International Centre for Settlement of Investment Disputes

Washington, D.C.

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.

v.

Argentine Republic

(ICSID Case No. ARB/97/3)

(Annulment Proceeding)

Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007

Members of the *ad hoc* Committee

Dr. Ahmed S. El Kosheri, President

Professor Jan Hendrik Dalhuisen

Ambassador Andreas J. Jacovides

Representing Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.:

Mr. Stanimir A. Alexandrov
Mr. Daniel M. Price [*]
Ms. Marinn Carlson
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Judge Stephen Schwebel

Mr. Luis Erize
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Representing the Argentine Republic:

Dr. Joaquín Pedro da Rocha
Procurador del Tesoro de la Nación Argentina
Procuración del Tesoro de la Nación Argentina

[*] *after 11 February 2009.*

Date of Dispatch to the Parties: 10 August 2010

TABLE OF DEFINITIONS

"*ad hoc* Committee"	The Second *ad hoc* Committee comprised of Dr. Ahmed S. El Kosheri, Professor Jan Hendrik Dalhuisen and Ambassador Andreas J. Jacovides constituted in Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (ICSID Case No. ARB/97/3) on 3 July 2002.
"Argentina"	Argentine Republic (also referred to as the "Respondent").
"Award"	Compañía de Aguas del Aconquija S.A. (formerly Compagnie Générale des Eaux) and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Second Arbitration Proceeding Award of 20 August 2007 (also referred to as the "Second Award").
"BIT"	Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments (also referred to as the "Treaty").
"CAA"	Compañía de Aguas del Aconquija S.A. (formerly Compagnie Générale des Eaux).
"CGE"	Compagnie Générale des Eaux (now Vivendi Universal S.A.) .
"Claimants"	Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.

"Consortium"	Aguas del Aconquija (later Compañía de Aguas del Aconquija S.A. or "CAA").
"Decision on Annulment"	Decision on Annulment of the *ad hoc* Committee, constituted on 3 July 2002, comprised of Mr. Yves Fortier, President, Professor James Crawford and Professor José Carlos Fernández Rozas, in Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (ICSID Case No. ARB/97/3).
"DYCASA"	Dragados y Construcciones Argentina S.A.
"ERSACT"	Tucumán Provincial water regulator created by Tucumán Provincial Law No. 6529, 18 January 1994 (formerly "ERAT") (also referred to as the "Regulator").
"Executive"	The executive branch of the Tucumán provincial government, composed of the Governor and the Lieutenant or Vice Governor.
"First Award"	Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic (ICSID Case No. ARB/97/3), Award of 21 November 2000 (also referred to as the "Original Award").
"First Tribunal"	The First Tribunal comprised of Judge Francisco Rezek, President, Judge Thomas Buergenthal and Mr. Peter Trooboff, constituted in Compañía de Aguas del Aconquija S.A. and Compagnie Générale des

	Eaux v. Argentine Republic (ICSID Case No. ARB/97/3) pursuant to a Request for Arbitration filed by Compañía de Aguas del Aconquija S.A. and Compagnie Générale on 26 December 1996 (also referred to as the "Original Tribunal").
"First *ad hoc* Committee	The First *ad hoc* Committee comprised of Mr. Yves Fortier, President, Professor James Crawford and Professor José Carlos Fernández Rozas,, constituted in Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (ICSID Case No. ARB/97/3) on 3 July 2002.
"ICSID Convention"	Convention on the Settlement of Investment Disputes between States and other Nationals of Other States.
"Legislature"	Tucumán provincial legislature.
"Original Award"	Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic (ICSID Case No. ARB/97/3), Award of 21 November 2000 (also referred to as the "First Award").
"Original Tribunal"	The original Tribunal comprised of Judge Francisco Rezek, President, Judge Thomas Buergenthal and Mr. Peter Trooboff, constituted in Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic, (ICSID Case No. ARB/97/3) pursuant to a Request for Arbitration filed by Compañía de Aguas del Aconquija

	S.A. and Compagnie Générale on 26 December 1996 (also referred to as the "First Tribunal").
"Province"	Province of Tucumán, Republic of Argentina (also referred to as "Tucumán").
"Rais Report"	Case Study, Concession for the Potable Water and Sewerage Services in Tucumán, by Jorge Carlos Rais, Maria Esther Esquivel, Sergio Sour, Consultants, April 2001.
"Regulator"	Tucumán Provincial water regulator created by Tucumán Provincial Law No. 6529, 18 January 1994 (formerly "ERAT") (also referred to as "ERSACT").
"Second Award"	Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Second Arbitration Proceeding Award of 20 August 2007 (also referred to as the "Award").
"Second Tribunal"	The Second Tribunal comprised of Mr. J. William Rowley, Prof. Gabrielle Kaufmann-Kohler and Mr. Carlos Bernal Verea, constituted in Compañía de Aguas del Aconquija S.A. and Compagnie Générale des Eaux v. Argentine Republic, (ICSID Case No. ARB/97/3) pursuant to a Request for Arbitration filed by Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. on 29 August 2002.

"Treaty"	Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments (also referred to as the "BIT").
"Tucumán"	Province of Tucumán, Republic of Argentina (also referred to as the "Province").
"Vivendi"	Vivendi Universal S.A. (formerly Compagnie Générale des Eaux).
"Vivendi I"	First Arbitration Proceeding and First Annulment Proceeding Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3).
"Vivendi II"	Second Arbitration Proceeding Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3).

I. Introduction

1. On 13 December 2007, the Argentine Republic ("Argentina" or "the Respondent") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (the "Centre" or "ICSID") an application for annulment of the Award dated 20 August 2007 (the "Award"). This Award had been rendered by a Tribunal composed of Mr. J. William Rowley (Canadian), Prof. Gabrielle Kaufmann-Kohler (Swiss) and Mr. Carlos Bernal Verea (Mexican), in the arbitration proceeding between Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. ("the Claimants") v. Argentine Republic (ICSID Case No. ARB/97/3).

2. The Application sought annulment of the Award on all five grounds set out in Article 52(1) of the ICSID Convention and was made within the time provided by Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the ICSID Convention").

3. The Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), for a stay of enforcement of the Award until the Application for Annulment was decided.

4. The Deputy Secretary-General of ICSID registered the Application on 19 December 2007 and transmitted a Notice of Registration to the parties on the same date in accordance with Rule 50(2) of the ICSID Arbitration Rules. The parties were also notified that the enforcement of the Award was provisionally stayed pursuant to ICSID Arbitration Rule 54(2).

5. By letter of 22 May 2008, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the Parties were notified of the constitution of the *ad hoc* Committee ("the Committee") composed of Dr. Ahmed S. El Kosheri (Egyptian), Professor Jan Hendrik Dalhuisen (Dutch) and Ambassador Andreas J. Jacovides (Cypriot).

6. On 23 May 2008, Claimants submitted Observations requesting the immediate termination of the provisional stay of enforcement. In the alternative, Claimants requested that the *ad hoc* Committee order Argentina to provide financial security as a condition of any continued stay, in the form of either (i) an escrow deposit of at least US$177,534,408.53 with a first-tier international bank outside Argentina, or (ii) an irrevocable bank guarantee or security bond in the

same amount issued by a first-tier international bank outside Argentina and immediately payable to or cashable by the Claimants upon the issuance of a decision denying annulment.

7. By letter of 30 May 2008, the Parties were notified that Dr. Ahmed S. El Kosheri had been designated President of the *ad hoc* Committee.

8. By letter of 27 June 2008, the Centre sent to the parties copies of the Declaration signed by each Member of the *ad hoc* Committee pursuant to ICSID Arbitration Rule 52(1) and Arbitration Rule 6(2).

9. The first session of the *ad hoc* Committee was held, with the agreement of the parties, on 17-18 July 2008, at the premises of the World Bank in Paris, France. During the session, both Parties addressed the *ad hoc* Committee with their arguments on the question of the continuation of the stay of enforcement of the Award.

10. Having heard the arguments of both Parties, the *ad hoc* Committee decided to continue the stay of enforcement until a decision was taken by the *ad hoc* Committee, and granted the Parties the opportunity to submit simultaneous post-hearing observations by 1 August 2008.

11. On 1 August 2008, both Parties submitted their post-hearing briefs. On 4 November 2008, the *ad hoc* Committee issued its Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award. Pursuant to paragraph 48(C) of such Decision, the stay of enforcement of the Award of 20 August 2007 terminated on February 8, 2009.

12. The Argentine Republic submitted its Memorial on the Annulment of the Award on 17 October 2008. The Claimants submitted their Counter-Memorial on Annulment on 15 January 2009. Argentina's Reply on Annulment was submitted on 6 March 2009 and the Claimants' Rejoinder on 24 April 2009.

13. The *ad hoc* Committee held a hearing on annulment on from 15-17 July 2009 in Paris. On the last day of the hearing the President of the *ad hoc* Committee requested that the parties advise whether there was any indication on the record of the arbitration proceedings about UBS shareholdings in Vivendi during the period between Professor Kaufmann-Kohler's appointment to the UBS Board on 19 April 2007 and the rendering of the Award on 20 August 2007. The

parties submitted their observations in this respect on 24 July 2009, as requested by the *ad hoc* Committee.

14. On 30 September 2009 the parties filed their statement of costs.

15. ICSID's Secretariat received from Argentina a communication dated 4 March 2010 containing certain information about events that took place in other instances. As instructed by the Committee, Vivendi was informed about the contents of that communication and was requested to respond thereto by 22 March 2010, which was duly done.

16. The *ad hoc* Committee declared the proceedings closed on 16 April 2010.

II. The Parties Contention

A. Argentina's position

17. In its Memorial on Annulment the Argentine Republic requests the annulment of the Award on the grounds set out in Article 52(1)(a), (b), (d) and (e) of the ICSID Convention, namely: i) that the Tribunal had not been properly constituted; ii) that the Tribunal had manifestly exceeded its powers; iii) that there had been a serious departure from fundamental rules of procedure and; iv) that the Award failed to state the reasons on which it is based.

1. The Tribunal was not properly constituted

18. According to Argentina, the Tribunal was not constituted in compliance with the provisions of the ICSID Convention and as a result of its improper constitution, had violated the general principles of impartiality and due process.

19. This claim was based on two main grounds:

    i. That Professor Gabrielle Kaufmann-Kohler lacked the requirements imposed by the ICSID Convention and should have been disqualified during the proceedings, had the relevant information been disclosed (Article 51(1)(a) and (d) of the Convention).

ii. That, since the situation that gave rise to the conflict of interest was not disclosed, Argentina was unable to challenge Professor Kaufmann-Kohler. This prevented the proper application of the procedure for selection and challenge of arbitrators. Her ability to serve on the Tribunal was not assessed and the composition of the Tribunal was in breach of the Convention and basic principles of law.

20. Argentina states that while Professor Kaufmann-Kohler was acting as a Member of the Board of Directors, Chairperson of the Nominating Committee and Member of the Corporate Responsibility Committee of the Swiss bank UBS, one of the largest and most influential institutions in the world, she was simultaneously serving as an arbitrator appointed by CAA and Vivendi in cases against the Argentine Republic. UBS held shares in Vivendi with voting rights valued at approximately €477,000,000 (2,38% of € 20.044 billion)[1]. At that time, UBS was the single largest shareholder in Vivendi[2].

21. Argentina argues that in view of Professor Kaufmann-Kohler's positions in UBS, she played a fundamental role in defining the strategy and corporate conduct of the bank as well as in the assessment of risk. Her duties towards UBS concerned the value of the bank's assets, including shares in other corporations. This interest in UBS' performance began in 2006 when she was appointed as a member of the Board of Directors. Argentina also argues that Professor Kaufmann-Kohler was partially remunerated with UBS shares.

22. While Argentina acknowledges that any issues regarding the ability of an arbitrator should be raised without delay during the arbitration proceeding[3], in this case this was not possible because Argentina only learned about the facts and circumstances affecting Professor Kaufmann-Kohler's ability to serve as arbitrator in November 2007, after the Award of 20 August 2007 had been rendered.

23. Argentina argues that any reasonable person confronted with the above facts would – at least – have serious doubts as to the appropriateness of Professor Kaufmann-Kohler's participation in the proceedings. Argentina further states that no tribunal may be properly constituted if one of

[1] See Vivendi's 2006 Annual Report.
[2] See Vivendi's 2006 Annual Report.
[3] Argentina argues that this was the case in other pending arbitration proceedings in which Professor Kaufmann-Kohler was challenged *i.e. Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) (hereinafter referred to as *Suez v. Argentina I*) and *Suez, Vivendi Universal S.A. and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19) (hereinafter referred to as *Suez v. Argentina 2*); *Anglian Water Limited (AWG) v. Argentine Republic* (UNCITRAL Arbitration) (hereinafter referred to as *AWG v. Argentina*); *Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/22) (hereinafter referred to as *EDF v. Argentina I*) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) (hereinafter referred to as *EDF v. Argentina 2*).

its members has failed to inform the parties of the existence of a situation that may jeopardize the result and the transparency of an arbitration proceeding.

2. The Tribunal manifestly exceeded its powers

a) The Tribunal manifestly exceeded its powers by failing to consider the applicable law

(i) Article 8.4 of the BIT

24. Argentina considers that the *ad hoc* Committee must take into account Article 8.4 of the Agreement between the Argentine Republic and France for the Promotion and Reciprocal Protection of Investments (the "BIT" or the "Treaty") which provides that the Argentine law and the provincial law of the Province of Tucumán are the law applicable to the dispute.

25. Argentina submits that the concession agreement was also part of the applicable law and that no violation of that agreement or the local law had been proved. Additionally, Argentina underscores that while the BIT is *lex specialis* with respect to customary international law, the local law is self explanatory and need not be supported by customary international law. Therefore, in order to determine whether there had been a violation of the standards set forth in the BIT, the Tribunal was bound to analyze Argentine law in general, and provincial law in particular, since this was the legal framework of the concession agreement.

(ii) CAA caused the failure of its own Agreement

26. According to Argentina, the Tribunal not only failed to consider that CAA's fulfillment of its contractual obligations in good faith was a requirement to invoke the BIT, but it failed by also putting exclusive emphasis on the conduct attributed to the Province of Tucumán in its role as a sovereign political power and not as a contracting party.

27. Argentina contends that the Tribunal therefore failed to address CAA's inability to demand performance of the Concession Agreement when in breach of its own obligations under that same agreement. The Tribunal also failed to consider this breach by CAA, bearing in mind that it was an administrative contract for the concession of a utility that was essential for the population subject to the principles of continuity, regularity and universality.

(iii) The definitional and regulatory function of local law

28. Argentina asserts that according to the BIT, local law defines the scope, constitution, transfer, and termination of rights of an investor. Once such rights are defined, they may become protected by certain customary and contractual rules of international law. International law therefore does not define what an agreement, an action or property is.

(iv) The complex statutory system applicable to the dispute

29. Argentina notes that in paragraphs 4.5.1 and paragraphs 4.5.5 through 4.5.7 of the Award, the Tribunal referred to provincial public law as relevant to resolve the dispute, in particular with respect to the CAA agreement[4]. However, Argentina claims that the Tribunal did the opposite by relying on law that was not applicable to the dispute (*i.e.* paras. 7.3.8, 7.3.9, 7.3.10 & 7.3.11).

(v) The concession agreement was the law applicable to the investment

30. Article 42(1) of the Convention and Articles 2, 8.4 and 10 of the BIT refer to the law and principles of law applicable to the dispute and therefore establish the scope of the Tribunal's jurisdiction. Pursuant to these Articles, Argentina contends that the Tribunal should have examined and applied the Concession Agreement, which defines "the terms of possible specific agreements concluded in relation to the investment."

31. Indeed, according to Argentina, the Award should have applied local law to the concession Agreement since both parties alleged the other party's breach of the Agreement. The performance or breach by both contracting parties was therefore relevant to decide the case. The Argentine Republic especially requested that the Tribunal consider the circumstances, under which the concession had operated, an issue which, according to Argentina, was not addressed in the Award. For Argentina, this failure to consider a question presented by one of the parties constituted a ground for annulment of the Award, as it implied a serious departure from a fundamental rule of procedure.

[4] At a prior stage of this case, CAA stated that: "The failure of the Tribunal to take the Concession Contract into account as part of the agreed applicable law amounted to a manifest failure to apply the proper law (…) under Article 52(1)(b) of the ICSID Convention". Exhibit 1094 "*Opinion on the Application for Annulment in Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic*" (ICSID Case No. ARB/97/3), Opinion of Professor Christoph H. Schreuer, August 20, 2001, para. 46.

32. Argentina alleges that without providing reasons for so doing, the Tribunal accepted as true particular events alleged by CAA and that it relied on these events to draw its conclusions. Instead, the investor's behavior should have been examined by the Tribunal, particularly pursuant to Article 4 of the BIT, as it only protects investors which have complied with the general local legislation and have fulfilled their obligations. According to Argentina, the Tribunal manifestly exceeded its powers by failing to evaluate the investor's behavior under: i) local law; ii) Articles 2 and 8.4. of the BIT; and iii) under the *pacta sunt servanda* principle of public international law.

b) The Tribunal manifestly exceeded its powers by failing to apply the law applicable to the dispute

33. Argentina argues that the Tribunal failed to consider the local law applicable to the dispute and that this failure is evidenced by the Tribunal's incorrect interpretation and conclusion regarding CAA's unilateral termination of the agreement. The Tribunal failed to consider that CAA did not have the unilateral right to terminate the agreement due to the non-compliance by the conceding authority. On the contrary, Argentina argues that CAA breached the contractual provisions of the Agreement and as result, CAA could not act as if that type of termination had taken place. Both under the Agreement and under the laws of Tucumán, such unilateral termination did not exist either in substance or form.

c) The Tribunal manifestly exceeded its powers by failing to incorporate any fundamental evidence of CAA's and Vivendi's stockholding

(i) The series of determinations on the issue of nationality

34. Pursuant to Article 1(2)(c) of the France-Argentina BIT, the French nationality of the Claimants is an essential condition for the Tribunal's jurisdiction.

(ii) The First Tribunal's determination

35. According to Argentina, at the time the Concession Contract was entered into between Compañía de Aguas del Aconquija, S.A. ("CAA") and the Tucumán Province, the shares in CAA were divided between Compagnie Générale des Eaux ("CGE" — subsequently Vivendi Universal S.A.— both French companies), Dragados y Construcciones (DYCASA, a Spanish company), and Benito Roggio e Hijos S.A. (Roggio, an Argentine company).

36. After the dispute had arisen, CGE acquired the shares of Dycasa and Roggio and then obtained effective control of CAA. During the first arbitration proceeding, Argentina raised objections *ratione personae* arguing that CAA should not be considered as a French investor[5]. The Tribunal decided that for purposes of resolving the case, and in view of the fact that CGE controlled CAA, CAA should be considered as a French investor from the effective date of the Concession Contract.

37. For Argentina, the First Tribunal's decision on this point was open to criticism for two reasons:

> (i) the election of two dates: the critical date for purposes of Article 25(2)(b) of the ICSID Convention (which refers to the date on which the arbitration is commenced), and the critical date for Article 1(2)(c) of the BIT (which refers to the time of the alleged breach of the obligation);
>
> (ii) there was no reference to the relevant test in Article 1(2)(c) of the BIT or indeed to any other legal materials to support the Tribunal's conclusion that CGE's control over CAA should be backdated to the effective date of the Concession Contract.[6]

Argentina therefore considers this an unreasoned finding.

[5] CGE's position was that the critical date for purposes of determining control under Article 25(2)(b) of the ICSID Convention (and under precedents interpreting the ICSID Convention) is the date for consent to arbitration which was the date in late 1996 when CGE submitted the dispute to arbitration

[6] Argentina's Memorial, para. 173.

(iii) The Decision on Annulment

38. According to Argentina the First *ad hoc* Committee appropriately characterized Article 1(2)(c) of the BIT as relevant to the scope of operation of the BIT and the jurisdiction of the Tribunal. However, Argentina argues that while the First *ad hoc* Committee considered that the First Tribunal arguably failed to state reasons for considering CAA as a French investor, it is difficult to follow how the Tribunal's finding could have "played no further part in [its] subsequent reasoning"[7], because that finding was essential to upholding its jurisdiction over CAA. CAA was an Argentine company and, as such, could only have standing as a claimant against Argentina based upon the France-Argentina BIT if it satisfied the requirements of Article 25(2)(b) of the ICSID Convention and Article 1(2)(c) of the BIT. Hence, in order to uphold the *ratione personae* jurisdiction, the Tribunal must have concluded that it was under the foreign control of CGE at the time arbitration proceedings were commenced, and was effectively controlled directly or indirectly by CGE at the time of the alleged breach of obligation forming the basis of the claim.

39. The First *ad hoc* Committee then further elaborated upon its finding, asserting that:

> *"[A]t the time of commencement of the arbitration CGE directly or indirectly controlled CAA, and for the purposes of ICSID jurisdiction that is enough. The Committee made it quite clear that in partially annulling the Tribunal's decision, including its finding that CAA was controlled by CGE from the effective date of the Concession Contract, it made no decision for itself on any aspect of the merits of the Tucumán claim*"[8].

40. Argentina considers that the first sentence of this statement is correct in relation to the requirement of control in Article 25 of the ICSID Convention, while the second sentence annulled the Tribunal's ruling that CGE's control of CAA applied retrospectively from the date of the Concession Contract.

(iv) The Second Tribunal's Conclusion on Jurisdiction

41. During the second arbitration proceeding, Argentina again contested the Tribunal's jurisdiction on a number of grounds, including the issue of nationality. However, in its decision on

[7] Argentina's Memorial, para. 175.
[8] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3) (hereinafter referred to as *Vivendi v. Argentina*), (Supplementary Decision and Rectification Proceeding), Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award of 28 May 2003, para. 21.

jurisdiction the Second Tribunal, quoting the First Tribunal's decision on this point, stated that "'[t]he *ad hoc* Committee on Annulment did not annul this positive finding; it expressly endorsed it."[9] In support of this conclusion, the Second Tribunal referred to the *ad hoc* Committee's decision on annulment, but not to the clarification and its supplementary reasons that it had annulled the positive finding in question. The Second Tribunal went on to reiterate this conclusion, verbatim, in the Award[10].

42. According to Argentina, the Second Tribunal relied on the doctrine of *res judicata* (see paragraphs 87 and 97) in holding that "this Tribunal is precluded from reconsidering the jurisdictional determination of the First Tribunal pursuant to which the requirements for jurisdiction were fulfilled". Argentina argued that the Tribunal offered no independent analysis or reasoning in support of its conclusions on the issues claimed by Argentina.

(v) Manifest Excess of Jurisdiction

43. Argentina argues that the Second Tribunal had jurisdiction over the dispute only if the requirements of Article 1(2)(c) of the BIT had been met. The Second Tribunal's application of the doctrine of *res judicata* clearly required that the relevant parts of the decision of the First Tribunal still remained after the annulment decision issued by the First *ad hoc* Committee. The Second Tribunal erred in applying parts of the decision of the First Tribunal as *res judicata* when the First *ad hoc* Committee had annulled that portion of the First Tribunal's findings. In doing so, Argentina submits that the Second Tribunal manifestly exceeded its jurisdiction.

(vi) Failure to state reasons

44. As provided by the *ad hoc* committee in *MINE v. Guinea*: "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 law."[11]

45. Argentina argues that, by relying on *res judicata* and on grounds of the First Tribunal's decision which had been annulled, the Second Tribunal failed to provide a valid chain of reasoning to its conclusion. A reader of the Second Decision on Jurisdiction and the Second Award therefore

[9] *Vivendi v. Argentina*, (Resubmission Proceeding) Decision on Jurisdiction, 14 November, 2005, para. 69.
[10] *Ibid*, Award of 20 August 2007, para. 2.6.5.
[11] *Maritime International Nominees Establishment v. Republic of Guinea* (hereinafter referred to as *MINE v Guinea*), Decision on the Application by Guinea for Partial Annulment of the Arbitral Award rendered on 6 January, 1988, 14 December 1989, para.5.09.

provided with no valid reasons to guide it "from points A to B". It appears that the Second Tribunal's reasoning was based on the mistaken belief that the *ad hoc* Committee had endorsed, rather than annulled, the relevant parts of the First Tribunal's Award.

d) The Tribunal manifestly exceeded its powers by deciding on issues that were outside its jurisdiction since they were *res judicata*

46. Argentina argues that the First Tribunal's decision should be considered *res judicata*, in so far as it was not annulled by the First *ad hoc* Committee. The First *ad hoc* Committee concluded that: "the Tribunal exceeded its powers in the sense of Article 52 (1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims." In analyzing how the First Tribunal failed to decide on certain claims, the First *ad hoc* Committee stated that:

> *"[t]he Tribunal, in dismissing the Tucumán claims as it did, actually failed to decide whether or not the conduct in question amounted to a breach of the BIT. In particular, the Tribunal repeatedly referred to allegations and issues which, it held, it could not decide given the terms of Article 16 (4) of the Concession Contract, even though these were adduced by Claimants specifically in support of their BIT claim."*[12]

47. The First *ad hoc* Committee added a footnote specifically indicating the paragraphs of the First Award to which it referred. These are paragraphs 65, 66, 67, 68, 69, 74, 75, 76, 77, 78, 79, 80, 81. However, according to Argentina, paragraph 91 of the First Award was not annulled by the *ad hoc* Committee. That paragraph referred to the fact that:

> "*[T]he Tribunal specifically asked the parties to address whether there was evidence in the record that actions of the legislators of Tucumán that adversely affected the operations of Claimants (e.g., demonstrations and encouragement of non-payment of invoices) were, in fact, directed or coordinated by the Governor of Tucumán or his cabinet*."[13]

In addition, the First Tribunal concluded that:

> "[A]*fter carefully reviewing the extensive memorials and testimony, the Tribunal finds that the record in these proceedings regarding these allegations does not establish a factual basis for*

[12] *Vivendi v. Argentina,* (First Annulment Proceeding) Decision on Annulment, 3 July 2002, para. 111.
[13] *Vivendi v. Argentina*, (Original Arbitration Proceeding), Award of 21 November 2000, para. 91.

attributing liability to the Argentine Republic under the BIT for the alleged actions of officials of Tucumán."[14]

48. Therefore, Argentina argues that the First Tribunal's decision is *res judicata* in this respect and it could not be decided again by the Second Tribunal's Award. According to Argentina, this did not imply that the Second Tribunal could not decide on the issue of whether the actions by the Tucumán Legislators which adversely affected the operations of the claimants "were, in fact, directed or coordinated by the Governor of Tucumán or his cabinet."[15]

49. Argentina submits that the Second Tribunal did not observe these limits and mentioned these issues in its conclusions. In view of the First *ad hoc* Committee's Decision, the Second Tribunal could not rely on "a coordinated effort by the Governor of Tucumán or its cabinet against the Concession Agreement"[16]. This allegation had already been decided by the First Tribunal and it was not annulled by the First *ad hoc* Committee.

50. According to Argentina, CAA took advantage of this new opportunity to reargue the issue and file new evidence on this matter and the Second Tribunal examined these acts and determined that they violated the fair and equitable treatment standard of the BIT.

3. The Award failed to state the reasons on which it is based and the Tribunal departed from a fundamental rule of procedure - Article 52(1)(d) and (e)

51. According to Argentina, the Second Tribunal seriously failed to establish the relevant facts of the case by: (1) considering events that had not been established as proven; (2) failing to consider questions presented by the parties; (3) basing its decision on evidence not incorporated into the proceedings; (4) partially considering some evidence and disregarding other evidence, thus using evidence selectively and arbitrarily; (5) selectively taking apart fundamental evidence; (6) using contradictory criteria; and (7) reversing the burden of proof.

52. A fundamental issue for Argentina is that the Tribunal specifically determined that the BIT had been violated through the existence of a campaign to deprive CAA of its investment by the government. According to Argentina, the Second Tribunal's conclusion about a campaign has

[14] *Vivendi v. Argentina,* (Original Arbitration Proceeding), Award of 21 November 2000, para. 91.
[15] *Ibid*, para. 91.
[16] Argentina's Memorial, para. 203.

many failings. These failings include the fact that the issue was *res judicata* and that the Second Tribunal failed to provide its reasoning or the evidence on which it based its findings.

a) Abusive use of testimonial evidence

53. Argentina argues that the Tribunal preferred to use testimony of the Claimants' officials instead of documentary evidence on the record. In so doing, the Tribunal contradicted its own criterion, having itself asserted that "more was required than" statements or brief testimonial references in order to prove a given fact[17].

b) The Tribunal failed to consider questions presented by the parties

54. The Tribunal violated a fundamental rule of procedure by failing to examine the allegations made by the parties, contrary to Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(h). Argentina contends that failure to address a question presented by a party or to decide such a question is a ground for annulment under Article 52(1)(e) of the Convention.

(i) The Rais Report should have been considered in full as requested by Argentina

55. According to Argentina, the Tribunal failed to address a request by Argentina to fully consider the "Rais Report", this being an essential piece of "balanced and very accurate" evidence attributed to an impartial third party hired to scrutinize the situation in Tucumán. According to Argentina, had the Tribunal adopted the conclusions of the Rais Report in their entirety, the result of this dispute would have been different as the report dismissed the existence of a conspiracy and/or coordinated effort by the Tucumán authorities to frustrate the Concession Agreement.

(ii) The Tribunal reduced the dispute to four controversial issues thus leading to annulment under Article 52(1)b, (d) and (e) of the ICSID Convention

56. According to Argentina, the Second Tribunal reduced the disputed issues to four controversial issues:

[17] *Vivendi v. Argentina*, (Resubmission Proceeding), Award of 20 August 2007, para. 8.3.9.

"(i) First: the causes and foreseeability of the black water issue; (ii) Second: the renegotiation of the Concession Agreement; (iii) Third: whether ERSACT acted correctly or not in its capacity as regulator; (iv) Fourth: the seventy changes to the 6 June 1997 bill." [18]

57. Therefore, according to Argentina, the Tribunal disregarded fundamental issues related to the dispute between the parties, *inter alia*: (a) the social conditions existing in the Province of Tucumán at the time of the investment and, consequently, the feasibility of the Concession Agreement; (b) the dispute between the parties related to the right to water as an essential human right; (c) the failure to fulfill the investment obligations in connection with the *non adimplimenti contractus* principle; (d) the nature of the concession contract under Argentine administrative law and the applicable public law of the Province of Tucumán; and (e) the scope of responsibility of provincial government officials according to the applicable law.

c) The Tribunal based its decision on evidence not incorporated into the proceedings

(i) The Tribunal based its decision on the existence of a conspiracy by the Tucumán agencies to make the concession agreement unsuccessful. Such conspiracy never existed or was never proven.

58. The Second Tribunal's decision was based on the idea that the Government of Tucumán organised a conspiracy in order to harm the concessionaire or -in the best of cases- to renegotiate the Concession Agreement and obtain an adjustment of the concession's service tariffs. Argentina contends that by adopting this criterion, the Tribunal breached Articles 52(1)(d) and (e) since, as stated above, the First *ad hoc* Committee did not annul paragraph 91 of the Award. According to Argentina, the First Tribunal in fact had determined that no evidence was submitted to establish the existence of such a campaign.

(ii) The argument of a campaign (or conspiracy) has no support in the evidence and has serious contradictions

59. The First Tribunal determined that there was no evidence in the record showing the existence of a conspiracy, a fact that required proof of the intent of the Governor of Tucumán or his cabinet to coordinate a campaign designed to make the concession fail. According to Argentina by basing its decision on the theory of the campaign, the Second Tribunal breached not only article

[18] Argentina's Memorial, para. 227.

52(1)(e) of the ICSID Convention but also breached Article 52(1)(b) and (d) of the ICSID Convention.

60. The Award is based merely on inferences because the Tribunal did not include any evidence in the decision and does not provide reasoning that easily leads to a conclusion.

61. According to Argentina, two paragraphs of the Tribunal's Award should be highlighted because they show that the conspiracy is the thread on which the Award's conclusion is based:

> *"On the facts before us, it is only possible to conclude that the Bussi government, improperly and without justification, mounted an illegitimate "campaign" against the concession, the Concession Agreement, and the "foreign" concessionaire from the moment it took office, aimed either at reversing the privatisation or forcing the concessionaire to renegotiate (and lower) CAA's tariffs".*[19]

> *"Here, the Province's actions – from the very opening months of the concession, continuing through its wrongful regulatory action and culminating in the unilateral amendments to the 8 April Agreement – had the necessary consequence of forcing CAA to terminate the Concession Agreement.*" [20]

62. For Argentina, CAA did not establish, and consequently the Tribunal had no evidence to prove, that there had been reasons for a coordinated effort against the company. The Argentine Republic claims that the Tribunal deemed that certain issues had been proved when they had not, and granted evidentiary value to issues with no such value, both with respect to specific events and the existence of a campaign. According to Argentina, these are not errors in the Tribunal's interpretation but an obvious violation of a fundamental rule of procedure, since issues with no supporting evidence were deemed proven. Furthermore, the Tribunal's reasoning does not lead "from points A to B" since there is evidence missing to arrive at its conclusions and hence there are grounds for annulment under Articles 52(1)(d) and (e) of the ICSID Convention.

[19] *Vivendi v. Argentina*, (Resubmission Proceeding), Award of 20 August 2007, para. 7.4.19.
[20] *Id*, para. 7.5.33.

63. Argentina submits that a rule of procedure has been seriously breached, and that in reaching this conclusion the Tribunal manifestly exceeded its powers. Therefore Argentina requests that annulment of this conclusion and of the Award as a whole.

(iii) With respect to the campaign, the Tribunal resolved extra petita

64. The Tribunal stated in paragraph 7.5.3.1. that the existence of the campaign had been alleged by the Claimants, while according to Argentina they had expressly abandoned the existence of a campaign as an argument in this dispute.

(iv) There is no evidence in the record to show a campaign by Bussi against CAA

65. According to Argentina, the Tribunal does not have evidence to support the following statement: "By contrast, contrary statements and conduct were well documented. In the 1995 election campaign, General Bussi's party told the people that the tariff was too high and that, if elected, it would fix it."[21] There is no evidence in the Award to prove this. This statement is unfounded and, due to its implications, provides grounds for annulment under Article 52(1)(d) and (e).

d) Other issues not supported by evidence

66. According to Argentina, the following other issues included in the Award were not supported by evidence:

(a) There was no document in the record to support Paragraph 4.3.6. that "The Ministry of the Economy […] requested the Consortium to […] provide a reduced tariff adjustment coefficient and an increased projected recovery rate."[22]

(b) There was no evidence to support the statement in paragraph 4.10.2 of the Award, where the Tribunal accepts that CAA submitted a model invoice to ERSACT before it began billing users. According to Argentina, this document never formed part of the evidence in the record[23] and therefore it was impossible to challenge the accuracy and content of it. Although the Tribunal never saw this document, the following statement was included in the Award: "(T)he invoices

[21] *Vivendi v. Argentina,* (Resubmission Proceeding), Award of 20 August 2007, para. 7.4.4.2.
[22] According to Argentina, Exhibit 123, referred to by the Tribunal (and its translation into English, Exhibit 939) shows that this is untrue. See Argentina's Memorial paragraph 261.
[23] See Argentina's Memorial footnote 50 and paras. 136 and 262-263.

corresponded precisely to the model previously submitted to ERSACT and, as with the model, also contained an additional charge for taxes, which included provincial taxes, municipal levies and federal taxes."[24]

(c) The Tribunal based part of its decision on evidence dismissed by the Tribunal itself. In section 8 of the Award, concerning damages (paragraph 8.3.7. and footnote 414), the Tribunal relied on a document submitted by the Claimants that it had expressly rejected. This is the case of Exhibit No. 1069. Valid evidentiary exhibits end at Exhibit No. 1065[25].

(d) No evidence supported the award of damages. There was no valid document in the record allowing the Tribunal to conclude: "CAA's accounts at the end of 2005 showed a debt owing from CAA to Vivendi of approximately US$75 million." [26]

(e) Despite the lack of evidence, the Tribunal concluded that the government of Tucumán caused the failure of the concession agreement by the unilateral incorporation of "70 changes" into the 22 April 1997 Bill.

(f) The Tribunal did not provide any support to find the negative effect of the "70 changes" to the Concession Agreement.

(g) Key decisions by the Tribunal were based on a document whose authenticity was challenged: Argentina refers to sections of the Award dealing with water turbidity from December 1995 through March 1996. Argentina argued that the Tribunal based its conclusion almost exclusively on the ERSACT / CAA Sub-Committee on Water Quality, Final Report[27], a document which Argentina had challenged and requested its exclusion[28]. Argentina argues that Exhibit 870 was not submitted with the Claimants' Memorial, since it is obvious that it was prepared after November 2004 and before the Claimants' Reply of 15 February 2006. Thus, according to Argentina, a new (and false) report containing 26 pages was written and compiled with other documents to fabricate Exhibit 870. Argentina alleged that the Claimants did not prove that Exhibit 870 had any validity as evidence.

[24] *Vivendi v. Argentina*, (Resubmission Proceeding), Award of 20 August 2007, para. 4.10.3.
[25] See Argentina's Memorial at para. 265.
[26] *Vivendi c. Argentina*, (Resubmission Proceeding), Award of 20 August 2007, para. 8.3.17
[27] Exhibit 870: "ERSACT / CAA Sub-Committee on Water Quality, Final Report".
[28] See Argentina's Rejoinder at paragraphs 104-106.

e) Independence and impartiality of arbitrators

67. Argentina asserts that the independence of arbitrators and the equality between the parties are essential rules of procedure. Also essential —and acknowledged as such by the ICSID Convention and the Arbitration Rules— is the arbitrators' obligation to declare their own independence and impartiality and to maintain such attributes throughout the arbitration proceedings by informing the parties of any situation that might cause a variation in such qualities.

68. Argentina argues that for a dispute resolution system to function properly, the parties must believe that their dispute will be decided by a fair tribunal that will observe the basic principles of due process. Argentina referes to Article 12 of the UNCITRAL Model Law, which states that circumstances likely to give rise to justifiable doubts as to the impartiality of the arbitrators must be disclosed.

69. An arbitrator's independence is normally questioned if there is, or there has been in the past, a relationship between the parties to the dispute and the arbitrator. Under ICC practice, there is no need for a direct relationship between the arbitrator and one of the parties for it to affect the ability of an arbitrator to serve in a given case.

70. Argentina stresses that the ICC Court case law is unanimous in holding that challenges should be upheld if there is a connection between the arbitrator and an affiliate of one of the parties. The necessary corollary to the arbitrator's duty of independence and the parties' right to a fair process is the obligation of the arbitrators to disclose each and every fact or circumstance that may affect the perception of the parties as to the impartiality and independence of the arbitral tribunal and its members.

(i) The IBA Guidelines on Conflicts of Interest in International Arbitration

71. Argentina mentions that the International Bar Association's Committee on Arbitration and ADR appointed a Working Group of 19 experts in international arbitration to study the issue of independence and impartiality in international arbitration. Professor Kaufmann-Kohler was among the 19 experts selected to participate in the Working Group.

72. The Working Group prepared the IBA Guidelines on Conflicts of Interest in International Arbitration, issued in 2004. The Working Group also drafted lists of specific situations that, in its view, should or should not lead to an obligation of disclosure or disqualification of an arbitrator.

73. As clarified in the official explanation to General Standard 2, the Working Group believed that the broad standard of "any doubts as to an ability to be impartial and independent should lead to the arbitrator declining the appointment". In order for standards to be applied as consistently as possible, it established that the test for disqualification should be an objective one (described under point 2.3.1. of the waivable Red List) which deals with situations where "The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties".

74. According to Argentina, taking a more lenient approach, Professor Kaufmann-Kohler would be in the situation described under the Orange List at 3.5.4 where "The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration."

75. Argentina argues that, irrespective of Professor Kaufmann-Kohler's situation, it was irrefutable that she should have disclosed her affiliation to UBS and Argentina should have been given an opportunity to challenge her continuation as a member of the Tribunal. Argentina argues that this position is supported by the IBA Working Group, which stated that in case of doubt, an arbitrator must always disclose a certain situation.

(ii) Independence and impartiality are even more important in ICSID Arbitration

76. Argentina relies on Article 14[29], Article 40[30] and Article 57[31] of the Convention to emphasize the importance of the quality of arbitrators, and of their independence and impartiality in investment arbitration and particularly due to its bearing on public issues and in civil society.

77. Argentina notes that absolute impartiality refers not only to the subjective impartiality of an arbitrator's judgment, but also to the objective appearance of impartiality on the part of the

[29] "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

[30] "Arbitrators may be appointed from outside the Panel of Arbitrators, [...] Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14."

[31] "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14."

arbitrator before third parties. Accordingly, Argentina submits that Professor Kaufmann-Kohler's position in UBS created, objectively viewed, a conflict of interest which was incompatible with the necessary appearance of impartiality required of an ICSID arbitrator. The conflict of interest remained throughout the arbitration proceeding which clearly justifies the annulment of the Award in its entirety.

78. According to Argentina, the Award should be annulled because of the two main grounds for annulment presented Articles 52(1)(a) and (d)– given not only that the decision was rendered by a tribunal with the participation of an arbitrator who lacked the qualities required by the ICSID Convention and by general principles of law, but also because Argentina —due to the unjustifiable lack of disclosure by Professor Kaufmann-Kohler— was deprived of the right to challenge her position on the Tribunal. This amounts both to a procedural breach and to an issue of irregular composition of the Tribunal.

4. The award of damages

79. Argentina submits that the Tribunal correctly understood that almost 95% of CAA's claim [*i.e.* US$ 300,532,000] was related to lost profits, and was exclusively dependent upon expected profits that the Concession Agreement had never guaranteed. According to Argentina, CAA relied exclusively on a discounted cash flow (DCF) methodology to value damages, which required the likelihood of profits to be established with a degree of certainty (Para. 8.3.4 of the Award).

80. The Tribunal did not accept the valuation methods proposed by the parties[32]. Instead it used a third method of its choice, the investment value of the concession, which, according to the Tribunal, seemed to offer the closest proxy of the compensation it wished to award[33].

81. Since none of the parties had submitted a valuation based on such criteria, Argentina argues that the Tribunal received no evidence to support the amount of compensation calculated according to such approach.

82. The Tribunal relied on this approach despite the lack of evidence, openly breaching the Convention and the Rules by manifestly exceeding its powers. By doing so, Argentina claims that

[32] *Vivendi v. Argentina*, (Resubmission Proceeding), Award of 20 August 2007, paras. 8.3.11 and 8.3.14.
[33] *Ibid.*, at paragraph 8.3.13.

the Tribunal distorted the evidence in the record regarding Vivendi's investment in CAA and it incorporated evidence which had been expressly excluded from the process by agreement of the parties and by the resolution of the Tribunal itself, as the sole basis for its decision. This constituted a serious departure from a fundamental rule of procedure. In addition, the Tribunal's decision lacked any reasoning, thus supporting annulment under Articles 52(1)(b), (d) and (e) of the Convention.

83. The Tribunal based its calculation of Vivendi's investment in CAA and, consequently, of the compensation granted, on the addition of three items: (i) a US$ 30-million capital contribution; (ii) further debt investments amounting to US$ 21 million; and (iii) additional debt investments in CAA by CGE/Vivendi totaling US$ 54 million.

84. According to Argentina, by using this method of calculation, the Second Tribunal committed an error that provide for the annulment of the Award pursuant to Articles 52(1)(b), (d) and (e), given that, in the context of arbitration proceedings with over one thousand pieces of evidence filed and no less than five different valuation reports, the Tribunal showed an alarming disregard for the evidence provided, leaving aside documentary evidence submitted by the parties.

a) Detailed explanation of the grounds for annulment related to damages

85. According to Argentina, in spite of clear instructions from the Tribunal and the parties' agreement of 1 July 2004[34], CAA attempted to file new evidence on 23 August 2006, supposedly for the purpose of supporting a valuation based on the investment.

86. In view of the above-referenced agreement, the Tribunal could not consider testimony or any other evidence that had not been introduced in writing. Nonetheless, according to Argentina, the Tribunal did so by validating a statement given by Mr. Régis Hahn during his oral testimony which was used by in the Award to justify investments made in the amount of US$ 75 million[35].

87. A similar situation occurred with Ms. Dominique Perrier's testimony, which the Tribunal also took into consideration to justify its Award. The witness herself had specifically represented that her testimony was exclusively of a methodological nature, and that she had not had access to the

[34] Also recorded in an attachment to the minutes of the Second Tribunal's session of July 7, 2004. The agreement states that "[t]he Tribunal shall not receive any testimony or other evidence that has not been introduced by writing, unless the Tribunal determines that exceptional circumstances exist."
[35] Transcript, Day 5, P:1322, L:12-14.

company's accounting books. The Tribunal supported Mr. Hahn's testimony with Ms. Perrier's testimony, both of them lacking any evidentiary value and in contradiction with the testimony given by Mr. François de Rochambeau.

88. Additionally Ms. Perrier's testimony contradicts her own source (Mr. de Rochambeau's affidavit). In paragraph 129 of Mr. Rochambeau's affidavit, he stated that Vivendi/CGE's total investment in CAA as of August 1998 was approximately $69 million, while on page 10 of Ms. Perrier's report (citing Mr. Rochambeau) she stated that the $69 million figure referred to Vivendi/CGE's debt investment (excluding equity).

89. According to Argentina, the Second Tribunal granted double compensation by relying both on the capital contributions to CAA and Ms. Perrier's reference to the US$ 69 million[36].

90. Argentina further mentions that when CAA and Vivendi were asked to identify any indication of the US$75 million investment made by Vivendi in CAA in addition to the capital contributions mentioned in the record,[37] the Claimants were only able to point out the three brief transcription lines where, during his direct examination, Mr. Hahn made such a statement.

91. Argentina contends that the Tribunal manifestly exceeded its powers in the Award by validating and accepting Mr. Hahn's testimony as a ground for its decision on compensation, as the documentary evidence to support it was not properly made part of the record in accordance with the agreed procedures and testimony had not been introduced in writing prior to the hearing on the merits, thus seriously affecting due process, the equality of the parties and the agreement between the parties, and providing clear grounds to annul the Award pursuant to Article 52(1)(d) of the Convention.

b) The award of damages is not based on available evidence and failed to state the reasons on which it is based

92. Argentina contends that the Second Tribunal provided no justification, based on the documentary evidence in the record, for its compensation award of US$105 million, and this decision was made in breach of the Second Tribunal's duties. The compensation granted totals US$27.5 million, 35% more than the maximum amount that can be derived strictly from the

[36] *Vivendi v. Argentina*, (Resubmission Proceeding), Award of 20 August 2007, footnote 424.
[37] Transcript, Day 11, P: 2815, L:6-13.

evidence produced by the Claimants. Further, in no way did the compensation awarded reflect the documented and verifiable amounts of Vivendi's actual investment in CAA, as evidenced by the record.

93. When calculating the compensation claimed by CAA and Vivendi, the Second Award does not attempt to explain how or why, the Tribunal only based its decision on: (i) the alleged capital contributions made by Vivendi and third parties in CAA; and (ii) the alleged financial -and other- contributions made by Vivendi. Assuming, that the Tribunal was entitled to calculate the compensation for the Claimants using the verifiable amounts invested as an approximation, according to Argentina, this does not explain why the Tribunal changed its criterion halfway through its analysis.

94. According to Argentina, the Tribunal provided no reasons whatsoever for its calculation of the compensation owed to the Claimants and, therefore, the Award should also be annulled under Article 52(1)(e).

c) Calculation of Interest

95. According to Argentina, the Tribunal's decision regarding interest also justified annulment of the Award. The Tribunal, without providing any reason whatsoever and exceeding its powers, awarded interest to Claimants in relation to the compensation imposed in an amount exceeding their claim.

96. The relevant provisions of the Award state as follows:

> *"(vi) Respondent, the Argentine Republic, shall also pay interest, compounded annually, at the rate of 6.00%, (a) on the amount of US$51,000,000.00 as from 28 August 1997 until the date of payment, and (b) on the further amount of US$54,000,000 as from 5 September 2002 until the date of payment."* [38]

97. The two dates mentioned in the Award as the starting date for accruing interest, according to Argentina, lacked any sense or explanation:

[38] *Vivendi v. Argentina,* (Resubmission Proceeding), Award of 20 August 2007, para. 11.1.

(i) *28 August 1997:* The Award acknowledges that the Claimants considered that the interest on any compensation should be paid as from 27 November 1997. However, without attempting to provide an explanation, the Tribunal decided that the interest on the amount of US$ 51 million should be paid as from 28 August 1997. The Award included no reasons for granting interest from a date preceding the date proposed by Claimants and thus constituted an *ultra petita* excess of power. According to Argentina, this also constituted a manifest excess of the Tribunal's powers under Article 52(1)(b) of the ICSID Convention, and a serious omission of the grounds on which the Award is based, contemplated by the provisions in Article 52(1)(e).

(ii) *5 September 2002:* According to Argentina, there is no indication in the Award, nor anywhere else in the record, as to why 5 September 2002 should be considered a date relevant to any loss by CAA or Vivendi in the amount of US$ 54 million. This, at the very least, constituted a serious omission by the Tribunal is stating the grounds for its decision. Therefore, the Award should be annulled pursuant to Article 52(1)(e) of the Convention.

B. Claimants' position

1. Independence of Arbitrator Kaufmann-Kohler

98. The Claimants submits that the alleged lack of independence of Professor Kaufmann-Kohler has already been rejected by another tribunal in another case specifically involving her, Argentina, and Vivendi. In any event, the Claimants considered that this claim is untimely, procedurally barred, and had no substantive basis and should therefore be dismissed.

a) Factual Background

99. According to the Claimants, at the end of 2006, UBS held 1.97% of the shares in Vivendi, while that shareholding had declined to 1.58% by the end of 2007. Many – if not all – of those shares were held by UBS on behalf of third parties.

100. On 19 April 2006, Professor Kaufmann-Kohler was elected as a member of the UBS Board of Directors for a three year term. According to the Claimants, the Swiss Banking Law and the UBS Articles of Association provide that the Board of Directors is responsible for the "supervision

and control" of UBS management and has "ultimate responsibility for management"[39]. Furthermore, the Board of Directors is distinct from the Group Executive Board, which is responsible for implementing the Board of Directors' strategic decisions and plays a more direct executive role in the company.

101. According to the Claimants, as a member of the Board of Directors, Professor Kaufmann-Kohler was required to be fully independent of management[40] and she took steps to ensure that her Board position at UBS would not raise any concerns regarding her impartiality or independence as arbitrator, including the submission to UBS of a list of all her arbitrations. UBS advised her that, with the exception of a single matter (from which she recused herself), her role on the UBS Board presented no conflicts of interest[41]. Moreover, according to the Claimants, Professor Kaufmann-Kohler was not generally kept informed of individual UBS securities holdings and received no information regarding Vivendi.

102. As a result, according to the Claimants, Professor Kaufmann-Kohler was unaware of UBS's shareholding in Vivendi until 29 November 2007, when Respondent raised the issue in the *Suez v. Argentina*[42] case, while the Second Tribunal had already issued its Award on 20 August 2007.

b) The Second Tribunal Was Properly Constituted

103. The Claimants submit that Respondent's assertion that the Second Tribunal was not properly constituted should be disposed of since the Second Tribunal was constituted on 14 April 2004 and Professor Kaufmann-Kohler did not join the UBS board until more than two years later, on 19 April 2006. Thus, there could not possibly have been any conflict or any question regarding Professor Kaufmann-Kohler's independence at the time the Second Tribunal was constituted.

c) Respondent's Challenge to Arbitrator Kaufmann-Kohler's Independence Is Procedurally Barred and Groundless

104. According to the Claimants, Respondent's alternative challenge based on the assertion of a serious departure from a fundamental rule of procedure is meritless. Respondent claimed that

[39] See *Suez v. Argentina I,* Decision on the Second Proposal for the Disqualification of a Member of an Arbitral Tribunal, 12 May 2008, para. 38.
[40] *Ibid* at paragraph 38; Swiss Implementing Ordinance on Banks and Savings Banks, 17 May 1972, Art. 8(2) (Exhibit 1192) (09691).
[41] Professor Gabrielle Kaufmann-Kohler's Letter at 2 (Exhibit 1194) (09739); *Suez v. Argentina I*, Decision on the Second Proposal for Disqualification, paras. 14, 47; *EDF v. Argentina 2,* Challenge Decision Regarding Professor Gabrielle Kaufman-Kohler, 25 June 2008, para. 59(iv).
[42] *Suez v. Argentina I*; *Suez v. Argentina 2*; *AWG v. Argentina*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal dated 12 May 2008.

Professor Kaufmann-Kohler was or could have been motivated by the prospect of a financial benefit were Vivendi to prevail on its claims. Further, Respondent asserted that Professor Kaufmann-Kohler knew or should have known that such a conflict of interest existed, and that she failed to disclose such conflict.

105. Claimants refer to two other cases, *Suez et al. v. Argentina* and *EDF International S.A. et al. v. Argentina*, in which Respondent raised identical challenges. In *Suez* – which also features Vivendi as a claimant – Respondent's challenge concerned the very same set of factual allegations regarding the same parties: namely, Professor Kaufmann-Kohler's relationship with UBS and UBS's connection to Vivendi. In *EDF*, the issue was extraordinarily similar, and involved UBS's connections to certain of the corporate claimants in that case. The tribunals in both *Suez* and *EDF* rejected Respondent's challenges.

(i) The Standard for an Arbitrator Challenge on Annulment

106. Claimants argue that the Respondent cannot demonstrate any departure whatsoever from the provisions of ICSID Convention Articles 14(1) and 57, let alone a serious departure. According to the Claimants, the standard for annulling an award on the basis of a lack of independence or impartiality is more exacting than the requirements for a challenge of an arbitrator.

107. Annulment is an extraordinary remedy, the application of which, according to the Claimants, must be weighed against the critical importance of finality in arbitration. The grounds that Respondent has invoked require the demonstration of a serious departure from the applicable rule. That element, in turn, is only established if the particular problem raised by the challenge is "such as to deprive a party of the benefit or protection which the rule was intended to provide"[43].

(ii) Respondent's Challenge to Professor Kaufmann-Kohler Is Procedurally Barred

108. The Claimants states that in the *Suez* case, the Respondent raised the very same challenge against Professor Kaufmann-Kohler. The remaining members of the *Suez* tribunal rejected Respondent's arguments in full, determining that Professor Kaufmann-Kohler does not manifestly lack the independent judgment required by Article 14(1).

[43] *MINE v. Guinea*, para. 5.05.

109. Accordingly, the Claimants argue that Respondent is barred by the principle of *res judicata* from raising the same issue in these proceedings, since the requisite elements of *res judicata* – identity of the parties, identity of the object, and identity of the cause – are satisfied given that the challenge in *Suez* dealt with the very same facts, arguments, and ICSID Convention standards, against the very same arbitrator, with respect to the very same claimant – Vivendi.

(iii) There Is No Material Connection Between Professor Kaufmann-Kohler and Vivendi

110. The Claimants submit that the Respondent's challenge would also fail on the merits, since the connections between Professor Kaufmann-Kohler and Vivendi are too minor and remote to give rise to reasonable or manifest doubts as to her impartiality and independence.

111. According to the Claimants, a party challenging an arbitrator's independence may not rely on the existence of any kind of connection between the arbitrator and a party. Rather, the connection "must be evaluated *qualitatively* in order to decide whether it constitutes a fact indicating a manifest lack of the quality of independence of judgment and impartiality required of an ICSID arbitrator."[44]

112. General Standard 2 of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, which Respondent has cited, provides that "justifiable doubts" may exist regarding an arbitrator's independence if the arbitrator has a "significant financial or personal interest in the matter at stake," such that a "reasonable and informed third party" would find a "likelihood that the arbitrator may be influenced by factors other than the merits of the case."[45] Thus, in order to demonstrate a manifest lack of independent judgment, an arbitrator's connection to a party must be "material," and much more than *de minimis*.

113. Claimants argue that the connection between UBS and Vivendi was *de minimis* by any definition. UBS's holdings in Vivendi constituted less than 0.046% of UBS's total assets. Additionally, as mentioned above, many of these limited UBS holdings in Vivendi were held *not* for UBS's own account, but rather on behalf of customers to whom it provides asset management or brokerage services, with respect to which UBS itself did not stand to benefit from Vivendi's financial performance.

[44] *Suez v. Argentina I*, Decision on the Second Proposal for Disqualification, para. 33, (emphasis in original).
[45] International Bar Association Guidelines on Conflicts of Interests in International Arbitrations, General Standard 2, 22 May 2004, *available at* www.ibanet.org; see also *EDF v. Argentina* at para. 114.

114. According to the Claimants, if the role that UBS's shareholdings in Vivendi could play in UBS's overall business was miniscule, the potential impact of the ICSID arbitration proceedings on these holdings was positively microscopic.

115. Claimants argue that even if Professor Kaufmann-Kohler held shares or share options in UBS, and even though she had a role on UBS's board, she could not have had any plausible motive, much less a "significant interest" to favor Vivendi. According to the *Suez* tribunal, "Professor Kaufmann-Kohler derives no benefits or advantages from and is in no way dependent on [Vivendi] as a result of the alleged connection," while "UBS shareholdings in [Vivendi] are not material to UBS financial performance, profitability, or share price and in no way affect the compensation that Professor Kaufmann-Kohler earns as a director of UBS."[46]

(iv) Professor Kaufmann-Kohler Did Not Know, and Had No Reason To Know, of Any Connection to Vivendi

116. Claimants allege that even if Professor Kaufman-Kohler had a material connection to Vivendi, her independence and impartiality were necessarily unaffected for the simple reason that she *did not* know of any such connection. As Professor Kaufmann-Kohler has expressly stated in writing to an ICSID tribunal, she did not become aware of any UBS shareholdings in Vivendi until 29 November 2007, well after the Award was rendered and the case concluded.

(v) Unanimity of the Award

117. Finally, Claimants argued that any concerns regarding Professor Kaufmann-Kohler's independence and impartiality are further mitigated by the fact that the Award was rendered unanimously.

2. Applicable Law (Manifest Excess Of Powers)

a) The Second Tribunal Properly Applied the BIT and Other Applicable Sources of Law

118. According to the Claimants, the Second Tribunal properly applied the BIT and other sources of law, ascertained the facts (including the content of the Concession Agreement and the parties'

[46] *Suez v. Argentina I,* Decision on the Second Proposal for Disqualification, para. 40.

conduct under its terms), identified the legal requirements imposed by the Treaty, and applied those legal standards to the facts.

b) Respondent's Invocation of Domestic Law Is Misplaced and Inconsistent with Its Prior Position

(i) Respondent Misconstrues the Roles of the BIT and Domestic Law

119. According to the Claimants, Respondent's assertion that the dispute is primarily governed by domestic law is unsupportable. According to the Claimants, the First Tribunal found that it was not entitled to decide claims under the Concession Agreement. The First *ad hoc* Committee agreed, adding that Claimants' BIT claims were governed by the ICSID Convention, the BIT, and international law. The Second Tribunal therefore merely followed the First *ad hoc* Committee's approach and this cannot ground a request for annulment.

120. Second, the Claimants argue that the Respondent waived any argument that the Second Tribunal was obligated to apply domestic law or the terms of the Concession Agreement since it forcefully rejected the application of domestic law, particularly Argentine and Tucumán contract law, to decide the treaty claims.

121. Third, the decisions of the First Tribunal and the First *ad hoc* Committee, as well as Respondent's own prior focus on international law, are well supported by relevant authority. The International Law Commission's Articles on State Responsibility make it clear that the propriety of an act under domestic law does not determine whether that act violates international law. ILC Article 3, entitled "Characterization of an act of a State as internationally wrongful," provides that:

> *"The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*"

122. The Claimants also rely on the decisions issued by other *ad hoc* annulment committees and Tribunals in ICSID merits proceedings which have adopted this line of analysis, *i.e. Wena Hotels v. Egypt*[47], *Azurix v. Argentina*[48] and *MTD Equity v. Chile*[49]. Claimants also referred to Article 8(4) of

[47] See *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) (hereinafter referred to as *Wena v. Egypt*), Decision on Annulment, 5 February 2002, para. 23.

the BIT, which addresses applicable law, refers to the BIT, host state law, international law, and the terms of any agreements between the parties (e.g., the Concession Agreement).

123. Fourth, the Claimants consider that the issue may well be moot for purposes of Argentine law since international law and treaties are incorporated into the body of Argentine law, and indeed prevail over other inconsistent provisions of domestic law. Additionally, Article 10 of the BIT provides that any "special agreement" shall govern the investment only to the extent that the terms of the agreement are "more favorable" than those of the BIT.

124. According to the Claimants, Argentina misinterpreted the function of the BITs by asserting that any issues relating to concession agreements for utilities in Argentina must be governed by domestic law rather than by international law, since the BIT does not address substantive provisions in this area. Claimants state that BITs are not designed to govern specific types of investments in particular sectors and instead mandate general standards of treatment (*e.g.*, fair and equitable treatment) which tribunals are authorized to apply, taking into account the particular circumstances of each case, as well as general principles of international law and decisions of prior tribunals.

(ii) The Second Tribunal Properly Dealt with the Concession Agreement

125. With respect to Respondent's claims that the Second Tribunal "failed to consider" that CAA's alleged breaches of contract caused a failure of the concession, the Claimants argue that the Respondent, once again, contradicted its own previous position since it had insisted that the Second Tribunal was *not* permitted to interpret the contract or decide whether the parties had breached the contract.

126. Respondent invoked the principle of *exceptio non adimpleti contractus* arguing that in breaching the Concession Agreement, Claimants forfeited any right to claim against Respondent for undermining that same contract. Claimants refer to the First *ad hoc* Committee's decision that the Second Tribunal was permitted to take the terms of the Concession Agreement into account as part of the factual background against which Claimants' treaty claims were to be considered.

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[48] *Azurix Corp. v. Argentina* (ICSID Case No. ARB/01/12) (hereinafter referred to as *Azurix v. Argentina*).
[49] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) (hereinafter referred to as *MTD v. Chile*).

127. Claimants argue that the Second Tribunal did not ignore the contractual issues; instead, it simply concluded that the actions of Tucumán's officials were not taken due to any alleged contractual breaches by CAA, but rather taken for improper political ends, and for the purpose of forcing Claimants to renegotiate the concession. For the Claimants this is a factual finding that is not subject to review in an annulment proceeding.

(iii) The Second Tribunal Properly Considered the Conduct of Tucumán Officials

128. Claimants consider that it is incorrect to argue that the Second Tribunal should have applied Argentine law to determine whether certain conduct could be attributed to the government of Tucumán, and ultimately to Respondent. As the First *ad hoc* Committee explained, the issue of attribution in this context is governed by international law.

129. Claimants also address Respondent's allegation that the Second Tribunal improperly failed to apply domestic law to determine whether certain authorities' actions demonstrated Tucumán's "official" position regarding certain matters (*i.e.* dispute between CAA and the Province regarding whether certain taxes were to be absorbed by CAA or instead charged to customers separately from the basic tariff). In this respect, Claimants argue that these are factual findings not subject to review on annulment.

130. Third, Respondent argued that the Second Tribunal disregarded applicable provincial law (*i.e.*, Tucumán law) in determining that various Tucumán authorities acted for political purposes rather than in proper exercise of their duties. According to the Claimants, this represents an attempt to re-argue the merits of the case. Claimants highlight that the claims were brought under the BIT, and not under the Concession Agreement or domestic law. Those claims are to be judged under standards of international law.

(iv) The Second Tribunal Properly Addressed the Termination of the Concession Agreement

131. Respondent argued that the Second Tribunal wrongfully failed to apply domestic law to the issue of the termination of the Concession Agreement. According to the Claimants, by the time CAA gave formal notice of termination on 27 August 1997, the Tucumán authorities had already committed numerous breaches of the BIT. Thus, it was unnecessary for the Second Tribunal to decide whether there were contractual grounds for CAA to rescind.

3. Nationality Of CAA (Manifest Excess Of Powers / Failure To State Reasons)

a) The Second Tribunal Properly Found that the Issue of CAA's Nationality Was *Res Judicata*

132. With respect to the Respondent's argument contesting CAA's nationality for purposes of the BIT, the Claimants rely on the Second Tribunal's Decision on Jurisdiction, which found that the issue of CAA's nationality for jurisdictional purposes was *res judicata*, and thus was not subject to further review.

133. Article 1(2)(c) of the BIT defines the term "investors" to include "legal persons effectively controlled directly or indirectly by a national of one of the contracting Parties." As with other jurisdictional issues, the facts relevant to determining whether this definition has been satisfied are those that were in existence at the time arbitral proceedings were commenced. Thus, in determining whether CAA was an "investor" and a proper claimant in this case, the critical question was whether CGE, a French company, effectively controlled CAA on the date arbitral proceedings were commenced.

134. Claimants argue that the First Tribunal, First *ad hoc* Committee, and Second Tribunal answered this question in the affirmative. The First Tribunal observed that as of June 1996, CGE owned 68.33% of CAA's equity capital and had beneficial ownership of another 16.67%. The parties agreed that as of late 1996 – when arbitral proceedings commenced – CGE had acquired the shares of DYCASA, one of the original investors in CAA. The First Tribunal found that CGE also controlled CAA much earlier – as of the effective date of the concession contract (18 May 1995). Together with its findings that CGE continued to increase its shares in CAA after that date, necessarily implied that CGE controlled CAA at the time the proceedings were commenced (on 26 December 1996). Thus, the First Tribunal found that CAA had French nationality at the relevant time (commencement of the arbitration), as well as at earlier times, and was a proper claimant. The First *ad hoc* Committee affirmed this finding.

135. According to the Claimants, the Second Tribunal properly determined that the question of CAA's nationality had been conclusively addressed by both the First Tribunal and the First *ad hoc* Committee and concluded that the issue was *res judicata*, and could not be reconsidered.

b) Respondent's Arguments Regarding CAA's Nationality Are Based on a Misrepresentation of the Record

136. Respondent asserted that the First Tribunal's key finding regarding CAA's nationality and its status as a proper claimant was annulled by the First *ad hoc* Committee, and that the Second Tribunal was wrong to treat it as *res judicata*. To support this claim, Respondent pointed to a passage of the First *ad hoc* Committee's decision on Respondent's request for supplementation and rectification of the first annulment decision, in which the First *ad hoc* Committee stated that it had annulled the First Tribunal's finding that CGE controlled CAA as of the effective date of the concession contract. According to Respondent, it was that specific (annulled) finding of the First Tribunal on which the Second Tribunal based its determination that the issue was *res judicata*. Thus, Respondent claimed, the Second Tribunal "manifestly exceeded its powers" and "failed to state reasons" by declining to re-consider the issue of CAA's nationality and status as a proper claimant.

137. According to the Claimants, Respondent's argument is not only wrong, but frivolous since the First Tribunal's finding that CGE controlled CAA as of the effective date of the concession contract (as opposed to the date of the filing) "played no part in the subsequent reasoning of the [First] Tribunal"[50] on the nationality issue. Indeed, even if the First Tribunal and First *ad hoc* Committee had expressly determined that CGE did *not* control CAA at the beginning of the concession contract, such a fact would have been irrelevant to the issue of jurisdiction.

138. The critical finding for jurisdictional purposes is the fact that CGE controlled CAA at the time arbitral proceedings were commenced. Accordingly, Claimants reject the Respondent's criticism of the Second Tribunal's decision.

4. The Second Tribunal's Findings of Fact (Failure to State Reasons / Departure From a Fundamental Rule of Procedure)

139. Respondent alleged that the Second Tribunal misinterpreted the factual record, gave improper weight to certain evidence, or failed to provide a sufficiently thorough explanation for its factual findings. Claimants replied that each of Respondent's claims is substantively baseless and should be rejected as inadmissible.

[50] *Vivendi v. Argentina*, (First Annulment Proceeding), Decision on Annulment of July 3, 2002, para. 50.

a) Respondent's Attempt To Re-Litigate the Issue of the Tucumán Authorities' Actions Against CAA Is Misleading and Improper

140. Claimants consider baseless each of the Respondent's arguments concerning the Second Tribunal's basic conclusion that various Tucumán authorities took hostile and improper actions against CAA.

(i) The Second Tribunal Properly Found that Tucumán Authorities Acted To Undermine Claimants' Investment

141. Claimants argue that the Award was thorough and accurate in documenting the many actions through which Tucumán officials destroyed CAA's concession and Claimants' investments therein.

(ii) Respondent's Invocation of Res Judicata Is Based on a Misrepresentation of the Record

142. Claimants assert that Respondent's claim that paragraph 91 of the First Award continues in force is incorrect. According to the Respondent this paragraph (which discussed certain actions of Tucumán officials), precludes the Second Tribunal's determination that the executive and legislative branches of the Tucumán government took action that undermined Claimants' investment. Claimants consider the Respondent's arguments unfounded in this respect.

143. According to the Claimants, Respondent misrepresents the record since paragraph 91 – along with all of the First Tribunal's other findings regarding Tucumán officials' actions – was in fact annulled by the First *ad hoc* Committee.

144. Claimants contend that all of the First Tribunal's findings regarding the actions of the Tucumán authorities – including those concerning the collective effect of "concerted action" by the executive and legislative branches – were annulled. Indeed, it is clear that paragraph 91 of the First Award, which the First *ad hoc* Committee identified as relating to the "Tucumán claims[51]", was among the annulled portions of that First Award. It is simply impossible to reconcile the text of the First *ad hoc* Committee's decision annulling "the entirety of the Tucumán claims"[52] with Respondent's theory that paragraph 91, or indeed any findings by the First Tribunal regarding

[51] *Vivendi v. Argentina*, (First Annulment Proceeding), Decision on Annulment of July 3, 2002, para. 107.
[52] *Ibid*, para. 115.

the actions of Tucumán officials, survived annulment. Respondent's theory of annulment would lead to a self-contradictory and absurd result.

(iii) Actions of Individual Legislators

145. Claimants also refer to Respondent's challenge of the Second Tribunal's findings regarding the attribution of provincial legislators' conduct to Argentina. According to Respondent, in paragraph 91, the First Tribunal concluded that the acts of legislators could not give rise to the responsibility of Argentina under the BIT, and thus the issue was *res judicata*. Respondent contended that the Second Tribunal improperly decided this issue, thereby manifestly exceeding its powers.

146. According to the Claimants, nothing that the First Tribunal stated in paragraph 91 is *res judicata* since that paragraph was expressly annulled by the First *ad hoc* Committee. Additionally, the Second Tribunal expressly declined to determine whether acts of individual legislators were attributable to Respondent since it was unnecessary to decide this issue, because the acts of other officials were sufficient to hold Respondent liable.

147. Finally, Respondent did not raise the *res judicata* argument with regard to the Tucumán claims before the Second Tribunal and therefore it had no opportunity to address it.

(iv) Respondent's Challenges to the Second Tribunal's Findings on the Tucumán Authorities' Actions Are Groundless and Improper at the Annulment Stage

148. Claimants contend that the Respondent sought to re-litigate on the merits the propriety of the Tucumán officials' actions. Respondent argued that the Second Tribunal found that various provincial authorities had engaged in a conspiracy against CAA, and that such a finding had no support in the evidence. Claimants state that such challenges are beyond the scope of an annulment proceeding and rely on a mischaracterization of Claimants' case and the Second Tribunal's findings.

149. Claimants argue that the Second Tribunal did not find that a conspiracy existed. Although the Second Tribunal found that certain conduct involved a degree of coordination among separate persons or entities, it did not suggest that each example of state action was conducted as part of a single master plan.

150. Claimants suggest that by raising this argument the Respondent simply seeks a comprehensive reconsideration of the evidence and the merits of the dispute, including a *de novo* review of the Second Tribunal's findings of fact.

b) Respondent's Challenges to the Second Tribunal's Other Findings of Fact Are Improper, Groundless and Immaterial

151. According to the Claimants, the Respondent raised a number of challenges to various specific factual findings of the Second Tribunal. Each of these factual arguments, briefly described below, are beyond the scope of an annulment proceeding, and the *ad hoc* Committee thus need not and should not address them on the merits.

(i) ERSACT/CAA Sub-Committee Report

152. According to the Claimants, Respondent made a particularly objectionable series of misrepresentations concerning the Second Tribunal's reliance on Exhibit 870, which contains the May 1996 Final Report of the joint ERSACT/CAA Sub-Committee on Water Quality. Respondent asserts that the Second Tribunal based its conclusions regarding the incidents of water turbidity "almost exclusively" on the Sub-Committee Final Report.

153. Claimants argue that contrary to the Respondent's assertion, the Second Tribunal did not rely "almost exclusively" on this Report in reaching its conclusions. Rather, in the portion of its decision addressing the turbidity incidents, the Second Tribunal cited written and oral testimony from at least five different witnesses as well as additional documentary evidence. Thus, even if the Final Report could be excluded in an annulment proceeding, the Second Tribunal's factual findings on the water quality issues were amply supported by other evidence, and there is no indication of any failure to state reasons or any serious departure from a fundamental rule of procedure.

(ii) Governor Bussi's Campaign Position

154. Respondent also took issue with the Second Tribunal's factual findings regarding the position that Fuerza Republicana, the political party of Governor Bussi and Vice-Governor Topa, took during its 1995 election campaign. Claimants argue that the Respondent has not explained why it

would be appropriate for an annulment committee to review such a finding of fact. An annulment does not provide an opportunity for *de novo* review of the factual record, the weight given by a tribunal to certain evidence, or the conclusions that a tribunal draws from that record.

(iii) The 70 Changes

155. Claimants also address the Respondent's claims against the Second Tribunal's factual findings regarding the 70 unilateral changes that Tucumán officials made to a revised concession contract that CAA and representatives of the Tucumán government negotiated and agreed to in April 1997.

156. Claimants reiterated, however, that such complaints cannot ground a request for annulment, and, as such, need not and should not be addressed by this *ad hoc* Committee.

157. Claimants consider that the annulment phase is not a permissible time or place to reassess whether either party sufficiently "proved" anything; it was the Second Tribunal's responsibility to judge the sufficiency of the evidence, and that judgment is not open to challenge an annulment proceeding.

(iv) Exhibit 1069

158. Claimants referred to Respondent's argument that in paragraph 8.3.7 of its Award, the Second Tribunal cited data from a document (Exhibit 1069, a CAA financial statement for the period ending 31 December 1997), that Respondent claimed was excluded from the record as untimely filed.

159. Claimants argue that Exhibit 1069 was not excluded from the record, and it was the same document that was submitted to the First Tribunal during the initial proceedings in 1998 as Exhibit 287. By agreement of the parties, as endorsed by the Second Tribunal, such previously-submitted exhibits automatically remained part of the record in the resubmitted case. Claimants simply re-numbered "Old Exhibit 287" as "Exhibit 1069" for purposes of the resubmitted proceedings. In its 15 September 2006 procedural order, the Second Tribunal excluded from the record only those documents that were submitted for the first time with Claimants' 23 August 2006 letter.

160. In any event, Claimants assert that the reference to the document prejudiced its position, given that the Second Tribunal cited the document as a basis for rejecting Claimants' arguments regarding the calculation of damages and supporting Respondent's position on that issue.

(v) Projected Recovery Rate

161. Respondent argued that there is no documentary evidence to support the Second Tribunal's finding of fact that the Tucumán Minister of Economy asked the Consortium to "consider revisions to the economic offer to provide a reduced tariff adjustment coefficient and an increased projected recovery rate."[53]

162. Claimants contend that once again, Respondent is complaining about factual findings of the Second Tribunal and the sufficiency of the evidence supporting those findings, which is not a proper subject of an annulment application. In any event, Claimants allege that Respondent's complaint is substantively unfounded and that the Second Tribunal's finding is well supported.

(vi) CAA Model Invoice

163. According to the Claimants, the Respondent sought to reargue the facts of the case and that such improper effort is without merit. First, while the model invoice itself is not on the record, the Second Tribunal was fully entitled to find as it did – based on substantial relevant evidence – that the model invoice existed. Claimants argued that as noted by the Second Tribunal, the Tucumán regulator published a newspaper advertisement discussing the charges listed in the model and actual invoices, and stating that such charges were in accord with the Concession Agreement. Thus, the regulator was familiar with the content of CAA's model (and actual) invoices, and approved of that content, and the Tucumán authorities' subsequent criticism of the invoices was questionable at best.

164. Claimants consider that this issue provides no basis for objecting to the Second Tribunal's finding of fact, much less a basis for annulment.

[53] Argentina's Memorial at para. 261 (discussing *Vivendi v. Argentina 2*, Award at para. 4.3.6).

c) The Second Tribunal Properly Considered the Parties' Claims

165. The Claimants note that although a tribunal is required to respond to every "question" raised by the parties, this requirement refers to dispositive substantive claims or defenses that the parties raise during the proceedings. According to the Claimants, Respondent erred in claiming that the Award should be annulled because it declined to adopt certain factual assertions made by one of Respondent's witnesses, and further that the Second Tribunal allegedly failed to address certain points raised by Respondent or certain pieces of Respondent's evidence. For the Claimants, none of these alleged omissions is a ground for annulment.

166. Finally, Claimants argue that the Respondent has not identified any genuine omission of a dispositive claim or defense from the Award. Therefore, the Claimants request that Respondent's application for *de novo* review and reversal of the following facts must be denied.

(i) The Second Tribunal's Findings Regarding the Rais Report Were Proper

167. With respect to Respondent's argument that the Second Tribunal did not adopt certain statements in the Rais Report that were favorable to Respondent's position, the Claimants note that Dr. Rais cannot be described as an "impartial third party." Claimants further note that contrary to Respondent's assertion, the Rais Report did not dismiss the existence of a conspiracy of the Tucumán authorities to frustrate the Concession Agreement. Rather, as the Second Tribunal noted, the Rais Report stated just the opposite. Third, again contrary to Respondent's argument, the Second Tribunal did rely on another portion of the Rais Report that favored Respondent. In any event, according to the Claimants, even if true, this argument does not provide a basis for annulment. The Second Tribunal, as the finder of fact, had full discretion in weighing evidence, determining the credibility of various statements, and reaching other decisions concerning the factual points in dispute.

(ii) The Second Tribunal's Summary of the Issues in Dispute Was Appropriate

168. The Claimants submit that the summary of issues made by the Second Tribunal identifying four general groups of the factual issues in dispute between the parties [54] was appropriate and it did not omit "fundamental" issues. Claimants argue that the Respondent ignored various portions of

[54] These four groups are: 1) the causes and foreseeability of the turbidity incidents; (2) the renegotiation of the Concession Agreement; (3) the reason for ERSACT's various regulatory actions against CAA; and (4) the 70 changes to the revised contract proposed in 1997.

the Award that indeed address directly the very issues that it claims were omitted by the Second Tribunal. According to the Claimants, the Second Tribunal was not required to consider the arguments in question, and, in any event, it *did* consider them. Accordingly, Respondent's criticism does not provide grounds for annulment.

d) The Second Tribunal Properly Considered Testimonial Evidence

169. Claimants argue that it is entirely appropriate for international arbitral tribunals to consider and rely upon oral testimony from party witnesses. Claimants referred to the ICSID Arbitration Rules which neither restrict the testimony of party witnesses, nor impute a lowered evidentiary value to such testimony. Arbitration Rule 34 gives the tribunal complete discretion in weighing the probative value of all testimony.

170. According to the Claimants, Respondent has not shown that the Second Tribunal's references to testimonial evidence materially affected the outcome of the dispute, and in any event the Second Tribunal referred extensively to the evidence before it in reaching its findings of fact and law. Claimants argue that the vast majority of the witness testimony cited in the Award is supported by statements contained in the documentary evidence in the file. Claimants contend that the Respondent cannot allege that the outcome of the Award hinged on references to witness testimony, without any documentary support. In any event, according to the Claimants, there would be nothing improper about such references, and they certainly could not constitute grounds for annulment.

e) The Second Tribunal's Findings Regarding Damages Were Appropriate

171. Claimants allege that none of the challenges raised by the Respondent regarding damages took into account the broad discretion afforded tribunals in weighing facts and determining damages. According to the Claimants, each of the arguments seeks to review of the Second Tribunal's findings of fact underlying its damages award, and is therefore inadmissible as a ground for annulment.

(i) The Second Tribunal's Damages Analysis

172. Claimants note that the starting point of the Second Tribunal's analysis was Article 5(2) of the BIT, which requires that expropriation be met with compensation equal to the "actual value" of

the investment. The Second Tribunal also based its damages analysis on the principle that an award of damages must re-establish the situation which would have existed if the illegal act had not been committed[55]. The Second Tribunal added that under these principles, its task was primarily to determine the "fair market value" of Claimants' investment. According to the Claimants, Respondent did not contest this approach.

173. Claimants had argued that the fair market value should be based on the profits that CAA would have obtained if the concession had not been undermined by the Tucumán government. Claimants sought an award equivalent to the discounted net cash flow (DCF) that the concession would have generated but for the Tucumán officials' alleged actions. At Respondent's request, the Second Tribunal declined to adopt this approach, finding that the record of the concession's operations failed to demonstrate with sufficient certainty that it would have been profitable.

174. Claimants thereafter proposed that damages could be based on the amounts that Vivendi/CGE had invested in CAA. As support for this alternative basis, Claimants cited to the written and oral testimony of Mr. Régis Hahn, CAA's Administrative and Financial Director as of 1997 (and later its Vice Chairman), and to certain CAA financial statements. This information was supported by testimony from Mr. François de Rochambeau, CAA's Vice President and former General Manager, and by the written expert report of Mr. Dominique Perrier of PricewaterhouseCoopers.

175. Claimants submitted that the record demonstrates that Vivendi continued to invest funds in CAA after August 1998. Mr. Rochambeau and Mr. Charles-Louis de Maud'huy (CAA's Chairman) stated that Vivendi/CGE had to extend $2.5 million per month in loans to CAA to cover the cash flow deficit during the "hostage" period that ended in October 1998. CAA's expenditures continued beyond the filing of Claimants' Memorial in late 2005, by which time, as Mr. Hahn testified, Vivendi/CGE had extended a total of $75 million in debt financing to CAA. Thus, as of late 2005, the total amount of equity and debt invested in CAA was $105 million: $30 million in capital contributions and $75 million in loans from Vivendi/CGE.

176. The Second Tribunal adopted this alternative basis for calculating damages. After citing the testimony of Mr. Hahn and Ms. Perrier, the Second Tribunal combined the accrued debt and equity figures as of late 2005 to reach a total of $105 million, which it awarded to Claimants as

[55] See *Vivendi v. Argentina*, (Resubmission Proceeding), Award 20 August 2007, para. 8.2.4 – 8.2.7 (citing *Case Concerning the Factory at Chorzow*, Judgment No. 13, 13 September 1928, Merits, 1928 P.C.I.J. Series A. No. 17, at p.47).

the amount invested. Further, it divided these amounts into two temporal categories: those investments made as of the date of the expropriation, and those made afterward. Based on the testimony of Mr. Hahn and Ms. Perrier, the Second Tribunal found that $51 million ($30 million in equity and $21 million in debt) fell into the first category, while the remaining $54 million (the $75 million in total debt as of late 2005, less the $21 million already counted) fell into the second category.

177. The Second Tribunal awarded interest to Claimants on these amounts, compounded at a rate of 6%. The starting dates for the calculation of interest were based on the two temporal categories noted above – damages incurred as of the time of the expropriation, and damages incurred afterward. Thus, interest was set to run on the first category of damages – the $51 million noted above – beginning on 28 August 1997, the day after CAA notified the Province of its rescission of the Concession Agreement, at which point the Second Tribunal deemed the expropriation to have taken place. Interest was set to run on the second category – the remaining $54 million – beginning on 5 September 2002, the date on which Tucumán enacted Law 7234 (barring CAA from enforcing judgments in local debt collection cases), which was a specific act by the Province that the Second Tribunal identified as contributing to the finding of an additional treaty breach.

(ii) The Second Tribunal's Evidentiary Findings Regarding Damages Were Proper

178. Respondent did not directly challenge the Second Tribunal's basic methodology for calculating damages. Rather, Respondent argued that the Second Tribunal based its damages conclusions on evidence that was, in Respondent's view, illegitimate, inadequate, or inconsistent with other portions of the record. According to Respondent, these allegedly flawed evidentiary determinations amounted to a manifest excess of powers, a serious departure from a fundamental rule of procedure, and a failure to state reasons, thereby justifying annulment under ICSID Convention Article 52(b), (d) and (e). Respondent's theory fails on every count, principally because it seeks review of the Second Tribunal's weighing of certain factual evidence – an exercise that is the exclusive province of the Second Tribunal under ICSID Arbitration Rule 34 and that is not properly subject to annulment.

(iii) Tribunal's Discretion Regarding Damages

179. Claimants submit that the Respondent's challenges to the Second Tribunal's damages calculations inappropriately assume that the *ad hoc* Committee is entitled to engage in plenary review of the Second Tribunal's factual findings.

180. According to the Claimants, Respondent ignored the discretion afforded to arbitral tribunals not only in making factual findings, but also in calculating damages. Moreover, as discussed above, ICSID Arbitration Rule 34 expressly provides that the tribunal is the judge of the admissibility and probative value of all evidence – necessarily including evidence on damages.

181. Claimants argue that Respondent's claims do not prove that the Second Tribunal committed any error that could properly provide grounds for annulment.

(iv) Testimony of Mr. Régis Hahn

182. Respondent raised a number of arguments concerning the testimony of Mr. Hahn, including that such testimony was invalid due to the parties' procedural agreement, adopted by the Second Tribunal. According to the Claimants, Respondent apparently reads that agreement to provide that the parties were not permitted to introduce oral testimony, or that the Second Tribunal was not permitted to treat such testimony as evidence of the facts of this case.

183. Claimants note that the parties' agreement cited by the Respondent was meant to restrict the introduction of new witnesses, new written witness testimony, or new documentary evidence at or after the hearing. However, it was not intended to prohibit witnesses for either party who had already submitted written testimony from providing oral testimony at the hearing, nor to preclude the Second Tribunal from considering and relying on such testimony.

184. Claimants argue that Mr. Hahn's testimony was supported by consistent information contained in written testimony and documents submitted prior to the hearing regarding the investments made in CAA as of October 1998. Mr. Hahn's testimony thus merely elaborated upon that evidence to confirm that CAA's activities were financed by Vivendi, and to update the information regarding the total amount of Vivendi's debt financing to CAA as of late 2005.

185. In addition, Claimants note that Respondent has not attempted to explain how the cited provision in the Order could constitute a "fundamental rule of procedure" for purposes of ICSID Convention Article 52(d). Claimants maintained that a prohibition on oral witness testimony would potentially violate, rather than uphold, fundamental procedural rules.

186. Second, Respondent asserted that Mr. Hahn's testimony was invalid because it was based on evidence that was part of the file. Claimants assumed that Respondent's contention is that Mr. Hahn based his testimony on the Vivendi financial and accounting records that the Second Tribunal determined were inadmissible as late-filed. Claimants consider that this argument is both unfounded and irrelevant since such documents merely offered additional support for Mr. Hahn's statements. The fact that the financial records themselves were not admitted into evidence in no way affects Mr. Hahn's knowledge as CAA's Administrative and Financial Director, nor the legitimacy of his testimony.

187. Furthermore, Claimants observe that Respondent elected not to cross-examine Mr. Hahn regarding his discussion of the $75 million in loans that Vivendi/CGE extended to CAA. Nor did Respondent act at any point, at the hearing or in its post-hearing submission, to demonstrate that Mr. Hahn's testimony was in any way inaccurate. Respondent merely objected to the admissibility of certain documents offered by Claimants after the hearing, based solely on the timing of their submission.

188. According to the Claimants, Respondent's argument is once again an attempt to re-open factual issues conclusively resolved by the Second Tribunal. Nothing in this argument amounts to a ground for annulment.

189. Respondent also criticized the Second Tribunal's reliance on Ms. Perrier's testimony by asserting that Ms. Perrier was uninformed regarding CAA's accounting matters, and thus that her testimony regarding Vivendi/CGE's amounts invested had no evidentiary value. Claimants noted that Ms. Perrier's expert report attached as an appendix an excerpt from CAA's financial statements, demonstrating that she did in fact have access to the relevant aspects of CAA's financial information. Still further, other information discussed in Ms. Perrier's report was by her own account based on the witness statement of Mr. Rochambeau, who undisputedly had direct knowledge of CAA's financial information.

190. With respect to the inconsistency alleged by the Respondent between Ms. Perrier's expert report and the testimony of Mr. Rochambeau, the Claimants argued that once again, Respondent's charge is misplaced. The reference in the Award challenged by the Respondent in fact refers to Ms. Perrier's report as stating that "Vivendi's shareholders account in CAA's books, reflecting its investment in CAA, had increased to US$69 million at the end of August 1998."[56], according to the Claimants this language makes it clear that the Second Tribunal correctly understood that the $69 million figure referred to Vivendi's total investment in CAA (debt and equity) as of late 1998. Claimants argue that given that CGE was required to continue funding CAA after 1998, that figure was entirely consistent with Mr. Hahn's testimony that Vivendi/CGE had invested $75 million in debt (and $105 million total) in CAA as of late 2005, as the Second Tribunal correctly stated.

191. Thus, the Second Tribunal correctly understood the testimony of both Mr. Rochambeau and Ms. Perrier, and made no error whatsoever, let alone an annullable error. Once again, Respondent's criticisms with respect to the above referenced testimony are unfounded, and in any event would not present errors that could provide grounds for annulment.

(v) Equity Investment in CAA

192. The Second Tribunal awarded $30 million based on the total equity invested in CAA (by Vivendi/CGE and other shareholders) and the additional $75 million in debt invested by Vivendi/CGE alone. Respondent considers it inappropriate for the Second Tribunal to have included in the former amount the portion of the equity that was not invested by Vivendi/CGE itself.

193. Claimants argue that Respondent's complaint is inapposite since Vivendi is not the only claimant in this case; CAA also received the entire $30 million as a capital contribution, and invested it in the concession. CAA then incurred losses that far outstripped that capital, for which CAA then turned to Vivendi/CGE for loans. Respondent has mischaracterized the Award, or, at a minimum, misunderstood the Second Tribunal's analysis. In any event, this unfounded challenge offers no ground for annulment.

[56] *Vivendi v. Argentina*, (Resubmission Proceeding), Award 20 August 2007, footnote 424.

(vi) The Second Tribunal's Approach to Calculating Interest Was Justified

194. Finally, the Respondent criticized the Second Tribunal's calculation of interest, specifically its choice of the starting dates for interest accrual. As to the first starting date, Respondent argued that Claimants had asked for interest to run only from 27 November 1997, while the Second Tribunal adopted the earlier date of 28 August 1997, giving Claimants more interest than they had sought.

195. Claimants argue that they had suggested the 27 November 1997 date as part of a broader damages request that included lost profits. The November date was used in the request for interest only because that was the date back to which Claimants had discounted the cash flows in their lost profits calculations. Claimants could just as well have discounted cash flows back to, and requested interest running from, 28 August 1997. In any event, the Second Tribunal rejected that request, and awarded damages at a lower level and with a lower interest rate, and thus a lower total interest amount than Claimants had requested. In setting the first accrual date, the Second Tribunal used the date on which, in its view, Claimants' investment had been expropriated – a point that Respondent does not dispute and a decision that was well within the Second Tribunal's discretion.

196. As to the second starting date, as explained above, the date in question – 5 September 2002 – is the date on which Respondent enacted Law 7234, the first of a series of laws blocking CAA's attempts to enforce judgments regarding unpaid invoices. The Second Tribunal had found that the enactment of such laws constituted an additional violation of the BIT. Thus, according to the Claimants it was quite appropriate to provide that interest on the damages incurred subsequent to the expropriation would begin to run on that date.

197. Once again, Claimants consider that Respondent's argument constitutes an attempt to re-argue the facts, and disregards the great discretion afforded to tribunals in evaluating evidence and calculating damages. Respondent's challenge thus does not articulate any legitimate ground for annulment.

5. Claimants' Conclusion

198. Claimants request that the *ad hoc* Committee dismiss Respondent's request for annulment in its entirety, and issue an award of costs, including counsel fees, in favor of Claimants.

199. Claimants argue that the Respondent is attempting to turn these annulment proceedings into a third merits phase, and to induce both Claimants and the *ad hoc* Committee to focus their efforts on an item-by-item reconsideration of the factual and legal arguments raised before the Second Tribunal. Claimants consider that the re-argument of the facts of the case does not provide a basis for annulment of the Award, as the applicable standards for annulment are found in ICSID Convention Article 52. Nothing in Respondent's submission comes close to satisfying that standard.

III. The *ad hoc* Committee's Views

A. Part One: The Proper or Improper Constitution of the Arbitral Tribunal

200. The Argentine Republic observes that the role of the *ad hoc* Committee is to "protect the integrity of the system"[57]. The *ad hoc* Committee concurs with this view. This fundamental premise is therefore uncontested, and all grounds invoked for annulment in the present case have to be addressed in the light of this paramount policy consideration.

201. The controversies between the parties in the written and oral phases of the present proceedings arise foremost from Professor Kaufmann-Kohler's appointment to the Board of UBS on 19 April 2006, either as a ground for the assertion that the Second Tribunal was "not properly constituted" under Article 52(1)(a) of the ICSID Convention or based on the assertion of "a serious departure from a fundamental rule of procedure" under Article 52(1)(d). A further ground for annulment under Article 52(1)(c) was withdrawn.

202. It is undisputed that the facts and circumstances affecting Professor Kaufmann- Kohler's ability to serve as arbitrator were "only discovered" after the Second Award had already been rendered.[58] None of the parties involved in the arbitrations in which Professor Kaufmann-Kohler acted as arbitrator at the time of her UBS board appointment were advised by her of this fact, which could not be considered public knowledge.

203. The Respondent sees here an important failure and ground for annulment. It has supported its view by the expert testimony of Professor Loukas Mistelis, who was cross-examined, and by an

[57] Respondent's Memorial of 17 October 2008, para. 34, page 9.
[58] Argentina's Memorial, para. 68, page 18.

earlier opinion of Professor Charles W. Wolfram in the *EDF v. Argentina*[59] case, which is also part of the record. Claimants have contested this view but have not presented an expert witness statement of their own.

204. A basic issue is the compatibility of a directorship in a major international bank with the function of international arbitrator. It concerns here the conflicts of interest that result or may result when the positions are combined and the way in which, in such situations, these present or prospective conflicts must be handled and managed by the arbitrator, notably in terms of (a) investigation of any connections between the bank and the parties in the pending arbitrations; (b) disclosure of any such connections to the parties in such arbitrations if the arbitrator wishes to continue; and (c) notice to the parties of the appointment regardless of any connections so found so that they may be properly informed.

205. The further question is what the consequences are in terms of annulment if there was a basic failure to investigate, disclose, or inform.

206. The *ad hoc* Committee is aware of its grave responsibility in matters of this nature. They concern not only the continued validity of the Second Award but, as already mentioned, more particularly the integrity of the ICSID process as a whole, which is the clear and undisputed underlying concern of Article 52 of the ICSID Convention.

207. In annulment cases, members of ICSID *ad hoc* committees are chosen exclusively from the Panel of Arbitrators, and serve at the invitation of ICSID to address this concern. Their position is therefore different from that of arbitrators.

208. In this connection, the *ad hoc* Committee noted the claim contained in Professor Mistelis' Report that there has been a demonstrable inclination of international arbitrators to raise the threshold for a challenge of their fellow arbitrators. This was not contested in cross-examination or commented upon by the parties after they were invited to do so.

209. It may be that such an attitude more easily results amongst arbitrators who are called upon to determine a challenge in respect of an arbitrator with whom they sit. This is the procedure under Article 58 of the ICSID Convention.

[59] *EDF v. Argentina 2.*

210. *Ad hoc* Committees are not in a similar position.

211. In this case, the difference in roles may also have a bearing on the discussion concerning the effect of the decisions in the earlier *EDF v. Argentina*[60] and *Suez v. Argentina*[61] cases and particularly on any *res judicata* effect of any conclusions reached therein on the present issue.

212. Regardless of this difference and the question whether an *ad hoc* Committee is ever bound by a finding in a prior case, the important equitable principle of estoppel still needs to be considered further.

213. It should be pointed out in this connection that both the *EDF v. Argentina* and *Suez v. Argentina* cases are still subject to ICSID annulment proceedings and are therefore not yet final.

214. Furthermore, they concerned the question of independence in the relationships respectively between UBS and EDF, or UBS and Suez (even though Vivendi was also a party in the latter case but CAA was not). Each relationship was different and must, like the relationship between UBS and Vivendi, be considered individually. Notably, a larger or smaller participation of UBS in the one or in the other company may have relevance in this connection.

215. Finally, the ICSID Convention being silent on the issue, it may also be relevant that parties in submitting to an ICSID arbitration could hardly have meant to accept any *res judicata* effect in a situation like the present one.

216. For these reasons, the *res judicata* argument is rejected.

217. As to the basic issue of the compatibility of a directorship in a major international bank and the function of international arbitrator, Professor Wolfram, strongly supported by Professor Mistelis during the hearing, makes the obvious point that a director in the exercise of his or her function is under a fiduciary duty *vis-à-vis* the shareholders of the bank to further the interests of the bank and therefore postpone conflicting interests.

218. That is fundamentally at variance with his or her duty as independent arbitrator in an arbitration involving a party in which the bank has a shareholding or other interest, however small it may

[60] *EDF v. Argentina 2*, Challenge Decision regarding Professor Gabrielle Kaufmann-Kohler dated 25 June 2008.
[61] *Suez v. Argentina 2*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal dated 22 October 2007.

be.[62] Since a major international bank has connections with or an interest in virtually any major international company (which companies are also the most likely to end up in international arbitrations), this suggests that the positions of a director of such a bank, and that of an international arbitrator, may not be compatible and should not be, or in a modern international arbitration environment, should no longer be combined.

219. As a minimum, the *ad hoc* Committee sees here reason for extreme caution, especially in ICSID cases where the public interest is often strongly engaged.

220. It means foremost that anyone aspiring to a position as director in a major international bank should understand the likely extent of such a bank's interests, and the possibility of conflict should be clear in particular to all senior and experienced international arbitrators accepting such a position.

221. Any arbitrator who still seeks to combine both functions must therefore make a special effort that the conflicts that may so arise are managed properly and handled with the greatest care[63].

222. In the view of the *ad hoc* Committee, this does not only require any arbitrator becoming or having become a member of the board of a major international bank first to specifically investigate whether the bank has any connection with or interest in any of the parties in its pending arbitrations but, if such an arbitrator decides in principle to continue, also to notify the parties in each arbitration of such a connection or interest. This imposes a continuous duty of investigation.

223. This obligation cannot be considered fulfilled by simply providing the bank at the time of the appointment with a list of current arbitrations accompanied by a request to see whether there may be any conflicts of interests, as was apparently done in this case. Rather, the foremost issue is whether the bank has any connection with or interest in any of the parties to the arbitrations and what the nature of that connection is.

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[62] The issue was raised in the course of the oral hearing whether "*the position of a director, even a non-executive director of a major international bank, is inconsistent and irreconcilable with the position of an international arbitrator*". (Transcript of the Hearing in English, page 354 paras. 7-11). Professor Mistelis answered "*absolutely*" (Transcript of the Hearing in English page 354 paras. 7-11) to the question "*do you think there is an irreconcilable conflict of interest?*" (Transcript of the Hearing in English page 359 paras. 7-8) and he later added that "*the non-disclosure affects the constitution of the Tribunal and therefore this arbitration is tainted*" (Transcript of the Hearing in English page 362 paras. 9-12).

[63] The ICSID Convention and Arbitration Rules give no clear guidance but the making of a declaration under Arbitration Rule 6, which refers to the reasons why an arbitrator should not serve and to its best knowledge in this connection, requires proper and adequate investigation. This is an objective requirement, the scope of which is only in first instance left to the arbitrator and may be tested in a challenge or annulment procedure.

224. That needs to be established first and any list of arbitrations provided by an arbitrator to the bank can only serve that primary purpose.[64] It is clear that Professor Kaufmann-Kohler did not ask the bank to investigate any such connections and to inform her of them.

225. Whether there were any conflicts for the bank's own purposes was for the bank to decide. Naturally, the bank could subsequently also decide whether to continue with the board appointment or not, but the bank could not decide these issues for others, particularly parties to an arbitration, who from the perspective of their arbitration may have a very different view of conflicts that result or could result for them from the involvement of their arbitrator with the bank.

226. Rather, having properly and adequately investigated and established any relationship between the bank and any of the parties to the arbitrations, it is for the arbitrator personally first to consider such a connection in terms of a voluntary resignation as arbitrator. Such connection must otherwise be properly disclosed to the parties through an adequate amendment of earlier declarations under Rule 6.

227. The arbitrator/board-member's duties are not fully exhausted even by such action. Since the bank might not be able easily to track the multiple types of contacts it may have with any of the parties to the arbitrations[65], it is also proper that at least an updated *curriculum vitae* be circulated to all parties to the arbitrations so that each party can decide for itself whether there are reasons why the arbitrator/board-member should no longer serve, even if any subsequent challenge is ill-founded.

228. In the view of the *ad hoc* Committee, such is the risk taken by any international arbitrator who wants to become a board member of a major international bank.

229. In other words, not only may the bank wish to have an opportunity to review the position in respect of the (impending) board appointment after disclosure of the (prospective) board member's pending arbitrations, but also the potentially affected arbitrating parties. It is, in any event, difficult to understand why the bank was notified by Professor Kaufmann-Kohler of her

[64] This should be considered quite apart from any regulatory requirement that may require prospective board members of public companies to disclose any competing or adverse interests.
[65] Proper due diligence could also have led to reading the Annual Reports of the parties in arbitration which in the case of Vivendi disclosed the UBS shareholding.

existing arbitrations but not the arbitrating parties of her (impending) directorship of the bank at the same time.

230. The complications that have subsequently arisen in terms of agony, ICSID credibility, and cost, not only in this case, provide a vivid and abject example of the consequences when an arbitrator accepts a board position in a major international bank without properly investigating and disclosing any connections between the bank and parties to its arbitrations and also neglects its information duties.

231. It may have been possible at first to consider Professor Kaufmann-Kohler's attitude in these matters as a one-off serious lapse of judgment but her removal by the Permanent Court of Arbitration in the Yukos cases[66] after her refusal voluntarily to withdraw appears to confirm that she has more broadly a view of her independence and of the relevant criteria in this connection which do not or do no longer accord with the minimum standards that now prevail in these matters.

232. The *ad hoc* Committee thus understands the argument that the Second Tribunal was no longer properly constituted after the board appointment of Professor Kaufmann-Kohler, and that there was a serious departure from a fundamental rule of procedure and considers that this could lead to annulment whenever justified within the context of the case under consideration.

233. Nevertheless, the *ad hoc* Committee must establish whether in this particular case the conduct and attitudes of Professor Kaufmann-Kohler constitute a sufficient ground under Article 52 effectively to annul the Second Award. It is well understood and established that under Article 52(3) an *ad hoc* Committee has here a measure of discretion and may consider other factors.

234. The Claimants have placed great stress on the fact that according to her own declarations, Professor Kaufmann-Kohler had no actual knowledge of the connection between UBS and the Claimants until after the Award was rendered. Even though the Respondent has not accepted this declaration at face value, there is no sufficient reason for the *ad hoc* Committee not to believe her.

[66] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 15 and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para.15.

235. The *ad hoc* Committee consequently accepts that the relationship between UBS and the Claimants had no material effect on the final decision of the Tribunal, which was in any event unanimous.

236. The Respondent has raised the important point that, if this is the decisive element, failure to adequately investigate, disclose and inform is encouraged in this manner, and that as a consequence a nonsense is being made of all duties in this respect, thus undermining the credibility of the entire ICSID process, which the Committee has already stated to underly all of Article 52. The Respondent cites the revision of the *Pinochet* case in the House of Lords[67] as powerful support.

237. The *ad hoc* Committee accepts without reservation that Argentina is entitled to the highest standards in this regard being observed and respected by all arbitrators in its ICSID cases. So are all parties.

238. In this case, the fact remains, however, that despite most serious shortcomings, Professor Kaufmann-Kohler's exercise of independent judgment under Article 14 of the ICSID Convention was in the circumstances not impaired. The Tribunal was thus functional and operated properly in respect of both parties.

239. Having extensively considered all the arguments, the *ad hoc* Committee, after long deliberations, has come to the conclusion that there is no sufficient ground to annul the Second Award.

240. In so finding, the *ad hoc* Committee was forced also to take into account that it would be unjust to deny the Claimants the benefit of the Award now that there is no demonstrable difference in outcome. Even though the Claimants originally appointed Professor Kaufmann-Kohler and may have felt that it was their duty to defend her in the annulment proceedings, they bear no responsibility for her actions or inaction.

241. Finally, the *ad hoc* Committee also considered the extraordinary length of the present case. The Respondent rightly says that this is not a conclusive argument in itself. In any event, both parties have contributed to it, and the prospect of yet another Tribunal operating in this case is not in itself a valid argument either but only the consequence of the annulment facility in the Treaty itself which *ad hoc* Committees are not called upon to question. Yet, it is an overriding principle that all litigation must come to an end unless there are strong reasons for it to continue.

[67] In *re Pinochet* [1999] UKHL, available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm

242. Under the circumstances, the *ad hoc* Committee can do no more than clearly express its opinion on conflicts of interest and how they should have been handled. The *ad hoc* Committee will state later in this decision its holdings on the division of costs incurred by the parties in connection with this challenge.

B. Part Two: The Other Grounds for Annulment

243. The Argentine Republic as Respondent further claims that the Second Award "disregarded fundamental issues related to the dispute between the parties as included in Article 52(1)(b), (d) and (e) of the Convention" *inter alia* "(a) the social conditions existing in the Province of Tucumán at the time of the investment, and, consequently the feasibility of the Concession Agreement; (b) the dispute between the parties related to the right to water as essential human rights; (c) the failure to fulfill the investment obligations in connection with the *non-adimpleti contractus* principle; (d) the nature of the concession contract under Argentine administrative law (and even the applicable public law of the Province of Tucumán); (e) the scope of responsibility of provincial government officials in the light of the applicable law"[68].

244. Also, the Argentine Republic denounced what it considered the Second Tribunal's "*vector through which the Treaty was breached*", *i.e.* not individual acts, but the alleged existence of a 'conspiracy' mounted by the authorities of the Tucumán Province[69] or in other terms a "*campaign to destroy the Concession Agreement*"[70].

245. The *ad hoc* Committee does not need to engage in theoretical debates on the exact meaning of the invoked annulment grounds since it has been rightly acknowledged by Respondent that the term "manifest" in the context of Article 52(1)(b) means that the excess of powers must be "evident"[71], and that for a possible annulment under Article 52 (1)(d), the departure must be a serious one and that the relevant rule of procedure be fundamental[72].

246. In essence, the *ad hoc* Committee has to focus directly on:

[68] Argentina's Memorial para. 228, p. 66.
[69] *Ibid.* para. 240, p. 70.
[70] *Ibid*, para. 253, p. 73.
[71] Memorial, para. 43, p. 12.
[72] *Ibid.,* para 44, p.12.

(i) The first argument of Respondent that under Article 52(1)(b) the Second Tribunal in various instances manifestly exceeded its powers.

(ii) The second argument of Respondent that under Article 52(1)(d) the Second Tribunal based its award in multiple instances on inadequate evidence.

(iii) The third argument of Respondent that under Article 52(1)(e) the Second Tribunal failed properly to answer relevant questions and adequately to give reasons.

247. As to these three grounds for annulment, the *ad hoc* Committee wishes to make the following observations.

(i) It is agreed by all that Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process. In the Treaty, the possibility of annulment is in this connection based on specific and limited grounds.

(ii) The *ad hoc* Committee understands this to mean that under Article 52 (1) (b) and (d), there must be a *prima facie* case for annulment as is signaled by the use of the words 'manifestly' and 'serious departure'.[73] In particular, these sections cannot be used effectively to recommence the entire case before the *ad hoc* Committee. Rather, Respondent must be precise and identify specifically each instance of which it complains under these subparagraphs in terms of a *prima facie* case for annulment.

(iii) Article 52(1)(e) is cast more in terms similar to an ordinary appeal, but, in the view of the *ad hoc* Committee, the standard is that the reasoning used by the Tribunal must have been plausible, that means adequate to understand how the Tribunal reached its decisions, it being given the benefit of the doubt if there is room for a difference of opinion in the matter. Only in this manner is, in the view of the *ad hoc* Committee, the nature and role of Article 52(1)(e) properly understood and safeguarded.

248. The *ad hoc* Committee also restates in this connection what was agreed by Respondent during the hearing and has a bearing on the interpretation of Artcile 48(3): not all arguments need to be

[73] It is often believed that under Article 52(1)(b) only arbitrary or clearly unreasonable decisions are to be rejected, see *MCI v. Ecuador*, Decision of 19 October 2009, para. 49, where references are made to *MINE ad hoc* Committee, para. 4.06; to *Wena v. Egypt*, para. 2; to *CDC v. Seychelles*, para. 41. Under Artcile 52(1)(d) the attention shifts to due process and fundamental procedural protections, no more.

addressed but only the fundamental ones. Only in respect of these, there has to be a sufficiently relevant reasoning. It is also understood that in the matter of adequate reasoning, upon a hearing, an ICSID *ad hoc* Committee may, if it deems it necessary, further explain, clarify, or supplement the reasoning given by the Tribunal rather than annul the decision.

249. In the view of the *ad hoc* Committee, a Tribunal may rely in this connection on expert and other testimony with which it agrees and may disregard other testimony. That is one of its principal tasks, cf. also Rule 34. It is generally accepted that a Tribunal has in these matters substantial discretion and does not need to explain expert views.

250. To further clarify its position, the *ad hoc* Committee also accepts that where a Tribunal agrees with one of the parties or with experts, it is not improper or unexpected for it to adopt the language used by them in the pleadings or in written testimony.

251. The *ad hoc* Committee also heard argument on whether erroneous findings of law and fact can be considered grounds for annulment. In the view of the *ad hoc* Committee, they can but only if they rise to the exacting standards for annulment as expressed in Article 52(1). The same applies to procedural incidents.

252. It was already said that even in the case of annullable error, the *ad hoc* Committee still has a measure of discretion under Article 52(3) in ordering annulment or in refusing to do so.

253. Interpreting Article 52(1)(b) (d) and (e) in the above manner and having considered all the arguments before it, the *ad hoc* Committee believes that in the present case, other than discussed under A above, there are no findings in or aspects of the Second Award that rise to the level of the grounds for annulment under Article 52(1) (b), (d), and (e).

254. First, the *ad hoc* Committee wishes to deal with the argument that the methodology and the details of the damage calculation were flawed, in which connection each of Article 52(1) (b), (d), and (e) were invoked by Respondent.

255. In the view of the *ad hoc* Committee, the 'amounts invested' approach adopted by the Tribunal was well within the margin of appreciation of the Tribunal. It was originally the method proposed by Respondent and reduced the claim for damages considerably. As to the final calculation, the Tribunal relied on the testimony of Mr. Régis Hahn supported by expert

testimony which found that CAA's debt to Vivendi was US$75 million in 2005 (besides an equity investment of US$30 million). The Tribunal stated within its authority when it prefered that testimony to that of others. The expert evidence given was not inadequate and the reasons given were not insufficient.

256. In the matter of interest and its calculation, the *ad hoc* Committee considers that no *ultra petita* exists, even with regard to the issue of determining the starting date for the calculation of the interest due to the Claimants, since the allocation of interest, like the evaluation of damages, falls within the discretionary power of the Tribunal in the light of all relevant circumstances of the case. There is no indication whatever, that this discretion was abused

257. Accordingly, the failure to express specific reasons in this respect cannot be considered a sufficient ground for annulment under Article 52(1)(e), as the reasons stated within the context of the Tribunal's approach to the evaluation of the damages to be compensated may be understood to cover also the issue of interest.

258. As to the issue of the nationality of CAA raised by Respondent under Article 52(1)(b), this issue was already considered by the first Tribunal and the first *ad hoc* Committee. They were unanimous in finding that CAA was an investor under Article 1(2)(c) of the Argentine-French BIT. The partial annulment by the First Annulment Committee related to other matters. This being the case, it cannot be accepted that the Second Tribunal manifestly exceeded its powers whilst confirming this view.

259. As to the issue of the applicable law, also raised by Respondent under Article 52(1)(b), there is here well known confusion as to the meaning of Article 42 of the ICSID Convention. The law applicable to the BIT was under its Article 8(4) the law of Argentina. Respondent considers not applying this law a manifest excess of power by the Second Tribunal.

260. Although an improper application of the applicable law is not directly mentioned as ground for annulment under Article 52(1)(b), it is generally accepted that it may amount to an annulment ground under that Article and this issue needs therefore further consideration.

261. To understand the applicable law clause in Article 42 properly, it must be realised that at the time the ICSID Convention was concluded the normal dispute resolution facility was based on a contractual arbitration clause. In cases based on BITs, the emphasis is essentially on international

law violation in the sense that the host state is alleged to have breached the standards of treatment provided for the foreign investor under the BIT in question

262. The result was a distinction between contract claims and treaty claims. As to the latter, international law applies. It may be that issues of other laws still arise in considering parties' actions, e.g. in the matter of faithful compliance with concessions agreements, but nothing in the Second Award suggests that in these matters the Second Tribunal, which in paragraphs 7.3.9ff made similar distinctions following the First *ad hoc* Committee which also did so, went beyond its powers in the application of what it viewed as relevant laws, let alone manifestly so.

263. As for the jurisdictional issue, raised under Article 52(1)(b) and (e), the Second Tribunal considered the jurisdiction issues *res judicata* (except for the argument of absence of proper powers of attorney for certain of Claimants´ counsel, which argument was rejected). These issues also cannot be revisited in annulment proceedings unless rising to the level of the criteria for annulment contained in Article 52(1). The *ad hoc* Committee finds that also here, there was neither manifest excess of power nor insufficient reasoning.

264. As for the issue of whether Respondent' arguments in respect of the actions of the Province of Tucumán were properly considered, raised under Article 52(1)(b),(d) and (e), the basic finding of the Second Tribunal was that these actions were in essence an election issue and therefore political, not merely a measured response to alleged shortcomings of CAA. The question is not whether the *ad hoc* Committee agrees with this or not, but whether the Second Tribunal had the power to reach that conclusion.

265. The *ad hoc* Committee considers that also in this aspect, the Second Tribunal acted within its powers and that there was neither procedural impropriety in the manner in which the Tribunal narrowed the issues and chose to explain its findings nor insufficiency in its reasoning.

266. Other matters of which Respondent complains in this connection are the Second Tribunal's dealing with the Projected Recovery Rate, with CAA´s Model Invoice, with Exhibit 1069, with the Report of the CAA-ERSACT Sub-committee on Water Quality, with Governor Bussi's attitudes during the election of 1995, with the 70 changes made by the Province to the revised

version of the Concession Agreement in 1997, with the action of individual legislators, and with multiple testimonial and other evidence issues[74].

267. The *ad hoc* Committee has considered all these matters but finds that none of the complaints rise to the level of a ground for annulment under Article 52(1).

C. Costs

268. In the matter of liability for the litigation cost, the *ad hoc* Committee finds that each Party should bear its own costs, both in respect of the stay proceedings and the proceedings on the merits.

269. As for the costs of the *ad hoc* Committee and of ICSID, in connection with the annulment proceeding, including the stay proceedings, the *ad hoc* Committee considers that parties should share these costs equally.

D. Decision

For the foregoing reasons, the *ad hoc* Committee decides to reject Argentina's Application for Annulment of the Second Award rendered by the Second Tribunal on 20 August 2007.

[74] Respondent's Memorial, paras. 207-276.

Professor Jan Hendrik Dalhuisen
Member of the *ad hoc* Committee
Date: July 30 2010
Subject to the attached separate opinion

Ambassador Andreas J. Jacovides
Member of the *ad hoc* Committee
Date: 3 August 2010

Dr. Ahmed S. El Kosheri
President of the *ad hoc* Committee
Date: 27th July 2010

Additional Opinion of Professor JH Dalhuisen under Article 48(4) of the ICSID Convention

1. Before ending the discussion, I should like to deal with the role of the ICSID Secretariat in this matter which has led to multiple complications and has delayed the final decision by many months.

2. It is clear that the Secretariat wants to obtain for itself a greater role in the conduct of ICSID cases and in the process also wants to involve itself in the drafting of the decisions. So also in this case. I believe this in general to be outside the Secretariat´s remit and undesirable.

3. The role of the Secretariat in ICSID is substantially defined in Article 11 of the ICSID Convention and in Chapter V of the Administrative and Financial Regulations. It is a role of administration and support; it is clear that the Secretariat has no original powers in the dispute resolution and decision taking process.

4. As a minimum, the Secretariat is keen to do the recitals, but as the recitals in this case also show, by accommodating the Secretariat's involvement, they are becoming longer and longer. To do it properly, choices need to be made and it is hardly the task of the Secretariat to make them. What are the key facts and relevant arguments and how they should be presented in the final decision or award is for Arbitrators or *ad hoc* Committee Members to select and decide.

5. Any other approach leads easily to a disjointed expose of arguments, counter-arguments, and decisions, especially in cases like the present one in which virtually everything was contested. Moreover, getting some presentable text out of the Secretariat in these circumstances delayed the final result considerably.

6. Although summarising the arguments may well be helpful, it should ideally be done much earlier in the case before the hearing so that such a summary could be tested by Arbitrators or *ad hoc* Committee Members in the oral proceedings. If preparatory help of this nature is needed, Arbitral Tribunals or *ad hoc* Committees may be wiser to appoint their own assistant subject to their full control and direction. Any text tested in this manner might in appropriate cases then serve as part of the final award or decision.

7. For the Secretariat also to draft part or all of the decisions and reasoning would appear wholly inappropriate, even if following basic instructions of Arbitrators or *ad hoc* Committee Members whilst the final version would naturally still be left to them for approval. This would not appear to be sufficient to legitimize the text.

8. During cross-examination it was asked why and questioned how some arbitrators could do so many cases. One way is to farm out the drafting to others, in the case of ICSID to the Secretariat. There appears to be much appreciation for this by busy arbitrators but it is improper.

9. In this case, the ICSID Secretariat even took the view that on its own initiative it could intervene to "streamline" the texts earlier agreed by the present *ad hoc* Committee and senior Secretariat members approached *individual* Committee Members informally with a view to amending the text. This naturally caused great stress in the Committee, raising many fundamental issues of propriety, independence, open and direct communication between Committee Members, and confidentiality.

10. It is relevant in this connection to note that a practice appears to have developed in ICSID whereby all communications, also those between the Chairman and *ad hoc* Committee Members (or Arbitrators as the case may be) are conducted through the Secretariat, but this is not the system of the Convention, quite apart from the question whether it gives the Secretariat subsequently power to intervene.

11. Under Regulation 24(1)(b), the communication between *ad hoc* Committee Members (and Arbitrators as the case may be) is specifically carved out from intermediation through the Secretariat and this is so during the full pendency of the proceedings.

12. This ties in with Arbitration Rule 15 which makes the deliberations private and secret. Only Members of the *ad hoc* Committee (or Arbitrators as the case may be) shall take part and no other persons are admitted.

13. These rules stand to reason and are mandatory. It may be doubted whether they can be waived, which would at least require the consent of all Committee Members (or Arbitrators). It means that the deliberations and related exchanges cannot properly be conducted through the Secretariat. The role of the Secretariat in record keeping (to the extent records exist) does not distract from these rules; the deliberations are not part of the record in this sense.

14. The need for this system to be respected is especially clear in a case like the present one where serious reputational issues are at stake. Privacy and secrecy are here of the essence to promote free communication whilst protecting *ad hoc* Committee Members (or as the case may be Arbitrators) but no less the persons whose reputation may be affected. It should be noted in this regard that the Secretariat, whilst receiving any of this information, appears to be under no similar secrecy obligation.

15. However this may be, the ICSID Secretariat is not entitled to this information and can not act on it at will. On the basis of what it sees, it may well be able to take the initiative in alerting the Committee to clear mistakes or oversights but it should do so in writing, to all Members simultaneously, and not otherwise intervene in any way, except if formally asked to do so by the Committee for clearly defined purposes which should never affect the substance of the case, either directly or indirectly.

16. Another idea seems to be that the Secretariat is the voice of a *jurisprudence constante* which it is its task to advance and protect and which gives it an autonomous right of intervention. This is also profoundly mistaken and may be seriously prejudicial to the parties. In any event, it is far too early to assume the existence of such a *jurisprudence* and its status as law would be uncertain even if it existed. It may be recalled that in international law, there has never been a rule of binding precedent and this is so for very good reasons.

17. For the moment, the formulation of any such *jurisprudence* must be left to academics whilst it should be appreciated that to engage in a form of system creation in this manner or of thinking in academic models is not necessarily objective and free of intellectual prejudice or other bias. It is in any event not the allotted task of the Secretariat to assume the academic mantle and it is not, and could not be staffed for it.

18. The Secretariat should not have a policy or view in these matters but respect the authority and independence of the Arbitral Tribunals and *ad hoc* Committees which must find the law on the basis of the facts as they present themselves to them. This does not, of course, rule out that earlier cases may have persuasive value but it is for the relevant Tribunal or *ad hoc* Committee to decide in each instance, taking into account the submissions of the parties.

19. Submissions by the Secretariat, whatever the intention, are here legally irrelevant and no more than unsolicited opinion. Not being subject to examination by the parties, they cannot carry any weight.

20. Decisions of this nature are also not legal textbooks or preachers' manuals and *ad hoc* Committees or Tribunals should not make them so in the reasoning. In any event, I do not believe that parties can be asked to pay for such exercises which make the opinions ever longer and more unmanageable or even muddled and do not do the international arbitration practice any favours. We are here primarily to solve a problem for the parties, not for others in the present or the future, and do not operate in this regard as ordinary judges.

21. In sum, the Secretariat is not the fourth member of ICSID Tribunals or *ad hoc* Committees and is not an interested party in any other way. It also does not have powers of scrutiny in the manner of the ICC Court. Although in practice it acts as appointing authority - in the case of *ad hoc* Committees of all Members - these Committees do not thereby become the extension of the Secretariat.

22. The potentially close interconnection in the present practices of the Secretariat between furthering its own role and its powers of appointment requires scrutiny and these practices themselves greater transparency. It lifts the question of the independence of *ad hoc* Committee Members and Arbitrators appointed by ICSID to the institutional level within ICSID. What is particularly necessary is that any semblance of collusion between the Secretariat and the Arbitrators or Committee Members it effectively appoints is avoided.

23. In short, it is urgent that the Secretariat clarifies its own role, which under the Convention, Administrative and Financial Regulations, and Arbitration Rules can be no more than one of support, respects and reinforces the privacy and secrecy of the deliberations of the *ad hoc* Committees or Tribunals, separates itself entirely and meticulously from the substance of the proceedings, appreciates that in legal matters wording is substance, organizes itself accordingly, and seeks financial support for this limited role only.

24. To conclude, the key issue in this annulment case was foremost the issue of independence of Arbitrators in the Second Award, but it became also an issue of the

independence of the Members of the Second *ad hoc* Committee and, in that context, of the privacy and secrecy of their deliberations and drafts.

25. What hovers over all of this is the potentially pernicious impact of the desire for (re)appointment in many, not least for financial gain, in which not only withholding from the parties relevant information, as was the subject of the decision of this *ad hoc* Committee, but also incurring the favour of the Secretariat, may be important issues in terms of independence. Recently, the world has been rightly dismayed at the complete lack of judgment in grasping senior bankers. Whatever the rights or wrongs in this case, it may serve as a serious warning, also for ICSID arbitrators.

26. If the self-cleansing forces in the international arbitration system are no longer sufficiently strong, and if there is thus a need for closer supervision of Arbitrators and *ad hoc* Committee Members, this would not be the task of the ICSID Secretariat, which itself should be properly supervised, but must come from a treaty change probably involving the creation and operation of a specialised *international court* which might also function as ultimate supervisor and referee in international commercial arbitrations (including challenges and recognition issues) where similar needs may increasingly exist.

Prof. Jan Hendrik Dalhuisen
Member of the *ad hoc* Committee
Date: July 30 2010