, in the sense that the claims stated in the Request for Arbitration are capable of constituting a breach of the DEI Bermuda LSA.*

But it nevertheless held in its *dispositif* that the dispute *'is within the jurisdiction of the Centre and the competence of the Tribunal.'*[166]

117. It has become common-place in ICSID jurisprudence for tribunals to invoke a so-called *'prima facie* standard' as applicable to jurisdictional challenges,[167] and to support their analysis by reference to the decisions of other international tribunals, including the International Court of Justice.[168] But this expression is apt to mislead, since it is in reality a short-hand for two quite distinct aspects of the jurisdictional enquiry, particularly as it relates to the determination of jurisdiction *ratione materiae,* only the first of which imports a *prima facie* qualification.

118. First, since – as the Tribunal here correctly observed – it *'must not in any way prejudge the merits of the case',*[169] an arbitral tribunal must, for the purpose of its jurisdictional determination, presume the facts which found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation). In that sense, its determination may be said to be *prima facie.* But, second, in the application of those presumed facts to the legal question of

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[162] *Supra* [107].

[163] Decision on Jurisdiction, [86].

[164] *Ibid* [87] – [88].

[165] *Ibid* [90].

[166] *Ibid* [168].

[167] Sheppard "The jurisdictional threshold of a prima-facie case" in Muchlinski et al *The Oxford Handbook of International Investment Law* (2009) 932.

[168] Notably in *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) [1996] ICJ Rep 803.

[169] Decision on Jurisdiction, [86].

jurisdiction before it, the tribunal must objectively characterise those facts in order to determine finally whether they fall within or outside the scope of the parties' consent. In making this determination, the tribunal may not simply adopt the claimant's characterisation without examination. In this way, a tribunal whose jurisdiction is contested strikes the balance between avoiding pre-judging the merits, on the one hand, and objectively determining the question of jurisdiction on the other.

119. That an objective and final determination must be made was a central element in the reasoning of the International Court of Justice in *Oil Platforms* when it observed:[170]

> *[T]he Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction* ratione materiae *to entertain, pursuant to Article XXI, paragraph 2.*

120. The distinction here drawn was well elucidated by Judge Higgins in her Separate Opinion, when she said:[171]

> *Where the Court has to decide, on the basis of a treaty whose application and interpretation is contested, whether it has jurisdiction, that decision must be definitive….It does not suffice, in the making of this definitive decision, for the Court to decide that it has heard claims relating to the various articles that are "arguable questions" or that are "bona fide questions of interpretation"….*
>
> *The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept* pro tem *the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes – that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.*

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[170] *Supra n* 168*,* [16].

[171] *Ibid,* Higgins Separate Opinion, [31].

121. The same distinction was made in the investment arbitration context by the Tribunal in *UPS v Canada* when it held:[172]

> *[The Tribunal] must conduct a* prima facie *analysis of the NAFTA obligations, which UPS seeks to invoke, and determine whether the facts as alleged are capable of constituting a violation of these obligations.*
>
> *That formulation rightly makes it plain that a claimant party's mere assertion that a dispute is within the Tribunal's jurisdiction is not conclusive.*
>
> *….*
>
> *The test is of course provisional in the sense that the facts alleged have still to be established at the merits stage. But any ruling about the legal meaning of the jurisdictional provision, for instance about its outer limits, is binding on the parties.*

122. Precisely this distinction was accepted by both parties in their submissions before this Committee.[173] Moreover, irrespective of the short-hand expression used in paragraph 90 of its Decision on Jurisdiction, the Committee is in no doubt that this is in fact the basis on which the Tribunal actually proceeded. Without making any final finding about the merits of the factual claims advanced by DEI Bermuda, the Tribunal made an objective determination of the question whether those facts, as alleged, were capable of falling within the parameters of the Tribunal's jurisdiction. It was neither required to, nor did, revisit those issues at any subsequent stage in the proceedings.

123. Thus, for the purpose of this Committee's review on annulment, it is entitled to and does proceed on the basis that it has before it, in the Decision on Jurisdiction, the Tribunal's definitive determination of the legal questions relating to the its jurisdiction. With that in mind, it is now possible to consider whether in confirming its jurisdiction in the way that it did, the Tribunal manifestly exceeded its powers.

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[172] *United Parcel Service of America Inc v Canada* (Award on Jurisdiction) (2002) 7 ICSID Rep 285, 296-7; and see, to like effect: *Continental Casualty Co v Argentina* (Decision on Jurisdiction) ICSID Case No ARB/03/9 (2006), [60] – [64]; accord Douglas *The International Law of Investment Claims* (2009) Rules 27 & 28, [502] – [527].

[173] Transcript, Day 2, 336-342 (Peru), 453/19 - 454/14 (DEI Bermuda).

3. ***Jurisdiction*** **ratione materiae**

(a) Manifest excess of powers

124. Peru contends, in applying for annulment, that the Tribunal did manifestly exceed its powers in asserting jurisdiction *ratione materiae* in two principal respects: (i) in failing to apply the applicable law to the determination of the scope of the parties' arbitration agreement; and (ii) in taking an approach to the meaning of the DEI Bermuda LSA which manifestly exceeded its scope.[174] Peru contends, in short, that the Tribunal was bound, but failed, to apply solely Peruvian law to the scope of its jurisdiction *ratione materiae* and that, had it done so, it would have been bound to adopt a literal construction of the DEI Bermuda LSA which would have excluded the Claimant's claims.

(i) Application of the applicable law

125. Peru's objection based on the Tribunal's alleged failure to apply the applicable law to the determination of its jurisdiction *ratione materiae* arises in a particular context, which distinguishes this case in at least two respects from many other challenges based on this ground: (i) as to the issue to which the question of applicable law applies; and (ii) as to the source of the parties' consent to ICSID arbitration.

126. In the first place, the Tribunal was seized of an issue of jurisdiction and not of substance. When a Tribunal has failed to apply the law chosen by the parties to the merits of the dispute, it may exceed its powers because it is not determining the dispute in accordance with the mandate entrusted to it by the parties. The same may be the case where the parties have not expressly chosen the applicable law, since, in that event, Article 42(1) of the ICSID Convention (which describes one of the 'Powers and Functions of the Tribunal') applies to mandate the approach to be taken by the tribunal to determination of the applicable law.

[174] *Supra* [31] – [36].

127. Some argument in the present case was devoted to the proper construction of Article 42(1),[175] but, as Peru rightly accepted in the course of the annulment hearing, Article 42 does not apply to a determination of jurisdiction.[176] It is concerned with the Tribunal's decision on the substantive dispute between the parties. Thus, *ad hoc* committees as well as tribunals have confirmed that *'the jurisdiction of the Centre is determined not by Article 42(1) of the ICSID Convention but by Article 25.'*[177]

128. Article 25(1) of the ICSID Convention provides, in relevant part:

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*

Thus, the critical question for the extent of the Tribunal's jurisdiction in the present case was simply whether the dispute was one which the parties had consented in writing to submit to the Centre.

129. The parties' consent to the jurisdiction of the Centre in the present case is founded upon an arbitration agreement between the parties, which is contained in an investment agreement, namely the DEI Bermuda LSA. It is not founded upon a state's unilateral offer of arbitration contained in a bilateral investment treaty, which is accepted by the investor in writing. Submission to ICSID jurisdiction by consent contained in treaties has, in recent years, become more common than submission pursuant to contract. But when the ICSID Convention was formulated, the Convention's framers envisaged that the first basis for consent to the jurisdiction of the Centre would be by contract between the host state and the investor.[178]

130. In the present case, the arbitration agreement is contained in Clause Nine of the DEI Bermuda LSA, which provides:

> *It being the intention of both parties that problems arising in connection with the enforcement of this agreement be resolved as expeditiously as*

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[175] Memorial [122]; Reply [82]; Transcript, Day 1, 36.

[176] Transcript, Day 2, 461/10 – 462/3.

[177] *CMS Gas Transmission Co v Argentina* (Decision on Annulment) ICSID Case No ARB/01/8 (September 25, 2007), [68] and see also *MCI supra* n 105, [40]. For the confirmation of this approach at the Tribunal stage see: *Southern Pacific Properties (Middle East) Ltd v Egypt* (*'SPP v Egypt'*) (Decision on Jurisdiction No 2) (1988) 3 ICSID Rep 131, and the further decisions cited in Schreuer *supra* n 121, 550-2.

[178] Report of the Executive Directors, [24], and see Broches (1972) 136 *Recueil des Cours* 331, 335.

possible, the parties agree hereinafter that any dispute, controversy or claim between them, relative to the interpretation, performance or validity of this Agreement, shall be submitted to the International Centre for the Settlement of Investment Disputes to be resolved by de jure international arbitration, pursuant to the Conciliation and Arbitration Rules set forth in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States which was approved by Peru pursuant to Legislative Resolution N. 26210.

The costs incurred in connection with the application of this clause shall be shared by both parties in equal parts.

131. The separability of an arbitration agreement from the contract of which it forms part is a general principle of international arbitration law today.[179] This principle is notably enshrined at Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration, which provides:

> *The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail* ipso jure *the invalidity of the arbitration clause.*

This principle has been recognised in Peruvian arbitration law, as part of its adoption of the Model Law.[180]

132. One of the consequences of the independence of the arbitration agreement is that the law governing the arbitration agreement is also independent of the law which governs the main contract, so that the arbitration agreement may be governed by a

[179] Born *International Commercial Arbitration* (2009) 311-353; Collins et al *Dicey, Morris & Collins on the Conflict of Laws* (14th edn, 2006) [16-011]; Gaillard & Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), [388] – [419]; Poudret & Besson *Comparative Law of International Arbitration* (2nd ed, trans Berti & Ponti, 2007) , [162] – [179]; *Plama Consortium Ltd v Bulgaria* (Decision on Jurisdiction) (2005) 20 ICSID Rev-FILJ 262, [212].

[180] Article 106 General Law on Arbitration of January 3, 1996 No 26572.

different law to that which governs the main contract.[181] Peru accepts in argument that this is possible in principle. But it submits that it was not the case here.[182]

133. In the present case, both parties accept that the main contract, the DEI Bermuda LSA, is governed by Peruvian law.[183] Clause One of the DEI Bermuda LSA mentions that the LSA is executed *'in accordance with the provisions set forth in Legislative Decree No. 662, in Title II and in the first chapter of Title V of Legislative Decree No 757*'. According to Article 39 in Title V of Legislative Decree no 757:

> *Legal stability agreements are entered into pursuant to Article 1357 of the Civil Code and have the nature of law-contracts with the force of law, so that they cannot be unilaterally modified or revoked by the Government. Such contracts are civil and not administrative in nature, and may only be modified or revoked by agreement between the parties.*

134. The Tribunal found as much, when it held:[184]

> *Under Peruvian law, the* Civil Code *provisions governing private contracts in general are also applicable to LSAs and, as such, these agreements are subject to the principles of* Contrato-Ley, *as set forth in Article 1357 of the 1984* Civil Code.
>
> ….
>
> *As private-law contracts, the negotiation, execution, interpretation and enforcement of the provisions set forth in LSAs are subject to the general principles applicable to contracts between private parties under the Peruvian* Civil Code*. As such, the fundamental rights granted by Peru pursuant to an LSA are private contractual rights that are enforceable against the Sate as if it were a private party*.

135. Further, both parties accepted at the annulment hearing that, in interpreting the scope of the instrument of consent, namely Clause Nine of the DEI Bermuda LSA, the Tribunal was entitled, as it did, to refer to the substantive clauses of the main

[181] Born *supra* n 179*,* 354-357; Collins et al *ibid,* [16-012] ff.

[182] Transcript, Day 2, 460/17-22.

[183] Transcript, Day 1, 29/6-38, 220-222.

[184] Decision on Jurisdiction, [28],[31].

contract (Clauses Two & Three), which define the scope of the agreement and also the nature of the investment.[185]

136. However, the parties differ in their view of the law applicable to the arbitration agreement. Peru submits that it is governed by Peruvian law alone, and specifically Peruvian contract law.[186] International law has no role to play in the interpretation of any part of the DEI Bermuda LSA, including Clause Nine. Peru continues:[187]

> *International law is relevant, if at all, to the process only of determining whether Claimant's dispute also meets the additional specific jurisdictional elements of Article 25 of the ICSID Convention. In other words, does the investor have the proper nationality? Is there an investment? ... International law applies to the interpretation of the ICSID Convention, not to the LSA ...*

137. On this basis, Peru submits that the Tribunal committed a manifest excess of powers by failing to apply Peruvian law – specifically Peruvian contract law – to the determination of the scope of the parties' arbitration agreement.[188] Without any suggestion that Peruvian law was inadequate to interpret the DEI Bermuda LSA, Peru submits that the Tribunal turned instead to international law and also invoked ICSID jurisprudence in order to justify its departure from the plain meaning of Clauses Two and Three.[189]

138. By contrast, DEI Bermuda submits that both Peruvian law and international law are applicable to the arbitration agreement. More precisely, it states:[190]

> *[T]he Tribunal has to determine its jurisdiction in an ICSID arbitration with reference to international law for purposes of construing the requirements under the ICSID Convention. And when it is interpreting the instrument of consent and specifically that part of the DEI Bermuda LSA which contains that consent, reference must be made to international law and Peruvian law.*

139. In a case where, as here, the parties have not expressly chosen a specific law to govern their arbitration agreement, but have instead consented to submit disputes relative to the interpretation of an investment agreement (itself governed by host

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[185] Peru: Reply [72] – [79]; DEI Bermuda: Transcript, Day 1, 226/7 – 227/19.

[186] Transcript, Day 2, 456/14-459/5.

[187] Transcript, Day 2, 313/20-314/10.

[188] Reply [72], Transcript, Day 1, 29/6 – 38/1.

[189] *Ibid* [82] – [90].

[190] Transcript, Day 1, 225/21 – 226/6.

state law) to international arbitration pursuant to the ICSID Convention (an instrument of international law), the *ad hoc* Committee takes the view that it would be artificial and incorrect to refer solely to the law applicable to the main agreement to determine the scope of the arbitration agreement.

140. The central question, which is posed by Article 25 of the ICSID Convention itself, is the extent of the parties' *consent.* This question is to be addressed, as the Tribunal correctly observed,[191] in the light of the general principles enunciated in *Amco Asia Corp v Indonesia* (a case where the Centre's jurisdiction was founded on an investment application, which had been accepted by the host state). The Tribunal held: [192]

> *[A] convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle* pacta sunt servanda, *a principle common indeed to all legal systems of internal law and to international law. Moreover – and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.*

141. In addressing this question of consent under Article 25, a tribunal is not bound to apply host state law, even in a case where the parties' consent derives from or relates to an agreement under host state law. Thus, in *SPP v Egypt,*[193] the source of the state's consent was a provision in its investment law. Egypt submitted that the jurisdictional issues were governed by Egyptian law, and that, pursuant to the Egyptian Civil Code, no effective arbitration agreement had been concluded. This submission was rejected by a Tribunal presided by Jiménez de Aréchaga. It applied instead general principles of interpretation and international law to the question of

[191] Decision on Jurisdiction, [76] – [78].

[192] (Decision on Jurisdiction) (1983) 1 ICSID Rep 394, [14].

[193] *SPP v Egypt supra* n 177, [55] – [61].

consent. In *CSOB v Slovakia,* the Tribunal's jurisdiction was derived from a contract. The Tribunal held nevertheless, citing *Amco* with approval, that:[194]

> *The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the* ICSID *Convention.*

142. Thus, an ICSID tribunal determining its jurisdiction is not required to interpret the instrument of consent according solely to national law, but rather it is to consider directly whether there is the requisite evidence of consent required by Article 25(1) of the ICSID Convention, having regard to the common will of the parties on which arbitration is grounded and the general principle (widely applied in municipal law as well as in international law) of good faith.

143. Having carefully reviewed the Decision on Jurisdiction in the present case, the *ad hoc* Committee is in no doubt that this is exactly what the Tribunal proceeded to do. In carrying out its task, the Tribunal did not ignore Peruvian law. On the contrary, the first reason it advanced for its construction of the scope of consent is *'Peru's Requirement that an Investment Contract Contribute to Economically Productive Activity.'* The Tribunal's reasoning on this point is supported by specific reference to Peru's Foreign Investment Law and to Article 1357 of the Peruvian Civil Code, which it records expressly provides that an LSA can be established only when *'supported by reasons of social, national or public interest*.'[195] Further, its discussion of the relevance of DEI Bermuda's Application for an LSA is conducted by reference to the requirements of the Foreign Investment Law.[196]

144. Peru objects before this Committee that the Tribunal ought to have been considering other provisions of Peruvian contract law, rather than the Foreign Investment Law.[197] But it is beyond the scope of the powers of review entrusted to this Committee under Article 52(1)(b) of the ICSID Convention to re-evaluate which particular provisions of Peruvian law might be said to be relevant to the Tribunal's determination of its jurisdiction. An *ad hoc* committee, which is not an appellate

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[194] *Ceskoslovenska Obchodni Banka AS ('CSOB') v Slovakia* (Decision on Jurisdiction) (1999) 5 ICSID Rep 330, [35].

[195] Decision on Jurisdiction, [94].

[196] *Ibid,* [113].

[197] Memorial [123] – [125]; Reply [70], [80], [88].

body, is not called upon to substitute its own analysis of law and fact to that of the arbitral tribunal.

145. Peru objects in particular to the Tribunal's reference to the *'unity of the investment'* principle as its fourth reason for reaching the decision which it did on the scope of the parties' consent. It claims that this was an improper reference to an international law principle which was developed to deal with treaty claims and can have no application in the interpretation of a Peruvian law contract. [198] Peru made precisely this submission to the Tribunal itself, which considered and rejected it, explaining:[199]

> *The Tribunal is not importing into this proceeding a general definition of "investment" from BITs together with inapposite BIT jurisprudence. In the relevant cases, which are discussed below,[200] ICSID tribunals have applied the principle of the "unity of the investment" in situations where consent to ICSID arbitration is found in individual investment agreements or contracts, not in an umbrella instrument such as a BIT. The Tribunal is of the view that the principles derived from those cases are directly applicable to its determination of the investment in relation to which the parties consented to ICSID arbitration in Clause Nine of the DEI Bermuda LSA.*

146. The Committee accordingly does not find any application of the wrong law to the determination of the scope of the parties' consent. On the contrary, this Committee considers that the Tribunal was proceeding in accordance with the general approach adopted in the Decision on Jurisdiction in *Amco Asia,* namely *'to find out and to respect the common will of the parties'* and to interpret the arbitration agreement *'in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.'*[201]

147. It remains then to consider in this section whether nevertheless, in proceeding to interpret the common will of the parties as to the scope of their arbitration agreement, the Tribunal manifestly exceeded its powers.

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[198] *Supra* [33] – [34].

[199] Decision on Jurisdiction, [121].

[200] *Holiday Inns v Morocco* 1 ICSID Rep 645; *CSOB v Slovakia supra* n 194, [72], [74] – [75], [80] – [82]; *Société Ouest-Africaine des Bétons Industriels ('SOABI') v Senegal* (Award) (1988) 2 ICSID Rep 164, [4.10].

[201] *Supra* n 192.

(ii) Determination of the meaning of the DEI Bermuda LSA

148. The Tribunal decided that the investment protected by the DEI Bermuda LSA could not be restricted solely to DEI Bermuda's US$200 million capital contribution in DEI Peru Holdings referred to in Clause Two of the DEI Bermuda LSA. Rather the investment referred to in the DEI Bermuda LSA, which was approved by Peru, *'was part and parcel of the investment being made by Duke Energy in DEI Egenor, an operating company generating wealth, jobs and providing public services in Peru (*i.e.*, an active investment).'*[202]

149. Peru claims that it can only be held to the content of what it signed.[203] Peru argues here that the Tribunal exceeded its powers under the literal meaning of the DEI Bermuda LSA.[204] In Peru's view, the DEI Bermuda LSA did not provide guarantees of legal stability with respect to Egenor or with anything other than the US$200 million capital contribution mentioned in Clause Two of the DEI Bermuda LSA.[205] According to Peru, the Tribunal disregarded the LSA scheme as there were five LSAs in force, each covering a separate segment of Duke Energy's investment in Egenor.[206]

150. Peru declares that it accommodated the wishes of Duke Energy to own Egenor through DEI Bermuda within the limits of the LSA system but that this does not make the DEI Bermuda LSA the all encompassing source of protection for a series of investment already made by Duke well before the DEI Bermuda LSA.[207] The DEI Bermuda LSA was structured to cover only one slice of Duke's investment in Peru because all other parts of its investment were already covered by their own LSAs. DEI Bermuda knew about this multi-tiered scheme of LSAs in order to protect sequentially each stage and each channel of the investment.[208]

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[202] Decision on Jurisdiction [99].

[203] Memorial [137]; Transcript, Day 1, 55, 56, 59; Day 2, 327.

[204] Reply [66].

[205] Memorial [127] – [132].

[206] Transcript, Day 1, 12-19.

[207] Transcript, Day 2, 326-327.

[208] Transcript, Day 1, 60; Day 2, 329-332, 467, 468.

151. In the view of the *ad hoc* Committee, the claims of DEI Bermuda, which were summarised by the Tribunal and are set out above,[209] related to breaches of the guarantees provided in the DEI Bermuda LSA in connection with the investment as well as to breaches of general obligations in the Peruvian law of contract. All claims were made under Clause Nine of the DEI Bermuda LSA, as acknowledged by the Tribunal.[210] They were based on alleged violations by Peru of the DEI Bermuda LSA arising out of the consequences for DEI Bermuda of the tax assessments by Peru against Egenor.[211] The *ad hoc* Committee considers that DEI Bermuda is correct in its submission that it never made claims on behalf of Egenor.[212] The Arbitral Tribunal remained within its terms of reference. The reasons for the Committee's conclusion are as follows.

152. In order to determine the scope of the reference in the arbitration agreement (Clause Nine of the DEI Bermuda LSA) to *'any dispute, controversy or claim between them, relative to the interpretation, performance or validity of this Agreement*' it is necessary, as the parties both agree, to refer to the operative clauses of the agreement. At the jurisdiction stage, this is not of course to determine whether such clauses may in fact successfully be invoked. Rather, it is to determine the scope of the subject-matter of the main Agreement referred to in the arbitration agreement.

153. The operative clause, Clause Three, makes certain guarantees of legal stability *'in connection with the investment referred to in CLAUSE TWO.'* Clause Two of the DEI Bermuda LSA speaks of an agreement by DEI Bermuda:

> *To make contribution to the capital stock of the company DUKE ENERGY INTERNATIONAL PERU HOLDINGS, S.R.L., incorporated in the city of Lima, registered in Entry n° 11184295 of the Registry of Companies of the Office of Registration of Lima and Callao, in the amount of US $ 200.000.000 (Two hundred million Dollars of the United States of America) within a term of no more than two (2) years, from the date of execution of this Agreement.*

But the scope of an arbitration agreement is not to be determined on the plain words in isolation, since the arbitral tribunal is obliged, as the Committee has earlier observed, *'to find out and to respect the common will of the parties'* and to interpret

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[209] *Supra* [103].

[210] Decision on Jurisdiction,[80].

[211] Transcript, Day 2, 386-387.

[212] Transcript, Day 1, 232/12-16.

the arbitration agreement *'in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.'* [213] As recounted in the Decision on Jurisdiction,[214] the privatization of Egenor was acknowledged as a complex process. The DEI Bermuda LSA was concluded as part of Duke Energy's effort to complete the protection of its investment in Egenor in Peru.

154. DEI Bermuda replaced Dominion and DEI Peru Holdings replaced Inversiones Dominion Perú S.A. ('**IDP**').[215] It is undisputed between the Parties that the Dominion LSA, also containing an ICSID arbitration clause, could not be assigned for technical reasons.[216] Duke Energy therefore declared in February 2000 that it wanted the same protection and stability regime as that accorded to Dominion with respect to the acquisition of Egenor when Dominion made a capital contribution of US$228 million in IDP whose place was taken by DEI Peru Holdings.[217] DEI Bermuda explained that different protections including tax stabilization, which are reflected in the Investment Regulations[218] are accorded to the investor and to the operating company.[219]

155. On June 20, 2000, DEI Bermuda filed a request for a foreign investor LSA and DEI Peru Holdings (which was established in May 2000) filed a request for a recipient company LSA. Looking at the terms of the two applications for LSAs, the Tribunal found that they reinforced the purpose of the capital contribution to permit consolidation of Duke Energy's ownership interest in Egenor.[220]

156. Duke Energy made a capital contribution to DEI Peru Holdings through DEI Bermuda on December 18, 2002. This capital contribution was used to acquire shares in Egenor from other Duke companies.[221] Duke, which already owned 90% of Egenor at the time the DEI Bermuda LSA was negotiated, did not need to buy Egenor

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[213] *Supra* [140], citing *Amco Asia.*

[214] Decision on Jurisdiction, [100].

[215] *Ibid* [102], [109].

[216] Transcript, Day 1, 145, 148-149.

[217] Decision on Jurisdiction [53] – [54]; Transcript, Day 2, 444-445, 447-448.

[218] Legislative Decree n° 662, Article 19 (a) to (e) and 25 of Supreme Decree n° 162-92-EF.

[219] Transcript, Day 1, 149-150; Day 2, 433-435.

[220] Decision on Jurisdiction [117] – [118].

[221] *Ibid* [45].

twice. The Tribunal declared that it was difficult to see how a contribution of funds from DEI Bermuda to DEI Peru Holdings could be an active investment within the meaning of Article 1 of Legislative Decree 662 if considered in isolation of the context of the transaction.[222] Peru itself recognized that the DEI Bermuda LSA did not require DEI Bermuda to invest in Egenor.[223]

157. At the annulment proceeding hearing, DEI Bermuda specified that the contribution of US$200 million came in and went out the same day. It was a paper or bookkeeping transaction intended to comply with the requirements of the Foreign Investment Law in order to provide Duke Energy with protection for its investment in Egenor.[224] But it also pointed out that this transaction, while necessary to meet the requirements for the granting of an LSA, was not sufficient, since, on its own, it provided no contribution to Peru's economic development, which was a prerequisite for the granting of an LSA. It was the prior US$263 million purchase of the shares in Egenor, which represented the reality of that investment and it would have been a fiction to maintain otherwise.[225]

158. Peru, whilst stressing the separate character of each of the LSAs in the structure of protections accorded to Duke Energy's investment in Egenor, accepted that there was no evidence in the record as to why the legal stability regime involved separate LSAs at each step.[226]

159. The Tribunal considered the provisions of the DEI Bermuda LSA in the broader context of Duke's investment in Peru. It held that the Peruvian investment laws did not contemplate a three-tiered structure including a holding-company such as DEI Bermuda.[227] It examined the overall circumstances of Duke's investment in Egenor to give an efficient meaning to the provisions of the DEI Bemuda LSA.

160. When a tribunal engages in interpretation of a written instrument of consent in light of the surrounding circumstances or in the context of other documents, its final construction of the meaning of the document in the light of all the evidence and

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[222] *Ibid* [94].

[223] *Ibid* [101]; Memorial [150].

[224] Transcript, Day 1, 151, 159-161, 164; Day 2, 447.

[225] Transcript, Day 2, 417/4-15. This is the figure provided to the Committee at the hearing. The Award at [54] states the total cost of Duke Energy's acquisition of a 90% interest in Egenor as of the end of 1999 as US$288 million.

[226] Transcript, Day 2, 464/17-20.

[227] Decision on Jurisdiction [96].

submissions of the parties is unlikely to amount to a manifest excess of powers. Interpretation, which leaves room for discussion (as the arguments of Peru in the annulment proceeding amply demonstrate),[228] is not likely to give rise to a manifest excess of powers. For the reasons set out in this section, the *ad hoc* Committee considers that the Tribunal did not exceed its powers in this case in its decision that the dispute submitted to it by DEI Bermuda fell within the parties' arbitration agreement.

(b) Failure to state reasons

161. Peru also claims that the failure to apply the proper law requires annulment under Article 52(1)(e) because the Tribunal failed to provide reasons for its decision on a dispositive issue in failing to provide reasons grounded in Peruvian law for its decision to ignore the express terms of the contract.[229]

162. Article 52(1)(e) retains an important, and distinct, place in the scheme of the ICSID Convention. A supplementary decision or correction envisaged by Article 49(2) can only take place for unintentional omissions to decide any question put to the Tribunal.[230] The failure to state reasons which is contemplated by Article 52(1)(e) of the ICSID Convention is not the failure to state correct or convincing reasons as this would otherwise draw an *ad hoc* committee into reviewing the substance of the arbitral tribunal's decision.[231]

163. In the present case, the Arbitral Tribunal provides reasons for its decision on *ratione materiae* jurisdiction which are sufficiently set forth in paragraphs 91 –134 of its Decision on Jurisdiction.

164. The Tribunal specifically answered each of Peru's four objections to its interpretation of the scope of the subject-matter of the DEI Bermuda LSA with the following conclusions:

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[228] See e.g., Memorial, [143]-[176].

[229] Memorial [178]; Reply, [69]-[70]; Transcript, Day 1, 38.

[230] See the decision of the *ad hoc* Committee in *Amco Asia Corp v Indonesia (Amco I)* (1986) 1 ICSID Rep 509, [32]-[34], on the relation between Articles 49(2) and 52.

[231] *MINE* supra n 130 [5.08]; *Vivendi v Argentina*, *supra* n 63,[64]-[65].

1. "*[T]he Tribunal finds that Respondent granted its approval for the DEI Bermuda LSA because it was part and parcel of the investment made by Duke Energy in DEI Egenor, an operating company generating wealth, jobs and providing public services in Peru (*i.e., *an active investment)*"; [232]

2. "*Because the underlying investment by Dominion (and later by Duke Energy) in the Peruvian electricity generator – Egenor – underpinned all of these transactions, including the capital contribution from DEI Bermuda to DEI Peru Holdings, the Tribunal cannot accept Respondent's argument on the characterization of the investment as defined in Clause Two of the DEI Bermuda LSA*";[233]

3. "*The wording of the application referred to in Clause One of the DEI Bermuda LSA is another evidentiary element which assists the Tribunal in concluding that the investment contemplated by the parties when they entered into the DEI Bermuda LSA included DEI Bermuda's indirect ownership of DEI Egenor*";[234]

4. "*Finally, by focusing on the guarantees included in the DEI Bermuda LSA, and excluding the application of the guarantees included in the other LSAs, the Tribunal is not limiting Claimant strictly to the text of the DEI Bermuda LSA. First, Claimant is entitled to the guarantees that are implied in the DEI Bermuda LSA by Peruvian law. Second, Claimant is entitled to the guarantees provided by such rules of international law as may be held by the Tribunal to be applicable to the merits of the dispute by virtue of Article 42(1) of the ICSID Convention*".[235]

165. Peru may not agree with the Tribunal's reasoning. But the Committee may only take the Decision on Jurisdiction as it is, not as Peru would have wished the decision to be. The role of an *ad hoc* committee is to ensure the stability of the ICSID arbitration system, not to overthrow awards because of its disagreement with the

[232] Decision on Jurisdiction, [99].

[233] *Ibid* [110] (citation omitted).

[234] *Ibid* [111] (citation omitted).

[235] *Ibid* [134].

arbitral tribunal. Otherwise, the annulment mechanism of Article 52 would slide into an appeal.

166. Finally, as mentioned above, because the Arbitral Tribunal is under no obligation to cite Peruvian law in reference to all of its findings, there is no contradiction in its reasoning in applying international law to jurisdiction as Peru claims.[236] Contradictory reasons which cancel each other out must be carefully distinguished from dissatisfaction with the reasons expressed in the award. Peru's criticism that the Tribunal misapplied the above four extrinsic factors[237] concerns the correctness of the Tribunal's reasoning and escapes review under Article 52.

(c) Serious departure from a fundamental rule of procedure

167. Peru says that the Tribunal's omission to apply Peruvian law chosen by the Parties requires annulment under Article 52(1)(d) because the obligation to apply the proper law is a fundamental rule of procedure from which the Tribunal seriously departed.

168. Definition of a fundamental rule of procedure can be found in the decision of the *ad hoc* Committee in *Wena*: [238]

> *The said provision refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured at an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.*

169. Rather than identifying such a fundamental rule, Peru voices yet another time its criticism of the outcome of the Tribunal's decision under a different count for annulment of Article 52(1). As the First *ad hoc* Committee in *Vivendi* recognized:

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[236] Memorial [138].

[237] *Ibid* [143].

[238] *Supra* n 116, [57].

'*Under article 52(1)(d), the emphasis is clearly on the term "rule of procedure", that is, on the manner in which the Tribunal proceeded, not on the content of its decision.'*[239] Peru fails to identify such fundamental rule of procedure.

4. Jurisdiction ratione temporis

170. Peru's principal ground of objection under this head is that the Tribunal failed to decide a question put to it. This constituted, in Peru's view, a manifest breach of Article 52(1)(b), since it was an obvious failure to address the objection to the Tribunal's jurisdiction raised by Peru. According to Peru, the objection which it had raised to the Tribunal's jurisdiction *ratione temporis* was not that the *dispute* arose after the entry into force of the DEI Bermuda LSA, but rather that *'there was no consent in the Bermuda LSA to retroactive application of the substantive promise of tax stability.'*[240] In deciding that *'[w]hat is decisive of the Tribunal's jurisdiction* ratione materiae *is the point in time at which the instant legal dispute between the parties arose, not the point in time during which the factual matters on which the dispute is based took place',* [241] the Tribunal had failed to address the question which Peru had submitted for its decision. Peru also submits that this failure is a departure from a fundamental rule of procedure requiring tribunals to consider issues put to them by the parties and that the Tribunal failed to state the reasons required to move from its statement of Peru's actual *ratione temporis* argument to its conclusion that it had jurisdiction *ratione temporis.*[242]

171. In the view of the *ad hoc* Committee, there is indeed a distinction between a jurisdictional objection *ratione temporis* based on: (i) the time at which the dispute between the parties arose; and (ii) the time at which the underlying events giving rise to the claim arose. Each may provide an independent ground of objection.

172. The second type of objection relates to the temporal application of the substantive obligations which give rise to the claim. It flows from the general principle (in the

[239] *Supra* n 63, [83].

[240] Transcript, Day 1, 80/11-14, citing Transcript of Jurisdiction Hearing, March 29, 2005, 75-76.

[241] Decision on Jurisdiction, [148].

[242] *Supra* [41] – [43].

absence of express provision by the parties to the contrary) enunciated by Judge Huber in *Island of Palmas* that*:* [243]

> *[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute arises or falls to be settled.*

This principle is as applicable to legal obligations arising under contract as by treaty.[244]

173. The consequence of this principle in the context of ICSID arbitration is that the tribunal's jurisdiction *ratione temporis* is limited to claims which are founded on legal obligations in force and binding on the host state at the time of the alleged breach.[245]

174. The application of this principle does not preclude a tribunal from taking into account any earlier facts. Rather, the tribunal is required to identify the facts which are the source or real cause of the dispute. If these facts arose after the entry into force of the obligation in question, an objection *ratione temporis* on this ground is not well-founded.[246]

175. This distinction was well explained in the context of determining the jurisdiction of an investment tribunal in *Mondev v United States of America*:[247]

> *Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.*
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> *….*

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[243] (1928) II RIAA 829, 845.

[244] In the case of obligations under international law, the principle is codified in Article 13 of the ILC Draft Articles on State Responsibility and in Article 28 of the VCLT.

[245] *Impregilo SpA v Pakistan* (Decision on Jurisdiction) (2005) 12 ICSID Rep 245, [309] – [314]; *Salini v Jordan supra* n 47 ; *Mondev International Ltd v United States of America* (Award) (2002) 6 ICSID Rep 181, 206-210; accord Douglas *supra* n 172, [616] – [617].

[246] This has been the *jurisprudence constante* of the PICJ and the ICJ in interpreting restrictions on its jurisdiction *ratione temporis* in relation to facts or situations arising prior to a specified date: *Electricity Co of Sofia and Bulgaria* PCIJ (1939) Ser. A/B, No 77, 82; *Right of Passage over Indian Territory* [1960] ICJ Rep 6; *Certain Property (Liechtenstein v Germany)* (Preliminary Objections) [2005] ICJ Rep 6, [41] – [46]; *Jurisdictional Immunities of the State (Germany v Italy)* (Order on Counter-Claim) (July 6, 2010), [23].

[247] *Supra* n 119, [70].

> *The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert … the intertemporal principle…*

176. In the present case, the *ad hoc* Committee is in no doubt that the Tribunal decided that the fact which was the source or real cause of the dispute between the parties was the Tax Assessment, levied on DEI Egenor on November 22, 2001 after the entry into force of the DEI Bermuda LSA, and not the prior tax years in respect of which that Assessment was levied. That was the state action which DEI Bermuda alleged constituted in turn a breach of Peru's obligations to it under the guarantee of legal stability contained in the DEI Bermuda LSA. [248] This must logically be so, since, prior to the levying of that Assessment, there was no state conduct by Peru in respect of the tax liability of Egenor in respect of which DEI Bermuda laid complaint. Its case depended upon establishing a breach of legal stability predicated upon an alleged change of legal position at the time of the Tax Assessment from that which had pertained hitherto.

177. The Tribunal finds as much, when it holds:[249]

> *It was in the Tax Assessment, and not before, that SUNAT decreed a tax liability of approximately US$48 million against DEI Egenor for what SUNAT determined, at that time, were tax underpayments in 1996 through 1999.*

178. The Tribunal is thus quite correct, when it continues by drawing the following distinction:[250]

> *Naturally, during the merits phase, the Tribunal will have full jurisdiction to consider all of the factual matters related to the dispute, including those that preceded the effective date of the DEI Bermuda LSA, for the purposes of determining whether the Respondent violated the DEI Bermuda LSA through conduct which took place or reached its "consummation point" after its entry into force (*i.e.*, the Tax Assessment).*

179. It is true that, in reaching its decision on jurisdiction *ratione temporis,* the Tribunal couches its reasoning in terms of a rejection of a test based upon *'the factual*

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[248] See the similar reasoning of the PCIJ in *Electricity Co of Sofia and Bulgaria supra* n 246.

[249] Decision on Jurisdiction, [149]

[250] *Ibid* [150].

matters on which the dispute is based' in favour of *'the point in time at which the instant legal dispute between the parties arose.'*[251] It relies for this purpose on a *dictum* in *Maffezini v Spain.*[252] This *dictum*[253] was concerned with the rather different question which might arise in satisfying jurisdiction *ratione temporis* of the first type, namely pin-pointing the time at which a dispute between the parties is to be treated as having crystallised.

180. However, read in the context of the Tribunal's decision on jurisdiction *ratione temporis* as a whole, the *ad hoc* Committee finds it to be clear that the Tribunal was simply finding that a number of matters related to the dispute, which had taken place prior to the entry into force of the DEI Bermuda LSA, were not in fact the relevant conduct. These included those enumerated in paragraph 146 of its Decision, such as that *'the tax liability at issue in SUNAT's tax audit was incurred by DEI Egenor with respect to tax years 1996 to 1999.'* Rather it was the Tax Assessment itself, which post-dated the entry into force of the DEI Bermuda LSA, which was the relevant conduct that *in turn* gave rise to the dispute. After all, the levying of a tax assessment does not, *ipso facto*, constitute a legal dispute. Its validity or consistency with the state's obligations under a relevant LSA would first have to be the subject of express objection by the taxpayer or investor as the case may be for there to be a dispute between the parties.

181. But the *ad hoc* Committee cannot regard any such infelicity in language or legal reference in the Decision on Jurisdiction as constituting a manifest excess of the Tribunal's powers. On the contrary, it is plain that the Tribunal did decide the substantive question put to it by Peru in its jurisdictional objection, by finding that the relevant conduct, namely the Tax Assessment, did take place after the entry into force of the DEI Bermuda LSA.

182. For the same reason, the Committee finds no failure in the reasoning of the Tribunal. On the contrary, by rejecting as irrelevant prior facts which did not give rise to the claim, and finding instead that the relevant conduct did take place within the relevant time, the Tribunal did explain the rationale for its decision. The fact that this Committee might have expressed these reasons in a different way, or by reference to different authority, is nothing to the point. Article 52(1)(e) is not

[251] *Ibid* [148].

[252] (Decision on Jurisdiction) (2000) 5 ICSID Rep 387, [95].

[253] Citing *Case concerning East Timor* [1995] ICJ Rep 90, [22].

concerned with the review of wrong reasons, it is concerned with the comprehensibility of the reasons advanced by the Tribunal itself.

3. Jurisdiction vested in other tribunals

183. Now that the Committee has explained the reasons for its decision not to annul the Tribunal's Decision on Jurisdiction in relation to jurisdiction *ratione materiae* and jurisdiction *ratione temporis,* it is possible to deal more briefly with Peru's objection that the Tribunal's assumption of jurisdiction constituted an excess of powers because it constituted an unwarranted incursion upon the jurisdiction of other tribunals chosen by the parties to the other LSAs.

184. Peru did not advance this objection in this way before the Tribunal itself. At that stage, it objected to the Tribunal's jurisdiction *ratione personae* on the ground that the claims advanced by DEI Bermuda were properly the claims of DEI Peru Holdings or DEI Egenor.[254] The Tribunal decided that:[255]

> *The arguments raised by the Respondent as objections to the Tribunal's jurisdiction* ratione personae *are, in reality, subject-matter objections in relation to the claims brought before this Tribunal by DEI Bermuda, dressed up as objections to the Tribunal's personal jurisdiction over putative claims by entities (such as DEI Peru Holdings and DEI Egenor) that are not claimants before this Tribunal.*

185. In these Annulment Proceedings, Peru contends differently that the Tribunal improperly arrogated to itself the jurisdiction vested in other tribunals (notably that chosen by the parties to the DEI Egenor LSA). This, Peru submits, constitutes a manifest excess of powers.[256]

186. In the Committee's view, this ground of objection to the Tribunal's Decision does not add materially to those already discussed. Arbitration, as a consensual method of dispute resolution, operates to confer jurisdiction on the parties' chosen tribunal in a manner that necessarily excludes other fora. It is well established in ICSID jurisprudence that a tribunal's *failure* to assume a jurisdiction which the parties have

[254] Decision on Jurisdiction, [136].

[255] *Ibid* [143].

[256] Memorial, [103].

conferred upon it may itself constitute a manifest excess of powers.[257] But it does not add anything to the enquiry mandated by Article 52(1)(b) into whether the tribunal has manifestly exceeded its powers by *exceeding* its jurisdiction to contend that the tribunal has trespassed upon the jurisdiction of other tribunals. The enquiry which the annulment committee is empowered to make is the same. In the present case, this has already been undertaken by the *ad hoc* Committee in considering Peru's objections in relation to the Tribunal's exercise of jurisdiction *ratione materiae* and *ratione temporis.*

187. This was not a case where the Tribunal had to consider staying its proceedings in light of the same, or substantially the same dispute being actually pending before another tribunal – a situation of *lis pendens.*[258] Nor was it a case where the same parties, who were before an investment tribunal pursuant to the general dispute settlement provisions of a bilateral investment treaty, had already chosen by contract another tribunal to determine the same dispute.[259]

188. On the contrary, in the present case, there was only one tribunal competent to determine a dispute between DEI Bermuda and Peru founded on alleged breaches of the DEI Bermuda LSA, namely the ICSID Tribunal designated by the parties pursuant to Clause Nine. By contrast, the arbitration agreement in Clause Eight of the DEI Egenor LSA (an agreement to submit disputes *'to national or international arbitration, which shall be defined by mutual agreement'*) related only to disputes between the parties to that agreement, namely DEI Egenor and Peru, and to disputes relating to the *'interpretation or execution of the various clauses of* [that] *Agreement.'*

189. In consequence, the Tribunal in the present case was simply required to satisfy itself that the dispute brought before it properly fell within its jurisdiction within the terms of that clause. This it did by conducting the enquiry into its jurisdiction *ratione materiae* and *ratione temporis* discussed above.

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[257] *Supra* [97].

[258] As in *Southern Pacific Properties (Middle East) Ltd v Egypt* (Decision on Jurisdiction No 1) (1985) 3 ICSID Rep 101, 129.

[259] As in *SGS Société Générale de Surveillance SA v Philippines* (Decision on Jurisdiction) (2004) 8 ICSID Rep 515. By the same token, Peru's reliance (Memorial, [102]) on *Southern Bluefin Tuna (Australia and New Zealand v Japan)* (UNCLOS Annex VII Tribunal, Award on Jurisdiction) (2000) 119 ILR 508 is inapposite here. In that case, the Tribunal's decision was based upon Article 281 of the 1982 United Nations Convention on the Law of the Sea, which required priority to be given to a method of dispute settlement chosen by the parties.

190. In so doing, it did not *'deprive*[] *the arbitral fora specified under* [the other] *LSAs of their rights to exercise the specific jurisdiction granted to them in those contracts.'*[260] On the contrary, the Tribunal emphasised that its jurisdiction was strictly limited to claims under the DEI Bermuda LSA, so that:[261]

> *… Claimant will need to substantiate its claims, during the merits phase, by reference solely to the guarantees contained in the DEI Bermuda LSA, and not those contained in any other LSAs. This is a function of the specific wording of Clause Nine of the DEI Bermuda LSA, and of the legal basis of the Claimant's claims as formulated in the Request for Arbitration, namely the alleged breach of the protections contained in the DEI Bermuda LSA, not in any of the other LSAs.*

As a consequence, the Tribunal's Decision on Jurisdiction could have no effect on the rights of other claimants under other LSAs.

191. Nor does the Committee accept that, in arriving at its Decision on Jurisdiction, the Tribunal made a decision *'driven by equity rather than law'*[262] by assuming an over-broad jurisdiction *'acting out of a misguided concern for Duke Energy's ability to seek relief in a single arbitration for a full range of claims.'*[263] Paragraph 102 of the Decision on Jurisdiction, on which Peru relies for this allegation, contains the Tribunal's reasoning as to the nature of the investment referred to in the DEI Bermuda LSA. The Committee has already found that the Tribunal was entitled to interpret that Agreement in consideration of the parties' real intentions.[264] But, as the passage from the Decision just cited in the previous paragraph makes clear, that does not mean that the Tribunal abandoned law for equity. On the contrary, it was at pains to emphasise that DEI Bermuda would have to make good its claims solely by reference to the contractual rights which it enjoyed pursuant to the DEI Bermuda LSA. Indeed, it went on to state that:[265]

> *… it will not be in a position to "give effect" to the protections in [the other] LSAs. In other words, in the peculiar circumstances of this case (successive*

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[260] Memorial, [100].

[261] Decision on Jurisdiction, [132].

[262] Memorial [95].

[263] *Idem.*

[264] *Supra* [153].

[265] Decision on Jurisdiction [133] (citation omitted).

agreements for the protection *of the investment), the unity of the investment does not necessarily imply the unity of the protection of the investment.*

192. For these reasons, the Committee holds that this third challenge to the Decision on Jurisdiction is not well founded and must be dismissed.

C. Award on the Merits

193. In view of the fact that the Committee has dismissed Peru's Application for Annulment of the Decision on Jurisdiction, it is necessary now to turn to a consideration of whether, in the alternative, the Award on the Merits is liable to partial annulment in one of the four respects of which Peru makes complaint.

194. The particular portions of the Award in respect of which partial annulment is sought are those dealing with:

(a) Tax stability guarantee;

(b) Tax amnesty;

(c) Good faith/*actos propios* (estoppel); and,

(d) Damages.

195. The Committee has set out the submissions of the parties on each of these points above in Part II B. It has also set forth its own general approach to the grounds of review specified under Article 52 of the ICSID Convention in Part III A. With these observations in mind, it is now possible to deal *seriatim* with the application of those general principles to each of the specific substantive issues, explaining first the Tribunal's treatment of the point and then the Committee's reasons for its decision on that aspect of the Application for Annulment.

1. Tax Stability

196. The question of the meaning and effect of the guarantee of tax stability contained in Clause Three of the DEI Bermuda LSA lay at the heart of the arbitral proceedings, since DEI Bermuda's claim was that the tax assessment levied by SUNAT against DEI Egenor in turn violated DEI Bermuda's rights under that Agreement.

197. The Tribunal dealt with the construction of Clause Three in paragraphs 186 – 228 of its Award. Having set out the clause, the Tribunal summarised the parties' arguments. In order, as the Tribunal put it *'to link the DEI Bermuda LSA and the Egenor LSA, but remain within the confines established by the Tribunal in paras. 132 and 133 of the Decision on Jurisdiction (cited earlier), Claimant has relied in particular on Article 23 of the Investment Regulations.'*[266]

198. The Investment Regulations,[267] enacted in implementation of Peru's Private Investment Law,[268] made detailed provision for the system and contents of LSAs. Article 23(a) provided, in relevant part, that:[269]

> *The stability regime granted to investors as provided for by section (a) of Article 10 of Legislative Decree No 662 implies that, in the event the income tax should be modified during the effective term of the stability agreement in such a manner that it results in a variation of the tax base or the percentages imposed on the profit generating company, or in the creation of new taxes imposed on the company's income, or for whatever other cause of equivalent effects the profits or dividends distributable or available to the investor is reduced in terms of percentage with respect to pre-tax profits in comparison with the ones distributable or available at the time the guaranteed tax regime became effective, by virtue of the protection granted by the agreement the tax rate(s) applicable to the profits or dividends the investor is entitled to shall be reduced in order to allow the profits or dividends finally available or subject to allocation are equal to the ones that were guarantied* [sic], *up to the possible limit as to the tax imposed on profits or dividends.*

199. The Tribunal, referring to the Memorial, summarised DEI Bermuda's case on the effect of that provision as being to afford DEI Bermuda a claim for damages in the event that the guarantee of tax stability afforded to DEI Egenor was breached by

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[266] Award, [194].

[267] Supreme Decree No 162-92-EF (October 9, 1992).

[268] Legislative Decree No 757 (November 8, 1991).

[269] The authoritative text of this article is that found in the original text in the Spanish language. The English translation of this Article is reproduced from that submitted by the parties in the arbitration at Exhibit C-010. It differs slightly, but not materially, from the translation reproduced by the Tribunal in the English text of its Award at [190]. The Committee has used the above translation for clarity of exposition.

amendment. Such an amendment, claimed DEI Bermuda, could be effected either by law or by a change in the interpretation or application of the law.[270]

200. The Tribunal next summarised Peru's position at paragraph 199 as that *'DEI Bermuda – can only invoke the guarantees under its own LSA, and therefore Claimant's attempt to fuse the DEI Bermuda LSA and the Egenor LSA (by way of Article 23 of the Investment Regulations or otherwise) is impermissible.'*[271] Peru added that the guarantee of tax stability related only to the law and not to its interpretation or application.[272]

201. The Tribunal then undertook its own analysis of the question in paragraphs 201 – 228. It proceeded to its decision in three steps:

(1) It found that *'[t]he parties agree that the linkage between the Egenor LSA and the DEI Bermuda LSA is provided by Article 23(a) of the Investment Regulations'*[273] but that they disagreed as to whether Article 23(a) was merely an offset mechanism or could also support a claim for damages;

(2) The Claimant's evidence as to Peruvian law was to be preferred – to the effect that Article 23 would support a claim for damages by DEI Bermuda if the tax stabilisation afforded to DEI Egenor was violated after 24 July 2001;

(3) The guarantee of tax stabilisation applied not only to laws, but also to stable interpretations or applications of the law. It may also be invoked to protect the investor in the absence of a prior stable interpretation to the extent that *'stabilized laws will not be interpreted or applied in a patently unreasonable or arbitrary manner.'*[274]

202. Peru's critique of this approach in these annulment proceedings is brought principally under Article 52(1)(d) (failure to state reasons) though it advances additional arguments based on Article 52(1)(b) (manifest excess of powers) in relation to steps (2) and (3) and adds in addition a claim under Article 52(1)(e) (procedure) in relation to step (3).[275]

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[270] Award, [195] – [197].

[271] *Ibid* [199].

[272] *Ibid* [199] – [200].

[273] *Ibid* [201].

[274] *Ibid* [227].

[275] Memorial [197] – [230].

203. The general approach which should guide the review of an award for failure to give reasons under Article 52(1)(e) has been well developed by earlier *ad hoc* committees. Thus the decision in *Klöckner I* explained that the Award must allow '*the reader to follow the arbitral tribunal's reasoning, on facts and on law*'.[276] In *MINE,* the *ad hoc* Committee added that *'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.'*[277]

204. These general statements must also be read in the light of the observations in *Vivendi* that:[278]

> *… it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons…Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning….*
>
> *It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an* ad hoc *committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.*

205. Moreover, an *ad hoc* committee is entitled itself to seek to understand the reasons for the award from the record before the tribunal.[279] Indeed, in appropriate cases, it should do so. As the *ad hoc* Committee held in *Soufraki*:[280]

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[276] *Klöckner supra* n 133, [119].

[277] *MINE v Guinea,* [5.09].

[278] *Vivendi v Argentina supra* n 63, [64] – [65], followed in *Rumeli v Kazakhstan supra* n 132, [137] – [138].

It is also possible that a tribunal may give reasons for its award without elaborating the factual or legal bases of such reasons. So long as those reasons in fact make it possible reasonably to connect the facts or law of the case to the conclusions reached in the award, annulment may appropriately be avoided.

(a) Linking of DEI Bermuda LSA and Egenor LSA

206. Peru's main criticism of the Tribunal's approach at Step (1) of its analysis is that there is a fundamental contradiction between the Tribunal's accurate statement of Peru's position at paragraph 199 with its finding two paragraphs later of an agreement between the parties.[281]

207. In order to understand the basis for the Tribunal's finding of an agreement between the parties, the Committee was referred to the transcript of the merits hearing. In the key passage, which, in view of its importance, the Committee now quotes in full, Peru submitted:[282]

> *There is nothing, however, in Article 23 that suggests that investors can invoke the tax stability guarantees in LSAs granted to the companies that receive the investment. There is nothing in Article 23 that suggests that the Tribunal was wrong in concluding that Claimant cannot invoke any other LSA but its own. In fact, this morning Mr. Baker* [counsel for DEI Bermuda] *conceded that Claimant cannot invoke the Egenor LSA. He stated instead that Claimant has certain rights under the DEI Bermuda LSA with respect to the tax stability of Egenor.*
>
> *This is an important point: Peru does not dispute that the legal stability guarantee for investors under Article 23(a) of the Private Investment Regulations may grant the investors certain protections if the income tax on the profit-generating company is affected in certain circumstances. Thus, under Article 23(a), certain changes in the income tax of Egenor might affect*

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[279] Accord Reisman *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (1992), 95.

[280] *Soufraki v UAE supra* n 127, [128].

[281] Transcript, Day 1, 61-65.

[282] Merits Hearing Transcript, Day 1, 249/1 – 250/4; and see, to like effect, *ibid,* Day 7, 1595/17 – 1596/21.

the tax stability granted to DEI Bermuda. If that occurs, DEI Bermuda can invoke its own, and only its own, LSA with respect to actions affecting Egenor's income tax. But this does not mean that DEI Bermuda can invoke the Egenor LSA. Nothing in Article 23 affects the Tribunal's conclusion that Claimant must show a breach of its own LSA, not of Egenor's LSA.

In the immediately following passage, Peru went on to explain *'an important limitation'* – namely that Peru was only obliged to reduce proportionately the investor's tax *'within the limits of the withholding taxes or the taxes from profits imposed on the investor.'*[283]

208. Examining the Tribunal's findings at paragraphs 199 and 201 in the light of that admirably clear explanation of Peru's submission as to the effect of Article 23(a), the Committee finds no fundamental inconsistency amounting to a want of reasons under Article 52(1)(e). On the contrary, in the Committee's view, the Tribunal has accurately captured the nuances of Peru's position as presented to it in these two paragraphs. On the one hand, Peru insisted, as the Tribunal recorded at paragraph 199, that Article 23(a) did not have the effect of *fusing* the two LSAs. DEI Bermuda would have to make its claim under the DEI Bermuda LSA and not otherwise. On the other hand, Peru did agree that Article 23(a) provided a linkage between the two LSAs to the extent that *'under Art23(a), certain changes in the income tax of Egenor might affect the tax stability granted to DEI Bermuda. If that occurs, DEI Bermuda can invoke its own, and only its own, LSA with respect to actions affecting Egenor's income tax.'*[284]

209. Where the parties did not agree was as to the proper construction and effect of the rights granted under Article 23(a) – as to whether, as Peru contends, such rights were limited to the extent of an offset any tax on DEI Bermuda's own dividends (a right which in the present case would have no result, since the tax rate on such dividends was zero), or alternatively whether Article 23(a) could found an independent claim for damages. But this, too, was accurately summarised by the Tribunal in the rest of paragraph 201.

(b) Supplementing Investment Regulations with Civil Code

[283] *Ibid* 251/3-5.

[284] *Ibid* 249/18-20 – 250/1.

210. Peru's critique of the second stage of the Tribunal's analysis is that it failed to explain how it could reconcile its application of the remedies provided under the Civil Code with the clear terms of Article 23(a), which limited the available remedy to the offset mechanism there specified.[285] Peru adds that this also amounted to an excess of powers, because it was a failure to apply the applicable law, which it defines here as *'the Peruvian* lex specialis *on foreign investment and stabilization agreements.'*[286]

211. In the Committee's view the Tribunal squarely addressed this point at paragraphs 204 – 209. It accepted that *'[t]he wording of Article 23(a), at first blush, appears to favour Respondent's line of argument.'*[287] But it then turned to consider the expert evidence on Peruvian law advanced to the contrary by DEI Egenor's two experts – Professors Trazegnies and Talledo. Citing from their evidence in detail, the Tribunal concluded that Peruvian law did allow a claim for damages, notwithstanding the limitation wording in Article 23(a), as a subsidiary means of compensation where the primary means provided for was not available.[288]

212. Nor can the Tribunal be criticized for having exceeded its mandate in applying the Civil Code to the resolution of this issue. On the contrary, the obligation upon a tribunal under Article 42(1) of the ICSID Convention to apply, *inter alia*, *'the law of the Contracting State'* is a reference to the whole of that law, such as the Tribunal may determine to be relevant and applicable to the issue before it, and not to any particular portion of it.

213. Peru may well disagree with the view that the Tribunal formed as to the correct solution of the issue before it under Peruvian law. But an *ad hoc* committee may not enter upon an assessment of whether a tribunal made a correct assessment of the content of the applicable law. It must be *'mindful of the distinction between failure to apply the proper law and the error* in judicando *drawn in* Klöckner I*, and the consequential need to avoid the reopening of the merits in proceedings that would turn annulment into appeal.'*[289]

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[285] Memorial [212] – [219].

[286] *Ibid* [215], citing Award [194].

[287] *Ibid* [204].

[288] *Ibid* [205] – [209].

[289] *Wena supra* n 116, [22].

214. Moreover, in the present case, the Tribunal reached its conclusions on the basis of a careful assessment of the evidence before it. By ICSID Arbitration Rule 34, *'[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.'* It would not be proper for an annulment committee to re-evaluate that evidence, and nor is it in a position to do so. As it was put in *Rumeli v Kazakhstan, '[a]n* ad hoc *committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties.'* [290]

(c) The meaning of tax stability and interpretation of the MRL

215. As regards step (3) of the Tribunal's analysis, Peru submits that there is a complete failure of reasoning in the Award to explain how it was that the Tribunal came to decide that the guarantee of tax stability applied to changes in interpretations of the law as well as to changes in the text itself.[291]

216. The Tribunal reasoned this issue in the following way:

(a) It opened this part of its analysis by stating that, as the Foreign Investment Law guarantees to investors the *'continuity of the existing rules',*[292] the question for it was to what extent this guarantee included *'their specific interpretation and application'* at the time of the investment.[293]

(b) It accepted that its task was not to sit on appeal from the decisions of SUNAT or the Tax Court, but only to determine whether their decision *'represents a change from their respective decisions prior to the entry into force of the DEI Bermuda LSA.'*[294]

(c) It stated that what would be required, in the case of a change in interpretation, would be a 'stable *interpretation at the time the tax stability guarantee was granted*' and a subsequent decision which modified it.[295] This

[290] *Supra* n 132, [96].
[291] Memorial [222] – [228].
[292] Preamble, Legislative Decree No 662.
[293] Award [210].
[294] *Ibid* [216].
[295] *Ibid* [218].

would have to be established by *'compelling evidence'* and not mere implication. [296]

(d) Even where there was no pre-existing stable interpretation, a decision on the interpretation or application of the law to the investor might infringe legal stability if it was *'patently unreasonable or arbitrary.'*[297]

217. This set of reasoning steps is both logical and complete. In other words, it very well explains how the Tribunal got from point A (the question for determination) to point B (its conclusion on the point). The Committee accepts that the Tribunal does not cite legal authorities or passages from the expert evidence in support of its reasons. But, as the *Soufraki* Committee pointed out, *'a tribunal may give reasons for its award without elaborating the factual or legal bases of such reasons.'*[298]

218. The Committee observes that the Tribunal was, in large measure, engaged in a process of logical reasoning which did not require citation of authority. The processes of interpretation and application are, as the Study Group of the International Law Commission on the Fragmentation of International Law has wisely observed, integral to law itself, which *'should be seen not merely as a mechanic application of apparently random rules'*.[299] They are the processes by which law gains its meaning.

219. Reference to the record in the arbitration[300] shows that the Tribunal had before it a considerable amount of expert evidence as to Peruvian law adduced by both parties on this question, from which it benefited when formulating its reasons in the way that it did. Thus, Professor Trazegnies developed in his evidence the point that: [301]

> *[I]nterpretation is an intrinsic part of the law, and one cannot be understood without the other. The sense of the law is the interpretation of the law. Consequently, legal stability can be thwarted if, without making changes to the text of the law itself, it is interpreted in a way that is radically different from the way it was understood and applied before.*

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[296] *Ibid* [220] – [221].

[297] *Ibid* [226] – [227].

[298] *Soufraki supra* n 127, [128].

[299] UN DocA/CN.4/L.682 (April 13, 2006), [34] – [36].

[300] Counter-Memorial, [244] – [250].

[301] Trazegnies 2 (February 22, 2005), [54] (a paragraph referred to in the Award at [196]; and see also Trazegnies 4, [22] – [34].

220. Professor Bullard, the expert called on behalf of Peru, accepted that *'every interpretation must be reasonably based on the stabilized regulations'.* [302] Whilst, therefore, in Professor Bullard's view, stabilization did not prevent SUNAT from interpreting or applying the Regulations, he added:[303]

> *That does not mean that the authorities have complete discretion to interpret and apply the stabilized regulations and said regulations shall remain subject to the principles of legality and lawfulness that govern public administration.*
>
> *In other words, interpretation cannot be used to "defraud" the stabilization framework created by the government as a mechanism designed specifically to protect investment. So SUNAT could not, for example, through an interpretation, change the income tax rate that applies under a stabilization agreement. SUNAT could, however, decide whether a specific legal consequence applies to a specific circumstance, as long as the circumstance reasonably falls within the scope of the stabilized regulation.*

221. Thus, in the Committee's view, this part of the Award was not only adequately reasoned, it was also arrived at after consideration of the evidence of Peruvian law. The Committee, therefore, cannot accept Peru's request to partially annul the Award under Article 52(1)(b) on account of the alleged failure to apply the applicable law.

222. Further, insofar as Peru seeks to bolster its application under this head by reference in addition to Article 52(1)(d), the Committee recalls the observations that it made in paragraph 92 *supra.* It does not add anything to a challenge based on failure to apply the applicable law to characterise such a failure as a *'serious departure from a fundamental rule of procedure.'* The requirement to apply the applicable law goes to the substantive legal framework within which the tribunal is empowered by the parties to decide the matter, for the reasons discussed in paragraph 96 *supra,* and not the procedures which the tribunal must ensure are observed in the hearing of that case. The Committee repeats the comments which it made in this regard *supra* at paragraphs 168 – 169.

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[302] Bullard 1, [45].

[303] *Ibid,* [47].

223. For these reasons, Peru's application for partial annulment under this head must also be dismissed.

2. Tax Amnesty

224. The next basis for partial annulment of the Award advanced by Peru relates to the Tribunal's treatment of the effect of DEI Egenor's acceptance of the tax amnesty afforded to it by SUNAT upon DEI Bermuda's claim in the arbitration.[304] Peru submits that the Tribunal failed to deal with its submission that this amnesty had a substantive as well as procedural effect and thus both failed to give reasons and failed to decide an issue submitted to it, committing a manifest excess of powers.

225. Peru's arguments as to the effect of the tax amnesty had been originally raised by as an admissibility objection.[305] The Tribunal took the view that this was a question for the merits phase.[306] Accordingly, it was fully re-pleaded on the merits.[307] The Tribunal addressed this issue in its Award at paragraphs 162 – 183. This was one of the preliminary issues addressed by the Tribunal in Part IV as providing the necessary framework for its decisions on the merits in Part V.

226. In the jurisdictional phase, the Tribunal stated Peru's argument in terms of estoppel.[308]At the merits phase, the Tribunal summarised Peru's case on the 'scope of renunciation' as follows:[309]

> *According to Respondent, a taxpayer's request to receive the benefits of the Tax Amnesty Law entails the recognition and acceptance of the tax obligations specified in the request, since payment made in accordance with the Tax Amnesty Law constitutes renunciation of any ongoing or future challenge of the tax obligation in question, whether through administrative or judicial proceedings.*

It added that Peru's expert had opined that this renunciation applied to proceedings in any forum including in international arbitration.[310] The Tribunal then outlined DEI

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[304] *Supra* [71] – [72].

[305] Respondent's Memorial on Jurisdiction [128] – [134].

[306] Decision on Jurisdiction [163] – [164].

[307] Memorial on the Merits [271] – [285]; Counter-Memorial on the Merits [120] – [136]; Reply on the Merits [389] – [407; Rejoinder on the Merits [307] – [330].

[308] Decision on Jurisdiction [163], citing Respondent's Memorial on Jurisdiction [133].

[309] Award [164].

Bermuda's principal response as being that *'the only effect of DEI Egenor's acceptance of amnesty was the waiver of its right to challenge the amnesty payments through the procedural mechanisms available under Peruvian tax law.'*[311]

227. The Tribunal then set out its own reasoning at 179 – 182:[312]

> *179. The Tribunal finds that the LSA rights of both DEI Egenor and of DEI Bermuda are separate and distinct from the rights to which the SEAP renunciation applies, quite apart from the fact that DEI Egenor may have reserved certain rights in its amnesty applications. In order to benefit from the Tax Amnesty Law, the taxpayer must desist from challenges before "administrative or judicial authorities." Under each LSA, it was agreed that disputes over the scope of protection provided by the LSA would be referred to arbitration (national or international arbitration, in the case of the Egenor LSA, and ICSID arbitration, in the case of the DEI Bermuda LSA) and not to administrative or judicial authorities.*
>
> *180. The Tribunal therefore concludes that, since neither administrative nor judicial authorities in Peru had jurisdiction to hear claims or challenges based on the LSAs, renunciation of all challenges to the tax obligation through "administrative or judicial authorities", as provided under the Tax Amnesty Law, could not have resulted in the waiver of the rights of DEI Egenor or DEI Bermuda under the respective LSAs.*
>
> *181. In addition, the DEI Bermuda LSA contains no specific provision regarding the applicable substantive law. In such circumstances, Article 42(1) of the ICSID Convention requires the Tribunal to apply "the law of the Contracting State party to the dispute (including its rules on conflicts of laws) and such rules of international law as may be applicable."*
>
> *182. Consequently, even if payment under the Tax Amnesty Law did, as a matter of Peruvian law, result in the renunciation of rights under the LSAs (which in the Tribunal's opinion it did not do), Peruvian law ("the law of the Contracting State party to the dispute"), and in particular the Tax Amnesty Law, would be inconsistent with applicable principles of international law.*

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[310] *Ibid* [165].

[311] *Ibid* [166].

[312] Footnotes omitted. It added, at [183] a subsidiary point of interpretation under Peruvian law, supported by experts for both parties, that specialised systems for tax matters were to be interpreted restrictively.

> *One such principle is that waiver of ICSID rights must be explicit (*see *Professor Dolzer Second Expert Report at paras. 28-29). As discussed in the previous Section, Respondent does not dispute that, in the case of such conflict, it is international law that must prevail over the local law.*

228. Article 48(3) of the ICSID Convention requires that *'[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons on which it is based.'* But the framers of the Convention declined to elevate failure to comply with the first element of this requirement to a ground for annulment,[313] preferring instead to provide the specialised remedy of a request to the tribunal for a supplemental decision.[314] Thus, a failure to address every question will not *ipso facto* constitute a ground for annulment. Rather, it is necessary for an applicant to demonstrate that such a failure amounts to a failure in the intelligibility of the reasoning in the award itself (under Article 52(1)(e)).[315]

229. Alternatively the applicant may show that the failure to address a question submitted to it by the parties amounts to a manifest excess of power, because it amounts to a failure on the part of the tribunal to undertake the mandate entrusted to it (under Article 52(1)(b)).[316] In that event, *'it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power.'* [317] A tribunal does not manifestly exceed its power if it fails to deal with every argument raised by one party as to a legal question, so long as, objectively, it has dealt with the legal question itself. As it was put by the *ad hoc* committee in *CDC v Seychelles:*[318]

> *The specific terminology used by the Republic in its Memorial cannot define the question the Tribunal was obliged to answer. Rather, the Tribunal was required to answer a legal question, or to put it another way, come to a conclusion about the Parties' rights and liabilities.*

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[313] History, II, 849.

[314] Article 49(2).

[315] Accord *MINE supra* n 130, [5.13]; *Wena supra* n 116*,* [100] – [101].

[316] *Supra* [97].

[317] *Vivendi idem,* and, to like effect, *Klöckner supra* n 133 [131], [148].

[318] *CDC Group PLC v The Seychelles*, *supra* n 130, [57].

230. With these considerations in mind, the *ad hoc* Committee is satisfied that the Tribunal has both addressed the legal question put to it and done so in a manner which shows no failure of reasoning.

231. Peru first raised its objection as to the preclusive effect of the tax amnesty as a plea as to admissibility at the jurisdictional phase. It submitted there that DEI Bermuda's claims were inadmissible because the tax disputes that were the predicates for the claim in the arbitration had all been fully resolved within the Peruvian tax system.[319] DEI Egenor's acceptance of the tax amnesty, submitted Peru, precluded DEI Bermuda's subsequent arbitration claim and estopped DEI Bermuda from pursuing it.[320] DEI Bermuda's response was that DEI Egenor's acceptance of the tax amnesty had no such effect, both as a matter of Peruvian law and because such a step could not in any event operate preclusively so as to estop DEI Bermuda from pursuit of its claims in the arbitration.[321]

232. In view of the fact that the Tribunal decided that this question went to the merits and not to admissibility, the parties resumed legal argument on it in their written pleadings at the merits stage. DEI Bermuda submitted that *'by availing of the local tax amnesty – and thereby capping its exposure, mitigating its damages, and protecting the value of its investment – Duke Energy only relinquished its rights as a local taxpayer against SUNAT under Peruvian tax law. It never relinquished its rights as a foreign investor against the Government of Peru under its LSAs.'*[322] In response, Peru submitted that '*Claimant's [r]ecourse to Peru's [t]ax [a]mnesty [l]aw [b]ars its [c]laims.'*[323] According to Peru, this followed whether as a matter of Peruvian law or in the application of the doctrine of equitable estoppel as applied in international law.

233. In the Committee's view, the parties thus submitted to the Tribunal what was in reality one legal question for decision: the legal effect of the conduct of DEI Egenor in accepting the tax amnesty on DEI Bermuda's ability to pursue its claim in the arbitration. It was that question that could have been dispositive of the outcome –

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[319] Memorial on Jurisdiction, Section V.

[320] *Ibid* [128] – [134].

[321] Counter-Memorial on Jurisdiction, [206] – [212].

[322] Memorial on the Merits, [272], footnotes omitted.

[323] Counter-Memorial on the Merits, Section III B.

in the sense that, had Peru succeeded in this defence, it would have been preclusive of DEI Bermuda's claim.

234. Each party then proceeded to develop different arguments in relation to that question, some under Peruvian law and some under international law. But the Committee finds no inherent bifurcation of the kind now asserted by Peru in these annulment proceedings, between the substantive and the procedural effect of the tax amnesty. On the contrary, once the effect of the amnesty had been determined by the Tribunal to be a matter for the merits phase of the arbitration, it had to be decided as a substantive matter – *i.e.* as a defence on the merits. But it is of the essence of a plea of preclusion or estoppel based upon the disposition of an issue in prior litigation, that the conduct of the party has a dual character – at once preclusive of the process and determinative of the substance. These two elements are not separable. They are inherent parts of the same plea. As a Chamber of the International Court of Justice put it in the *Gulf of Maine* Case: *'preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle.'*[324]

235. In the context of this case, a logically essential element in determining this effect was to determine the extent to which the conduct of one party (DEI Egenor) in one legal forum could estop or preclude another party (DEI Bermuda) from pursuit of its related claim in another forum. The Tribunal, by its reasoning in paragraphs 179 – 182, found that the conduct of DEI Egenor could not preclude DEI Bermuda's claim, since the rights of each were separate; the jurisdictions of the Peruvian tax authorities and the ICSID Tribunal did not overlap; and each claim was governed by a different applicable law. It thus considered both the substantive and the procedural consequences of the tax amnesty plea and rejected Peru's defence. In the result, then, there has been neither a failure of reasoning nor a manifest excess of power.

*3. Good faith/*actos propios *(estoppel)*

236. The Tribunal was divided on DEI Bermuda's claim that Peru had breached its implied duty of good faith and the Peruvian doctrine of *actos propios* or estoppel. The majority on this point (President Fortier and Arbitrator Tawil) found that there

[324] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ Rep 246, 305, [130].

was such a breach. Arbitrator Nikken delivered a Partial Dissenting Opinion devoted to this issue.

237. The majority set out its reasoning in four sections of the Award: (i) in its determination of the applicable law; (ii) in its determination of the scope of protection implied in the DEI Bermuda LSA; (iii) in its application to the depreciation assessment claim; and (iv) in its application to the merger revaluation claim.

238. In determining the applicable law generally, the Tribunal held, applying Article 42(1) of the ICSID Convention, that, in view of the fact that there was no express choice of law clause in the DEI Bermuda LSA, it was entitled to apply both Peruvian law and international law. To the extent of any inconsistency between the two, this had the effect that it was entitled to accord priority to international law.[325] It held that *'principles of international law must be given effect in determining the extent to which the division of the State into separate entities and agencies can insulate the State from liability for certain actions and representations (i.e. the analysis of good faith and the doctrine of* actos propios*)'*.[326]

239. Then, it set out its approach to the preliminary issue as to the legal content of the obligation.[327] It held that estoppel, as an obligation to be implied into the DEI Bermuda LSA, could not be construed purely by reference to Peruvian law. Rather, the Tribunal thought it was entitled to apply international law and to *'take into account the perspective of a reasonable foreign investor, perceiving, observing and interacting with the Government of Peru.'*[328] The Tribunal, however, rejected the unity of the state test proposed by DEI Bermuda, derived from the law of state responsibility. Rather, it considered that *vis-à-vis* a foreign investor, *'the State assumes the risk for the acts of its organs or officials which,* by their nature, *may reasonably* induce reliance *in third parties.'*[329] What mattered, thought the Tribunal, was the 'reasonable appearance *that the representation binds the State',* a determination in which '*the manifest lack of competence'* of the State organ could well be decisive.[330] The Tribunal referred by analogy to the test in Article 46 of the

[325] Award [158].

[326] *Ibid* [160].

[327] In Part IV C 2 (c) [241] – [251].

[328] *Ibid* [241].

[329] Award,[246].

[330] *Ibid* [247].

Vienna Convention[331] dealing with provisions of internal law regarding competence to conclude treaties, which precluded a state from relying on a violation of its internal law *'unless that violation was manifest and concerned a rules of its internal law of fundamental importance.'* Thus, the representation had to be '*unequivocal*' in the sense it is *'the result of an action or conduct that,* in accordance with normal practice and good faith*, is perceived by third parties as an expression of the State's position, and as being incompatible with the possibility of being contradicted in the future.'*[332]

240. The Tribunal dismissed DEI Bermuda's claim in relation to the Depreciation Assessment, finding that it had failed to meet its burden of proof of establishing that it had received the requisite unequivocal representation.[333]

241. It then returned to the estoppel argument in the context of the Merger Revaluation Assessment.[334] At that stage in its analysis, the Tribunal had already considered DEI Bermuda's claim for breach of the contractual undertaking of tax stability in the DEI Bermuda LSA and had found that there was a breach of that undertaking. An essential step leading to that finding was that there was a stable interpretation of the tax law in place at the time the tax stability guarantee was granted, which interpretation was itself stabilised pursuant to the DEI Bermuda LSA.[335]

242. Therefore, the Tribunal opened the section of its Award dealing with estoppel with the observation that, having found Peru liable for breach of the tax stability guarantee, it *'need not consider Claimant's alternative grounds for liability, including breach of the doctrine of* actos propios *or good faith.'*[336] However, it continued, *'[t]he Tribunal nevertheless feels compelled, having heard a substantial amount of evidence and argument on this point, to set out its views on the issue.'*[337]

243. Following its detailed assessment of the evidence on the support of various State actors for the merger of Egenor with Power North, the Tribunal added that these

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[331] *Supra* n 119.

[332] Award [249].

[333] *Ibid* [320] – [323].

[334] *Ibid* Part V B 3, [379] – [442].

[335] Award [352] – [366].

[336] Award [379].

[337] *Idem.*

officials were simply implementing applicable Peruvian policy at the time. It added, for good measure:[338]

> *[T]he Tribunal's primary finding in respect of the Merger Revaluation Assessment is that SUNAT breached the Egenor LSA by straying from the widely-accepted and stable interpretation of the MRL at the time of the foreign investment into Egenor. The Tribunal's findings concerning the conduct of the various individuals that are described under the Tribunal's analysis of the* actos propios *issue are secondary in nature and support its primary finding on liability.*

244. It then proceeded to find that Peru was not entitled to rely on SUNAT's sole authority to make representations on tax matters, because, opined the Tribunal, the law applicable to the question was international law not Peruvian law. *'In international law, it is possible for entities and agencies other than the national tax service to bind the State to a particular position concerning transactions with tax implications.'*[339]

245. Arbitrator Nikken dissented from this portion of the Award. In his view, *both* estoppel as a rule of international law and *actos propios* as a matter of Peruvian law were *'beyond any doubt'* applicable.[340] However, this did not mean that the state must always act with complete consistency. What mattered was, as the majority had held, whether the state's actions reasonably induced reliance. Reliance could not be reasonable where the representation was made by an organ which manifestly lacked competence.[341]

246. Where Arbitrator Nikken parted company with the majority was not therefore on the relevant legal test, but rather on its application to the problem at hand. He opined that an investor could be expected to know the legal order of the State in which he was investing, at least in respect of a fundamental issue connected with his economic activity, such as tax. In a tax matter, he was of the view that the investor could not reasonably conclude that the transaction had been approved in a clear and consistent way if the tax authority had not pronounced on the matter.[342] He

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[338] *Ibid* [427].

[339] *Ibid* [432].

[340] Nikken Dissenting Opinion, [5].

[341] *Ibid* [6] – [7].

[342] *Ibid* [11].

pointed out that this was consistent with normal practice in privatizations, since the seller (a State enterprise) would normally, as in this case, assume liability for hidden tax liabilities, since it was not the seller but the tax authority which had the power to determine the application of the tax law. Thus he considered that the conduct of the other state officials was relevant only to confirm the prevailing interpretation, which was stabilized under the DEI Bermuda LSA and did not in addition create an estoppel.[343]

247. Peru advances a wide-ranging critique of the majority's finding in its Award on this issue, alleging a manifest excess of powers based upon failure to apply Peruvian law as the applicable law and a number of failures in the Tribunal's reasoning.[344]

248. DEI Bermuda responds simply that the Tribunal's observations on this point are *obiter* and therefore do not provide a basis for annulment. Peru replies, accepting that the Award is *'susceptible to Claimant's interpretation'*[345] but arguing that it is *'equally susceptible to the interpretation that the Tribunal has decided after all to consider and decide Peru's liability on this alternative ground.'*[346] It submits further that this secondary finding would become particularly important were this Committee to have annulled the Tribunal's primary finding on liability for tax stability, since then it could operate as an alternative basis of Peru's liability.[347] Peru points out that DEI Bermuda had been invited to, and had not, confirmed its acceptance that the Tribunal's conclusions on *actos propios* would not have this consequence, were the Committee to annul the primary finding in the Award.[348]

249. The resolution of the substantive issue presented to the Tribunal is one on which views might legitimately differ. This is so as regards the balance to be struck between the twin legal systems specified as the applicable law in the absence of express choice under Article 42(1) of the ICSID Convention,[349] a formulation which undoubtedly *'confer[s] on to the Tribunal a certain margin and power of*

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[343] *Ibid* [19].

[344] Summarised *supra* at [75] – [79].

[345] Reply, [181].

[346] *Idem.*

[347] *Ibid* [183]; Transcript, Day 1, 107/20 – 108/5.

[348] Transcript, Day 1, 108/6 – 109/10.

[349] Cf. Reisman "The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of its Threshold" (2000) 15 ICSID Rev-FILJ 362 and Gaillard and Banifatemi "The Meaning of 'And' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process" (2003) 18 ICSID Rev-FILJ 375.

interpretation.'[350] It is also the case that alternative tenable views as to the application of the law may be entertained even if international law principles of estoppel are applicable, as all members of the Tribunal thought. Different views might legitimately be taken, as they were between the arbitrators, as to the balance to be struck between the effect produced on the respondent and the degree of authority in fact vested in the relevant official,[351] especially in the context of representations on tax matters, where there may well be grounds for a more cautious approach.

250. The *ad hoc* Committee is in no doubt that the views expressed by the majority in this case cannot be treated as a binding part of its Award, since they do not constitute a decision on an issue that was essential or fundamental to the Award, a part of the necessary reasoning of the arbitrators in reaching their decision, as opposed to being incidental to the arbitral tribunal's determination.[352] Rather, the majority's views on this issue are, as appears from the face of the Award, *obiter dicta.* The *ratio* of the Award is the finding of breach of the tax stability guarantee in the DEI Bermuda LSA by the MRA. The Tribunal's assessment of damages, leading to the award of damages in the *dispositif,* is for *'breach of the DEI Bermuda LSA'* as a result of the MRA.[353] The Tribunal emphasised the subsidiary nature of its findings on *actos propios* in the passages cited *supra* in paragraphs 242 – 243. Furthermore, the Tribunal carefully distinguished elsewhere in the Award between its *finding* of breach of the tax stabilization guarantee and its *conclusions* in relation to *actos propios.* [354]

251. The Committee has not, for the reasons set out in section III C 1 of its Decision, annulled the finding of the Tribunal in relation to the guarantee of tax stability. The Award and its *ratio* stand. Therefore the possible scenario adverted to by Peru as requiring consideration of partial annulment of the section of the Award dealing with *actos propios* has not come to pass. Furthermore, DEI Bermuda having taken the formal position in its pleadings that the Tribunal's conclusions on estoppel are

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[350] *Wena* supra n 116, [39].

[351] Accord: Thirlway "The Law and Procedure of the International Court of Justice 1960–1989 Part One" (1989) LX BYIL 1, 36.

[352] ILA Committee on International Commercial Arbitration 'Final Report on Res Judicata and Arbitration' (2006) 72 ILA Conf Rep 186, 200, [56]; accord: *Associated Electric and Gas Insurance Services Ltd (**AEGIS**) v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 (PC), [14].

[353] Award [454], [474].

[354] Award [142], [450].

obiter dicta is itself bound by that statement. In the light of parties' positions, therefore, it is not necessary for the Committee to enter upon an analysis of whether the grounds for annulment advanced in relation to this section have merit, since such an analysis could not lead to the outcome sought by Peru, namely the partial annulment of that portion of the Award dealing with the MRA.[355] Accordingly, the Committee does not do so.

4. Damages

252. The Tribunal dealt with the quantum of damages in Part VI of its Award (paragraphs 460 – 488). It had before it reports in chief and reply from experts called by each of the parties: Mr Kaczmarek of Navigant Consulting for DEI Bermuda and Mr Bustamante of Macroconsult for Peru, whose calculations are summarised at paragraphs 460 – 473, together with their respective critiques of each other's approach.

253. The Tribunal held that its task was to calculate damages resulting from the MRA only, limited to the period until the DEI Bermuda LSA expired in 2011. The Tribunal noted that the difference between the respective experts on these parameters was between US$19,469,721 (Navigant) and US$9,568,158 (Macroconsult).[356]

254. In order to resolve this difference, the Tribunal considered the methodology adopted by each of the experts and their respective critiques of the other's approach. In the end, having scrutinised the data and calculations in each of the reports, the Tribunal came to the view that it could rely on the calculations of Mr Kaczmarek. By contrast, it was unable to verify the calculations of Mr Bustamante by reference to the supporting data. As a result, it adopted the sum as calculated by Mr Kaczmarek.[357]

255. Peru objects that the Tribunal did not supply reasons to explain why it regarded Macroconsult's methodology as inadequate. If it had had such concerns, Peru contends that the Tribunal had a duty to call Mr Bustamante to give oral evidence at

[355] Application for Annulment [101(2)].

[356] Award [474] – [475].

[357] *Ibid* [481] – [483].

the hearing, as DEI Bermuda had not. Its failure to do so violated Peru's fundamental procedural right to be heard.[358]

256. The question of the margin of appreciation accorded to a tribunal in calculating damages was the subject of detailed consideration by an *ad hoc* committee in *Rumeli Telekom A/S v Kazakhstan.*[359] That committee observed:

> *[T]ribunals are generally allowed a considerable measure of discretion in determining issues of quantum. Thus, in* Wena Hotels*, the* ad hoc *Committee held:*[360]
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> > *With respect to determination of the quantum of damages awarded, it may be recalled that the notion of "prompt, adequate and effective compensation" confers to the Tribunal a certain margin of discretion, within which, by its nature, few reasons more than a reference to the Tribunal's estimation can be given, together with statements on the relevance and the evaluation of the supporting evidence.*
>
> *This is not a matter to be resolved simply on the basis of the burden of proof. To be sure, the tribunal must be satisfied that the claimant has suffered some damage under the relevant head as a result of the respondent's breach.*[361] *But once it is satisfied of this, the determination of the precise amount of this damage is a matter for the tribunal's informed estimation in the light of all the evidence available to it. This is widely accepted in municipal law.*[362]

257. This analysis is equally applicable here. The Tribunal had determined that DEI Bermuda had suffered loss as a result of the MRA. It was common ground between the experts that the MRA had had a material effect on DEI Bermuda. The Tribunal's task was thus to determine the extent of that loss as a matter of informed estimation, taking into account the evidence before it.

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[358] Memorial [270] – [272].

[359] (Decision on Annulment) ICSID Case No ARB/05/16 (25 March 2010), [146] – [147].

[360] Supra n 116, [91].

[361] Citing *Chorzów Factory Case (Germany v Poland)* (Merits) (1928) PCIJ Rep Ser A No 17, 56.

[362] Citing Gotanda 'Recovering Lost Profits in International Disputes' (2004-5) 36 Georgetown JIL 61, 101 and *Sellars v Adelaide Petroleum NL* (1992-4) 179 CLR 332, 368 (HCA).

258. This the Tribunal patently did. It is the Tribunal that is *'the judge of the admissibility of any evidence adduced and of its probative value'.*[363] It is no part of the mission entrusted to an *ad hoc* committee under Article 52 to review those judgments. Nor were the parties denied an opportunity to be heard on the question of damages. Both parties adduced two rounds of reports. In view of the sequential nature of written pleadings in ICSID procedure, this gave Peru and its expert the opportunity to consider and respond in writing to the approach taken by DEI Bermuda's expert and to respond to the latter's critique of Peru's approach. A tribunal is not obliged to hear from all witnesses orally. On the contrary, it is empowered under ICSID Arbitration Rule 36 to admit evidence given by a witness or expert in a written deposition. It follows that it may also evaluate the probative value of the evidence given in such a form. This final ground for partial annulment of the Award is thus also rejected.

IV. COSTS

259. It remains for the *ad hoc* Committee to consider what order it should make for, respectively, (i) the **ICSID Costs**[364]; and (ii) the costs and expenses of the parties in connection with the Annulment Proceeding (**'Party Costs'**).

260. In accordance with the direction of the *ad hoc* Committee, each party submitted a statement of its costs on 1 December 2010:

(a) Peru submitted a Statement of its Costs quantified at US$1,365,400.60 (including Party Costs of US$885,400.60 together with its advances of ICSID Costs, which at that stage totalled US$480,000.00).

(b) DEI Bermuda submitted a Statement of its Party Costs, which it quantifies, using an hourly rate, at US$1,373,325.40, whilst conceding that at present it is only obligated to pay US$662,380.90 as its attorneys' fees are capped, subject to an unspecified success fee.

[363] ICSID Arbitration Rule 34(1).
[364] Comprising, in accordance with Articles 52(4) & 61(2) of the ICSID Convention, the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre.

261. DEI Bermuda's Statement of Costs was accompanied by legal submissions as to costs. The *ad hoc* Committee accorded Peru the opportunity to respond to those submissions, which it did by letter dated 10 December 2010.

262. DEI Bermuda requests that the *ad hoc* Committee order Peru to pay DEI Bermuda's Party Costs together with all of the ICSID Costs.[365] DEI Bermuda submits that an award of costs is justified on the basis that Peru's application was *'manifestly unfounded'* and *'most unlikely to succeed'*,[366] and that Peru *'artificially and unnecessarily'* drove up the cost of defending the annulment application.[367]

263. Peru responds that it has already paid US$480,000 in advances to the Centre and has not requested to be reimbursed for any portion of the ICSID costs.[368] Peru further argues that it has brought *'serious, well-substantiated claims for annulment'* and thus submits that an order for it to pay DEI Bermuda's Party Costs is not justified and should be dismissed.[369]

264. The *ad hoc* Committee has discretion to determine how, and by whom, ICSID Costs and Party Costs should be borne (Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 47(1)(j), read in conjunction with Article 52(4) of the ICSID Convention and Arbitration Rule 53).

265. In view of Peru's clarification regarding ICSID costs, the *ad hoc* Committee is not required to make a determination as to apportionment of those costs, and accordingly makes an order confirming that Peru has to bear all of those costs.[370]

266. In relation to DEI Bermuda's claim for reimbursement of its Party Costs, the practice of virtually all ICSID annulment committees has been to order each party to bear their own Party Costs, even where the Applicant has been wholly unsuccessful in its annulment application. [371]

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[365] Counter-Memorial [312(2)].
[366] Claimant's Statement of Costs, [13].
[367] *Ibid* [13] – [14].
[368] Peru's Response to Claimant's Submission on Costs, [18].
[369] *Ibid* [8] – [17].
[370] The Secretariat will in due course provide the Parties with a financial statement showing the ICSID Costs. The Centre will reimburse Peru any remaining balance in the case account once all costs and expenses have been paid.
[371] Schreuer *supra* n 121, 1234. See, e.g.,*Wena Hotels supra* n 116, [112]; *Klöckner supra* n 133, 163; *Amco Asia supra* n 230, [10.01]; *Rumeli supra* n 359, [183]; *MCI supra* n 105, [89]; *Azurix Corp v Argentine Republic* (Decision on Annulment) ICSID Case No ARB/01/12 (1 September 2009), [380].

267. There have only been two cases in which *ad hoc* committees have departed from this approach. In each such case, there were exceptional circumstances.[372] Thus, in *CDC v Seychelles* the *ad hoc* Committee concluded that the Respondent's application was *"fundamentally lacking in merit" and "most unlikely to succeed"*.[373] In *Repsol v Ecuador,* the *ad hoc* Committee stressed that *"the arguments for annulment did not pose novel or complex questions"*[374] and also pointed to the Applicant's failure to make timely payment of the advance on costs.

268. In the present case, not all of the grounds raised in Peru's Application for Annulment were manifestly unfounded. Peru raised arguments in particular on the question of manifest excess of power – as it relates both to the Tribunal's exercise of jurisdiction *ratione materiae* and *ratione temporis* and to the Tribunal's approach to the law applicable to *actos propios/*estoppel – that required the *ad hoc* Committee's extended consideration. Moreover, despite the number of points raised by Peru during the annulment proceeding, the Committee considers that Peru pursued the annulment proceeding in a constructive and professional manner. In light of these factors, the *ad hoc* Committee is not prepared to order that Peru pay DEI Bermuda's Party Costs. The Parties shall each bear their own Party Costs.

[372] *CDC v Seychelles supra* n 130, [89]; *Repsol YPF Ecuador S.A. v Empresa Estatal Petróleos del Ecuador* (Decision on Annulment) ICSID Case No ARB/01/10 (8 January 2007), [86].
[373] *Ibid* [89].
[374] *Ibid* [87].

V. DECISION

269. For the reasons given above, the *ad hoc* Committee decides that:

(1) Peru's Application for Annulment is dismissed in its entirety.

(2) Peru shall bear all ICSID Costs incurred in connection with this annulment proceeding.

(3) Each Party shall bear its own Party Costs incurred in connection with this annulment proceeding.

(4) Pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3), the stay of enforcement of the Award ordered by the *ad hoc* Committee in its decision of 23 June 2009 is terminated.

C. a. McLachlan

Professor Campbell McLachlan QC
President of the *Ad Hoc* Committee

Date: 28 February 2011

Judge Dominique Hascher
Member of the *Ad Hoc* Committee

Date: 7 February 2011

Judge Peter Tomka
Member of the *Ad Hoc* Committee

Date: 25 January 2011