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

In the annulment proceeding between

DAIMLER FINANCIAL SERVICES A.G.

Applicant

and

REPUBLIC OF ARGENTINA

Respondent

ICSID Case No. ARB/05/1

DECISION ON ANNULMENT

Members of the ad hoc *Committee*
Eduardo Zuleta, Chairman
Florentino Feliciano, Member
Makhdoom Ali Khan, Member

Secretary of the Tribunal
Anneliese Fleckenstein

Date of dispatch to the Parties: January 7, 2015

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List of Defined Terms

¶	Paragraph.
18-month clause	Articles 10(2) and 10 (3)(a) of the BIT.
2001 Draft Articles	2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.
Applicant or Claimant	Daimler Financial Services AG.
Application	Application for Partial Annulment of Daimler Financial Services AG, dated December 20, 2012.
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings, April 2006.
Argentina	The Argentine Republic.
art.	Article.
Award	Award rendered on August 22, 2012 in *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/01).
Background Paper on Annulment	Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012.
C-Mem. or Counter-Memorial	Respondent's Counter-Memorial on Annulment.
Committee	The *ad hoc* Committee composed of Mr. Florentino Feliciano, Mr. Makhdoom Ali Khan and Mr. Eduardo Zuleta.
Daimler	Daimler Financial Services AG.
Dissenting Opinion	Dissenting Opinion of Judge Charles N. Brower, dated August 15, 2012.
Germany-Argentina BIT or the BIT or the Treaty	Treaty between the Argentine Republic and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments signed on 9 April 1991.
Hearing on Annulment	Hearing on annulment that took place at the seat of the Centre in Washington, D.C. on July 14 and 15, 2014.
ICJ	International Court of Justice.
ICSID or the Centre	International Centre for Settlement of Investment Disputes.
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
Joint Procedural Agreement	The joint procedural agreement submitted by the Parties on April 24, 2013.

Mem. or Memorial	Daimler's Memorial on Annulment.
MFN	Most-Favored-Nation.
Opinions	The Dissenting Opinion of Judge Charles N. Brower and the Separate Opinion of Professor Domingo Bello Janeiro.
Parties	The Argentine Republic and Daimler Financial Services AG.
Rej. or Rejoinder	Argentina's Rejoinder on Annulment.
Reply	Daimler's Reply on Annulment.
Respondent	The Argentine Republic.
Separate Opinion	Opinion of Professor Domingo Bello Janeiro, dated August 16, 2012.
Tr. [page:line]	Transcript of the Hearing on Annulment.
Tribunal	The Arbitral Tribunal that rendered the Award.
VCLT	Vienna Convention on the Law of Treaties.
World Bank Guidelines or Guidelines	1992 World Bank Guidelines on the Treatment of Foreign Direct Investment.

I. INTRODUCTION AND PARTIES

1. Pursuant to Article 52 of the ICSID Convention and Rule 50(1) of the Arbitration Rules, on December 20, 2012, Daimler Financial Services AG filed an application requesting the partial annulment of the Award issued on August 22, 2012 by an Arbitral Tribunal consisting of Professor Pierre-Marie Dupuy (President), Judge Charles N. Brower, and Professor Domingo Bello Janeiro, in the arbitration between Daimler Financial Services AG and the Argentine Republic (ICSID Case No. ARB/05/1) (hereinafter referred to as the "Award").

2. The Applicant is Daimler Financial Services AG and is hereinafter referred to as "Daimler" or the "Applicant".

3. The Applicant is a company incorporated under the laws of the Federal Republic of Germany.

4. The Respondent is the Argentine Republic and is hereinafter referred to as "Argentina" or the "Respondent."

5. The Applicant and the Respondent are hereinafter collectively referred to as the "Parties." The Parties' respective representatives and their addresses are listed above on page (ii).

II. PROCEDURAL HISTORY

6. On December 20, 2012, the International Centre for Settlement of Investment Disputes ("ICSID") received from Daimler an application for partial annulment of the Award (hereinafter the "Application").

7. On December 27, 2012, the Secretary-General of ICSID registered the Application in accordance with Rule 50(2)(a) of the Arbitration Rules and notified the Parties of the registration pursuant to Arbitration Rule 50(2)(b). In the Notice of Registration, the Secretary-General informed the Parties that in accordance with Rule 52(1) of the Arbitration Rules, she would request that the Chairman of the Administrative Council of ICSID appoint the members of the *ad hoc* committee that would consider the Application as stipulated by Article 52(3) of the ICSID Convention.

8. On February 25, 2013, the Secretary-General informed the Parties that ICSID was proceeding to recommend to the Chairman of the Administrative Council the appointment of Mr. Eduardo Zuleta, a national of Colombia, Judge Florentino Feliciano, a national of the Philippines, and Mr. Makhdoom Ali Khan, a national of Pakistan.

9. On March 7, 2013, the Secretary-General, in accordance with Rule 6(1) of the Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Committee was therefore deemed to have been constituted on that date. Ms. Anneliese Fleckenstein, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.

10. The Committee is composed of Mr. Eduardo Zuleta, Chairman of the Committee, Judge Florentino Feliciano and Mr. Makhdoom Ali Khan.

11. On April 24, 2013, the Parties submitted their Joint Procedural Agreement.

12. On April 30, 2013, the Committee acknowledged receipt of the Joint Procedural Agreement. The Committee noted that the Parties had agreed on all points of the agenda and that there were no further points for discussion. Therefore, and provided the Parties did not agree otherwise, the first session with the Parties would be cancelled.

13. On May 15, 2013, the Committee informed the Parties that it had held a first session on May 2, 2013 and agreed to the Parties' Joint Procedural Agreement. In their Joint Procedural Agreement, the Parties confirmed that the Members of the Committee had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be English and Spanish and that the place of proceedings would be the seat of the Centre in Washington, D.C.

14. As agreed in the Parties' Joint Procedural Agreement, the Applicant filed a Memorial on annulment on July 31, 2013; the Respondent filed a Counter-Memorial on annulment on November 18, 2013; the Applicant filed a Reply on annulment on January 23, 2014; and the Respondent filed a Rejoinder on annulment on April 7, 2014. Translations of each of these submissions into the other procedural language were submitted by the Parties pursuant to the Joint Procedural Agreement.

15. A hearing on annulment took place at the seat of the Centre in Washington, D.C. on July 14 and 15, 2014. In addition to the Members of the Committee and the Secretary of the Committee, present at the hearing were:

For the Applicant:

Mr. Paolo Di Rosa	Arnold & Porter LLP
Mr. John Bellinger III	Arnold & Porter LLP
Ms. Nancy Perkins	Arnold & Porter LLP
Ms. Mallory Silberman	Arnold & Porter LLP
Mr. Brian Bombassaro	Arnold & Porter LLP
Mr. Kelby Ballena	Arnold & Porter LLP
Ms. Ana Pirnia	Arnold & Porter LLP
Mr. Bernd Fritzinger	Daimler Financial Services AG

For the Respondent:

Dr. Javier Pargament	Subprocurador del Tesoro de la Nación
Dr. Carlos Mihanovich	Procuración del Tesoro de la Nación
Dr. Gabriel Bottini	
Dr. Mariana Lozza	Procuración del Tesoro de la Nación
Dr. Silvina González Napolitano	Procuración del Tesoro de la Nación
Dr. Julián Negro	Procuración del Tesoro de la Nación
Dr. Sebastián A. Green Martínez	Procuración del Tesoro de la Nación
Dra. Lucila Miranda	Procuración del Tesoro de la Nación
Dra. Magdalena Gasparini	Procuración del Tesoro de la Nación

16. The proceeding was closed on December 5, 2014, pursuant to Arbitration Rule 38.

17. The Committee has conducted its deliberations in person and by various modes of communication among its members and in issuing this Decision on Annulment has taken into account all written submissions and oral arguments of the Parties.

III. POSITION OF THE PARTIES AND THE TRIBUNAL'S ANALYSIS ON THE GROUNDS FOR ANNULMENT

18. Daimler seeks partial annulment of the Award on the basis that: (a) the Award has failed to state the reasons on which it is based, contrary to Article 52(1)(e) of the ICSID Convention; (b) the Tribunal has manifestly exceeded its powers within the meaning of Article 52(1)(b)

of the ICSID Convention; and (c) the Tribunal committed serious departures from fundamental rules of procedure, in violation of Article 52(1)(d) of the ICSID Convention.[1]

19. Argentina argues that Daimler's request for partial annulment manifestly lacks legal merit as is evident from the fact that the sole basis for Daimler's request is its disagreement with the Tribunal's interpretation in relation to the MFN clauses. Furthermore, even if the Tribunal's interpretation were incorrect, it would not warrant annulment under the ICSID Convention.[2]

20. This section addresses the submissions of the Parties on the three grounds of annulment invoked by Daimler and provides a summary of the claims and reliefs sought by each Party. The Committee's analysis on each of these grounds for annulment is included after the summary on the position of the Parties.

21. The Committee has carefully reviewed all claims, reasoning, documents and legal authorities submitted by the Parties, and the fact that a reasoning, document or legal authority is not cited or referred to in the summary does not mean that the Committee has not considered the same.

A. FAILURE TO STATE REASONS - ARTICLE 52(1)(E)

1. THE STANDARD

(i) Daimler's arguments

22. Daimler argues that the Award failed to state the reasons on which it was based regarding the Tribunal's determination on the applicability of the BIT's MFN clause to bypass the 18-month domestic court litigation requirement stipulated in the BIT.[3] According to Daimler,

[1] Mem. ¶ 110.

[2] C-Mem. ¶ 2.

[3] Mem. ¶ 111.

the Award suffers from "*lacunae*, contradictory reasons and a failure to explain the reasoning on key issues."[4]

23. According to Daimler, the Parties agree on the following: a failure to state reasons might result from the omission of reasons or from contradictory reasons; a tribunal's failure to "deal with every question presented" or to reach a majority decision on such questions is a failure to state reasons; and a failure to state reasons, on a point logically necessary for the tribunal's decision, must leave the decision essentially lacking in any expressed rationale.[5]

24. However, Daimler states that the Parties disagree on a number of points. Even though the standard under Article 52(1)(e) of the ICSID Convention is a failure to state "reasons", Argentina proposes a different standard based on whether "decisions" were made by the Tribunal.[6] This is evident in Argentina's claims that the Tribunal analysed the Parties' positions and took decisions on all questions put forward.[7] Yet, according to Daimler, "analyzing" and "deciding" all questions is not sufficient to escape annulment because the tribunal must explain why it reached its conclusions in order to fulfill the purpose of Article 52(1)(e).[8] A tribunal must "show its work" by guiding the reader through logical steps that lead to a conclusion. If one of the steps is missing, then the decision is not capable of leading the reader from "Point A. to Point B. and eventually to its conclusion" and the award must be annulled.[9] Daimler argues that its position has been confirmed in the *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4) ("*MINE*") and *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) ("*Soufraki*") decisions on annulment.[10]

25. Accordingly, Daimler argues, the Committee must review each pivotal or outcome-determinative point that serves as a link in the logical chain of the Award's premises and

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[4] Mem. ¶ 111.
[5] Reply ¶ 5.
[6] Reply ¶ 6.
[7] Reply ¶ 6.
[8] Reply ¶ 7.
[9] Mem. ¶ 116; Reply ¶ 7.
[10] Reply ¶ 8.

conclusions, and determine whether the Tribunal failed to state reasons or stated contradictory reasons on each of these points.[11]

26. Daimler submits that the Award should be annulled because of failure to state reasons, given (1) a failure to reach a majority decision on each question submitted and (2) the existence of inconsistencies in the Award's findings concerning the BIT's 18-month clause and the scope of the BIT's MFN clauses.

(ii) Argentina's arguments

27. According to Argentina, it is clear that Daimler has fully understood the Tribunal's analysis and reasons for declining jurisdiction as can been seen from the arguments in its Memorial.[12] The weakness in Daimler's arguments is further evidenced in its acknowledgement that the BIT requires submission of its dispute to local courts and that it failed to meet this requirement. Yet, it argued that in spite of this, the Tribunal was not mandated to apply the 18-month clause by virtue of the BIT's MFN clauses.[13] It is clear in the Award that the Tribunal analyzed each party's position and ultimately disagreed with Daimler's position on the MFN clauses.[14] Moreover, Daimler has admitted that the majority took into consideration the positions of both Parties and based its interpretation on the Vienna Convention on the Law of Treaties ("VCLT").[15] Argentina states that the Tribunal neither failed to exercise its jurisdiction nor to state the reasons on which its decision was based.[16] This is also true of the application of the Tribunal's interpretation to the facts of the case in relation to the failure to satisfy the prior recourse to local courts requirement and the alleged futility of such recourse.[17]

28. Argentina argues that a ground for annulment under Article 52(1)(e) of the ICSID Convention is warranted in circumstances where "two *genuinely* contradictory reasons

[11] Reply ¶ 9.
[12] C-Mem. ¶ 4.
[13] C-Mem. ¶¶ 6-7.
[14] C-Mem. ¶ 5.
[15] C-Mem. ¶¶ 8-10.
[16] C-Mem. ¶ 10.
[17] C-Mem. ¶ 11.

cancel each other out", which is not the case here.[18] Additionally, in order for an award to be annulled on the basis of failure to state reasons, the omission has to be pivotal to the outcome of the case and, as such, two conditions must be met: i) the failure to state reasons must leave the decision on a particular point essentially lacking in any express rationale and, ii) that point must be logically necessary for sustaining the tribunal's decision.[19] Daimler invokes four alleged contradictions but it has not explained how they would affect the outcome of the Award.[20]

2. FAILURE TO REACH A MAJORITY DECISION ON EACH QUESTION SUBMITTED

(i) Daimler's arguments

29. According to Daimler, as per Article 48(1) of the ICSID Convention, a tribunal must decide each question by a majority of votes and, pursuant to Articles 48(3) and 52(1)(e) of the ICSID Convention, the award must deal with each question submitted and provide a statement of reasons.[21] Daimler states that a necessary predicate to the notion of "dealing with a question" is that the majority of the tribunal has reached a consensus decision on such question.[22] As such, it is possible for a tribunal to fail to deal with every question by failing to reach a majority decision on such question.[23]

30. Daimler argues that a very small number of ICSID cases feature separate opinions by more than one arbitrator and in the instances where this is the case, the *ad hoc* committees must look carefully at the reasoning provided by each arbitrator to determine whether each question has been decided by a majority of the tribunal.[24] If there is different reasoning on outcome-determinative issues, then a majority is not reached on such issues and the requirement of Article 48(1) is not satisfied.[25] This may be a ground for annulment under

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[18] C-Mem. ¶ 53.

[19] C-Mem. ¶54, citing the *ad hoc* committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) ("*Vivendi I*").

[20] C-Mem. ¶¶ 54-55, ¶ 75.

[21] Mem. ¶¶ 112-113.

[22] Mem. ¶ 114.

[23] Mem. ¶ 114.

[24] Mem. ¶ 115.

[25] Mem. ¶ 115.

Article 52(1)(e) if the parties are unable to follow the reasoning of the Tribunal from "Point A. to Point B. and eventually to its conclusion"[26]. In addition, annulment can also be ordered if there is a complete absence of reasoning. This takes place by an omission to state reasons or by reasons, which are contradictory.[27]

31. In this vein, Daimler argues that the Committee must take Professor Bello Janeiro's Separate Opinion into account for the purpose of following the Award's reasoning and thus determining if there was a failure to state reasons.[28]

32. Daimler argues that although all three arbitrators in the *Daimler* case signed the Award, the act of signature itself is insufficient to establish that there was a majority on all questions presented.[29] This is evidenced by Judge Brower's Dissenting Opinion disagreeing with the Award's determination on the MFN issue and Professor Bello Janeiro's divergence of conclusions and reasoning in his Separate Opinion.[30]

33. Moreover, Daimler states that it seems that the Award reflects the reasons and conclusions of only the President of the Tribunal.[31] As acknowledged in the Award, it reproduces in large part the reasoning in an award of a different case that shared the same President.[32] This aspect is even more significant because the analysis that the Award reproduced was critical to the outcome in this case: defining the principles of treaty interpretation that would apply to the MFN issue.[33] The gravity of the situation is further compounded because the *ICS Inspection and Control Services Limited v. Argentine Republic* ("*ICS*") award was issued in another case, conducted under a different set of rules and under a different Bilateral Investment Treaty.[34]

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[26] Mem. ¶ 116.

[27] Mem. ¶¶ 117-118, also citing the *ad hoc* committee in *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) ("*Pey Casado*").

[28] Hearing on Annulment, Tr. 66:12 – 71:12.

[29] Mem. ¶ 121.

[30] Mem. ¶¶ 121-122.

[31] Mem. ¶ 123.

[32] Mem. ¶ 123.

[33] Mem. ¶ 124.

[34] Mem. ¶ 125.

34. Daimler argues that another manifestation that the Award does not reflect the majority opinion was Professor Bello Janeiro's recognition in his Separate Opinion that he was subscribing or adhering to the President's conclusions.[35] This admission further suggests that the Tribunal failed to abide by its obligation to render an Award, which enables the reader to determine the reasons of the Tribunal, and not those of each individual member, on each question presented.[36]

35. According to Daimler, the crucial part of the Award turns mainly on the meaning of "treatment" in the BIT's MFN clauses. Interpreting this word in the context of the VCLT, the Award adopts a two pronged approach in that it 1) ascertains the intention of the State Parties to the BIT, and 2) applies the principle of contemporaneity. The Tribunal then determined whether its conclusion represents the Parties' intention at the time the BIT was negotiated.[37] A failure of the majority to decide and deal with these questions amounts to a gap in the logic of the Award.[38]

36. Contrary to the conclusion in the Award that the World Bank Guidelines shed light on the word "treatment" but are not determinative, Professor Bello Janeiro in his Separate Opinion considers these Guidelines as determinative.[39] The Award discusses other textual evidence to discern the meaning of "treatment" but, according to Daimler, this is not the approach of the majority because Professor Bello Janeiro contradicts this analysis and bases his conclusions on the World Bank Guidelines, without referring to other evidence of contemporaneous understanding of State Parties to the BIT.[40] Daimler argues that this divergence of views makes it impossible to confirm either that a majority decision was reached with respect to each element of the standard determined to be applicable by the Award or to follow the majority's reasoning on each key point.[41]

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[35] Mem ¶ 127.
[36] Mem. ¶ 128.
[37] Mem. ¶ 129.
[38] Mem. ¶ 130.
[39] Mem. ¶¶ 131-132.
[40] Mem. ¶¶ 134-136.
[41] Mem. ¶ 137.

37. According to Daimler, if an arbitrator's signature alone were sufficient to establish his agreement with the award and its reasoning, Judge Brower's signature on the Award would have meant that he accepted the discussion of the MFN issue, which he expressly stated in his Dissenting Opinion that he did not.[42] Consequently, Argentina's argument in this respect is incorrect. Daimler argues that the two cases before the International Court of Justice ("ICJ") that Argentina relies on, dealt with different questions, which are not before this Committee.[43]

38. In the ICJ *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* ("*Case Concerning the Award of 1989*") the question before the ICJ was the validity of an individual's vote and its effect on the existence of the award.[44] Daimler states that it is not questioning the validity of the Tribunal members' votes, but whether the Award must be annulled for failing to fulfill the requirements in Article 48 of the ICSID Convention.[45] Similarly, the *Advisory Opinion on Application for review of Judgment No. 333 of the United Nations Administrative Tribunal* ("*Review of Judgment No. 333 Opinion*") does not address any claims regarding the failure to state reasons. However, Daimler continues, this case does give some guidance on the relevance of separate opinions under international law, which need to be taken into account in order to interpret or elucidate a judgment.[46] The ICJ decisions relied on by Argentina actually favor a close review by the Committee of Professor Bello Janeiro's Opinion, which is in line with the conclusion in the *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) ("*Amco I*") decision, that committees in ICSID cases must examine what the tribunal had said it was doing and what it was in fact doing to resolve a question.[47]

39. Similarly, the *Granite State Machine Co. Inc v. Islamic Republic of Iran et al*[48] award from the Iran-United States Claims Tribunal cited by Argentina supports Argentina's submission

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[42] Reply ¶11.
[43] Reply ¶¶ 12-14.
[44] Reply ¶¶ 12-13.
[45] Reply ¶ 12.
[46] Reply ¶¶ 14-15.
[47] Reply ¶ 16.
[48] *Granite State Machine Co. Inc. v. Islamic Republic of Iran et al.*, Award No. 18-30-3, dated 15 December 1982, *Iran-US Claims Tribunal Reports*, vol. 1, at 442

in respect of the validity or existence of the award, which is distinct from the question of whether reasons in a concurring opinion, which contradict the award, warrant annulment.[49] This is consistent with the views of Judge Schwebel, who, citing the same authorities that Argentina refers to, stated that an arbitrator who expresses views at variance with his vote might prejudice the execution of the award and this prejudice could include annulment under Article 52(1) of the ICSID Convention.[50] Daimler argues that in light of this, the existence of an award or the validity of an arbitrator's vote in favor of the *dispositif* does not preclude that a separate statement of reasons might lead to the annulment of the award.[51] In this case, according to Daimler, Professor Bello Janeiro's Opinion contradicts the Award in several material aspects and thus nullity is required.[52]

40. Argentina's arguments with regard to the contents of the Separate Opinion fail to rebut Daimler's argument that the substance of the Separate Opinion is important to the Committee's task under Article 52(1)(e).[53] Daimler argues that, contrary to Argentina's contention, the Committee must examine Professor Bello Janeiro's Opinion, which ostensibly states that he fully subscribes to the Award but which actually contradicts it on two outcome-determinative questions that the Tribunal had to decide. The first concerned the Contracting State Parties' intentions at the time of negotiating the BIT and, the second concerned the principle of contemporaneity.[54]

41. According to Daimler, on the first point the Award found that certain material was not direct evidence of the intention of the State Parties to the BIT, whereas Professor Bello Janeiro found this material decisive. This is evident in the different treatment of the World Bank Guidelines in the Award and the Separate Opinion.[55] On the second point regarding the principle of contemporaneity, Daimler argues that the Award considers decisions of other investor-State tribunals, made subsequent to the execution of the BIT, as "inadequate for the

[49] Reply ¶ 17.
[50] Reply ¶¶ 17-18.
[51] Reply ¶ 19.
[52] Reply ¶19.
[53] Reply ¶ 20.
[54] Reply ¶¶ 21-22.
[55] Reply ¶ 23.

purposes of assessing the Parties' understanding of particular BIT terms".[56] Yet, Professor Bello Janeiro lists the evolution in investor-State arbitration as "decisive" and "most important" to his reasoning. Moreover, the three most important reasons that he gives are based on legal materials that the Award rejects.[57] A review of what Professor Bello Janeiro said he would do and what he actually did shows a clear contradiction on the same issues between his reasons and those in the Award.[58] Furthermore, Professor Bello Janeiro's contradictory reasons and his reliance on authorities not cited by or which the Parties had an opportunity to address or explain was unfair to Daimler.[59]

42. Daimler states that Argentina's argument to the effect that it wasn't necessary for Professor Bello Janeiro to refer to all arguments in the Award is inapplicable. Indeed, Professor Bello Janeiro refers to certain sections of the Award before proceeding to give contradictory reasoning.[60] Argentina's defence that Professor Bello Janeiro wrote his Separate Opinion to explain his "change of heart" since the *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) ("*Siemens*") case, is unresponsive. Whatever Professor Bello Janeiro's motivations were, his Separate Opinion articulates his reasons for concurring in the Award's findings, and these reasons are contradictory to those set forth in the Award.[61]

43. With regard to the Award's "importation" of the analysis in the *ICS* case, Daimler states that this shows that the deliberative process was not undertaken, or critical determinations were not made, by a majority of the Tribunal as required by the ICSID rules.[62] According to Daimler, Argentina's defense of the "Tribunal President's recycling of the analysis from *ICS*"[63] misses the point that Daimler made: that the "President's copy/paste exercise reflects

[56] Reply ¶ 24.
[57] Reply ¶ 25.
[58] Reply ¶¶ 26-27.
[59] Reply ¶ 27.
[60] Reply ¶ 28.
[61] Reply ¶¶ 28-29.
[62] Reply ¶ 30.
[63] Reply ¶ 33

a failure by *this* Tribunal to agree on a single line of reasoning for the Award's conclusion on the issue of the 18-month and MFN clauses".[64]

(ii) Argentina's arguments

44. According to Argentina, there is no "divergence of views" between the two majority arbitrators and, even if there were, it would not affect the validity of the Award.[65] Firstly, pursuant to Arbitration Rule 47(3), an arbitrator may "attach his individual opinion to the award, whether he dissents from the majority or not". It would be futile for an arbitrator to attach a concurring opinion if it did not say anything different from what was stated in the award, provided that this arbitrator supports the decision made in the award.[66] Secondly, Argentina argues that Professor Bello Janeiro stated that he was attaching an individual opinion to explain his position, which differed from his position in the *Siemens* case.[67] Thus, the reasons in the Separate Opinion have a different function from those of the Award.[68] Moreover, it was recognized in Daimler's Memorial, and also by Judge Brower, that Professor Bello Janeiro joined the President to form the majority.[69] According to Argentina, it was only natural for Professor Bello Janeiro to include in his opinion points that only concerned him.[70]

45. Daimler's argument that, by his own admission, Professor Bello Janeiro merely adhered to the conclusions of the Tribunal's President shows its lack of understanding of Arbitration Rule 14(1), which envisages that the President of the Tribunal take a leading role in the deliberations.[71] Additionally, Argentina argues, deliberations are secret and subject to no regulations and as such they can be conducted as arbitrators see fit. In fact, Judge Brower's

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[64] Reply ¶¶ 33-34.
[65] C-Mem. ¶ 12; Hearing on Annulment,Tr, 147:17 – 150:1.
[66] C-Mem. ¶ 14.
[67] C-Mem. ¶ 15.
[68] Rej. ¶ 22.
[69] C-Mem. ¶¶ 15-16
[70] C-Mem. ¶ 16.
[71] C-Mem. ¶ 17.

harshly critical opinion does not maintain that the deliberations were conducted in violation of any rule or principle.[72]

46. Argentina argues that the Award is well founded and Daimler's grounds for seeking partial annulment are inadequate. In this regard, Argentina refers to the decision of the committee in *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) *("Azurix"),* which held that this ground for annulment only applies in a clear case of a tribunal failing to state reasons.[73] Additionally, the *Azurix* committee, citing the decision by an *ad hoc* committee in *Vivendi I*, observed that Article 52(1)(e) concerns the failure to state reasons and not "the failure to state correct or convincing reasons".[74] According to Argentina, in the case at hand, there was a majority on each question, the Tribunal gave a decision on each question, the reader can follow the Tribunal's reasoning and all three members of the Tribunal signed the Award.[75]

47. Contrary to Daimler's claims, the Tribunal reached a majority decision on both questions *i.e.*, the 18-month wait clause and the MFN clause, with Professor Bello Janeiro voting in favor of the Award's conclusions and explaining "his reasons for subscribing to the Award".[76] According to Argentina, in this context, which Tribunal member proposed the terms of the Award is merely anecdotic. What is important is that the decision was by a majority, as was the case here when Professor Bello Janeiro voted in favor of the decision contained in the Award and its grounds regarding each of the Parties' claims.[77] In fact, ICJ jurisprudence[78] supports the view that even if Professor Bello Janeiro had expressed an opinion different from the Award or had expressed preference for a different solution, the

[72] C-Mem. ¶ 18.

[73] C-Mem. ¶31.

[74] C-Mem. ¶ 31, citing the *Azurix* Decision on Annulment at ¶ 55.

[75] C-Mem. ¶ 33.

[76] C-Mem. ¶¶ 34-35.

[77] C-Mem. ¶¶ 36-37.

[78] *Case Concerning the Award of 1989; Review of Judgment No. 333 Opinion*.

decision in the Award that he voted for would have been sustained.[79] This has also been confirmed by the jurisprudence of the Iran-US Claims Tribunal.[80]

48. Argentina argues that contrary to Daimler's allegations, there is nothing incorrect or inappropriate about the Award referring to the *ICS* decision. The reason it makes this reference is because both cases share the same President, who did not want to burden the parties "with duplicative drafting costs in respect of certain general points of law common to both cases"[81]. According to Argentina, it is common practice for tribunals to transcribe parts of other awards they agree with and consider applicable.[82] The fact that the *ICS* case was an UNCITRAL case brought under a different Bilateral Investment Treaty is irrelevant as the Tribunal referred to it with regard to a question that applied *mutatis mutandi* to this case. Accepting Daimler's argument would lead to the "absurd situation" that tribunals could only refer to case-law based on the same treaty and originating from the same tribunal.[83]

49. As regards the Award's interpretation of the term "treatment", Argentina states that paragraph 224 of the Award, referring to the use of the World Bank Guidelines, clearly indicates that they were taken into account "not as outcome-determinative evidence *per se* but 'as an indication of the prevailing view among the community of states during the period contemporaneous to the adoption of the German-Argentine BIT'".[84] Argentina refutes Daimler's assertion that Professor Bello Janeiro seems to contradict the Award's reference to the Guidelines. The Award was clear in its reference to these Guidelines and Professor Bello Janeiro had no need to repeat all that was stated in the Award.[85]

50. With regard to Daimler's claim that Professor Bello Janeiro failed to cite any evidence as to "the contemporaneous understanding of the State Parties to the BIT", Argentina argues that he had no reason to do so because an arbitrator is not obligated to attach an individual

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[79] C-Mem. ¶¶ 38-42

[80] C-Mem. ¶ 43.

[81] C-Mem. ¶ 44, citing Award, footnote 303.

[82] C-Mem. ¶ 44.

[83] C-Mem. ¶ 45.

[84] C-Mem. ¶ 47.

[85] C-Mem. ¶ 48.

opinion.[86] In fact, the ICJ has found that the content of a separate opinion or statement is of no consequence to a tribunal's decision. The fact that subsequent decisions to the *Siemens* case have led arbitrator Bello Janeiro to review his position on the applicability of the MFN clause does not nullify the decision adopted by the majority.[87]

51. In its Rejoinder, Argentina argues that Daimler devotes several paragraphs of its Reply to the need for the Tribunal to explain the process of its analysis. This argument is futile because Argentina has already showed that the Tribunal stated reasons for its decisions on each issue submitted in connection with the 18-month period and the MFN clauses, which can be followed easily by any reader.[88] The *MINE* decision supports its arguments because that committee rejected the request for annulment on the grounds of contradictions in the award, clarifying that it was not necessary to state reasons for "truly obvious issues from which it drew no conclusions".[89] The *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) ("*Caratube*") committee held that only contradictory or frivolous reasons could be equated to a failure to state reasons. Daimler has failed to prove that the reasons given by the Tribunal were either contradictory or not well founded.[90]

52. According to Argentina, Daimler continues to distort its position in the Reply. Argentina did not state that arbitrator Bello Janeiro gave contradictory reasons. It posed a hypothetical and subsidiary argument on "the meaning of the majority opinion in an award and the value of separate opinions".[91] Additionally, it did not state that the Committee should limit itself to the verification of whether or not an arbitrator signed the Award. Indeed, under Article 52 of the ICSID Convention, the Committee must determine whether an award has stated the reasons on which it is based.[92]

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[86] C-Mem. ¶ 49.
[87] C-Mem. ¶¶ 49-50.
[88] Rej. ¶ 8.
[89] Rej. ¶¶ 9-10.
[90] Rej. ¶¶ 11-12.
[91] Rej. ¶ 13.
[92] Rej. ¶ 14.

53. Daimler failed to support with jurisprudence this ground for annulment, whereas Argentina referred to ICJ jurisprudence for the proposition that an award issued by a majority with a separate or individual opinion is valid.[93] This lack of reference to jurisprudence by Daimler is due to the fact that the jurisprudence suggests that even if there were contradictions between statements in the award and an individual opinion, the arbitrator's decision in the award will prevail.[94] As to Daimler's citation of the ICJ's *Review of Judgement No. 333 Opinion* regarding the consideration of individual opinions, Argentina emphasises that whatever the position is under general international law, pursuant to Article 52 of the ICSID Convention, the Committee must determine whether "*the award* has stated the reasons on which it is based."[95]

54. In this case, the Award can be understood and is well founded thereby precluding the need to refer to explanations in the individual opinions.[96] Judge Schwebel, whom Daimler quotes, is of the opinion that even if an arbitrator expresses strong disagreement, "his vote will stand anyway". This is not the case here, as arbitrator Bello Janeiro did not disagree with the Award.[97]

55. Argentina further argues that the Tribunal reached a majority on the 18-month and the MFN clauses, and it took account of the World Bank Guidelines as an indication of the prevailing view of the community of states at the time the BIT was adopted, not as determinative evidence.[98] Arbitrator Bello Janeiro's Opinion adds additional grounds and does not alter the decision made jointly with the President.[99] Moreover, the reasons stated in his Separate Opinion had a different role than those reasons set forth by the Tribunal as grounds for the Award;[100] Professor Bello Janeiro never argued against the Tribunal's conclusion that the World Bank Guidelines do not intend to directly clarify a term of the BIT.[101] In his Opinion,

[93] Rej. ¶15.
[94] Rej. ¶ 16.
[95] Rej. ¶ 17.
[96] Rej. ¶ 18.
[97] Rej. ¶ 19.
[98] Rej. ¶¶ 20-21.
[99] Rej. ¶ 22.
[100] Rej. ¶ 22.
[101] Rej. ¶ 25.

Professor Bello Janeiro merely clarified that he considered the MFN issue the most important part of the Award. Both the Opinion and the Award refer to the meaning given to the term "treatment" at the time of the conclusion of the BIT, and arbitrator Bello Janeiro's reference to more recent case law does not alter the analysis in the Award.[102]

56. In arbitrator Bello Janeiro's view, the World Bank Guidelines confirm that at the time of the BIT's conclusion, "treatment" of investments and dispute settlement were different issues and the Award conveys the same. His emphasis on the Guidelines is of no relevance because what matters is that the majority considered it a "clue" that, together with other elements, allowed the majority to reach its conclusion.[103] Moreover, under international law there are no binding precedents and as such arbitrator Bello Janeiro's references to other case law is of no compelling consequence.[104]

57. According to Argentina, Daimler's argument on the transcription of the *ICS* decision is a *non-sequitur*. The fact that the Tribunal transcribed some paragraphs of another award in this Award does not mean that the reasons so transcribed were not discussed. Given the secret nature of deliberations, the Parties may not have had knowledge of them. As such, the logical conclusion would be that all paragraphs in the Award, including those taken from the *ICS* award, were discussed by the three arbitrators and two arbitrators agreed to form the majority. Nothing in the Award or in the Opinions leads to a different conclusion.[105]

3. THE AWARD IS INTERNALLY INCONSISTENT IN ITS FINDINGS CONCERNING THE BIT'S 18-MONTH CLAUSE AND THE SCOPE OF THE BIT'S MFN CLAUSES

(i) Daimler's arguments

58. According to Daimler, the Award is inconsistent in its treatment of the 18-month clause and of the scope of the BIT's MFN clauses. First, Daimler contends that the Award invokes contradictory reasons regarding the nature of the BIT's 18-month clause. In this regard,

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[102] Rej. ¶ 25.

[103] Rej. ¶ 26.

[104] Rej. ¶ 27.

[105] Rej. ¶ 28.

Daimler explains that the Award contradicts itself by saying in one paragraph that the 18-month clause cannot be waived as a condition of Argentina's consent to arbitrate, and in another paragraph that it can be waived under certain circumstances.[106] Daimler argues that pre-arbitration requirements can be either mandatory or permissive. Mandatory requirements are "conditions of consent", which are jurisdictional in nature and must be fulfilled. Permissive requirements can be, and have been, disregarded by a tribunal for various reasons.[107] The Award contradictorily treats the 18-month requirement as both mandatory and permissive by first concluding that it cannot be bypassed or waived by the Tribunal, and subsequently concluding that the clause can be waived in certain circumstances.[108]

59. The two scenarios described by Argentina to explain the contradictions outlined by Daimler are not different: if the 18-month clause is jurisdictional (mandatory) it cannot be bypassed; but if it is a procedural requirement (permissive), it could be waived by the Tribunal.[109] Daimler argues that the Tribunal's findings in paragraphs 192 and 193 of the Award that the 18-month clause was jurisdictional, cannot be reconciled with its findings a few paragraphs later that it could be waived if complying with the 18-month clause was deemed futile. Daimler states that this contradiction leaves the Award "essentially lacking in any express rationale".[110]

60. Daimler further argues that the Award is contradictory on whether the BIT's MFN clauses reflect the Contracting States' intention to allow the MFN clauses to be invoked in order to overcome the Treaty's conditions precedent to accessing international arbitration.[111] In its analysis the Award looks to the expression treatment "in the territory" found in the MFN clauses to determine the intention of the Contracting States. The Award states that if the MFN clause applies to "treatment in the territory of the Host State", treatment that is outside the territory of the host State cannot be covered.[112] It then concludes that while litigating

[106] Mem. ¶¶ 139-142.
[107] Reply ¶ 36.
[108] Reply ¶ 37.
[109] Reply ¶ 38.
[110] Reply ¶ 38.
[111] Mem. ¶ 144.
[112] Mem, ¶ 146.

before the domestic courts – as required by the 18-month clause – constitutes treatment within Argentina, resorting to international arbitration does not constitute treatment within the territory because it occurs, by definition, outside the host State.[113] Since the right to invoke international arbitration does not implicate "treatment in the territory", the Award concludes that Daimler could not rely upon the MFN clause in order to bypass the 18-month requirement.[114] However, this conclusion is contradicted in the Award's comparison of the dispute resolution clauses contained in the Argentina-Chile and Argentina-Germany BITs when it states that Argentina could violate the MFN provision by requiring Daimler to litigate its dispute in local courts, which constitutes treatment within Argentina, and not requiring the same of Chilean investors.[115] According to Daimler, this contradictory reasoning, "seriously affects the coherence of the Award".[116]

61. In Daimler's views, Argentina's defense that these contradictions should be accepted by the Committee because they appear in the section of the Award that is *dicta,* fails. Contradictory reasons cancel each other out and warrant annulment under Article 52(1)(e) of the ICSID Convention whether or not they are in the operative part of the award, because this Article does not limit its coverage to sections of the Award "its author (or defender) considers operative".[117]

62. Daimler also argues that the Award suffers from further contradictory reasons in its analysis of the Tribunal's authority to address the MFN claim. In analyzing such claim, the Tribunal first conveyed that the MFN clause may confer the Tribunal with jurisdiction to hear the case, but then asserted that Daimler had no standing to invoke the MFN clauses because it had not satisfied the 18-month domestic litigation requirement.[118] Contrary to Argentina's contentions, the use of the term "unless" in paragraph 200 of the Award underscores the circularity of the Award's reasoning because it implies that the Tribunal does not have the power to review the MFN clause, unless the MFN clause itself confers such power on the

[113] Mem. ¶ 147.
[114] Mem. ¶ 149.
[115] Mem. ¶ 148.
[116] Mem. ¶ 151.
[117] Reply ¶ 45.
[118] Mem. ¶¶ 152-154; Reply ¶ 46.

Tribunal.[119] Furthermore, this contradiction would not be in favor of Daimler because the Tribunal declined jurisdiction as a result of the conflicting reasons.[120]

63. Finally, Daimler claims that the Award contradicts itself by holding that the BIT's 18-month clause did not accord German investors less favorable treatment than Chilean investors, whose BIT does not have such a clause, but then concluding that requiring German investors to fruitlessly spend time and resources in Argentine courts while exempting Chilean investors from such requirement, "could be viewed as discriminatory impairment of the German investors' rights".[121] Daimler argues that Argentina's claim that the Tribunal's reasoning on "more favorable treatment" is not comparable with its reasoning on "a discriminatory impairment" is a position of "willful blindness"[122]. According to Daimler, these two concepts overlap and their treatment in different sections of the BIT does not alter this overlap.[123]

64. In its Reply, Daimler argues that Argentina's statement that it did not prove how the alleged contradictions would affect the outcome of the Award, reflects three critical errors: i) it premises its counter-arguments on an improperly narrow understanding of the term "question"; ii) it overlooks the fact that reasons that conflict cancel each other out whether or not one of them appears in *dicta*; and iii) it describes an improperly heightened burden of proof.[124]

65. Daimler argues that previous committees have explained in the context of a "serious departure" under Article 52(1)(d) of the ICSID Convention, that an applicant cannot be required to prove that the tribunal would have reached a different conclusion. The standard is focused on "the steps that comprise the award's 'logical chain', from premise to conclusion".[125] According to Daimler, the Award bases its decision to decline jurisdiction

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[119] Reply ¶¶ 47-48.
[120] Reply ¶ 49.
[121] Mem. ¶ 155.
[122] Reply ¶ 52.
[123] Reply ¶¶ 50-53.
[124] Reply ¶ 54.
[125] Reply ¶ 55

on four preliminary conclusions that are contradictory and cannot stand. Even a single contradiction would leave the Award lacking in rationale and collapse its foundation. If the majority had dealt with any of them, it might have reached a different conclusion.[126]

(ii) Argentina's arguments

66. As to the nature of the 18-month clause, Argentina argues that there are no contradictory reasons in the passages described by Daimler. The Tribunal stated in paragraph 194 that the 18-month clause could not be bypassed or waived by the Tribunal "as a mere 'procedural' or 'admissibility-related' matter", which leaves open potential exceptions for reasons other than those indicated by the Tribunal.[127] As such, Argentina argues, in paragraph 190 of the Award the Tribunal examines the alleged futility argument invoked by Daimler as a potential exception to the 18-month provision and concludes that there was no such futility.[128] Similarly, in paragraph 192 of the Award, the Tribunal examines a different hypothesis for bypassing the 18-month requirement to the effect that the requirement was merely procedural and not jurisdictional, granting the Tribunal discretionary power to observe or discard it, and concludes in paragraph 194 that it is not a procedural or admissibility-related matter.[129] Thus, Argentina argues, there is no contradiction between the paragraphs Daimler cites because they analyse different scenarios. Moreover, there is no contradiction in regard to the nature of the 18-month clause since the Tribunal analyses the futility requirement as a possible exemption from compliance with this clause, which the Tribunal has described as a jurisdictional pre-requisite.[130]

67. In this regard, Argentina further argues that the alleged contradiction asserted by Daimler is in reality a difference in judgement between Applicant and the Tribunal regarding the concepts of "jurisdictional clause" and "procedural clause".[131] The Award concludes that a procedural requirement is one within the discretion of the Tribunal to observe or discard,

[126] Reply ¶¶ 55-56.
[127] C-Mem. ¶ 58.
[128] C-Mem. ¶ 59.
[129] C-Mem. ¶ 60.
[130] C-Mem. ¶ 61
[131] Rej. ¶ 33; ¶36.

and finds that the 18-month clause is not a procedural requirement. Further, the Award concludes that a jurisdictional requirement establishes the conditions under which a tribunal may exercise jurisdiction with the consent of the parties.[132] Yet there are exceptions to those conditions, such as futility, which was addressed in the Award ultimately concluding that there was no futility in this case.[133]

68. Furthermore, there are no contradictions in the Tribunal's analysis of the meaning of the term "treatment in the territory". According to Argentina, paragraphs 226 to 228 and footnote 402 cited by Daimler are not contradictory as they refer to the treatment afforded by Argentine national courts to Daimler within the context of "treatment in the territory", excluding international arbitration.[134] Additionally, footnote 402 applies to the Tribunal's analysis in the alternative of the requirement that the comparator treaty must be more favourable. In this regard, the Award itself states, "that it is not necessary to examine the requirement that the comparator treatment invoked must be more favorable" [135] and as such, even if there were a contradiction, it would not be "outcome-determinative".[136]

69. In its Rejoinder, Argentina states that Daimler has changed the paragraphs that it considered contradictory in regard to the meaning of "most-favoured nation treatment in the territory", because it was unable to show the alleged contradictions. However, a plain reading of these paragraphs shows that there are no contradictions. The Award clearly distinguishes between extraterritorial dispute resolution and the actual treatment an investor receives in domestic courts.[137]

70. Argentina argues that upon Applicant's own admission, to warrant annulment there must be genuinely contradictory reasons that leave the decision on a pivotal point essentially lacking in any expressed rationale[138]. Daimler has not explained how the alleged contradiction would

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[132] Rej. ¶ 35.
[133] Rej. ¶ 35.
[134] C-Mem. ¶ 64.
[135] C-Mem. ¶ 65.
[136] C-Mem. ¶ 66.
[137] Rej. ¶¶ 37-39.
[138] Rej. ¶ 40.

affect the outcome of the Award.[139] Argentina states that even if there were contradictions, these would not have an effect upon a pivotal or outcome-determinative point. This is so, because the portions of the Award referred to by Daimler belong to a section of the Award that contains a subsidiary analysis on the comparator treaty requirement, which was not necessary to the Tribunal's decision.[140] In this regard, Argentina refers to the *Caratube* committee, which rejected an annulment application because it related to an issue that was incidental to and unnecessary for the Tribunal's analysis.[141]

71. As to Daimler's argument on the Tribunal's analysis of its power to hear the MFN claim, Argentina argues that the Award is not contradictory. The Tribunal analyses two different bases for determining its jurisdiction, which is clear in the underlining of the term "unless" in paragraph 200 and items 1 and 2 of paragraph 281 of the Award. This is further clarified in footnote 355, which states that the Tribunal analyses its jurisdiction on two independent bases, namely Article 10 (the dispute resolution clause) and Articles 3 and 4 (the MFN clauses) of the BIT.[142] According to Argentina, following the rationale of the Award, the Tribunal must first determine whether it has jurisdiction under the basic BIT, *i.e.* the Germany-Argentina BIT, to then settle a claim about the applicability of the MFN clauses. The Tribunal does so by first determining its jurisdiction under the dispute resolution clause of the BIT, concluding that it does not have jurisdiction because Daimler failed to fulfil the 18-month requirement. It then examines its potential basis for jurisdiction under the MFN clauses and, in this context the Tribunal considers the parties' arguments on the scope and meaning of the MFN clause in the BIT.[143] According to Argentina, even if there were a contradiction, it would be in favor of Daimler because the MFN analysis considers the possibility of providing the Tribunal with jurisdiction to the advantage of Daimler.[144]

72. Similarly, with reference to Daimler's claim that the Award is contradictory on the issue of whether the 18-month clause grants less favorable treatment or not, Argentina states that the

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[139] Rej. ¶ 40.

[140] Rej. ¶ 41.

[141] Rej. ¶ 42.

[142] C-Mem. ¶ 69; Rej. ¶¶ 45-46.

[143] C-Mem. ¶ 70.

[144] C-Mem. ¶ 71; Rej. ¶ 47 .

paragraph and footnote invoked by Daimler deal with different issues under different provisions of the BIT and, as such, cannot be contradictory.[145] Paragraph 250 deals with treatment in the territory of the host State under the BIT's MFN clauses, whereas footnote 433 examines arbitrary or discriminatory treatment under Article 2(3) of the BIT.[146] Additionally, the alleged contradiction is non-existent because footnotes 432 and 433 do not refer to the 18-month clause as a jurisdictional requirement, but to the actual treatment received by an investor in local courts after submitting its claims thereto. If such treatment were to put an investor in an unfavorable position, it could result in less favorable treatment according to the circumstances of the case.[147]

73. Additionally, even if there were contradictions they would not affect a "pivotal or outcome-determinative point" since the Award itself clarifies that it need not examine the requirement that the comparator treatment invoked must be more favorable, because the wording of the MFN clauses do not allow agreement with Daimler's position.[148]

4. THE COMMITTEE'S ANALYSIS OF THE ALLEGED FAILURE TO STATE REASONS

(i) The Standard

74. Article 52(1)(e) of the ICSID Convention provides that an award may be annulled if it has "failed to state the reasons on which it is based". Several *ad hoc* committees have observed that annulment under this ground requires that the tribunal has failed to comply with its obligation to render an award that allows readers to comprehend and follow its reasoning.[149]

75. The *ad hoc* committee, in the *MINE* annulment proceeding stated that:

> "5.08 The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the

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[145] C-Mem. ¶ 73; Rej. ¶ 50.

[146] C-Mem. ¶ 73; Rej. ¶ 50.

[147] Rej. ¶ 51.

[148] C-Mem. ¶ 74; Rej. ¶ 52.

[149] See, e.g.: *MINE*, ¶¶ ¶5.08-5.09; *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) ("*Wena*"), ¶ 81; *Vivendi I*, ¶64.

reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. […] 5.09 In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons."[150]

76. Article 52(1)(e) of the ICSID Convention does not empower the Committee to review the merits of the case. Such a review would amount to an appeal which is not a remedy provided for in Article 53 of the ICSID Convention. As stated by the *Wena* annulment committee:

"79. The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not. As stated by the *ad hoc* Committee in MINE, this ground for annulment refers to 'minimum requirement' only. This requirement is based on the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision. If the Tribunal has given such sequence of reasons, there is no room left for a request for annulment under Article 52(1)(e).[151]

77. Two tests must be satisfied before an *ad hoc* committee can annul an award based on contradictory reasons. First, the reasons must be genuinely contradictory in that they cancel each other out so as to amount to no reasons at all. Second, the point with regard to which these reasons are given is necessary for the tribunal's decision. In this regard the *Vivendi I* annulment committee observed:

"In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave

[150] *MINE* ¶¶ 5.08-5.09.
[151] *Wena*,¶¶ 79 and 81.

the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations."[152]

78. Therefore, in reviewing the alleged contradictions, an *ad hoc* committee must be mindful of the fact that what sometimes may appear as a contradiction may be the result of a compromise reached by a collegiate body to reach a decision. In addition, in reviewing the apparent contradictions, the *ad hoc* committee should, to the extent possible and considering each case, prefer an interpretation which confirms an award's consistency as opposed to its alleged inner contradictions. [153]

79. The standard for annulment under Article 52(1)(e) of the ICSID Convention is, therefore, high. It does not permit an *ad hoc* committee to second guess the reasoning of the tribunal and that imposes on the applicant the burden of proving that the reasoning of the tribunal on a point that is essential for the outcome of the case was either absent, unintelligible, contradictory or frivolous. In order to succeed the Applicant must discharge this burden.

(ii) The Alleged Failure to Reach a Majority Decision on Each Question Submitted

80. The issue posed to this Committee is whether, considering the scope and application of Article 48 of the ICSID Convention (and in particular sections 1 and 3 thereof), the Separate Opinion contradicts the Award and such contradiction results in a failure by the Tribunal to reach a majority decision on each question submitted by the Parties.

81. Article 48 of the ICSID Convention reads:

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[152] *Vivendi I*, ¶ 65.

[153] See: *Vivendi I*, ¶ 65 and *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14) *("CDC")*, ¶ 81.

"(1) The Tribunal shall decide questions by a majority of the votes of all its members. (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it. (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based. (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent. (5) The Centre shall not publish the award without the consent of the parties."

82. The Committee will interpret Article 48 of the ICSID Convention following the provisions of the VCLT, particularly Articles 31 and 33. Article 48 of the ICSID Convention must, therefore, be read in good faith. Its words should be given their ordinary meaning, taking into account their context, and in the light of the object and purpose of the ICSID Convention taken as a whole.[154] The texts of the ICSID Convention in English, French and Spanish, (English and Spanish, are the languages of these proceedings) must be, insofar as possible, given identical meaning.[155]

83. The Parties do not seem to differ on the scope and interpretation of sections (2) and (4) of Article 48 as regards the Separate Opinion. Professor Bello Janeiro signed the Award and "voted for it" (section (2)), and he had the option of attaching an individual opinion, even when not dissenting from the majority (section 4).

84. As regards paragraphs (1) and (3) of Article 48 of the ICSID Convention, the Committee observes that they use different language in addressing the issue of "questions" to be decided by the tribunal in the award that it drafts. Paragraph (1), in the English text, refers to "*questions*" which a tribunal shall "*decid*e" … "*by a majority of votes of its members*". Paragraph (3) uses a different expression. It refers to "*every question*". The context is also different from paragraph (1). In paragraph (3) the requirement is different. The award is to "*deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based*". In the Spanish version, paragraph (1) uses the words "*todas las cuestiones*" and

[154] Cf. VCLT, art. 31.
[155] Cf. VCLT, art. 33.

paragraph (3) makes reference to "*todas las pretensiones*".[156] The French version uses, in paragraph (1) the expression "*toute question*," while paragraph (3) refers to "*tous les chefs de conclusions*".[157]

85. A reading of the aforementioned sections of Article 48 in English, French and Spanish, the three authoritative languages of the ICSID Convention leads the Committee to conclude that despite the ostensible similarity of the language in paragraphs (1) and (3) of Article 48 referring to "questions" to be addressed in the decision, these two paragraphs address two different issues and deal with different matters.

86. Article 48(1) generally refers to how the decision-making process of the tribunal must take place, and indicates that when the tribunal "*decides*" "*questions*", the decision must be supported by the vote of a majority of its members. In other words, any decision of the tribunal in the award on a question decided by it requires a majority "vote".

87. Article 48(3) refers to the tribunal's obligation to "*deal with*" "*every question*" submitted to it when rendering an "*award*". The expression "*every question*" has not been defined by the ICSID Convention. All versions of the ICSID Convention ought to be given the same meaning.[158] When read in conjunction with the Spanish and French versions of the ICSID Convention, it seems without doubt that the words "*every question*" in the English version refer to the heads of claim of the parties ("*las pretensiones*" in the Spanish version, *les chefs de conclusions* in the French version). Article 48(3), therefore, refers to the tribunal's

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[156] The Spanish version of Article 48 reads: "(1) El Tribunal *decidirá todas las cuestiones* por mayoría de votos de todos sus miembros. (2) El laudo deberá dictarse por escrito y llevará la firma de los miembros del Tribunal que hayan votado en su favor. (3) El laudo contendrá *declaración* sobre *todas las pretensiones* sometidas por las partes al Tribunal y será motivado. (4) Los árbitros podrán formular un voto particular, estén o no de acuerdo con la mayoría, o manifestar su voto contrario si disienten de ella. (5) El Centro no publicará el laudo sin consentimiento de las partes." [Emphasis added].

[157] The French version of Article 48 of the ICSID Convention reads: "(1) Le Tribunal *statue* sur *toute question* à la majorité des voix de tous ses membres. (2) La sentence est rendue par écrit; elle est signée par les membres du Tribunal qui se sont prononcés en sa faveur. (3) La sentence doit *répondre à tous les chefs de conclusions* soumises au Tribunal et doit être motivée. (4) Tout membre du Tribunal peut faire joindre à la sentence soit son opinion particulière – qu'il partage ou non l'opinion de la majorité – soit la mention de son dissentiment. (5) Le Centre ne publie aucune sentence sans le consentement des parties." [Emphasis added]

[158] According to Article 33(4) of the VCLT, when there are multiple, equally authentic versions of a treaty, they are all presumed to have the same meaning.

obligation to deal with, either directly or indirectly, all of the parties' *heads of claim* within its award.

88. In sum, the Committee considers that paragraphs (1) and (3) of Article 48 of the ICSID Convention refer to two different obligations of the tribunal. On the one hand, Article 48(1) provides that each and every question that is decided by a tribunal must be approved by a majority of its members. On the other hand, Article 48(3) stipulates that, in its award, a tribunal needs to deal with, either directly or indirectly, all the parties' heads of claim ("*questions*", "*chefs de conclusions*" or "*las pretensiones sometidas... al Tribunal*"). To meet this obligation, it is for the tribunal to determine and formulate the questions, which are material to resolve the dispute between the parties and put these to a vote by the members of the tribunal.

89. Based on the above, the Committee will now turn to the analysis of whether, as claimed by Daimler, the Separate Opinion evidenced the Tribunal's failing to reach a majority on each question submitted.

90. According to Daimler, in the case of separate opinions, *ad hoc* committees must look carefully at the reasoning provided by each arbitrator.[159] If there is different reasoning on outcome determinative issues, then a majority is not reached. Daimler submits that the signature of the arbitrator or the vote alone is not sufficient to establish that there was a majority on all questions presented.[160]

91. According to Daimler, since the Award reproduces in a large part the reasoning of an award rendered in a different case that shared the same President, and Professor Bello Janeiro subscribed or adhered to the President's conclusions, the Tribunal failed to render an award that reflected the reasons of the Tribunal and not those of each individual member.[161]

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[159] Mem. ¶ 115.
[160] Mem. ¶ 121.
[161] Mem. ¶ 123; ¶¶ 127-128.

92. According to Argentina, there are no divergent views between the two majority arbitrators, and if there were, the Award would still be valid.[162] In addition, it would be futile for an arbitrator, in the majority, to attach a separate concurring opinion if he had nothing different to say from what was stated in the award.[163] Argentina claims that Professor Bello Janeiro joined the President to form the majority. He attached an individual opinion to explain his position as it expressed a view different from that expressed by him in his previous position in the *Siemens* case.[164]

93. What is important, according to Argentina, is that the decisions on the 18-month and on the MFN clauses was by a majority. Professor Bello Janeiro voted in favor of the decision contained in the Award and added reasons to explain his change of mind, which reasons do not affect the Award.[165]

94. The Committee is of the opinion that the question of jurisdiction that the Parties required the Tribunal to resolve – and which the Tribunal had to decide – was whether or not it had jurisdiction over the dispute between Daimler and Argentina, in the light of the 18-months and the MFN clauses of the Germany-Argentina BIT. The decision of these questions was dispositive of the issue before the Tribunal.

95. The Committee is of the considered opinion that the Tribunal in its Award dealt with the question before it *i.e.*, whether it had jurisdiction in the matter. The Tribunal decided this question by a majority vote. It complied with the ICSID Convention. Both Professor Pierre-Marie Dupuy and Professor Domingo Bello Janeiro agreed that the Tribunal lacked jurisdiction to hear the case. Judge Brower dissented and concluded that the Tribunal had jurisdiction. The question of jurisdiction was decided by a 2 to 1 vote in favor of declining jurisdiction.

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[162] C-Mem. ¶ 12; Hearing on Annulment, Tr. 147:17 – 150:1.
[163] C-Mem. ¶¶ 13-14.
[164] C-Mem. ¶¶ 15-16.
[165] C-Mem. ¶¶ 34-35.

96. Therefore, the Tribunal dealt in its Award with the "*question*" of jurisdiction and "*decided*" it by a majority vote in strict compliance with both paragraphs (1) and (3) of Article 48 of the ICSID Convention.

97. In the following paragraphs the Committee will deal with (a) the question of whether the reasoning of the opinion of Professor Bello Janeiro (i) affects the majority and (ii) contradicts the Award; and (b) assuming that there is a contradiction, whether, it would result in the Award (i) not dealing with the questions submitted to the Tribunal or (ii) not stating the reasons on which it is based.

98. The Committee has carefully reviewed the Separate Opinion and the alleged contradictions between the Separate Opinion and the Award. The Committee is of the view that there are no such contradictions. But even if the Committee were to accept Daimler's submission with regard to contradictions between the Separate Opinion and the Award its conclusion would remain unchanged. The majority clearly voted that the Tribunal did not have jurisdiction, and the reasoning in the Separate Opinion did not affect the vote of Professor Bello Janeiro or the majority decision. Further, the Committee does not regard any of these alleged contradictions as having the effect of stripping the Award of its rational basis on an outcome-determinative question.

99. As for the alleged contradictions, Daimler claims that "there is a divergence of conclusions and reasoning between the Award and Professor Bello Janeiro's Separate Opinion, rendering it impossible to confirm that a majority decision exists on the key jurisdictional issue decided in the Award."[166] According to Daimler, the contradictions lie in three specific points: (a) the interpretative framework; (b) the World Bank Guidelines and (c) the evolution in case law. The Committee does not agree with Daimler.

100. In the introductory paragraphs to his Separate Opinion Professor Bello Janeiro states his full agreement with the decision contained in the Award and the reasoning thereof.[167] After an

[166] Mem. ¶ 122.

[167] Separate Opinion, page 1. "Introductory Considerations: I wish to state at the outset that I fully subscribe to the decision proposed by the President of the Tribunal. I find the award to be well founded since the question of most favoured-nation (MFN) treatment is dealt with much more judiciously than in prior cases, in particular *Mafezzini* and *Siemens* (Decision on Jurisdiction)."

examination of the Separate Opinion this Committee has no doubt that Professor Bello Janeiro not only voted for the decision, but also clearly expressed his agreement with the foundational reasons thereof.

101. After explaining his involvement in the *Siemens* case and the discussions that took place in that case, Professor Bello Janeiro refers to the right that an arbitrator has to change his mind with respect to positions taken or opinions expressed in previous cases.[168]

102. Professor Bello Janeiro cites examples of cases where arbitrators, in his view, have changed their opinion on certain issues, indicates the factors that led him to clarify his opinion and concludes that "***my change of heart*** between the decision in the arbitral award concerning the claim by *Siemens* against Argentina and the current case ***can be explained by the important aspects summarized below***, naturally without prejudice to any other more substantiated opinion, but can be fully justified by the obvious fact that each arbitration is different."[169] (Emphasis added). The "important aspects summarized below", *i.e.*, the reasons that made Professor Bello Janeiro change his mind with respect to *Siemens,* are basically contained under the heading "Substantive Elements" of the Separate Opinion.

103. It is in this context that the wording of the Separate Opinion must be understood. Professor Bello Janeiro agreed with the decision in the Award as well as with its foundational reasons. The comments that he made, on the several aspects which Daimler terms contradictions, are, on the one hand, explanations as to why he changed his mind with respect to the *Siemens* award, and on the other hand additional reasons to support his vote in favor of the decision on jurisdiction in the present case.

104. Article 48(4) of the ICSID Convention clearly lends support to the approach taken in the Separate Opinion. It explicitly permits an arbitrator to record a separate opinion even if he does not dissent "*from the majority*". While voting with the majority on the decision(s) he may author and attach his "*individual opinion to the award*". Such an opinion is unlikely to

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[168] Separate Opinion, page 2, "In any case, with regard to the practical possibility for an arbitrator on an ICSID Tribunal to change, clarify or alter in any way his opinion or his position, he clearly has in principle complete freedom to do so, particularly after considering developments in the case and subsequent decisions rejecting the extension or maximum expansion of the ambit of the MFN clause to cover dispute resolutions".

[169] Separate Opinion, page 3.

be authored or attached to the award if it records nothing in addition to or different from what is stated there. If a separate opinion were limited to agreeing with all aspects of the reasoning in the majority award then it would be both repetitive and meaningless. If this is all that Article 48(4) permitted it too would be meaningless.

105. But even assuming that in the three topics identified by Daimler (i.e., the interpretative framework, the World Bank Guidelines and the evolution in case law) Professor Bello Janeiro was not giving explanations as to his "change of heart" but stating his reasons to support the Award, the Committee finds no contradiction between the Separate Opinion and the Award with regard to the three topics.

106. First, there is no indication in the Separate Opinion that Professor Bello Janeiro disagrees with the reasoning in the Award or that the reasoning that he puts forward substitutes the reasoning of the Award. On the contrary, he expressly supports the reasoning of the Award. Second, even if the Separate Opinion were to suggest, as Daimler submits, that more weight should be assigned to certain sources (*e.g.*, to judicial practice and case law), or that more relevance should be given to the World Bank Guidelines, or that the evolution of case law was relevant and should have been considered, these are, in the context of the Separate Opinion, additional or subsidiary reasons that Professor Bello Janeiro gives. These reasons are not intended to replace those in the Award. The two arbitrators in majority agreed on the decision and the foundations thereof, but assigned different weight to certain sources. Third, a separate opinion by its very nature includes additional or subsidiary considerations that are not reflected in the award.

107. However, even assuming that the reasoning of the Award and that of the Separate Opinion were contradictory, this would not affect the Award in any way or result in a ground for annulment.

108. As indicated in paragraph 98 above, in the Committee's view the relevant issue is how the majority voted. If the arbitrators in majority agree on the decision and vote in favor of it, the fact that they may not concur in all the reasons leading to their vote in support of the decision is irrelevant. The ICSID Convention, as already mentioned in paragraphs 83 and 104 above,

provides that arbitrators may issue a separate opinion if they agree on the decision but disagree on the reasons leading to that decision.

109. The Committee would like to emphasize that a separate opinion is attached to express a complementary, subsidiary or even different reasoning than that of the award. As correctly pointed out by Argentina, "if an arbitrator has nothing to add to the award, there would be no reason to draft a separate opinion".[170]

110. On the issue of whether the award would be affected by a contradiction in the reasoning between the award and the separate opinion, Prof. Schreuer states that:

> "A majority vote is not affected by an apparent contradiction contained in a declaration or individual opinion […] made by a member who has voted in favor of the decision. A member of a tribunal may vote for an award not because he or she wholly agrees with it but because he or she feels that it is necessary to provide a majority."[171] "A concurring opinion that differs from the majority opinion on certain points of the reasons does not affect the majority necessary for reaching a decision […]. What matters for the validity of the award in accordance with Art. 48(1) is that the result has attracted the votes of a majority of the tribunal and not that the members who voted for the award agreed on all points of the reasoning accompanying it."[172]

111. The three ICJ decisions cited by Argentina in its Counter-Memorial and discussed by the Parties in these proceedings support the above conclusion.

112. In the *Case Concerning the Award of 1989,* the ICJ reviewed an award in which one of the arbitrators dissented and the president, who formed the majority, added a statement to the effect that he would have responded in a different manner to one of the issues that had to be decided in the award. The ICJ considered that even though there had been some contradictions between the award and the opinion of the president, the alleged contradiction

[170] Rej. ¶ 23.
[171] Christoph H. Schreurer, "The ICSID Convention: A Commentary", Second Edition, p. 810.
[172] Christoph H. Schreurer, "The ICSID Convention: A Commentary", Second Edition, p. 832.

would not prevail over the position of the president when voting the award. In the words of the ICJ:

> "Furthermore, even if there had been any contradiction […] between the view expressed by President Barberis and that stated in the Award, *such contradiction could not prevail over the position which President Barberis had taken when voting for the Award*. In agreeing to the Award, he definitively agreed to the decisions, which it incorporated, as to the extent of the maritime areas governed by the 1960 Agreement, and as to the Tribunal not being required to answer the second question in view of its answer to the first. As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favor of a decision of the tribunal even though he might individually have been inclined to prefer another solution. *The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned, which are therefore without consequence for the decision of the tribunal*." [173] (Emphasis added).

113. The ICJ also upheld an award under similar circumstances – a separate opinion from the president of the tribunal who formed the majority – in the *Review of Judgment No. 333 Opinion.*

114. In the *Granite State Machine Company, Inc. v. Iran* case, one of the arbitrators issued a concurring opinion stating that he concurred in the award so as to "end protracted deliberations" despite the fact that he did not concur with one of the elements considered for compensation of the claimant. Moreover, the arbitrator, even though he did form the majority, did not sign the award.[174]

115. Other decisions, not cited in these proceedings, took the same approach. For example in *Starrett Housing International, Inc. v. Iran,* an arbitrator, whose vote formed the majority, decided to vote in favor of the award, rather than to dissent, despite his disagreement with

[173] *Case concerning the Arbitral Award of 31 July 1989* (Guinea-Bissau v Senegal), ICJ Judgment of 12 November, 1991.

[174] *Granite State Machinery Company, Inc. v. Iran*, Award No. 18-30-3, December 15 1982; Iran-US Claims Tribunal Reports, vol. 1 at 442.

the damages awarded, based on "the realistic old saying that there are circumstances in which 'something is better than nothing." The arbitrator indicated that "in a three-member Chamber a majority of two members must join, or there can be no Award. My colleague Dr. Kashani having dissented, I am faced with the choice of either joining in the present Award or accepting the prospect of an indefinite postponement of any Award in this case. […] The deliberations in this case have continued long enough; […]. Neither the parties nor the Tribunal will, in my view, benefit from further delay."[175]

116. In all the cases referred to above, an arbitrator expressed reasons that could be considered – and in some cases were in fact claimed as such by the party seeking annulment of the award – contradictory to the reasoning in the award. Moreover, without the vote of the concurring arbitrator, no award could have been issued in those cases. There was no identity of views or similarity in the reasons given by the arbitrators forming the majority. Yet, given the identity of their votes, the awards were valid.

117. In sum, what matters for purposes of making up a majority is not the individual reasoning of the members in majority, but their votes.

118. In his 1996 Freshfields Lecture, profusely cited by the Parties in these proceedings, Judge Stephen M. Schwebel noted the following in commenting the *Case Concerning the 1989 Arbitral Award*:

> "The claim of Guinea-Bissau in the end boiled down to the complaint that the tribunal had voted for what it could muster a majority for rather than for what a majority of its members thought to be right. That complaint was well founded. But it did not follow that the resultant award was inexistent, null and void, or even voidable. On the contrary, so much of the judicial and arbitral process is characterized by judges and arbitrators voting to form a majority rather than voting to express what each of them may see as the optimum judgment. In a collective body, there is very frequently a process of accommodation of differing views, sometimes sharply differing views.

[175] *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. The Government of the Islamic Republic of Iran*, Bank Omran, Bank Mellat, Interlocutory Award No. ITL 32-24-1, December 19, 1983, 4 Iran-US C.T.R. 122, 159 (Concurring Opinion of Howard H. Holtzmann).

The result may be the consecration of the least common denominator. That may not be a noble result, but it is a practical result. It is better than no result."[176]

119. Daimler suggests that the decisions invoked by Argentina and referred to above would not apply to this case given that the grounds for annulment presented in those cases did not refer to a "failure to state reasons".[177] The Committee disagrees. What emerges from the authorities cited above is that what matters for the validity of an award is not an identity of reasoning by the arbitrators in majority, but the identity of their votes with respect to the outcome. In this case the majority clearly voted to decline jurisdiction.

120. In sum, in the present case, the Committee has no doubt that the arbitrators making up the majority voted in favor of dismissing the case for lack of jurisdiction and the Separate Opinion does not affect the Award nor does it allow annulment based on the alleged "failure to state reasons".

(iii) The Alleged Internal Inconsistencies of the Award in its Findings Concerning the BIT's 18-month Clause and the Scope of the BIT's MFN Clauses

121. According to Daimler, the Award "suffers from fatal internal inconsistencies, contradictions and gaps in logic, including with respect to issues that the Award itself recognizes as integral to its acceptance of Argentina's objection based on the 18-month clause in the Germany-Argentina BIT."[178]

122. Daimler finds that the Award invokes contradictory reasons related to the BIT's 18-month clause and scope of the BIT's MFN clauses in four different aspects: (a) the nature of the BIT's 18 month clause; (b) the meaning of "treatment in the territory" in the MFN clauses; (c) the Tribunal's authority to address the MFN claim; and (d) whether the 18-month clause grants less favorable treatment.

[176] Stephen M. Schwebel, May the Majority Vote of an International Arbitral Tribunal be Impeached?: The 1996 Freshfields Lecture, Arbitration International, (Kluwer Law International 1997 Volume 13 Issue 2) pp. 145 - 154.
[177] Reply ¶¶ 12-15.
[178] Mem. ¶ 138.

123. The Committee will address each of these alleged inconsistencies.

(a) The nature of the BIT's 18-month clause.

124. Daimler claims that, while in paragraph 194 "the Award concludes that 'the 18-month domestic courts provision constitutes a treaty-based precondition to the Host State's consent to arbitrate, [and] it *cannot be bypassed or otherwise waived by the Tribunal*'"[179], in both paragraphs 190 and 198, "the Award states directly the opposite: that the 18-month clause, despite being a 'treaty-based jurisdictional pre-condition', *could* be bypassed if certain circumstances were found to exist."[180]

125. According to Daimler "the Award asserts, on the one hand, that the 18-month clause *was not waivable at all, and,* on the other, *that it was indeed waivable under certain circumstances."*[181] "These findings – Daimler argues- are entirely contradictory and cannot be reconciled."[182]

126. Argentina, however, was of the view that there was no contradiction whatsoever between paragraph 194, on the one hand, and paragraphs 190 and 198, on the other hand.[183] According to Argentina, "the Award analyses and discards two different hypotheses invoked as potential ways to bypass compliance with the BIT's 18-month provision."[184] First, in paragraph 190, the Tribunal analyses futility as a possible exception to the 18-month requirement and concludes that there is no futility. Then, in paragraph 192, it analyses if the 18-month clause may be by-passed on the grounds that it is procedural. The answer thereto is provided in paragraph 194, where the Tribunal concludes that "the 18-month provision cannot be bypassed or otherwise waived by the Tribunal **as a mere 'procedural' or 'admissibility-related' matter**."[185] Finally, in paragraph 198 the Tribunal refers to futility – as opposed to nonsensicality – as a possible exemption from compliance with a treaty-

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[179] Mem. ¶ 140, citing Award, ¶ 194.

[180] Mem. ¶ 141.

[181] Mem. ¶ 142.

[182] Mem. ¶ 142.

[183] C-Mem. ¶ 61.

[184] C-Mem. ¶ 58.

[185] C-Mem. ¶ 58 citing to Award, ¶ 194.

based jurisdictional pre-requisite – such as the 18-month clause- and reiterates that futility was not established in the present case.[186]

127. The Committee has already stated in paragraph 77 above that for contradictory reasons to result in a failure to state reasons, the reason must be on an outcome determinative issue and the contradictions must be such that the reasons cancel each other out. Only in such cases can it be said that the reasons amount to no reasons at all. The Committee has also observed that an interpretation in favor of the award's consistency should be preferred to an approach, which expresses preference for annulling an award on grounds of some alleged inner contradictions.

128. The Committee agrees with Argentina that there is nothing in the Award or the Separate Opinion that could suggest that the award is not based on reasons. A holistic reading of the Award, in its context, as opposed to a comparison between isolated sections further supports the decision of this Committee.

129. The Tribunal found that it had no jurisdiction based on Article 10 of the BIT (the 18-month clause). In doing so, the Tribunal first considered whether the 18-month provision could be waived or bypassed by the Tribunal as a mere "procedural" or "admissibility related matter" (paragraph 194). The Tribunal concluded that the 18-month requirement could not be waived or bypassed because it is of a jurisdictional nature. Then the Tribunal examined whether or not the 18-month domestic court litigation requirement is "nonsensical" (paragraphs 195-198) and in that context concluded that "[s]overeign States are free to agree to any treaty provisions they so choose – whether concerning substantive commitments or dispute resolution provisions or otherwise – provided these provisions are not futile and are not otherwise contrary to peremptory norms of international law". [187]

130. In sum, the Tribunal – as correctly pointed out by Argentina – analyzed two different scenarios but did not – as claimed by Daimler – record contradictory findings on the issue of whether the 18-month clause can be waived or bypassed.

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[186] C-Mem. ¶¶ 58-61.

[187] Award, ¶ 198.

(b) The meaning of "treatment in the territory" in the MFN clauses.

131. By first comparing paragraphs 226 to 228 of the Award with footnote 432, Daimler claimed that the Award reached contradictory conclusions regarding the question of whether the 18-month requirement could be bypassed by virtue of a MFN clause. According to Daimler, in doing so the Award first concluded that the right to invoke international arbitration did not involve treatment "in the territory" of the host State and that the MFN clause was, thus, inapplicable. But then – Daimler argued – the Award reached a contradictory conclusion as it admitted that treatment received by an investor in Argentinean courts could lead to a violation of the State's MFN commitments.[188] According to Daimler, the fact that the contradiction is contained in a footnote made no difference, because contradictory reasons have the same effect regardless of their position in the award.[189]

132. Argentina, argued that the contents of footnote 432 did not contradict the prior determination made by the Tribunal in paragraphs 226 to 228 of the Award. First, Argentina pointed out that paragraphs 226 to 228 and footnote 432 referred to treatment received by an investor in the Argentinean courts, *i.e.* "treatment in the territory" – without including international arbitration as a part thereof.[190] Second, Argentina noted that footnote 432 referred to an analysis of the favorability of the comparator treaty, which, as previously established by the Tribunal, was not required. Given that the analysis was not necessary, even if the alleged contradictions had taken place, they would not have an effect upon an outcome-determinative point of the Award.[191]

133. In its Rejoinder, Argentina noted that Daimler changed the portions of the Award invoked by Daimler as contradictory. Regarding these newly compared portions, Argentina stated that when analyzing the territorial limitation of the MFN clauses of the BIT, the Award drew a clear distinction between extraterritorial dispute resolution from the actual treatment

[188] Mem. ¶¶ 147-149.
[189] Reply ¶ 45.
[190] C-Mem. ¶ 64.
[191] Rej. ¶¶ 41-42.

received by the investor in the domestic courts and hence, there was no contradiction between the conclusion of the Tribunal on this matter.[192]

134. Upon an examination of the sections of the Award invoked by Daimler as contradictory – paragraphs 230 and footnote 403, on the one hand, and paragraphs 247 to 248 and footnote 432 on the other hand[193] – the Committee is of the view that these sections of the Award do not contradict each other. Further, the Committee is of the view that, even assuming that such sections were contradictory; they do not meet the required standard to annul an award. That standard is met only when contradictions within the award cancel its reasons out to such an extent that these amount to no reasons at all on a point that is determinative for the decision of the Tribunal.

135. The Committee reiterates that a submission that an award contains contradictory reasons must not be examined in isolation. The reasons in an award have to be examined with due regard to their context. A committee before it proceeds to annul an award on the ground of contradictory reasons must examine their context and satisfy itself that these have the effect of cancelling each other out leaving the decision on an outcome-determinative issue without any rational basis. Moreover, if after having stated its reasons and deciding a given point, the Tribunal, in an excess of caution or otherwise, analyses the other arguments made by the parties, such additional – and perhaps unnecessary – analysis cannot be compared with the reasons for the decision of the Tribunal to determine whether the two sets of reasons are contradictory, for even if they are they will not cancel one another. In such cases, the reasons for the decision are already in the Award, and the additional reasons can have no impact on the decision of the Tribunal.

136. Footnote 432 belongs to paragraph 248 of the Award. This paragraph is under the section titled "*Requirement that the comparator treatment invoked must be favorable*". This section

[192] Rej. ¶ 39.

[193] The Committee notes that Daimler changed the parts of the Award which are the subject matter of the comparison. In the Memorial it compared paragraphs 226 to 228 with footnote 432 (See: Mem.¶144-151) and in the Reply it compared paragraph 230 and footnote 403 (See: Reply. ¶40), on the one hand, and paragraphs 247-248 and footnotes 432 and 433, on the other (See: Reply. ¶ 40). In the Hearing Daimler cited the contradictions between ¶231 of the Award and footnote 403 (Tr: 81:11-22)

comprises paragraphs 240 to 250. In the first paragraph of that particular section, *i.e.* paragraph 240, the Tribunal stated:

> "Since this Tribunal has already concluded that the wording of Articles 3 and 4 of the BIT as centred on the phrase 'treatment in its territory' does not permit it to agree with the Claimant's thesis, *it is not strictly necessary to examine the requirement that the comparator treatment invoked must be more favorable*. Even *if such an examination were necessary*, the Tribunal could not at present reach the same conclusion as the Claimant on this point."[194] (Emphasis added).

137. On a reading of the text and on examining the context of the Award, it is clear for the Committee that the Tribunal gave its reasons in connection with the words "treatment in the territory" and concluded that the wording of the BIT, and specifically Articles 3 and 4 thereof, did not allow the Tribunal to accept Daimler's submissions in this regard. The reasoning on the requirement of favorability of the comparator treatment is not – in the words of the Tribunal – "*strictly necessary*", but even if it were it would not lead the Tribunal to a conclusion favorable to the Applicant.[195]

138. Considering that the reasoning on the comparator treatment was subsidiary or - in the words of the Tribunal – "*not strictly necessary*", and that a decision was made on the point for different reasons, the alleged contradictions, even if these existed, would not have affected the outcome of the Award.

(c) The Tribunal's authority to address the MFN claim.

139. Daimler submitted that the Award invoked contradictory reasons on the Tribunal's authority to address the MFN claim. According to the Applicant, the Tribunal contradicted itself when it conveyed that the MFN clause might confer it with jurisdiction, but then asserted that Daimler could not invoke MFN treatment because it had not satisfied the conditions

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[194] Award, ¶ 240.
[195] Award, ¶ 240.

precedent to arbitration.[196] According to Daimler these contradictory reasons resulted in the Tribunal rejecting jurisdiction.[197]

140. According to Argentina, the alleged contradiction in the Tribunal's analysis of its authority to address the MFN claim does not exist. This is obvious from a simple review of the wording in the Award. In fact – Argentina argued – the Award dealt with the dispute resolution clause and the MFN clauses as two separate potential bases for jurisdiction. In addition to the fact that there is no contradiction in the Tribunal's reasoning on this issue, the fact that the Tribunal considered two independent bases for jurisdiction is more favorable to Daimler. Referring to the decision on annulment in *Azurix*, Argentina further argued that the Award should not be annulled on the basis of an alleged contradiction that was to the advantage of the Applicant.[198]

141. The Committee agrees with Argentina in that there is no contradiction between paragraphs 200 and 281, on the one hand, and footnote 355 and paragraph 204, on the other.

142. In paragraph 200, the Tribunal addresses the issue of whether it has jurisdiction under the BIT, which requires an initial recourse to domestic courts. It concludes that since "Claimant has not yet satisfied the necessary condition precedent to Argentina's consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clause themselves supply the Tribunal with the necessary jurisdiction".[199]

143. In footnote 355 the Tribunal used the word "*unless*" to clarify that the dispute resolution clause and the MFN clause are to be analyzed as independent potential bases for the Tribunal's jurisdiction.

144. Paragraph 204 examined whether the 18-month provision could be bypassed by the MFN clauses, *i.e.*, the analysis in paragraph 200 (the Tribunal lacks jurisdiction "unless the MFN

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[196] Mem. ¶¶ 152-154; Reply ¶¶ 46-48.
[197] Reply ¶ 49.
[198] C-Mem. ¶¶ 67-71; Rej. ¶¶. 43-47.
[199] Award, ¶ 200.

clauses themselves supply the Tribunal with the necessary jurisdiction"). In this regard the Tribunal concluded that the impediment arising from the 18-month proviso "might be surmounted by the content of the MFN clauses in question, in particular if those clauses evince an intention, on the part of the Contracting State Parties, to allow the Treaty´s conditions precedent to accessing international arbitration to be altered by operation of its MFN provisions."[200]

145. Finally, in paragraph 281 the Tribunal reached the conclusions based on its analysis of the issue.

146. The line of reasoning of the Tribunal is clear and leads to its conclusion. The Tribunal noted that since Daimler had not complied with the 18-month clause, the Tribunal did not have jurisdiction to hear Daimler's claims (including claims based on MFN clauses). The Tribunal was of the view that unless the MFN clause itself conferred such jurisdiction it could not go further. The Tribunal then considered whether the MFN clause would confer such jurisdiction and concluded that it did not. There is no contradiction in this reasoning, much less a contradiction of a nature where the reasons cancel each other out.

(d) Whether the 18-month clause grants less favorable treatment.

147. According to the Applicant, the Award contains contradictions as it states that the 18-month requirement does not grant German investors less favorable treatment compared to Chilean investors under the Chile-Argentina BIT, but, at the same time, holds that requiring German investors to fruitlessly litigate their treaty-based disputes in the Argentine courts, "while exempting Chilean investors from the same requirement *could be viewed as discriminatory impairment of the German investors' rights.*"[201] (Emphasis added).

148. In response, Argentina argued that (i) Daimler's comparison between paragraph 250 and footnote 433 was inappropriate because those portions of the Award deal with different provisions of the BIT; (ii) the alleged contradiction does not exist since the cited footnote does not refer to the 18-month clause as a jurisdictional requirement; and (iii) even if the

[200] Award, ¶ 204.
[201] Mem.¶ 78.

reasoning on this issue was contradictory, it would not affect an outcome-determinative point of the Award, to justify annulment.[202]

149. Footnote 433 is included in paragraph 248 of the Award where, as stated in paragraph 138 above, the Tribunal undertook an additional and subsidiary analysis that was not necessary. Based on the standard spelt out in paragraph 77 above, the Committee agrees with Argentina that even if footnote 433 contradicted paragraphs 250 and 281, the contradiction would not affect a pivotal or outcome determinative point of the Award.

150. In other words, the text of footnote 433 is not pivotal to the main decision, and does not affect the main reasoning of the Award on the point.

151. For the foregoing reasons, the Committee is of the considered view that neither of the two grounds for annulment put forward by Daimler constitute a failure by the Tribunal to state reasons. Accordingly Daimler's application for annulment of the Award, under Article 52(1)(e) of the ICSID Convention cannot succeed.

B. MANIFEST EXCESS OF POWERS - ARTICLE 52(1)(B)

1. THE STANDARD

(i) Daimler's arguments

152. Daimler's second ground for partial annulment rests on the basis that the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention by concluding that the MFN clause could not be used by Daimler to bypass the 18-month clause.[203] Daimler cited the decision in the *CDC* case, in which the committee observed that for a tribunal to commit an excess of powers, it "(1) must do something in excess of its powers and (2) that excess must be manifest".[204] According to Daimler, it has been recognized by numerous committees that an excess of powers can also be committed by a tribunal that fails to exercise its jurisdiction or errs in such exercise. Daimler further refers to the *Duke Energy International*

[202] Rej. ¶¶ 48-52.
[203] Mem. ¶ 158.
[204] Mem. ¶ 159.

Peru Investments No. 1 Ltd. v. Republic of Peru (ICSID Case No. ARB/03/28) ("*Duke Energy*") committee, which stated that the powers of a tribunal go further than its jurisdiction; they go to the scope of the task entrusted to the tribunal by the parties. As such, a tribunal's failure to apply the law chosen by the Parties was accepted by the ICSID Contracting States to be an excess of powers.[205]

153. In determining whether a tribunal failed to apply the applicable law under Article 52(1)(b) of the ICSID Convention, the Committee must determine whether in fact the tribunal applied the law it was bound to apply. Accordingly, the Committee need not accept without questioning the Tribunal's conclusions on the applicable law, nor must it accept as dispositive the Tribunal's statement that it applied the applicable law. Moreover, many committees have confirmed that non-application of the applicable law constitutes manifest excess of power and this non-application may consist of applying rules other than those agreed to by the parties or a decision not based on any law.[206] Daimler cited the *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) ("*Sempra*") decision, in which the award was annulled because the committee found that the tribunal's failure to apply the relevant provisions of the BIT amounted to a failure to apply the proper law.[207] Daimler also cited the *Duke Energy* committee, which held that a tribunal's failure to deal with all the questions presented to it amounted to an excess of power.

154. Daimler argued that an excess of power is manifest when the excess is "*obvious, clear, or self-evident*", but it can also be manifest when the excess is "*serious and material*" to the outcome of the case.[208]

155. In its Reply, Daimler stated what it considered to be the points of agreement between the Parties on the legal standard: that a failure to apply the applicable law is an excess of powers;

[205] Mem. ¶¶ 160-162.
[206] Mem. ¶¶ 163-165.
[207] Mem. ¶ 166.
[208] Mem. ¶ 168.

that a "*gross or egregious*" error in applying the law can be grounds for annulment; and that "*manifest*" means "*obvious, clear or self-evident*".[209]

156. According to Daimler, the Parties disagree on how "*obviousness*" should be determined. Argentina relies on the *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10) ("*Repsol*") and *Wena* annulment decisions and argues that obviousness must be determined "*simply by reading the Award*" and avoiding "*elaborate interpretations one way or another*". However, Daimler argues, that recent annulment decisions have held that a more detailed review of the arguments of the parties in the arbitration is necessary when conducting an analysis of manifest excess of powers.[210]

157. Concerning its claims for annulment, Daimler argued that the Tribunal manifestly exceeded its powers in three ways: (i) it failed to apply the VCLT; (ii) it improperly applied the law of "Full Reparation"; and (iii) it failed to apply the principle of *Pacta sunt servanda.*

(ii) Argentina's arguments

158. According to Argentina, Daimler's claim that the Tribunal manifestly exceeded its powers by concluding that the MFN clause could not be used to bypass the 18-month requirement is simply an allegation that the Tribunal applied the law incorrectly.[211] Argentina argues that previous ICSID committees have recognized that an error in the application of the law is not a ground for annulment unless "it is so gross or egregious as substantially to amount to failure to apply the proper law".[212] Argentina submitted that Daimler has acknowledged that a tribunal's excess must be manifest to warrant annulment. Previous committees have held that "[t]he excess of power must be self-evident rather than the product of elaborate interpretations one way or the other".[213] According to Argentina, the excesses identified by

[209] Reply ¶ 57.
[210] Reply ¶¶ 58-59.
[211] C-Mem. ¶¶ 76-77.
[212] C-Mem. ¶ 77.
[213] C-Mem. ¶ 79.

Daimler are not manifest but are "a product of elaborate interpretations" not warranting annulment.[214]

159. In its Rejoinder, Argentina submitted that Daimler failed to show how the Tribunal exceeded its powers and stated that the three grounds invoked by Daimler are interrelated and constitute a mere disagreement with the Tribunal's interpretation of the law.[215]

160. According to Argentina, it is undisputed that a mere disagreement with the interpretation of an award on the applicable law is not a ground for annulment. This has been confirmed by committees such as the *Pey Casado* and *Amco I* committees.[216] Daimler itself recognized that the Tribunal was exclusively responsible for defining the scope of the Treaty, which was done in the present case regarding the 18-month and MFN clauses.[217]

2. FAILURE TO APPLY THE VIENNA CONVENTION ON THE LAW OF TREATIES

(i) Daimler's arguments

161. According to Daimler, the Tribunal manifestly exceeded its powers by failing to apply the law agreed to by the Contracting States to the BIT in connection with Argentina's fifth jurisdictional objection. The Tribunal's failures are contrary to the mandate in Article 42(1) of the ICSID Convention and Article 10(5) of the BIT, rendering each such failure an independent ground for annulment.[218]

162. The first failure was a failure by the Tribunal to apply the VCLT to which Germany and Argentina are parties. Moreover, the rules of treaty interpretation enshrined in Articles 31 and 32 of the VCLT are a part of customary international law. As such, under the ICSID Convention and the BIT, the Tribunal was obligated to interpret the BIT provisions pursuant to the VCLT rules on treaty interpretation.[219] According to Daimler, the Tribunal's failure

[214] C-Mem. ¶¶ 79-80.
[215] Rej. ¶¶ 53-54.
[216] Rej. ¶¶ 55-56.
[217] Rej. ¶ 57.
[218] Mem. ¶¶ 169-171.
[219] Mem. ¶¶ 172-174.

to apply the VCLT's rules on treaty interpretation constitutes one of two annullable errors: an application of a law not agreed to by the parties or "*a decision not based on any law*".[220] Indeed, even though the Award mentioned the VCLT it failed to apply its principles in reaching the conclusion that the BIT's MFN provisions cannot be used by Daimler to overcome its non-compliance with the 18-month requirement. Judge Brower referred to this failure in his Dissenting Opinion.[221]

163. During the hearing, Daimler explained that the application of the "*affirmative-evidence standard*" and the "*standing-community standard*" to the issue of the Contracting State's consent to international arbitration, shows that the Tribunal failed to apply the VCLT's rule according to which an international treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms.[222]

164. Daimler argued that in addition to the Award failing facially to apply the VCLT, Professor Bello Janeiro's admission in his Separate Opinion that he found other authorities to be decisive on the MFN issue, underscores that there was not a majority decision "*of the Tribunal based on an interpretation of the relevant clauses of the Germany-Argentina BIT pursuant to VCLT principles*".[223] This shows that the Tribunal failed to apply the proper law, which amounts to a manifest excess of powers.[224]

165. In its Reply, Daimler stated that Argentina failed to rebut Daimler's argument based on the Tribunal's manifest excess of powers.[225] Moreover, Daimler pointed out that instead of addressing Professor Bello Janeiro's failure to apply the VCLT, Argentina repeated its arguments that the Separate Opinion is immune from scrutiny and that Professor Bello Janeiro simply added some additional considerations.[226] According to Daimler, such

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[220] Mem. ¶ 175.
[221] Mem. ¶ 176.
[222] Hearing on Annulment, Tr. 104:3 – 109:19.
[223] Mem. ¶¶ 177-180.
[224] Mem. ¶ 181.
[225] Reply ¶ 60.
[226] Reply ¶ 64.

contentions contradict the ICJ's ruling that a separate opinion attached to an arbitral award is important for the analysis of the award under review.[227]

(ii) Argentina's arguments

166. Argentina referred to the passages cited by Daimler as a basis for its claim and stated that these passages actually show that the Tribunal did in fact apply the interpretative principles of the VCLT.[228] It is evident from the Award itself that the Tribunal analysed the MFN clauses with reference to the VCLT. Indeed, the Award clarifies that as a preliminary matter it would refer to the *ejusdem generis* principle and then develop the interpretation of the clause in light of the VCLT. In paragraph 217 of the Award the Tribunal first referred to the ordinary meaning of the word "*treatment*" and then considered the context of the term.[229] According to Argentina, the Tribunal followed this same construction in its analysis of activities related to investment and investors, the exceptions established in Articles 3(3) and 3(4) of the BIT, the expression "*less favorable*", and the relationship between the MFN clauses in the BIT and other BIT provisions.[230] Furthermore, the Tribunal concluded that it has undertaken the MFN analysis by taking into account the ordinary meaning of the text in the relevant context and bearing in mind the BIT's object and purpose, as mandated by the VCLT.[231] Thus, it cannot be seriously argued that the Tribunal did not apply the interpretation provisions of the VCLT.[232]

167. Argentina further rejected Daimler's argument according to which the Tribunal increased Claimant's burden of proof by applying an "*affirmative evidence standard*" in contravention of the VCLT's rules of treaty interpretation. Argentina argued that such change in the burden of proof was non-existent. The Tribunal carried out an interpretative analysis of whether

[227] Reply ¶ 64.
[228] C-Mem. ¶¶ 81-84.
[229] C-Mem. ¶ 85.
[230] C-Mem. ¶ 86.
[231] C-Mem. ¶ 87 citing Award, ¶254.
[232] C-Mem. ¶ 88.

consent existed and such analysis was conducted within the framework in which the Parties presented their arguments.[233]

168. Argentina argued that the "weakness" in Daimler's argument is further evidenced by the fact that the entire argument relies on the alleged failure to apply the applicable rules in arbitrator Bello Janeiro's opinion, which is false and, in any case, irrelevant. There was a majority sustaining the Award as evidenced by arbitrator Bello Janeiro's express adherence to it and, as such, the text of the Award needs to be examined and not his Separate Opinion.[234] Additionally, citing ICJ decisions, Argentina argues that the use of separate opinions has been recognized in international law as a means to add further reasoning to a decision without rejecting its reasons or grounds. Arbitrator Bello Janeiro expressly subscribed to the Award and its grounds, and added additional considerations on issues that he thought should be mentioned.[235] Given the purpose of the Separate Opinion and Professor Bello Janeiro's joining the majority vote, on the decision, there was no need for him to reiterate the rules of treaty interpretation in his concurring opinion.[236]

169. In its Rejoinder, Argentina argued that because Daimler alleged that the Tribunal failed to apply the VCLT, it is Daimler which bears the burden of proof.[237] Daimler recognized that the Tribunal applied the VCLT rules of interpretation but submitted that it failed to do so with regard to "*certain*" provisions, such as the MFN clauses. This shows that "*a fortiori*" Daimler's argument is a mere discrepancy in the application of the law.[238]

170. Argentina argued that in its Counter-Memorial it demonstrated the interpretative course the Tribunal undertook and the Applicant gave no answer to this. Indeed, there is no difficulty in following the Tribunal's reasoning in the application of VCLT interpretative principles to its MFN analysis.[239] With respect to other decisions of arbitral tribunals, the Tribunal made

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[233] Hearing on Annulment, Tr. 175:16 – 177:12.
[234] C-Mem. ¶¶ 89-90.
[235] C-Mem. ¶¶ 91-94.
[236] C-Mem. ¶ 94
[237] Rej. ¶ 59.
[238] Rej. ¶ 59.
[239] Rej. ¶¶ 60-61.

clear that it would consider these decisions because the Parties made extensive references to them. The Tribunal also acknowledged that there is no precedent system in investor-State arbitration but that it would consider decisions of other tribunals under certain criteria, which it laid out.[240]

171. On the Tribunal's application and non-application of the MFN clauses, Argentina submitted that the Applicant is mistaken in focusing its analysis on only seven paragraphs of the Award without taking into account other relevant sections.[241] The Applicant is dissatisfied because it disagrees with the Tribunal's interpretation and not because there is a failure to apply the applicable law.[242] This is also confirmed by Daimler's argument on the *pacta sunt servanda* principle; it sought that this be disregarded by the Tribunal when it claimed that the Tribunal should ignore the dispute resolution clause in the BIT.[243]

172. Contrary to the Applicant's argument, arbitrator Bello Janeiro did not fail to apply the VCLT. He fully subscribed to the Award and as the Award applied the VCLT, so did arbitrator Bello Janeiro, who limited himself to adding additional arguments that did not contradict the decisions reached in the Award.[244]

173. As to Daimler's reference to the *Sempra* case, Argentina stated that it is clearly distinguishable. In that case the tribunal failed to apply the applicable law.[245] That was not the case here.

3. APPLICATION OF THE NON-APPLICABLE PRINCIPLE OF "FULL REPARATION" AND FAILURE TO APPLY THE RULE OF *PACTA SUNT SERVANDA*

(i) Daimler's arguments

174. According to Daimler, another flaw in the Tribunal's reasoning is found in its analysis of whether the "*comparator treatment*" given by Argentina to Chilean investors was "*more*

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[240] Rej. ¶ 65.
[241] Rej. ¶¶ 66-70.
[242] Rej. ¶ 71.
[243] Rej. ¶¶ 74-75.
[244] Rej. ¶ 72.
[245] Rej. ¶ 76.

favorable" than the treatment it gave to German investors.[246] Daimler argues that the Tribunal applied the general principle of full reparation to determine whether the comparator treaty was in fact more favorable to the investor.[247] However, the Award does not apply the applicable law because this principle applies exclusively to the consequences of an internationally wrongful act of a State, as evidenced by the plain text of Article 31 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts ("2001 Draft Articles") and the commentaries thereon.[248] Indeed, Daimler argues that the "*full reparation*" rule applies only after a tribunal has found that it has jurisdiction over a dispute, that the State is responsible for an unlawful act and that there is injury.[249] According to Daimler, the Award reflects a manifest excess of powers by applying an inapplicable rule.[250]

175. Daimler cites the *Sempra* committee, which annulled an award in similar circumstances, finding that the tribunal's application of Article 25 of the 2001 Draft Articles instead of the applicable BIT, constituted a failure to apply the applicable law and was, therefore, in excess of powers.[251] According to Daimler, in this case, the Award's excess of power is "*manifest*" as it explicitly states that it will apply the principle of "*full reparation*" to determine if Argentina was treating German investors less favorably than Chilean investors.[252]

176. Daimler submitted that Argentina does not contest that the Award applied the principle of full reparation nor does it suggest that this principle was applicable to any jurisdictional issues.[253] In response to Argentina's assertion that the Award applied the full reparation principle only after taking into account other aspects of the BIT, Daimler argued that it is evident from the Award that it conducted a balancing test on the "less favourable treatment", for which the application of the reparation principle was an essential factor despite the

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[246] Mem. ¶¶ 182-183.

[247] Mem. ¶185; Reply ¶ 65.

[248] Mem. ¶¶ 186-190; citing the Report of the International Law Commission to the General Assembly, 2001 Draft Articles, with Commentaries, U.N. Doc. A/56/10 80-84 (2001) (ACA-39).

[249] Mem. ¶ 190; Reply ¶ 67.

[250] Mem. ¶ 191.

[251] Mem. ¶¶ 192-194.

[252] Mem. ¶ 195; Reply ¶ 68.

[253] Reply ¶ 67.

"obvious non-applicability of a rule on damages to a jurisdictional determination".[254] The application of the non-applicable principle of "full reparation" was thus critical to the Tribunal's decision to reject Daimlers' claims.[255]

177. According to Daimler, the rule that should have applied to the Award's analysis of "less favorable treatment" was the *jus cogens* rule of *pacta sunt servanda* established in the VCLT.[256] The Award failed to apply the principle of *pacta sunt servanda* by not recognizing that Argentina was bound by its obligations under the BIT, which must be performed in good faith and, applying the rule of "full reparation", allowing Argentina to "purchase its way *out of* its treaty obligations by paying damages in a subsequent arbitration for any discrimination suffered by Daimler Financial in the Argentine courts".[257] Daimler cited Professor Schreuer for the proposition that disregarding the basic principle of *pacta sunt servanda* amounts to a non-application of international law.[258]

178. Finally, Daimler submitted that Argentina did not dispute that *pacta sunt servanda* was the applicable law nor did it argue that the Award did in fact apply that principle to the "*less favorable*" analysis. Moreover, Argentina did not submit any observations on Daimler's reference to the *Sempra* decision that strongly supports annulment in the present case. These "*implicit concessions*" confirm that annulment is warranted.[259]

(ii) Argentina's arguments

179. Regarding the alleged misapplication of the principle of full reparation and the non-application of the rule of *pacta sunt servanda*, Argentina argued that the Tribunal sought to objectively determine whether a BIT with a prior submission to a local court requirement was less favorable than the one with a fork-in-the-road provision.[260] The Tribunal then concluded that a BIT, such as the present one with a local court submission requirement was

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[254] Reply ¶ 66 and ¶ 68.
[255] Reply, ¶ 66.
[256] Mem. ¶¶ 198-199.
[257] Mem. ¶ 200.
[258] Mem. ¶¶ 201-202.
[259] Reply ¶ 71.
[260] C-Mem. ¶¶ 95-97.

not less favorable than the Argentina-Chile BIT, which did not have this provision.[261] According to Argentina, the Award's reference to the possibility of claiming before an arbitral tribunal any expenses related to the domestic court litigation reinforced the fact that the dispute resolution provision in the BIT was not less favorable. These references were made in this context to illustrate that the investor couldn't argue less favorable treatment than that accorded to investors in BITs with fork-in-the-road provisions, as it may seek reparations for these higher costs.[262] Accordingly, there are no grounds for claiming that the Tribunal manifestly exceeded its powers.[263]

180. Regarding the alleged application of the principle of full reparation, Argentina claimed that the Tribunal considered it an additional consideration to the time and cost factors, in its discussion on whether there was less favourable treatment or not when investors had to resort to local courts before arbitration, as opposed to investors that could proceed directly to arbitration.[264] Indeed, the Tribunal had already decided that the MFN clauses were not applicable, which is evidenced by the use of the word "*moreover*" in paragraph 247 in which it refers to the full reparation principle. According to Argentina, this shows that the analysis was alternative and not determinative for the conclusion of the Award.[265]

4. THE COMMITTEE´S DECISION ON THE ALLEGED MANIFEST EXCESS OF POWERS

(i) The Standard

181. Daimler submitted that the Tribunal manifestly exceeded its powers by failing to apply the rules of law agreed by the Contracting States to the BIT because the Tribunal (i) failed to apply Article 31 of the VCLT; (ii) applied the non-applicable principle of "full reparation" and (iii) failed to apply the rule of *pacta sunt servanda*.

182. The Parties agree that under Article 52(1)(b) of the ICSID Convention the applicable test for a manifest excess of powers is to determine whether (i) there is an excess of powers; and (ii)

[261] C-Mem. ¶ 97.
[262] C-Mem. ¶ 98.
[263] C-Mem. ¶ 99.
[264] Rej. ¶ 77.
[265] Rej. ¶¶ 78-81.

whether the excess is "manifest." They also seem to agree on the well-established point that a failure to apply the proper law or a failure to apply the law chosen by the parties may amount to an excess of powers.

183. The Parties seem to differ, however, as to what is "*obvious*" or "*manifest*". Argentina, quoting, *inter alia*, the decisions of the *ad hoc* committees of *Repsol* and *Wena* advanced an interpretation where obviousness must be determined by simply reading the award without entering into a detailed examination of its contents and without elaborate interpretations one way or the other.[266] Daimler, citing, *inter alia*, the *ad-hoc* committees of *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25) ("*Fraport*") and *Pey Casado* supported an interpretation whereby it is necessary for the *ad hoc* committee to engage in a careful review of the arguments that have been advanced by the parties in the underlying arbitral proceedings, rather than in a merely superficial inquiry.[267]

184. As regards the test to determine whether the Tribunal failed to apply the proper law, Daimler submitted that there was no presumption of validity in favor of the Award and therefore the Committee must (i) reach its own conclusion on the applicable law; (ii) determine if that was the law that the Tribunal purported to apply; and (iii) whether there were any basis for concluding that the decision of the Tribunal involved a manifest failure to apply the proper law.[268]

185. Argentina, in turn, claimed that this was not a case in which the Tribunal failed to apply the proper law or the law agreed upon by the Parties, but rather a case in which Daimler was not satisfied because the Tribunal disagreed with its interpretation.[269]

[266] C-Mem. ¶ 79.

[267] Reply ¶ 59.

[268] Mem. ¶¶ 163-165; Hearing on Annulment, Tr. 101:16 – 102:4.

[269] C-Mem. ¶ 80

186. The Committee is of the view that an excess of power must be "*manifest*"; in other words it must be plain, evident, obvious and clear to warrant annulment.[270] As stated by the *Wena* annulment committee: "*The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.*"[271] If this Committee were to undertake a careful and detailed analysis of the respective submissions of the parties before the Tribunal, as Daimler suggests, and annul the Award on the ground that its understanding of facts or interpretation of law or appreciation of evidence is different from that of the Tribunal, it will cross the line that separates annulment from appeal.

187. The Committee also considers that when more than one interpretation is possible, an award cannot be annulled on the ground that it suffers from an exercise of excess of powers, much less a manifest excess of powers. In the words of the *CDC* annulment committee

> "[…] the term 'manifest' means clear or 'self-evident'. Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other', is not manifest. […] If the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive.'"[272]

188. The annulment proceeding is not an appeal and therefore, is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed.[273] Annulment under the ICSID Convention is a limited remedy destined to ensure the fundamental fairness of the arbitration proceeding.[274]

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[270] See, e.g.: *Wena*, ¶ 25; *Repsol*, ¶ 36; *Azurix*, ¶¶ 48 and 68; *Sempra* ¶ 213.

[271] *Wena* ¶ 25.

[272] *CDC* ¶ 41.

[273] *See, e.g.: Amco I, ¶ 23; Wena, ¶ 18; Azurix, ¶ 41; Impregilo S.P.A v. Argentine Republic* (ICSID Case No. ARB/07/17), Decision of the *Ad Hoc* Committee on the Application for Annulment, January 24, 2014,*¶* 119

[274] See, e.g.: *MINE*, ¶ 4.04; *Soufraki*, ¶ 20;

189. Therefore, when an allegation is made that there was a manifest excess of powers for failure to apply the applicable law, it is not the role of an *ad hoc* committee to verify whether the interpretation of the law by the tribunal was correct, or whether it correctly ascertained the facts or whether it correctly appreciated the evidence. These are issues relevant to an appeal, but not for annulment proceedings in view of the limited grounds provided for under the ICSID Convention.

190. As stated by the *CDC* annulment committee:

> "Regardless of our opinion of the correctness of the Tribunal's legal analysis, however, our inquiry is limited to a determination of whether or not the Tribunal endeavored to apply English law. That it did so is made plain by its explicit statement in the Award that it did as well as by its repeated citation to relevant English authorities."[275]

191. In sum, what the Committee can do is to determine whether the Tribunal correctly identified the applicable law and endeavoured to apply it. As to the latter, there is a distinction between endeavouring to apply the correct law and correctly applying the law. While the former may provide a ground for annulment the latter is outside the scope of authority of an *ad hoc* annulment committee. The Committee is of the view that the Tribunal complied with what was required of it by the ICSID Convention.

(ii) The Alleged Failure to apply the Vienna Convention on the Law of Treaties

192. As regards the alleged failure to apply the VCLT, the Committee finds that the Tribunal clearly identified the VCLT as applicable to the dispute and endeavored to apply it to the several issues of interpretation of the BIT that arose between the Parties.

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[275] *CDC*, ¶ 45. The *MINE* annulment committee, in turn, considered that: "Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment." *MINE,* ¶ 5.04.

193. In paragraph 46 of the Award (corresponding to the section titled "Applicable Law") the Tribunal observed:

"This claim arises under the German-Argentine BIT, in conjunction with the ICSID Convention. As both the BIT and the ICSID Convention are international treaties concluded between sovereign States, both are subject to the usual customary law rules governing treaty interpretation under public international law, as reflected in article 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). *The Tribunal will apply these rules in discerning whether all of the jurisdictional requirements of the ICSID Convention and the BIT have been met*." (Emphasis added).

194. Thereafter the Award undertakes the analysis of the application or non-application of the MFN clauses and indicates, in several paragraphs, how, in the opinion of the Tribunal, the VCLT is relevant to the interpretation of the different provisions of the BIT.[276]

195. Daimler quoted Judge Brower's Dissenting Opinion to support the alleged lack of application of the VCLT and referred to the Separate Opinion to indicate that Professor Bello Janeiro did not apply the VCLT.[277] As for the opinion of Judge Brower, it constitutes a different approach to the application of the VCLT and it is not for the Committee to review the correctness of the interpretation of the Tribunal or the merits of the criticism of Judge Brower. Suffice it to say that had Judge Brower not been critical of either the Award or the Separate Opinion he would have joined the majority and the Award would have been unanimous. He dissented because he was critical of the reasoning and disagreed with the decision. His dissent cannot form the basis of annulment unless it is evident that the majority Award suffers from a manifest excess of powers by the Tribunal. With respect to the Separate Opinion, the Committee has already expressed its views and conclusions as to the effects of such a Separate Opinion on the Award in paragraphs 107 to 120.

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[276] See, e.g., Award, ¶ 167; ¶¶ 172-173; ¶ 178; ¶ 231 and ¶ 254.

[277] Mem. ¶¶ 175-179.

196. This is sufficient, in the Committee's view, to conclude that annulment of the Award under Article 52(1)(b) of the ICSID Convention for the alleged failure to apply the VCLT is not warranted.

(iii) The Alleged Application of the Non-applicable Principle of Full Reparation and Lack of Application of the Principle of *Pacta Sunt Servanda*

197. Daimler considered that the excess of powers resulting from the application of the non-applicable principle of full reparation and the excess of powers resulting from the lack of application of the principle of *pacta sunt servanda* are related "since by applying the 'full reparation' principle, the Award failed to honor the principle of *pacta sunt servanda*."[278]

198. According to Daimler, in its analysis of the "comparator treatment" to determine whether the treatment granted by Argentina to Chilean investors was more favorable than the one granted to German investors, the Award applied the principle of full reparation to conclude that Chilean investors do not necessarily receive a better treatment than German investors. This principle, according to Daimler, applied only after a tribunal had found (i) jurisdiction over the dispute, (ii) State responsibility for an unlawful act and (iii) injury.[279]

199. Daimler further contended that first by applying the principle of full reparation the Tribunal acted in a manifest excess of its powers by applying a non-applicable provision. Second, the Tribunal exceeded its powers by failing to apply the applicable law, *i.e.* the principle of *pacta sunt servanda*. In the words of Daimler, the Award failed to apply such principle "by failing to vindicate the rule that the Germany-Argentina BIT is *binding* on Argentina, and that Argentina must therefore perform its obligations under the treaty in good faith."[280].

200. The Committee is of the opinion that there was no failure to apply the applicable law.

201. In paragraphs 240 to 243 of the Award, the Tribunal identifies the sources and principles that it would apply to determine whether Chilean investors receive a better treatment than

[278] Reply ¶ 69.

[279] Mem.¶¶ 183-190.

[280] Mem. ¶ 200.

German investors, and concludes that applying such principles to the matter in question "the Tribunal could not endorse the Claimant's proposed use of the MFN clause unless it could determine that the dispute resolution provisions of Article 10 of the German-Argentine BIT (the "Basic Treaty") are objectively less favorable than those of Article X of the Chilean-Argentine BIT (the "Comparator Treaty")."[281]

202. The Award then states:

> "It might be tempting to simply accept the Claimant´s assertion that the Comparator Treaty is more favorable under the assumption that it must be favorable if the Claimant prefers it. The problem, however, is that claimants´ preferences are subjective. It is certainly conceivable that some future claimant may instead prefer to have two successive chances for a favorable outcome under the Basic Treaty rather than proceed immediately to international arbitration under the Comparator Treaty. *This is particularly so since recent trends indicate that the costs of international arbitration may be quite high relative to the costs of domestic dispute resolution, and the average time required to resolve disputes via international arbitration may equal or exceed that of domestic court processes*."[282] (Emphasis added).

203. After indicating that accepting Claimant´s assertions as to what is favorable could lead to a situation where the terms "more" or "less" favorable have no objective meaning, the Award analyzes the factors that should be considered in determining when the treatment of an investor may be considered more favorable, which factors include the costs of pursuing a case in the domestic courts and in international arbitration.[283] In such context, the Award indicates that if in resorting to the domestic courts the investor receives less favorable or discriminatory treatment, such investor would have to be compensated "in accordance with the ordinary general international law principle of full reparation".[284]

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[281] Award, ¶ 244.

[282] Award, ¶ 245.

[283] See: Award, ¶¶ 246-247.

[284] Award, ¶ 247.

204. The Committee stresses that the Award must be read in context. The Tribunal reviewed in detail the factors relevant for the so-called comparator treatment, including costs, and indicated, in an ancillary manner, that if the investor received less favorable or discriminatory treatment in the local courts it could be compensated in accordance with the principle of full reparation. Moreover, this analysis of the "comparator treatment", as stated under paragraph 138 above, was identified by the Tribunal as unnecessary to determine the issue of jurisdiction, and specifically, the application of the 18-month clause and the MFN clause.

205. Therefore, Daimler is not correct in its claim that the Award applied the principle of "full reparation" or failed to apply the principle of *pacta sunt servanda* to its decision on jurisdiction. An ancillary observation in the context of a section that the Tribunal considered as additional, but not necessary, to its decision could not result in an annulment for failure to apply the proper law.

206. Consequently, the *ad hoc* Committee dismisses the contention by Daimler that the Award is the result of a manifest excess of powers, as per Article 52(1)(b) of the ICSID Convention.

C. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE - ARTICLE 52(1)(D)

1. THE STANDARD

(i) Daimler's arguments

207. Daimler also requested a partial annulment of the Award on the ground that the Tribunal committed serious departures from fundamental rules of procedure pursuant to Article 52(1)(d) of the ICSID Convention. According to Daimler, the Tribunal committed

> "numerous procedural anomalies and excesses, including causing prejudicial delay in forcing the parties to undertake a prolonged and costly merits phase that could and should have been averted; by failing to apply the applicable principles concerning the burden of proof; by depriving the parties of the opportunity to address authorities that were critical to the conclusions reached by the two purported members of the

majority of the Tribunal; and by effectively failing to deliberate on the issues that yielded the Award's outcome-determinative conclusion with respect to Argentina's fifth jurisdictional objection."[285]

208. According to Daimler, Article 52(1)(d) of the ICSID Convention protects parties from awards that violate their due process rights.[286] The Committee must establish three elements for annulment to occur: "(1) identification of a "*fundamental*" rule of procedure; (2) a finding that the tribunal "*departed*" from such fundamental rule; and (3) a finding that such departure was "*serious*.""[287]

209. Pursuant to Article 52(1)(d), only violations of "*fundamental*" rules of procedure warrant annulment of an award. Daimler cited the *CDC* and *Pey Casado* committees, which explained "*fundamental*" as rules of natural justice, rules that are essential to the integrity of the arbitral process.[288] According to Daimler, four such rules were violated by the Tribunal: "(1) the right to the prompt and efficient resolution of disputes, free from prejudicial delay; (2) proper allocation of the burden of proof; (3) the right to a full and fair opportunity to be heard; and (4) the tribunal's obligation to deliberate and render a majority decision on each question presented."[289]

210. In regard to the right to prompt and efficient resolution of the dispute, Daimler argued that the notion of ICSID arbitration as an efficient dispute resolution mechanism is reflected throughout the Arbitration Rules, which establish timelines for claims, limits for the preparation of an award and places primacy on the early resolution of preliminary issues.[290] Daimler states that fairness sometimes requires timelines to remain flexible, but it also prohibits prejudicial delay.[291] Delay alone has not been found as a ground for annulment,

[285] Mem. ¶ 205.

[286] Mem. ¶ 206, citing the *CDC* Committee that Article 52(1)(d) is "necessary in order to ensure that the resulting award is truly an 'award,' *i.e*. a result arrived at fairly, under due process and with transparency, and hence in the basic justice of which parties will have faith."

[287] Mem. ¶ 208. Hearing on Annulment, Tr. 36:14-17.

[288] Mem. ¶ 209.

[289] Mem. ¶ 210.

[290] Mem. ¶ 211.

[291] Mem. ¶ 211.

but committees have left open the possibility for annulment for unreasonable delay. Unreasonable delay has been examined by international tribunals in the context of denial of justice claims and in those cases, most tribunals have taken into account the complexity of the case and the parties' procedural behavior.[292] Daimler argued that the effect of a delay may also determine whether it was unreasonable, as was determined in the *Pey Casado* case.[293] In short, annulment must follow in cases where the delay is unreasonable, *i.e.* the delay is unjustified or it causes prejudicial effects.[294]

211. In regard to the proper allocation of the burden of proof, Daimler quoted Professor Schreuer who has noted that Arbitration Rule 34(1) is the only rule that refers to rules of evidence, yet parties have attacked arbitral awards in annulment procedures for the way in which they deal with evidence and the burden of proof, alleging a violation of a fundamental rule of procedure.[295] Professor Schreuer further noted the distinction drawn in the *Wena* and the *CDC* cases between a tribunal's failure to follow the applicable rules of evidence and its discretion to form its view and weigh the evidence.[296] According to Daimler, reversing this burden by imposing a higher burden exceeds the Tribunal's discretionary power and can lead to annulment.[297] Additionally, the tribunal's discretion under Arbitration Rule 34(1) is not unlimited and it cannot exercise this discretion without discussing or referring to the relevant evidence or respecting relevant legal standards.[298]

212. The right to a full and fair opportunity to be heard is one of the most basic concepts of fairness in adversarial proceedings and has been recognized by numerous committees as a fundamental rule of procedure under Article 52(1)(d).[299] Unless this right is given to the parties at every stage of the proceeding, annulment is justified.[300] "*Full*" means the right to

[292] Mem. ¶ 212, citing *Jan Oostergetel and Theodora Laurentius v. Slovak Republic,* UNCITRAL (Award, 23 April 2012); *and Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador,* UNCITRAL, PCA Case No. 34877 (Partial Award on the Merits, 30 March 2010).

[293] Mem. ¶ 213.

[294] Reply, ¶ 76.

[295] Mem. ¶ 214.

[296] Mem. ¶ 214.

[297] Mem. ¶ 215.

[298] Mem. ¶ 216.

[299] Mem. ¶ 217.

[300] Mem. ¶ 218.

address every formal motion before the tribunal and every legal issue raised, and "*fair*" opportunity to be heard not only means that the right is given equally to both parties to respond adequately to arguments and evidence raised by the other, but that neither party is prejudiced by unexpected events.[301] Daimler cited the *Fraport* committee, which annulled the relevant award on the basis that the tribunal had admitted certain documents by the respondent, did not give an opportunity to the parties to comment on the documents and then based much of its findings on them.[302] According to Daimler, a party's right to be heard is "*equally critical*" when the Tribunal relies on evidence and arguments presented in another case by one of the parties without affording the other party the right to comment.[303]

213. In regard to the Tribunal's obligation to deliberate and render a decision on each question presented, Daimler stated that the obligation to deliberate is not explicit but is presupposed in ICSID Arbitration Rule 15(1) by establishing that deliberations shall take place in private and remain secret.[304] A previous committee found that "the requirement of deliberations could be considered a fundamental rule of procedure", which must be real and not merely apparent.[305] However, given the secret nature of deliberations, it is not possible to determine their seriousness, but a committee may be able to determine their effectiveness or whether they occurred.[306] This is true for situations where an award is issued together with separate opinions that diverge on outcome-determinative points, evidencing that deliberations did not fulfill their purpose of reaching a majority on each question presented.[307]

214. Daimler argued that whether or not a there was a "*departure*" from a fundamental rule of procedure was a fact specific inquiry, which required the committee to look at what the tribunal said it was doing and what it was actually doing. Daimler added that in order to

[301] Mem. ¶ 218.
[302] Mem. ¶ 219.
[303] Mem. ¶ 220.
[304] Mem. ¶221.
[305] Mem. ¶ 221.
[306] Mem. ¶ 222.
[307] Mem. ¶ 223.

determine whether there was a "*departure*" the *ad hoc* committee must examine the full record[308].

215. Whether a departure was "*serious*" will be determined by the fact that the tribunal issued an award substantially different from the award it would have issued had the rule been observed, which only requires proof of the impact the issue may have had, or whether the party was deprived of the protection the rule intended to provide.[309] Referring to annulment decisions in *Wena*, *Caratube* and *Pey Casado*, Daimler submitted that the applicant must demonstrate the impact the issue may have had on the award, and not that the result would have been different.[310] Furthermore, Daimler argued that if a committee finds a serious departure from a fundamental rule, it has no discretion to uphold the award.[311]

216. According to Daimler, the Parties agree on most of the aspects of the legal standard applicable under Article 52(1)(d).[312] The Parties agree that to be a serious departure from a fundamental rule of procedure, the departure "must be substantial and deprive the party of the benefit or protection that the rule was intended to provide", yet they disagree on whether the "*seriousness*" requirement entails proof that the departure in effect altered one or more of the Tribunal's decisions.[313] Daimler disagreed with Argentina's argument which refers to *Repsol,* which in turn refers to the *Wena* committee. Argentina submitted that there must be proof that the Tribunal would have reached a different decision had it not been for the violation. According to Daimler, the *Pey Casado* committee also referred to the *Wena* decision and argued that it stood for the proposition that the applicant must prove the impact that the issue "*may have had on the award*", not the impact the tribunal's error actually had.[314] According to Daimler, this analysis is more logical since it is impossible to prove the impact that an alternative scenario would have had. Furthermore, when an ICSID tribunal

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[308] Hearing on Annulment, Tr., 37:2-7.
[309] Mem. ¶ 225.
[310] Hearing on Annulment, Tr. 37:12-38:6.
[311] Mem. ¶ 226.
[312] Reply ¶ 72.
[313] Reply, ¶¶ 72-73
[314] Reply, ¶ 73; Hearing on Annulment, Tr. 249:1-250:13.

departs from a fundamental rule of procedure, such departure is serious and warrants annulment.[315]

(ii) Argentina's arguments

217. Argentina stated that the purpose of Article 52(1)(d) is to "safeguard basic fairness and integrity of the arbitration process".[316] A departure from a fundamental rule is serious if it has deprived the party of the benefit or protection of the rule; it must be outcome-determinative.[317] According to Argentina, what is important to determine is "whether the underlying proceeding was fundamentally fair" in respect of basic rules of procedure under international law.[318]

218. According to Argentina, Daimler failed to prove the elements it identifies as part of the analysis under Article 52(1)(d), namely: i) the "*fundamental*" nature of the rule of procedure; ii) a finding that there was a departure from such fundamental rule and iii) a finding that the departure was "*serious*" or substantial[319] and would have resulted in a different outcome.[320]

219. According to Argentina, there was no departure from a fundamental rule of procedure in the Tribunal's analysis of Argentina's fifth jurisdictional objection. Indeed, the Award contains a description of the facts, a well-reasoned analysis of the applicable law and the defenses raised by Daimler.[321] Daimler's claim is based on its disagreement with the Tribunal's dismissal of its claims but it does not show that there was a departure from a fundamental rule of procedure.[322]

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[315] Reply ¶¶ 73-74.
[316] C-Mem. ¶ 100.
[317] C-Mem. ¶ 101.
[318] C-Mem. ¶ 102; referring to the *Wena* committee's Decision on Annulment.
[319] Hearing on Annulment, Tr. 182:16-183:2
[320] C-Mem. ¶¶ 103-104.
[321] C-Mem. ¶ 110.
[322] C-Mem. ¶ 111.

2. PREJUDICIAL DELAY IN RENDERING A JURISDICTIONAL DECISION

(i) Daimler's arguments

220. According to Daimler, the Tribunal committed a serious departure from a fundamental rule of procedure by unduly delaying a decision on jurisdiction despite having the elements to rule on it since 2008. Indeed, on July 16, 2008 the Tribunal informed the Parties that it had enough information on the issue of jurisdiction, yet it made them plead the merits of the case. According to Daimler, the jurisdictional issues regarding the 18-month and the MFN clauses were purely legal, not factual, and thus, joinder was not necessary.[323] This resulted in the Parties wasting time and resources pleading an issue on which the Tribunal ultimately decided it had no jurisdiction.[324] Daimler argued that the "fundamental" nature of the right to a prompt and efficient resolution of a dispute is clear from the fact that its violation may constitute a denial of justice. In this case, the Tribunal's failure to issue its decision in a timely manner deprived Daimler during "four years, one month and six days" from pursuing annulment proceedings and/or litigation before Argentine courts.[325] Furthermore, the delay in rendering a jurisdiction decision led the Tribunal to rely on key issues imported from the *ICS* award with regard to which Daimler never had an opportunity to be heard.[326]

221. In the Hearing on Annulment, Daimler argued that it "suffered prejudice from the jurisdictional proceeding in ICS because the chair of both of the Tribunals, Professor Dupuy, was influenced by these new arguments and Legal Authorities that were presented by Argentina on the 18-month objection in the ICS context, which Daimler did not have an opportunity to rebut."[327] Daimler argued that the delay led to a change of heart by the majority of the Tribunal that in 2012 decided to uphold the 18-month objection put forward by Argentina,[328] although the same had not crossed their minds back in 2008.[329]

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[323] Hearing on Annulment, Tr. 231:11-12.
[324] Mem. ¶¶ 228-229.
[325] Mem. ¶ 229.
[326] Reply ¶ 76.
[327] Hearing on Annulment, Tr. 44:5-11.
[328] Hearing on Annulment, Tr. 50:2-9.
[329] Hearing on Annulment, Tr. 15:16 – 17:3; 41:1–3.

222. Daimler argued that the Parties agree that in some circumstances, delay may render an award subject to annulment and that delay, in and of itself, may be insufficient to justify annulment.[330] Daimler rejected as incorrect Argentina's submission that for a delay to justify annulment it must be equivalent to a denial of justice. Similarly, Argentina questioned Daimler's reliance on the *CDC* committee because while that committee found that even if the tribunal had erred in issuing the award when it did, it did not find that to be a ground for annulment.[331] According to Daimler, this conclusion was reached because the committee in that case found that the applicant had failed to show how it was prejudiced by the alleged unreasonable delay. In this case, Daimler argued, it has shown the prejudice it suffered from the delay.[332]

223. Regarding Argentina's argument that Daimler had proposed the joinder of the merits and jurisdiction phases and that it had conceded that there was no unfairness, Daimler argued that Argentina's submission is erroneous. According to Daimler, its first proposition of joinder was made in order to expedite the process and have the pleadings in both phases proceed *in tandem,* and it was only in this context that it stated that there would be no unfairness. Daimler's second proposal had been to only have two rounds on the jurisdictional issue and then, based on these pleadings, the Tribunal had to decide the issue of jurisdiction. As such, Argentina erred in its submission that Daimler cannot now object to the procedure adopted by the Tribunal.[333]

224. Daimler submitted that Argentina's next argument that Daimler waived its right to the length of the proceeding overlooks the record. On August 5, 2008 Daimler sent a letter to the Tribunal urging it to issue "its decision on jurisdiction now..." stating its concern on the further delay that might be caused. Thereafter, the Tribunal issued Procedural Order No. 4 joining jurisdiction to merits and Daimler had no choice but to comply with the Order.[334] Moreover, Daimler argued, it was not required to object during the drafting period since it

[330] Reply ¶ 77.
[331] Reply ¶ 78.
[332] Reply ¶ 78.
[333] Reply ¶¶ 79-81.
[334] Reply ¶ ¶ 82-83.

had already objected to the joinder. The important aspect of the Award is the fact that it addressed only the jurisdictional issues for which the Tribunal had stated it had enough information since 2008. Arbitration Rule 27 applies only when a party "knows or should have known that a rule has not been complied with". Daimler did not and could not know that the Award would only address jurisdictional points and, thus, Rule 27 is not applicable.[335]

225. Daimler agreed with Argentina's statement that tribunals have discretion to join the jurisdictional and merits phases, but it argued that this discretion is not unbridled and cannot be exercised arbitrarily.[336] Daimler also disagreed with Argentina's suggestion that a tribunal exercising this discretion is immune from review under Article 52(1)(d) of the ICSID Convention.[337] Additionally, Argentina's submission that the Award referred to citations of the merits pleadings does not reconcile the Award's delay when the Tribunal declared in 2008 that it had enough information. Occasional references to the merits pleadings regarding the jurisdictional objections did not justify a four-year delay in issuing the Award. [338]

(ii) Argentina's arguments

226. In regard to the Tribunal's joinder of the jurisdictional objections to the merits of the case, Argentina submitted that this is a power that tribunals have been granted expressly under Article 41 of the ICSID Convention.[339] This power is further confirmed by the Convention's *travaux préparatoires*, as well as the Report of the Advisory Regional Meeting of Legal Experts in Investment Disputes.[340]

227. As to Daimler's argument on the length of time it took the Tribunal to issue its Award, Argentina argued that, first, it was Daimler that initially insisted on the joinder of the objections to the merits. It cannot now complain that the Tribunal exercised a power

[335] Reply ¶ 84.
[336] Reply ¶ 85.
[337] Reply ¶ 85.
[338] Reply ¶ 86.
[339] C-Mem. ¶ 112.
[340] C-Mem. ¶¶ 113-115.

envisaged in the Rules and invoked by Daimler.[341] Second, Daimler cannot complain now about the length of the proceedings when it had expressly agreed with Argentina that the deadlines for the first submissions would be 180 days long.[342] Third, pursuant to Arbitration Rule 27, Daimler waived its right to object because it did not complain before the Tribunal that its delay was a breach of a rule of procedure.[343] Fourth, the joining of jurisdiction and merits implies that the Award could uphold a jurisdictional objection. Failure to have raised this objection at the time of the joinder entailed a waiver by Daimler.[344] Additionally, it was appropriate for the Tribunal to join its objections to the merits because three of the five objections raised by Argentina concerned the merits of the case.[345] As such, Argentina submitted that the Tribunal's joinder of the objections to jurisdiction to the merits of the case and the subsequent admission by the majority of one such objection was within the Tribunal's scope of competence and does not warrant annulment of the Award.[346] In any case, the duration of the proceedings between the first hearing and the issuance of the Award was five years and seven months, which is not unusual for ICSID timelines.[347]

228. Furthermore, Argentina referred to Daimler's argument that relies on the *Pey Casado* case regarding the concept of "*unreasonable*" delay examined in the context of "*denial of justice*" claims. According to Argentina, the conclusion in the *Pey Casado* case is not applicable to the present case because the alleged delay in the Award did not result in the lack of treatment of Daimler's claims.[348] Daimler's subjective belief of the appropriate period to consider the issuance of the Tribunal's decision as timely, cannot serve as grounds for annulment where the issues claimed by the Parties were analysed and decided by the Tribunal.[349] Argentina submitted that Daimler's complaint was about only one of the five jurisdictional objections. It further submitted that the time it must have taken to prepare the Dissenting and Separate

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[341] C-Mem. ¶¶ 23-24
[342] C-Mem. ¶ 25.
[343] C-Mem. ¶ 26.
[344] C-Mem. ¶ 27.
[345] C-Mem. ¶ 28.
[346] C-Mem. ¶ 29.
[347] Hearing on Annulment, Tr. 128:17-21.
[348] C-Mem. ¶¶ 120-121.
[349] C-Mem. ¶ 122.

Opinions must also be considered as that probably added to the time of issuance of the Award.[350]

229. According to Argentina, Daimler centered its request for annulment on the *CDC* case, which, according to Daimler, left open the door for consideration of unreasonable delays as grounds for annulment under Article 52(1)(d). However, Daimler failed to mention that the committee in that case stated that "[e]ven had the Tribunal erred in issuing the Award when it did, the Committee would see no basis for annulling the Award as a result".[351]

230. Citing *Wena,* Argentina submitted that Daimler failed to demonstrate how the decision would have been different if it had been issued earlier[352], depriving it of the benefit it would have received.[353]

231. Furthermore, Argentina states that Daimler's argument on the dismissal of the claim on jurisdictional grounds would mean that every time a tribunal joined jurisdictional objections to the merits it would be forced to reject the jurisdictional objections because otherwise its decision would be unduly delayed.[354] Such a result would not only be absurd but would also go against the tribunal's powers under the ICSID Convention and Rules.[355] It would be contrary to the manner of exercise of authority as set forth by international courts and tribunals, as well as the common practice of ICSID tribunals.[356] Argentina further argued that Daimler had not cited a single case which supported annulment on the ground of delay in issuing an award.[357]

232. According to Argentina, Daimler mischaracterized the Tribunal's Procedural Order No. 3. The Tribunal did not state in Procedural Order No. 3 that it had enough information to decide the jurisdictional issues nor did it close the discussion thereon. The Tribunal simply stated

[350] C-Mem. ¶ 123.
[351] C-Mem. ¶ 124.
[352] Hearing on Annulment, Tr. 193:11-21.
[353] C-Mem. ¶ 125.
[354] Rej. ¶ 84; Hearing on Annulment, Tr. 124:2-9.
[355] Rej. ¶¶ 84-87.
[356] Rej. ¶¶ 87-89.
[357] Rej. ¶¶ 90-91; According to Argentina, the Committee in the *CDC* case cited by the Applicant's rejected the argument of undue delay and did not leave the door open to such annulment had the evidence been different.

that it would not hold a jurisdictional hearing as it had "received enough information on the positions of the parties on the issue of jurisdiction as they have been so far developed by them in their respective written pleadings"[358], leaving the joinder to the merits as an issue to be decided in a further procedural order. Following the Tribunal's decision to join jurisdiction to merits, there were discussions over jurisdictional issues and both merits and objections to jurisdiction were dealt with at the hearing.[359] The decision taken by the Tribunal is not different from that of other ICSID Tribunals.[360]

3. IMPOSITION OF AN IMPROPERLY-HEIGHTENED BURDEN OF PROOF

(i) Daimler's arguments

233. Daimler argued that the Award further departed from a fundamental rule of procedure by applying an improperly heightened burden of proof in its interpretation of the expression of consent in the BIT. Instead of interpreting the BIT's meaning in accordance with the VCLT, the Award imposed an affirmative evidence requirement on Daimler to prove that the Parties to the BIT intended the MFN clauses to include dispute resolution.[361] According to Daimler, reversing the burden of proof was an abuse of the Tribunal's discretion to handle evidence and to form its own view of the relevance to be accorded to evidence under Arbitration Rule 34.[362] The ICJ has also recognized a ruling of this nature as contrary to a fundamental rule of procedure founded upon the "*basic principle*" of "*the equality between the parties to the dispute*".[363] Applying the ICJ's observation to this case, Daimler submitted that "'establishing or proving' the 'rules of international law' contained in the Germany-Argentina BIT '[could not] be imposed upon any of the parties.' "[364]

234. The Tribunal imposed on Daimler this "affirmative evidence" requirement relying on a single quote from the ICJ's *Djibouti v. France* judgment ("*Djibouti*" judgment), a decision

[358] Rej. ¶¶ 92-93.
[359] Rej. ¶ 93.
[360] Rej. ¶ 94.
[361] Mem. ¶¶ 233-234.
[362] Mem. ¶¶ 215-216.
[363] Mem. ¶¶ 233-234.
[364] Mem. ¶ 235.

that first appeared in the Award and on which Daimler was never given an opportunity to comment.[365] As put in the Hearing on Annulment, Daimler was held to a higher standard without its knowledge because the higher standard was imported from the *ICS* proceeding.[366] Additionally, the quote relied on by the Award was taken out of context and imposed no such burden upon the Parties. The ICJ merely discerned the scope of consent to jurisdiction of the parties and did not impose a burden of proof on the respondent to present affirmative evidence. The analysis undertaken by the ICJ in the *Djibouti* judgment mirrors its analysis in the *Fisheries Jurisdiction 1974* ("*Fisheries*") case, where the court determined the scope of consent of the parties by interpreting the consent in light of the VCLT and did not impose a burden on the parties.[367] Daimler stated that this was the approach that Judge Brower found appropriate for the Tribunal in this case.[368]

235. Daimler argued that the Tribunal's misplaced reliance on the *Djibouti* judgment led to its imposing an improperly heightened burden of proof on Daimler and demonstrated that its use as an authority for the "*affirmative evidence*" requirement was crucial and, as such, Daimler should have had an opportunity to submit its views.[369] Imposing on Daimler the "*affirmative evidence*" burden to prove Argentina's expression of consent to the BIT was a breach of the fundamental rule of procedure that parties could not be required to establish or prove rules of international law. The Tribunal thereby breached "*the basic principle*" of equality of the parties.[370] Daimler stated that the departure was "*serious*" because it imposed on it an improper burden on the essential issue of consent to arbitration, which was an issue that could have led to a substantially different outcome in the Award.[371] Additionally, it deprived Daimler of the protection afforded by the rule, *i.e.* equality of the parties.[372]

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[365] Mem. ¶¶ 236-237.
[366] Hearing on Annulment; Tr. 240:11-21.
[367] Mem. ¶¶ 238-241; Reply, ¶88.
[368] Mem. ¶ 242.
[369] Mem. ¶ 243.
[370] Mem. ¶ 244.
[371] Mem. ¶ 245; Reply. ¶ 95.
[372] Mem. ¶ 245.

236. Daimler further argued that it is irrelevant whether the Tribunal intended to impose the standard only on itself rather than on Daimler. The establishment of the affirmative evidence standard was a *de facto* change in the burden of proof that ultimately led the Tribunal to review the evidence presented by Daimler on the issue of consent under a more stringent standard.[373]

237. In response to Argentina's argument, Daimler submitted that the fact that consent is important does not justify imposing an improper burden on Daimler because consent is a matter of treaty interpretation, which is the Tribunal's responsibility.[374] According to Daimler, the Tribunal "advances a novel theory" that when determining consent to a treaty, fundamental rules of treaty interpretation no longer apply. However, the ICSID Convention requires tribunals to apply the applicable law and forbids them from departing from fundamental rules of procedure.[375] Argentina criticized the authorities cited by Daimler as misleading because the quote from the ICJ *Fisheries* case referred to the principle of *iura novit curia*. According to Daimler, the criticism is unfair because Daimler did quote the entire passage and, more importantly, this principle is both consistent and relevant to the principle of equality between the parties, which was made clear by the ICJ in the cases[376] of *Fisheries* and *Military and Paramilitary Activities*[377] cases. According to Daimler, "*in an attempt to distrac*t" Argentina also argued that Daimler failed to prove a violation of Arbitration Rule 34, yet this rule does not encompass all rules of evidence and procedure and does not address the burden of proof. As such, it is irrelevant to a claim of a serious departure from a fundamental rule of procedure.[378]

(ii) Argentina's arguments

238. According to Argentina, the Award did not commit an "annullable error" in requiring Daimler to produce evidence on the interpretation of the expression of consent in the BIT.

[373] Hearing on Annulment, Tr. 60:8 – 61:9.
[374] Reply ¶ 89.
[375] Reply ¶ 90.
[376] Reply ¶¶ 92-93.
[377] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27).
[378] Reply ¶ 94.

Indeed, the Tribunal explained the importance of consent to the interpretation of the Treaty and its analysis showed that this evidentiary requirement is not abusive or excessive.[379]

239. Furthermore, Argentina argued, that the principle of equality between the parties was not breached by the Tribunal and Daimler's reference to the *Fisheries* case was misleading, as this case did not refer to this principle but to the *iura novit curia* principle.[380] According to Argentina, Daimler failed to prove that the Tribunal breached the principle of equality between the parties by upholding Argentina's fifth jurisdictional objection.[381]

240. Contrary to Daimler's allegation, Argentina never acknowledged a wrongful imposition of the burden of proof upon Daimler.[382] The Tribunal did not impose an improper burden of proof on Daimler and the paragraph cited to this effect merely supports the undisputed proposition that State consent to any international settlement procedure must be conclusively established. This is further made clear in the following paragraph where the Tribunal assumes such responsibility.[383] Furthermore, Argentina argued that the Tribunal's reference to the *Djibouti* judgement – which is only cited once in a footnote – relates to the need to determine the scope of the State's consent to the Tribunal's jurisdiction and is not relied upon for the burden of proof.[384]

241. According to Argentina, it is evident from the Award that the Tribunal ascertained the relevant law, engaged in an interpretive analysis pursuant to the VCLT and applied the applicable law.[385]

242. According to Argentina, Daimler further failed to prove that the departure was serious. Indeed, the Tribunal determined the scope of the clauses in the Treaty and interpreted them,

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[379] C-Mem. ¶ 116.
[380] C-Mem. ¶ 117.
[381] C-Mem. ¶ 118.
[382] Rej. ¶ 96.
[383] Rej. ¶¶ 97-99.
[384] Rej. ¶¶ 100-101.
[385] Rej. ¶¶ 104-105.

so any alleged change in the burden of proof would not have had a substantial impact on the decision.[386]

4. Denial of a full and fair opportunity to be heard

(i) Daimler's arguments

243. According to Daimler, the Award's reliance on the *Djibouti* judgment as the sole authority for the "*affirmative evidence*" burden also evidences the Tribunal's breach of Daimler's right to a full and fair opportunity to be heard. Daimler submits that a full opportunity implies that both parties receive the opportunity to address every legal issue raised by the case; and a fair opportunity means that each party is allowed to respond adequately to arguments presented by the other and that it is not prejudiced by unexpected events.[387]

244. Accordingly, even after the briefing phase is closed, the parties should be able to controvert new evidence on which the tribunal intends to rely on as well as arguments and evidence that were submitted in another case by one of the parties.[388] Daimler argued that the *Djibouti* judgment was neither submitted nor referred to by either party in this case, but seemed to have been discussed in the *ICS* case. In that proceeding, Argentina submitted the *Djibouti* judgment for the proposition that consent must be "*unequivocal*". The case was later cited in the *ICS* award, which reveals that the Tribunal applied the same "*affirmative evidence*" requirement as in the present case.[389] Similarly, the World Bank Guidelines were relied upon in the Award even though they were not submitted by the Parties or addressed during the hearing. Although the Award stated that they were not determinative for the issue of the Contracting Parties' intentions, Professor Bello Janeiro seems to have treated them as applicable law in his Separate Opinion.[390] Daimler argued that given these circumstances, the Tribunal was required to reopen the proceedings and hear both Parties "*on the*

[386] Rej. ¶¶ 106-107.
[387] Mem. ¶ 218, ¶¶ 236-238.
[388] Mem. ¶220.
[389] Mem. ¶¶ 247-248.
[390] Mem. ¶ 249.

arbitrators' new thesis" and the evidence it relied upon[391], as it actually did in 2010 in regard to another of the jurisdictional objections.[392]

245. ICSID tribunals retain some ability to rely on evidence or arguments not introduced by the parties to the extent that the parties receive a full and fair opportunity to be heard if the evidence or arguments are determinative or constitute the sole basis or authority invoked by the tribunal for the outcome, and are not merely duplicative or corroborative.[393] Daimler stated that two of the three awards annulled in ICSID proceedings under Article 52(1) (d) of the ICSID Convention were annulled due to the fact that the tribunal failed to afford the parties a full and fair opportunity to be heard on evidence that resulted decisive in the award.[394]

246. Contrary to Argentina's contention, Daimler argued that the fact that the reference to the *Djibouti* judgement was preceded by the term "*e.g.*" does not negate that this was the only authority on which the Tribunal based its determination that Daimler bore the burden of proving Argentina's consent to the BIT.[395] Also in response to Argentina's Counter-Memorial, Daimler stated that it did not argue that the mere reference to the *ICS* decision warrants annulment. Instead, its reference to the *ICS* case was noted because it appeared that the *Djibouti* judgement had been introduced in the *ICS* case and found its way into the Award without input from Daimler.[396] This is also the case for the World Bank Guidelines, which Professor Bello Janeiro found "*particularly revealing*".[397] On this point Argentina only argued that there was extensive discussion on whether or not consent existed, but this says nothing on whether the Parties discussed these two points.[398] In sum, Daimler submitted that while Argentina had the chance to address the *Djibouti* judgment as well as the World Bank

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[391] Mem. ¶ 255.
[392] Hearing on Annulment, Tr. 251:15 – 255:4.
[393] Mem. ¶ 250.
[394] Mem. ¶ 250-251; citing to *Fraport*, and *Pey Casado*.
[395] Reply ¶¶ 99-100.
[396] Reply ¶ 101.
[397] Reply ¶ 102.
[398] Reply ¶ 102.

Guidelines during the *ICS* proceedings, Daimler was not given such an opportunity during this arbitration.

247. Furthermore, Daimler notes that the Award and the Separate Opinion refer to several post-July 2008 references, despite the fact that the Tribunal had told the parties in July 2008, that it had enough information on the question of jurisdiction.[399] Daimler argued that in light of these new materials, the Tribunal was obliged to request additional submissions by the Parties and its failure to do so amounts to a denial of a full opportunity to be heard that warrants annulment under Article 52(1)(d).[400]

(ii) Argentina's arguments

248. In regard to the Tribunal's alleged reliance on the *Djibouti* judgment, Argentina argued that this reference is made at the end of a long footnote by way of an example. Furthermore, it was cited in response to the distinction drawn in Judge Brower's Dissenting Opinion between consent to submit to a specific dispute resolution method and the scope of this consent.[401] Likewise, Daimler's claim that the Tribunal incorrectly referred to the affirmative evidence requirement of consent is misplaced as consent is the "*cornerstone of the jurisdiction of the Centre*" and the existence of consent was extensively discussed before the Tribunal.[402] The Award is very eloquent in paragraph 175 on Daimler's alleged inconsistency between the fundamental principle of consent to international jurisdiction, the need for a party invoking it to prove it and the interpretation rules contained in the VCLT.[403]

249. Argentina stated that Daimler was not deprived of the right to be heard. Daimler only contends that it was not given the opportunity to comment on certain legal authorities cited by the Tribunal, which were publicly available and some of which were in the record.[404] However, the relevant question here is that during the proceedings the Parties widely

[399] Reply ¶¶ 104-110.
[400] Reply ¶ 110; Hearing on Annulment, Tr. 53:14 - 54:2; 56:16 - 18.
[401] Hearing on Annulment, Tr. 191:1 - 8.
[402] C-Mem. ¶ 21.
[403] C-Mem. ¶ 21.
[404] Rej. ¶ 109.

discussed the relevant issues in relation to which the Tribunal cited the legal authorities.[405] As such, the Tribunal was not limited by the submissions of the Parties in regard to the legal authorities. This is further confirmed by the principle of *iura novit curia,* whereby the Tribunal had the duty to consider on its own initiative the rules of international law and legal authorities relevant to the case.[406] Furthermore, Argentina claimed that Daimler did not even argue that such authorities exceed the "*legal framework*" established by the Parties' arguments. In fact, the Parties extensively discussed the issues in relation to which the Tribunal cited or invoked the legal authorities in question.[407] Specifically, the proposition that the State's consent cannot be presumed – which, according to Argentina, is what "*affirmative evidence*" means – was discussed by the Parties in the hearing with reference to the *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14) decision and also addressed by Argentina in its post-hearing brief in reference to the "*Armed Activities Case in the Territory of Congo*".[408] Moreover, the Tribunal did not need the *ICS* case record to have access to these authorities because they were publicly available and the Tribunal could consider them *sua sponte*.[409]

250. Contrary to Daimler's argument, this case is not similar to that of *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) (Second Decision on Annulment) because in the present case the Tribunal did not make any decisions on a request from Argentina without hearing Daimler.[410]

251. Regarding the reference to legal authorities subsequent to July 2008, Argentina stated that the Tribunal did not close the discussion on the jurisdictional issue, but simply considered that it had received enough information on the position of the Parties "*so far developed*", and therefore a hearing to address exclusively jurisdictional issues was not required[411].

[405] Rej. ¶ 111.
[406] Rej. ¶¶ 111-112.
[407] Rej. ¶ 115.
[408] Hearing on Annulment, Tr. 284:17 - 291:11.
[409] Rej. ¶ 116.
[410] Rej. ¶ 121.
[411] Rej. ¶ 124

Following the joinder of the jurisdictional objections to the merits, jurisdictional issues were further discussed, both at the hearing and thereafter.[412]

252. The cases cited by Daimler in support of its argument were clearly distinguishable. In *Fraport* the tribunal took into account essential factual issues, specifically prohibiting the parties from making submissions on such material and then relied on this factual material to decide the case.[413] In *Pey Casado* the committee found that the tribunal decided issues not raised by the parties and, thus, went beyond the legal framework.[414] This is not the case here. Daimler only contends that it was not given an opportunity to comment on legal authorities cited by the Tribunal in relation to matters that had been widely discussed by the Parties.[415] Additionally, Daimler failed to show that this alleged breach was serious. Indeed, the Tribunal already knew the Parties' positions on these issues so that the lack of opportunity to comment on the authorities could not have had an impact on the Award.[416]

5. FAILURE BY THE TRIBUNAL TO DELIBERATE AND RENDER A MAJORITY DECISION

(i) Daimler's arguments

253. Daimler argued that the Tribunal also breached a fundamental rule of procedure by failing to deliberate and render a majority decision. Daimler stated that although deliberations are not expressly required under the ICSID Rules, they are fundamental to an ICSID arbitration and "annulment is nevertheless justified when it is apparent that deliberations have not occurred, have not been meaningful, or have not achieved their purpose."[417]

254. In accordance with Article 48 of the ICSID Convention, deliberations are intended to ensure that all questions submitted to a tribunal are decided by majority vote[418]. During deliberations the tribunal seeks to reach a majority decision on each "*question submitted*" by

[412] Rej. ¶¶ 122-125.
[413] Rej. ¶ 127.
[414] Rej. ¶ 128.
[415] Rej. ¶129.
[416] Rej. ¶ 130.
[417] Mem. ¶ 256.
[418] Mem. ¶ 257.

the parties; arbitrators cannot simply "*agree to disagree*".[419] Daimler argued that it is evident in this case that on some of the issues deliberations took place but a review of the Award and the Separate Opinions reveals that "no deliberations took place between the two arbitrators who declined jurisdiction".[420] Daimler stated that upon the Award's own admission, the MFN discussion was taken from the analysis of a different award and was, therefore, not subject to deliberations.[421] Additionally, Professor Bello Janeiro stated in his Separate Opinion that the Award was fully drafted and he simply "subscribe[d] to the decision proposed by the President of the Tribunal".[422]

255. Daimler argued that if the Committee were to find the above evidence insufficient, the divergence of opinions between the two "*majority*" arbitrators on the interpretation of the term "*treatment*" in the MFN clauses was proof of the failure to deliberate.[423] According to Daimler, in spite of the Award's recognition of the two-prong test (see paragraph 35 above), the Award and the Separate Opinion reflect different positions in regard to each prong. Indeed, the Award recognizes that the World Bank Guidelines are soft law and do not shed direct light on the matter, whereas the Separate Opinion treats these Guidelines as applicable law.[424] Similarly, the Award distinguishes between State practice and investment case law and states that investor-State jurisprudence cannot be evidence of the understanding of States. As such, the Award looks to other textual evidence to discern the meaning of "*treatment*". However, Professor Bello Janeiro in his Separate Opinion relied on previous investment case law, such as the *Wintershall* case, as well as apparent statements by States, including Argentina. Daimler argued that this shows Professor Bello Janeiro's opinion was "*divorced*" from the intention of the Contracting Parties to the BIT.[425] Furthermore, Daimler stated that Professor Bello Janeiro's decision was also "*divorced*" from the principle of

[419] Mem. ¶ 258.
[420] Mem. ¶ 259.
[421] Mem. ¶¶ 260-261.
[422] Mem. ¶ 261.
[423] Mem. ¶ 262.
[424] Mem. ¶ 264.
[425] Mem. ¶¶ 265-267.

contemporaneity because, apart from relying on the World Bank Guidelines, he relied on evidence almost exclusively post-dating the BIT negotiations.[426]

256. According to Daimler, despite the fact that the Award concluded that the term "*treatment*" depended on the understanding of the Contracting Parties at the time the BIT was negotiated, only the Tribunal's President purported to apply this analysis to the conclusion that dispute resolution was not within the term "*treatment*" in the MFN clauses of the BIT.[427] Given the importance of this term to the Award's conclusion and the fact that the analysis turned on those two elements, the absence of a majority decision on each of those elements constitutes a serious departure from a fundamental rule of procedure.[428]

257. According to Daimler, Professor Bello Janeiro enjoyed a degree of discretion to add supplementary comments or reasons, but these needed to be consistent with the Award. That not being the case, the deliberations cannot be said to have fulfilled their purpose.[429] Contrary to Argentina's contention, Daimler's argument was not merely that the Tribunal cited the *ICS* case, but that the President's copy/paste of the *ICS* reasoning showed that the Tribunal failed to deliberate and agree on a line of reasoning, because it merely imported into the Award the product of deliberations of a different Tribunal and did not reach a genuine majority.[430]

(ii) Argentina's arguments

258. Argentina submitted that Daimler's arguments on the *ICS* decision are made simply to divert attention from the jurisdictional objection that was upheld in the Award. Indeed, Daimler failed to prove that any question on the fifth jurisdictional objection was not discussed by the Parties during this proceeding irrespective of whether or not it appears in the *ICS* decision.[431]

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[426] Mem. ¶ 268.
[427] Mem. ¶ 269.
[428] Mem. ¶ 270.
[429] Reply ¶ 112.
[430] Reply ¶ 113.
[431] C-Mem. ¶ 119.

259. According to Argentina since deliberations are secret, Daimler conveniently assumed that the Tribunal failed to deliberate meaningfully. However, there is no indication in either opinion to this effect.[432] Furthermore, the fact that the President of the Tribunal submitted a proposal to which arbitrator Bello Janeiro subscribed is in accordance with the ICSID rules which recognize the President's leading role in deliberations.[433] The fact that certain paragraphs of the *ICS* award are transcribed does not alter this position.[434]

6. THE COMMITTEE´S DECISION ON THE ALLEGED SERIOUS DEPARTURE FROM FUNDAMENTAL RULES OF PROCEDURE

(i) The Standard

260. The Parties seem to agree that a decision to annul under Article 52(1)(d) of the ICSID Convention comprises three elements: (i) the identification of a "*fundamental rule of procedure*"; (ii) a finding that the tribunal has departed from such a fundamental rule; and (iii) a finding that the departure was serious.

261. As to the seriousness of the departure, Daimler submitted that for departure from a fundamental rule of procedure to be serious it must either (i) have the potential to cause the tribunal to render an award substantially different than that it would have rendered if the fundamental rule had been observed, or (ii) deprive a party of the benefit or protection that the rule was intended to provide.[435] Argentina agreed that for a departure to be serious it must deprive the party of the benefit or protection that the rule intended to provide.[436] However, Argentina submitted that the departure from a fundamental rule of procedure was serious when it led a tribunal to a result substantially different from the result it would have

[432] Rej. ¶ 132.
[433] Rej. ¶ 133.
[434] Rej. ¶¶ 135-137.
[435] Mem. ¶ 225.
[436] C-Mem. ¶ 101.

reached had the departure not occurred.[437] Moreover, the applicant in an annulment proceeding must prove that a different result would have been reached otherwise[438].

262. The Committee considers that under Article 52(1)(d) of the ICSID Convention, a departure from a procedural rule justifies annulment of the award provided that (i) the given departure is serious; and (ii) the rule in question is fundamental.

263. A departure is serious if it deprives a party of the protection afforded by the said rule. In the words of the *MINE* annulment committee:

> "5.05 A first comment on this provision concerns the term 'serious'. In order to constitute a ground for annulment the departure from a 'fundamental rule of procedure' must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide."[439]

264. In other words, for a violation of the procedural rule to be serious, such violation "must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed."[440]

265. With respect to the rules of procedure that are to be considered fundamental, the Committee considers that they are the rules of natural justice *i.e.*, rules concerned with the essential fairness of the proceeding. As pointed out by the *CDC* annulment committee:

> "A departure is serious where it is 'substantial and [is] such as to deprive the party of the benefit or protection which the rule was intended to provide.' […] As for what rules of procedure are fundamental, the drafters of the Convention refrained from attempting to enumerate them, but the consensus seems to be that only rules of natural

[437] C-Mem. ¶ 104.
[438] C-Mem. ¶ 104.
[439] *MINE*, ¶ 5.05.
[440] *CDC*, ¶ 49.

justice – rules concerned with the essential fairness of the proceeding – are fundamental. Not all ICSID Arbitration Rules are fundamental in this sense."[441]

266. The applicant, in this case Daimler, had the burden of proving both that (i) the Tribunal committed a serious departure from a procedural rule; and (ii) that the said rule was fundamental.

267. The Committee will now address the four actions of the Tribunal that, according to Daimler, seriously violated fundamental rules of procedure.

(ii) Alleged Prejudicial Delay in Rendering a Jurisdictional Decision

268. Daimler submitted that on July 16, 2008, the Tribunal indicated that it had enough information on the positions of the Parties on the issue of jurisdiction. However, it did not issue its jurisdictional decision at that time, but joined jurisdiction and merits and "mandated a long series of pleadings, oral argumentation, and witness examinations exclusively addressing the merits of the parties' dispute, which delayed a decision on the jurisdictional issues for an additional four years, one month and six days. […] These extensive and expensive proceedings in the end amounted to a nullity and an egregious waste of resources, given the Tribunal's ultimate conclusion that it lacked jurisdiction to decide any merits issues at all".[442]

269. According to Daimler, it was clearly prejudiced by the delay because, (i) had the Tribunal issued its jurisdictional decision in time, Daimler would have devoted its time and resources to annulment proceedings, and/or to litigate the matter before the Argentinian courts;[443]and (ii) the delay "led the Tribunal to rely on key sources imported from another arbitration, with respect to which Daimler Financial never had an opportunity to be heard."[444]

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[441] *CDC*, ¶ 49.
[442] Mem. ¶ 229.
[443] Mem. ¶ 230; Reply ¶ 76.
[444] Reply ¶ 76.

270. The Parties seem to agree that a delay *per se* would not merit annulment, but that impermissible or unreasonable delay that causes prejudice to a party may, depending on the circumstances, open the door for annulment.

271. In the Committee's opinion, the record of these annulment proceedings does not support Daimler's allegations and therefore the Committee will dismiss such allegations.

272. According to the text of Procedural Order No. 3, on July 16, 2008 the Tribunal did not decide, as contended by Daimler, that it had enough information to make a determination on the issue of jurisdiction. In the said Procedural Order the Tribunal considered that no separate hearing was required for jurisdiction given that it had received enough information through the written submissions· Therefore, the Tribunal cancelled the hearing on jurisdiction originally scheduled for December 5 and 6, 2008.

273. It was in Procedural Order No. 4, dated August 27, 2008 that the Tribunal decided to join jurisdiction and merits.

274. Nothing in the record of these annulment proceedings suggests that as a result of Procedural Order No. 3, or the decision to join jurisdiction and the merits, the Tribunal closed the submissions on jurisdiction or prevented the Parties from presenting further arguments or allegations on jurisdiction. On the contrary, the record indicates, and during the Hearing on Annulment it became even clearer, that after July 16, 2008 the Parties further discussed the objections on jurisdiction, including debates in the hearing that took place from November 30 through December 7, 2009, where merits and jurisdictions were addressed.[445]

275. The Parties submitted their post-hearing briefs on March 29, 2010 – Respondent – and March 30, 2010 – Claimant.[446] Thereafter the Tribunal requested some additional information from the Parties on August 20, 2010 and the Parties responded on September 28, 2010.[447]

276. In the proceedings that ended with the Award, Argentina submitted five different jurisdictional objections. In the Award the Tribunal referred to each one of these objections,

[445] Hearing on Annulment, Tr. 312:21 – 317:8; Tr. 342:21 – 343:9.
[446] Award, ¶¶ 29-30.
[447] Award, ¶¶ 31-32.

and after stating the positions of the Parties it rejected four objections and accepted the fifth titled "The Most-Favored Nation Clause does not Authorize the Claimant to Bypass the Requirements of Articles 10(2) and 10(3) of the Treaty". It was not, therefore, a case where, as suggested by Daimler, the Tribunal decided to postpone the decision on one objection to jurisdiction, have the Parties plead merits for months, and then issue an Award based on that particular objection to jurisdiction.

277. A reading of the Award suggests that at least some of the objections to jurisdiction could not have been decided without discussing the facts, or additional evidence related to the merits of the case. But in any event, it is not the duty of the Committee to second-guess the reasons that the Tribunal may have had to cancel the separate hearing on jurisdiction, or to join jurisdiction and merits or not to decide all the objections to jurisdiction without addressing the merits. That would require, on the one hand, a review of the entire file and all the circumstances existing at the time each such decision was made, and on the other, a review of the reasons that the Tribunal had to conduct the proceedings in the manner it did. Even if the Committee carried out this exercise it would serve no purpose. An extensive review of this nature while it may be permissible in appellate proceedings which allow a review of both errors of fact and law is clearly beyond the scope of annulment proceedings.

278. As a result of the foregoing, the Committee considers that there was no undue or unreasonable delay in issuing the Award as claimed by Daimler and therefore, no violation of a fundamental rule of procedure that merits annulment of the Award.

(iii) Alleged Imposition of an improperly-heightened burden of proof

279. Daimler attacked the wording of paragraph 175 of the Award as an imposition on Daimler of an "*affirmative evidence*" requirement to prove the consent of the State Parties to the BIT to include dispute resolution within the scope of the MFN clause.[448]

280. Daimler, citing the ICJ *Fisheries* case, argued that the burden of establishing or proving rules of international law cannot be imposed upon any of the parties and that such a rule is founded

[448] Mem. ¶ 234.

upon the basic principle of the equality of the parties to the dispute.[449] The concept of "*rules of international law*" includes rules contained in treaties binding on the parties. Therefore, by imposing on Daimler the burden of proving the scope of the consent of the Contracting States to the BIT the Tribunal departed from a fundamental rule of procedure.[450]

281. The Committee considers that – as rightly stated by Argentina[451] – a reading of paragraph 175 of the Award in its proper context together with the paragraphs which immediately follow, including paragraph 177 of the Award, makes clear that the Tribunal did not impose a burden of proof on Daimler, much less a heightened and unacceptable burden of proof, that resulted in a departure from a fundamental rule of procedure.

282. Paragraph 175 of the Award reads:

> "[I]t is not possible to presume that consent has been given by a state. Rather, *the existence of consent must be established*. This may be accomplished either through an express declaration of consent to an international tribunal´s jurisdiction or on the basis of acts 'conclusively establishing' such consent.[321] What is not permissible is to presume a state's consent by reason of the state's failure to proactively disavow the tribunal's jurisdiction. Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence. But the impossibility of basing a state's consent on a mere presumption should not be taken as a 'strict' or 'restrictive' approach in terms of interpretation of dispute resolution clauses. It is simply the result of respect for the *rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure*." (Emphasis added)

283. Paragraph 177 of the Award states the following:

> "In addressing the different issues raised by the disputing parties in the present case, the *main task of the Tribunal is therefore to identify the true will of the Federal*

[449] Mem. ¶ 234.
[450] Mem. ¶ 235.
[451] Rej. ¶¶ 98-101.

Republic of Germany and the Republic of Argentina as it was stated in the 1991 Treaty which they agreed upon for the 'promotion and reciprocal protection of investments'. In particular, *the Tribunal must determine whether the State Parties, in concluding the German-Argentine BIT, intended to submit to the jurisdiction of an international arbitral tribunal* in circumstances wherein the investor has satisfied the procedural requirements for international dispute resolution under a Comparator Treaty but has not fully complied with the investor-State dispute resolution process laid down in the Basic Treaty." (Emphasis added).

284. As already observed, the Award must be read in its context, and the paragraphs and sentences cannot be interpreted or given a meaning in isolation from the section in which they are included or the related paragraphs that provide them context. A reading of the above quoted paragraphs and a review of the Award makes it clear that the Tribunal did not impose a burden of proof on either Party; it simply stated that consent of the State cannot be presumed and therefore must be established. Thereafter the Tribunal noted that it was its duty, based on the different issues raised by the Parties, to identify the true will of the States when expressing their consent to the BIT.

285. It follows from the above that the Tribunal did not impose an improper burden of proof on Daimler that amounts to a serious departure from a fundamental rule of procedure.

(iv) Alleged Denial of a Full and Fair Opportunity to be Heard

286. Daimler submitted that it was denied a fair opportunity to be heard because the Tribunal relied on the *Djibouti* judgment as the sole authority for the affirmative evidence requirement. Such decision was never discussed or presented in the arbitration between Daimler and Argentina and appeared only in the Award. The *Djibouti* judgment was imported into the Award by the President of the Tribunal from the *ICS* case where Argentina had the opportunity to be heard with respect to such opinion.[452]

287. Daimler also submitted that it was denied a fair opportunity to be heard because the Tribunal informed the Parties in 2008 that the Tribunal had received enough information from the

[452] Mem., ¶¶ 236-237; ¶¶ 247-248.

parties on the issue of jurisdiction, and then introduced and referenced a number of cases in the Award and Separate Opinion that did not even exist in July 2008.[453]

288. The Committee is of the view that there was no serious violation of the fundamental right of Daimler to be heard in the proceedings that ended with the Award.

289. The *Djibouti* judgment is mentioned once in the Award, in a footnote[454] and its purpose is to respond to an argument advanced in the Dissenting Opinion. After indicating that State consent is the incontrovertible requisite for any kind of international settlement procedure, the Award states: "What is true of the very existence of consent to have recourse to a specific international dispute resolution mechanism is also true as far as the scope of this consent is concerned". Footnote 325 was inserted after this sentence and reads as follows:

> "The Dissenting Opinion attempts to draw a neat dividing line between the establishment of consent to be bound by a specific dispute resolution mechanism and the scope of that consent, suggesting that the former can be founded on purely "formal indicia" such as the fact of signature and ratification of a treaty, while the latter is a matter of textual interpretation (Dissenting Opinion at n. 15). This distinction is a red herring. If the interpretive analysis reveals that the scope of Argentina's consent to submit to the jurisdiction of an international arbitral tribunal does not extend to the matter at hand, it is difficult to understand in what sense the State's consent to submit to that jurisdiction will have nevertheless been "established" on the basis of the State's mere signature and ratification of the Treaty. The relevant question is not whether the Treaty was ratified – which it was – but what precisely the States consented to in ratifying the Treaty. See e.g. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177, at paras. 65ff (finding it necessary to determine the "extent of the consent given by the Parties to the Court's jurisdiction").

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[453] Reply ¶ 104.

[454] Award, Footnote 325.

290. The *Djibouti* judgment is not, as Daimler contends, the legal authority on the basis of which the Tribunal required a heightened burden of proof from Daimler. Its text and context clearly indicates, in the opinion of the Committee, that it was mentioned to support a response to the Dissenting Opinion on the matter of how the Tribunal should interpret the provisions of the BIT to establish the existence and scope of consent. It is clear from the record that the Parties made extensive submissions on the issue of consent in relation to jurisdiction. A single reference to an opinion, in a footnote responding to the Dissenting Opinion cannot be, in the context in which it was written, considered as a legal authority that imposed an undue burden of proof on Daimler, or as a legal authority with respect to which Daimler should have been provided an opportunity to be heard.

291. As for the submission that the Tribunal informed the Parties in 2008 that it had received enough information on the positions of the Parties on the issue of jurisdiction, and then introduced and referenced a number of cases in the Award and Separate Opinion that did not even exist as of July 2008 without giving Daimler the opportunity to be heard on those authorities, the record in this annulment proceedings does not support Daimler's contention.

292. As already observed in paragraph 274 above, by joining the merits and jurisdiction the Tribunal did not close the submissions on jurisdiction or prevent the Parties from making further arguments or allegations on jurisdiction. The Parties, in fact, referred to the jurisdictional objections in the hearing and included jurisdictional submissions in their post-hearing briefs.

293. Turning to the authorities quoted by Professor Bello Janeiro in the Separate Opinion, and the effect thereof on the Award, the Committee has already addressed this matter in paragraphs 107 to 120 above. The reasons stated there are sufficient to reject the claim that the reference in the Separate Opinion to authorities other than those presented by the Parties constitutes a violation of a fundamental rule of procedure.

294. As to the post-July 2008 authorities cited in the Award, the Committee has three observations: First, they were publicly available and either Party could access them. Second, they were available before the Parties submitted their post-hearing briefs and nothing prevented the Parties from relying on such authorities in support of their arguments. Third,

the Parties had extensively discussed the issues on which the legal authorities were cited in the Award.

295. This Committee is of the view that an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it. This is exactly the case here. Daimler had the opportunity to make submissions on all the relevant issues related to objections to jurisdiction. Once such an opportunity was provided the Tribunal was not obliged to confine itself to only those authorities, which had been cited by the parties. No rule of law or procedure or requirement of due process prevented it from referring to or relying upon other authorities that were in the public domain. Such reliance did not violate any rule of natural justice including the right to be heard.

296. In sum, on July 16, 2008 the Tribunal decided not to hold a separate hearing on jurisdiction, but did not close the proceedings on jurisdiction or prevented the Parties from making further submissions on jurisdiction. Daimler had the opportunity to present its case on the objections to jurisdiction filed by Argentina, from July 16, 2008 to the submission of the post-hearing briefs on March 2010, including submissions during the hearing on jurisdiction and merits held on November and December 2009. The fact that the Tribunal cited in the Award decisions or authorities not previously cited by the Parties, but which were publicly available, and were relevant to the issues on which the Parties had made extensive submissions, does not constitute a serious departure from a fundamental rule of procedure.

(v) Alleged Failure by the Tribunal to Deliberate and Render a Majority Decision

297. Daimler contended that the Tribunal had failed to comply with one of its basic duties: to deliberate and reach a majority decision on each one of the questions submitted by the Parties. In Daimler's view, a review of the Award and the Separate Opinion reveals that no deliberations had taken place between the two arbitrators who declined jurisdiction.[455]

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[455] Mem. ¶¶ 258-259.

298. According to Daimler, the lack of deliberations is evidenced by (i) the admission in the Award, in footnote 303, that portions of specific parts of the analysis overlap with the decision in the *ICS* arbitration whose tribunal shared the same President; (ii) the statement by Professor Bello Janeiro in his Separate Opinion that he subscribed to the decision proposed by the President of the Tribunal, which statement suggests that he was simply presented with the Award by the President of the Tribunal; and (iii) the divergence of opinions between the arbitrators that formed the majority.[456]

299. Neither the text of the Award, nor the Arbitration Rules much less arbitration practice, and other evidence in these annulment proceedings support Daimler's contentions.

300. The Committee sees no departure from a fundamental rule of procedure in the President preparing and submitting to the co-arbitrators for their consideration a draft award. On the one hand, it is the President who presides over the deliberations (Arbitration Rule 14(1)). On the other hand the preparation of a first draft by the President of the Tribunal is a working method that tribunals frequently employ in order to draw up an award. From this it cannot be inferred that the members of the Tribunal did not deliberate upon the Award. Nothing in the record suggests that the draft was not discussed or that there was no deliberation. On the contrary, the Dissenting Opinion and the Separate Opinion strongly suggest that the arbitrators had deliberated; that there was dissent from the decision – Judge Brower – and a need to clarify the vote – Professor Bello Janeiro – which clearly establishes that the Tribunal reached its conclusions after due deliberations.

301. It is true, and the Parties do not dispute, that in the drafting of the Award the President decided to use, in certain parts of the analysis, portions of the draft used in a different case that he was chairing. This was clearly disclosed in footnote 303 of the Award. However, this cannot *ipso facto* lead to the conclusion that the Award was made without deliberations. There is not even an iota of evidence, which even remotely suggests that the President simply copied an award, or substantial portions of it, from a different case and that Professor Bello

[456] Mem. ¶¶ 260-262.

Janeiro merely concurred without any discussion or deliberation. Again, the Dissenting Opinion and the Separate Opinion suggest otherwise.

302. As for the differences between the Award and the Separate Opinion, the Committee has already referred to them in paragraphs 89 to 120 above and concluded that the tribunal had deliberated. There are no contradictions between the Award and the Separate Opinion of Professor Bello Janeiro. Even if there were, the Award would not be affected as the majority clearly voted to decline jurisdiction.

303. The Committee thus considers that there was no violation of a fundamental rule of procedure resulting from the alleged failure of the Tribunal to deliberate and reach a majority decision.

IV. COSTS

304. The Committee must now deal with the question of the costs of these annulment proceedings, as to which the Committee has discretion.

305. The large majority of committees, in annulment proceedings, have held that legal costs should be borne equally by the parties. They have done so not only where the application for annulment has succeeded in whole or part, but also where it failed.

306. This Committee has considered whether such practice should be followed and whether or not the result of such practice may be anomalous. In particular, the Committee debated whether the Respondent should bear costs at all, given that every ground for annulment presented by Daimler has been rejected.

307. Finally, the Committee decided that the Applicant should bear the costs of the annulment proceedings (which it has already paid).

308. Insofar as legal costs are concerned this Committee decided to follow the aforesaid practice and order that each Party should bear its own legal costs. This is not because this Committee agrees that it should be applied as a general rule, but because of the circumstances of the present case.

309. Even though Daimler was not successful in any of its claims, this is not a case where, as indicated in *CDC*, the annulment application is "fundamentally lacking in merit" and that Applicant's case was "to any reasonable and impartial observer, most unlikely to succeed." In addition, the present case involved a "difficult and novel question of public importance" (*Vivendi I*, paras. 117) concerning the effects of concurring opinions in the formation of the majority, the deliberations and the reasoning of the award.

V. DECISION

310. For the reasons set forth above, the Committee unanimously decides:

i. To dismiss in its entirety the Application for Annulment of the Award submitted by Daimler Financial Services A.G.

ii. That each party shall bear its own legal costs and expenses incurred with respect to this annulment proceeding.

iii. That the Applicant, Daimler Financial Services A.G. shall bear the costs of the proceeding, comprising the fees and expenses of the Committee Members, and the costs of using the ICSID facilities.

[*Signed*]

Florentino Feliciano
Arbitrator
Date: 26/11/2014

[*Signed*]

Makhdoom Ali Khan
Arbitrator
Date: 19/12/2014

[*Signed*]

Eduardo Zuleta
President
Date: 24/12/2014