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

IN THE PROCEEDING BETWEEN

HUSSEIN NUAMAN SOUFRAKI,
Claimant

and

THE UNITED ARAB EMIRATES
Respondent

ICSID Case No. ARB/02/7

DECISION OF THE *AD HOC* COMMITTEE ON THE APPLICATION FOR ANNULMENT OF MR. SOUFRAKI

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Professor Brigitte Stern

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1. PROCEDURAL HISTORY OF THE PRE-ANNULMENT CASE: ICSID CASE NO. ARB/02/7

A. The factual and procedural aspects of the case

1. On 4 November 2004, pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"), Mr. Hussein Nuaman Soufraki ("Mr. Soufraki" or "Claimant") submitted a Request for annulment (the "Application" or "Request for annulment") of the Arbitral Award issued on 7 July 2004 (the "Award"), in the case *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7) to the Secretary-General of ICSID.

2. By letter of 18 January 2005, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee had been constituted and was composed of Judge Florentino Feliciano, Dr. Omar Nabulsi and Professor Brigitte Stern. The Parties were further notified that Judge Florentino Feliciano had been designated President of the Committee.

3. The Award whose annulment is requested was rendered in a case initiated by a Request for arbitration submitted on 16 May 2002 against the United Arab Emirates ("U.A.E." or "Respondent") by Mr. Soufraki, a natural person describing himself as an Italian national and invoking his right as such to present a claim under the ICSID Convention and the Bilateral Agreement between the Government of the Italian Republic and the Government of the United Arab Emirates for the Protection and Promotion of Investments (the "Italy-U.A.E. BIT" or "BIT"), which had entered into force on 29 April 1997.[1] The case was decided by an ICSID Arbitral Tribunal (the "Tribunal"), composed of Mr. L. Yves Fortier, as President, Judge Stephen M. Schwebel and Dr. Aktham El Kholy as Members.

4. The dispute concerned a concession agreement, dated 21 October 2000 (the "Concession Contract"), between the Dubai Department of Ports and Customs and the Claimant, who was described in the Concession Contract as a Canadian national. Sheikh Mohammed bin Rashid Al Maktoum, the Crown Prince, issued a letter declaring that Mr.

[1] The Treaty was concluded on 22 January 1995, and entered into force on 29 April 1997.

Soufraki was entitled to the full concession over the Port "for the purpose of development, management and operation for thirty years with effect from the date of the signing" of the Concession Contract. Subsequently, a dispute arose regarding cancellation by the Respondent of the Concession Contract, and Mr. Soufraki submitted the dispute to an ICSID tribunal, claiming that the U.A.E. had committed a violation of the BIT's guarantees to Italian investors. Mr. Soufraki provisionally estimated his damages as being between US$580 million and US$2.5 billion.

5. The Concession Contract referred to Mr. Soufraki as "a Canadian national and proprietor of HNS Group and other companies in Canada and Europe." The U.A.E. raised objections to Mr. Soufraki's standing to invoke, as an Italian, the Italy-U.A.E. BIT. Because of the discrepancy between the nationality asserted by Mr. Soufraki in the Concession Contract and the nationality claimed in order to avail himself of the Italy-U.A.E. BIT for the purposes of ICSID arbitration, the U.A.E. raised an objection to the Tribunal's jurisdiction, challenging Mr. Soufraki's standing under the BIT. Pursuant to ICSID Arbitration Rule 41, the Tribunal bifurcated the arbitration in order to hear the U.A.E.'s objection to jurisdiction as a separate preliminary matter.

6. The jurisdictional proceedings lasted from December 2002 to July 2004. During an initial phase, two sets of memorials were, in accordance with normal practice, exchanged between the Parties, and a Hearing on jurisdiction took place in May 2003. At the initial session with the Tribunal on 20 December 2002, the U.A.E. noted that the Concession Contract referred to Mr. Soufraki as Canadian, and requested him to produce a formal certificate of nationality from Italian authorities supporting his claim to be Italian. The U.A.E. thus first requested proof of the Italian nationality of Mr. Soufraki and, in case this evidence would be provided, indicated that it would nonetheless present a jurisdictional objection on the basis of the international law theory of "effective nationality." The U.A.E. claimed that Mr. Soufraki's links with the Republic of Italy were so limited that he was not entitled to invoke the BIT for purposes of an ICSID claim.

7. Mr. Soufraki presented five official certificates of nationality issued by Italian officials:

- The first certificate of nationality dated 12 September 1988, and issued by the Municipality of Massarosa, certified that Mr. Soufraki "is in possession of Italian citizenship."

- The second certificate of nationality dated 7 October 2002, and again issued by the Municipality of Massarosa, certified that Mr. Soufraki had been registered in the Register of Italian Citizens Residing Abroad (the AIRE) since 1 July 1990, stated that he was permanently residing in Monte Carlo and concluded: "when he left this country on 1st July 1990, he is in possession of Italian citizenship."

- The third certificate of nationality dated 9 January 2003, also issued by the Municipality of Massarosa, recited the fact of Mr. Soufraki's registration in the AIRE, stated that he was permanently residing in Dubai and concluded: "when he left this country on 15th December 1988, he is in possession of Italian citizenship."

- The fourth certificate of nationality dated 14 April 2003, and issued by the Italian Consul General in Monaco, recorded Mr. Soufraki as being resident in Monaco and certified that he is an Italian citizen.

- The fifth certificate of nationality dated 5 May 2003, two days before the Hearing before the Tribunal on 7 May 2003, and produced at the Hearing, was issued by the Italian Consul General in Istanbul and certified that "based on the records of our office," Mr. Soufraki, who had resided in Istanbul since 28 April 2003 – *i.e.* six days before the date of issuance of the certificate – "is an Italian citizen."

As the three first certificates only gave indication as to Mr. Soufraki's citizenship before he became Canadian, the Tribunal considered them of no evidentiary value for his case. Therefore, the only pertinent certificates are the fourth and fifth.

8. During the initial jurisdictional phase, before it became clear that Mr. Soufraki had lost his Italian nationality according to the applicable Italian law when he acquired Canadian nationality, the discussion before the Tribunal focused on the effectiveness of his claimed Italian nationality. After the exchange of Post-Hearing Memorials on jurisdiction, the Tribunal ordered Mr. Soufraki to present an affidavit on unclear aspects of his status. He was then cross-examined in a Hearing on 12 March 2004, which was followed by submission of Post-Hearing Memorials.

9. During the initial phase of the case, the key question was the international law issue of whether Mr. Soufraki's claimed Italian nationality was effective and dominant over his Canadian nationality for purposes of the ICSID Convention and the BIT. To prove that he had stronger links with Italy than with Canada, the Claimant summarized all his periods of residence in Italy in his Reply Memorial dated 3 March 2003, as follows:

> - "… the Claimant has not taken permanent residence in Italy for longer than two years at a time. However:
> - in 1983-1984 the Claimant had the day to day management of the Fratelli Benetti shipyard in Viareggio;
> - in 1988 the Claimant resided permanently in Massarosa and is recorded as so doing in official records; and
> - during subsequent frequent stays in Italy, the Claimant stays at his own hotel in Viareggio, the American Hotel, which is not documented."

10. The date of the acquisition of Mr. Soufraki's Canadian nationality was disclosed in the Claimant's Reply Memorial. The Respondent thereupon presented a new challenge to Mr. Soufraki's standing before the ICSID Tribunal, based this time not on ineffectiveness of his Italian nationality, but on the simple inexistence of such nationality. This challenge was supported by a Legal Opinion of Professor Giorgio Sacerdoti dated 24 March 2004.

11. Professor Sacerdoti's opinion analyzed the two relevant successive Italian Laws on Nationality and their consequences for the Claimant's case, these two laws having quite different provisions in case of acquisition by an Italian national of another nationality. The Law of 13 June 1912, in force when Mr. Soufraki acquired his Canadian nationality, provided that in case of acquisition of another nationality, the Italian nationality of the person acquiring another nationality was automatically lost. This law was replaced by the Law of 5 February 1992, which entered into force on 16 August 1992. The Law of 1992 adopted a different approach towards the acquisition of another nationality by an Italian citizen, as it admitted dual nationality and no longer provided for loss of Italian citizenship in case of acquisition of a foreign nationality. The Law of 1992 also allowed those who had lost their Italian nationality under the 1912 Law to reacquire it under two alternative conditions: either by making a declaration before a certain date, or by taking up residence in Italy for one year.

12. The questioning by the Respondent of the existence of his Italian nationality prompted a new account of his situation by the Claimant. In answering the first challenge – ineffectiveness – to his Italian nationality, Mr. Soufraki gave an account of his situation

which had some implications for the second challenge to his Italian nationality – inexistence. In his Reply Memorial, as cited in paragraph 8 of the Tribunal's Award, no "one year residence" is mentioned as having taken place in 1993-1994, but only some "stays" after 1988. Later, however, on May 2, 2003, Mr. Soufraki submitted new evidence to show, *for the first time*, that he had been resident in Italy during the period from January 1993 to April 1994. That evidence consisted of an affidavit of Messrs. Casini and Nicotra, Mr. Soufraki's two close associates, a lease for an office space, and an agreement for free accommodation with his lawyer, Mr. Picchi, dated August 1988. Mr. Soufraki did not attend the Jurisdiction Hearing that took place on 7 May 2003. The Tribunal then decided to get more information and, on 5 August 2003, requested an affidavit from the Claimant himself, to straighten out his account of his situation and give him a chance to prove his entitlement under the BIT.

13. No adequate clarification was provided by the affidavit given by Mr. Soufraki on 9 September 2003, where he stated: "I very much deplore the necessity to prove that I am who I am." And he added that: "the Italian Foreign Ministry has confirmed that it supports my right, as an Italian citizen, to pursue this arbitration under the Italy-U.A.E. bilateral investment treaty."[2] The affidavit provided, *inter alia*, the following information:

> "I was born in Derna, Libya in 1937. At that time Libya was an integral part of the then Kingdom of Italy";
> After having received for the first time an Italian passport in 1988, "I formally moved my residence to Monaco, principally for tax reasons";
> "I obtained my Canadian nationality in 1990."

In his affidavit, there is mention of residence in Monaco but not of residence in Italy nor of permanent residence in Dubai. Also, it is worth noting that certain gaps and potential inconsistencies appear on the face of the five certificates produced by Mr. Soufraki concerning his residence: for example, the certificate dated 7 October 2002 stated that he is permanently residing in Monaco "as at the date of his departure on July 7, 1990", while the certificate dated 9 January 2003 provided that he was permanently residing in Dubai "in the date" he left Italy on December 15, 1988.

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[2] The letter of the Ministry of Foreign Affairs was presented to the Tribunal on the day of the Hearing on jurisdiction, 7 May 2003. It should be mentioned that in any case it is not for the Italian Ministry to decide whether a person has a right to ICSID arbitration, as this is a decision for the Tribunal.

In respect of his claimed residence in Italy during the year 1993-1994, Mr. Soufraki stated for the first time in his letter to the Tribunal of May 2, 2003 that "(f)rom March 1993 until April 1994 I had made Viarregio/Massaroa the sole place for my personal and business activities, although of course I traveled extensively." Mr. Soufraki's travels to the U.A.E., especially between 23 April-3 May 1993, 4-10 October 1993, 25-30 October 1993, were all done with his Canadian passport, on which he had a U.A.E. visa granted in April 1993. During the Cross-examination Hearing held on 12 March 2004, Mr. Soufraki added: "… our main home is in London, Avenue Route, Number 37 Avenue Route,'Saint Johns Wood'. That's where we lived" … "The family home sir, whether I'm in Canada, the Emirates or whatever it is, my main, main family home where I have raised all my children since 1979 is London."[3]

B. The Award of the Tribunal

14. The Tribunal found that it lacked jurisdiction to hear the dispute, and, therefore, declined to decide the case on its merits. As the Tribunal came to the conclusion that the Claimant did not have Italian nationality, it did not need to rule on the effectiveness of that nationality.

15. The Award of the Tribunal principally dealt with the following points:

- The Tribunal under Article 41(1) of the ICSID Convention, « shall be the judge of its own competence."[4]
- This competence is determined by Article 25(2)(a) of the Convention, which refers to "a national of a Contracting State," and Article 1(3) of the BIT, which defines an "investor of the other Contracting State" as a "natural person holding the nationality of that State in accordance with its law."[5] In other words, under the ICSID Convention and the BIT, the Tribunal had jurisdiction to hear the dispute only if the Claimant was on the pertinent dates an Italian national.[6]

[3] Transcript of Cross-examination of Mr. Soufraki dated 12 March 2004, pp.163-164.
[4] Award, para. 21.
[5] Award, para. 23. In fact, the BIT refers to "the laws" and not the "law".
[6] Award, paras. 21-23.

- The Tribunal had to verify whether or not the Claimant was an Italian national according to Italian laws. For this purpose, the questions that the Tribunal had to address were set out in paragraph 47 of the Award:

> "The Tribunal must decide:
> (1) whether Claimant, prior to 1991, was an Italian national;
> (2) if so, whether Claimant lost his Italian nationality when he acquired Canadian nationality and took up residence in Canada in 1991;
> (3) whether Claimant reacquired automatically his Italian nationality according to Italian law after 1992;
> (4) whether questions of Italian nationality are within the exclusive and dispositive competence of Italy or whether the Tribunal is entitled to look behind the passports, identity cards, certificates and assurances issued by Italian authorities certifying the Italian nationality of Mr. Soufraki."[7]

16. In appraising the evidence before it, the Tribunal referred to the international rules of evidence that it considered it had to follow: "What weight is given to oral or documentary evidence in an ICSID arbitration is dictated solely by Rule 34(1) of the ICSID Arbitration Rules."[8] Among the pieces of evidence taken into consideration were the certificates of nationality, which the Tribunal considered merely as "*prima facie* evidence"[9] as well as other evidence submitted by Mr. Soufraki to show residence of one year in Italy, which was one of the alternative conditions for reacquiring the lost Italian nationality. The other evidence consisted of two affidavits, a lease and an agreement for the free use of an apartment. The Tribunal's conclusion was that these elements, taken together, were not sufficient to prove the one year residence in Italy essential for reacquisition of Italian nationality by Mr. Soufraki. The two affidavits produced by the Claimant were not considered as coming from disinterested witnesses or as convincing evidence. Similarly, the lease of office space and the agreement of *comodatum* dated 1988 were not deemed adequate to show that the Claimant had actually resided in Italy at the relevant dates and had the intention of becoming a permanent resident in Italy again.[10]

17. The Tribunal acknowledged that Mr. Soufraki may not have been aware of the loss of his Italian nationality. As stated by the Tribunal:

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[7] It should be noted that the Tribunal, in good logic, should have decided that it was entitled to look into Italian nationality – question 4 – before doing so in addressing questions 1, 2 and 3.
[8] Award, para. 61.
[9] Award, para. 63.
[10] Award, para. 84.

> "(f)or its part, the Tribunal accepts and respects the sincerity of Mr. Soufraki's conviction that he was and remains a national of Italy. However, the terms of Article 8, paragraph 1 of the Italian Law No. 555 of 1912 are clear and leave no room for interpretation. As a consequence of his acquisition of Canadian nationality and residence in Canada, Mr. Soufraki has lost his Italian nationality in 1991, by operation of Italian law."[11]

In fact, Mr. Soufraki admitted that he had not informed any Italian official of his loss of Italian citizenship since he did not realize that he had lost it:

> "Furthermore, the Tribunal notes that, when he was cross-examined, Mr. Soufraki admitted that he had not informed any Italian official of his loss of Italian citizenship since he did not believe that he had lost it."[12]

18. The core issue was whether the Tribunal could make an independent determination of the nationality of the Claimant or whether it was bound by the determination made by the Italian municipal and consular authorities through the different documents, such as passports and certificates of nationality, issued to the Claimant. The answer of the Tribunal to this central question is contained in paragraph 55 of the Award, which is crucial to this annulment proceeding and will therefore be quoted *in extenso*:

> "It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. Article 1(3) of the BIT reflects this rule. But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue."

It is essentially this paragraph that prompted the Request for annulment, as will be seen later.

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[11] Award, paras. 51-52.
[12] Transcript of cross-examination of Mr. Soufraki dated 12 March 2004, pp. 225-226.

2. THE SCOPE OF ANNULMENT PROCEEDINGS, GENERALLY

19. The available grounds for annulment of an ICSID award are set out in Article 52(1) of the ICSID Convention:

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

20. It is not contested by the parties that the annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award. In other words, it is not contested that "... an *ad hoc* committee does not have the jurisdiction to review the merits of the original award in any way. The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings."[13] This has been stressed very recently in the case *MTD Equity and MTD Chile v. Republic of Chile*:

> "Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal."[14]

A. The standards of interpretation

21. Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty.[15]

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[13] L. Reed, J. Paulsson and N. Blackaby, *Guide to ICSID Arbitration*, The Hague, Kluwer, 2004, p. 99.

[14] *MTD Equity and MTD Chile v. Republic of Chile* (hereafter *MTD Chile*), Decision on Annulment, 21 March 2007, (Case No. ARB/01/07), para. 31, available at http://ita.law.uvic.ca/documents/MTD-Chile_Ad_Hoc_Committee_Decision.pdf

[15] See, for a similar position, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (Case No. ARB/81/2), Decision on Annulment, 3 May 1985 (hereafter *Klöckner I*), 2 *ICSID Reports*, p. 97, para. 3 (English translation of French original); *Amco Asia Corporation and others* v. *Republic of Indonesia*, (Case No. ARB/81/1), Decision on Annulment, 16 May 1986 (hereafter *Amco*

22. Some commentators have suggested that in case of doubt, an annulment committee should decide in favor of the validity of the award. Such presumption, however, finds no basis in the text of Article 52 and has not been used by annulment committees. This *ad hoc* Committee will interpret Article 52 in accordance with the principles of interpretation of international treaties, embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties,[16] which call for an examination of the ordinary meaning of the words of the treaty, read in their context, and in the light of the object and purpose of the treaty involved, in this case the ICSID Convention.[17]

23. In the view of the *ad hoc* Committee, the object and purpose of an ICSID annulment proceeding may be described as the control of the fundamental integrity of the ICSID arbitral process in all its facets. An *ad hoc* committee is empowered to verify (i) *the integrity of the tribunal* – its proper constitution (Article 52(1)(a)) and the absence of corruption on the part of any member thereof (Article 52(1)(c)); (ii) *the integrity of the procedure* – which means firstly that the tribunal must respect the boundaries fixed by the ICSID Convention and the Parties' consent, and not manifestly exceed the powers granted to it as far as its jurisdiction, the applicable law and the questions raised are concerned (Article 52(1)(b)), and secondly, that it should not commit a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) *the integrity of the award* – meaning that the reasoning presented in the award should be coherent and not contradictory, so as to be understandable by the Parties and must reasonably support the solution adopted by the tribunal (Article 52(1)(e)). Integrity of the dispute settlement mechanism, integrity of the process of dispute settlement and integrity of solution of the dispute are the basic interrelated goals projected in the ICSID annulment mechanism.

I), 1 *ICSID Reports*, pp. 515-516, para. 23; *Maritime International Nominees Establishment v. Republic of Guinea* (Case No. ARB/84/4), Decision on Annulment, 22 December 1989 (hereafter *MINE*), 4 *ICSID Reports*, p. 85, paras. 4.04-4.05; *Wena Hotels Ltd v. Arab Republic of Egypt* (Case No. ARB/98/4*)*, Decision on Annulment, 5 February 2002, (hereafter *Wena*), 6 *ICSID Reports*, p. 129, para. 18; *Compania de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* (Case No. ARB/97/3), Decision on Annulment, 3 July 2002 (hereafter *Vivendi*), 6 *ICSID Reports*, 2004, p. 327, para. 62. See also Gabrielle Kaufmann-Kohler: "It is well established that the interpretation of the annulment grounds should be neither extensive, nor restrictive, but merely reasonable.", "Annulment of ICSID Awards in Contracts and Treaty Arbitration: Are There Differences?" *in* E. Gaillard and Y. Banifatemi (eds.), *Annulment of ICSID Awards*, Huntington, N.Y, Juris, 2004, p. 191.

[16] Vienna Convention on the Law of Treaties, January 27, 1980, 1155 *UNTS*, p. 331, available at http://www.un.org/law/ilc/texts/treaties/htm.

[17] Article 31(1) of the Vienna Convention: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

B. The role of an *ad hoc* Committee

24. The three goals which the ICSID annulment mechanism seeks to secure – integrity of the tribunal, integrity of the procedure and integrity of the award – shape the annulment process itself and make it an important and serious matter. An *ad hoc* committee is responsible for controlling the overall integrity of the arbitral process and may not, therefore, simply determine which party has the better argument. This means that an annulment, as already stated, is to be distinguished from an ordinary appeal, and that, even when a ground for annulment is justifiably found, an annulment need not be the necessary outcome in all circumstances. It is true that one of the differences between annulment and appeal lies in their outcome. In a successful appeal, the appellate tribunal can reverse the initial decision and correct the solution. In a successful application for an annulment, the result can only be the invalidation of the original decision, not its correction. This being said, the *ad hoc* Committee considers that, with regard to the reasoning of the award, if the Committee can make clear – without adding new elements previously absent – that apparent obscurities are, in fact, not real, that inadequate statements have no consequence on the solution, or that succinct reasoning does not actually overlook pertinent facts, the Committee should not annul the initial award. For example, as regards the ground that the award has failed to state the reasons on which it is based, if the *ad hoc* Committee can "explain" the Award by clarifying reasons that seemed absent because they were only implicit, it should do so.

25. It is well known that the first *ad hoc* committee declined to play that proactive role, stating that:

> "… the Award in no way allows the *ad hoc* Committee or for that matter the Parties to reconstitute [reconstruct?] the arbitrators' reasoning in reaching a conclusion that is perhaps ultimately perfectly justified and equitable (and the Committee has no opinion on this point) but is simply asserted or postulated instead of being reasoned."[18]

The overcautious approach on this particular point has not been followed by other *ad hoc* committees, such as the one in *MINE*:

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[18] *Klöckner I*, 2 *ICSID Reports*, p. 149.

> "An *ad hoc* Committee retains a measure of discretion in ruling on applications for annulment. To be sure, its discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. It may, however, refuse to exercise its authority to annul where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards."[19]

26. In *Vivendi*, the *ad hoc* committee suggested that only for weighty reasons should an ICSID award be annulled and that the committee can provide the apparently missing reasoning, if it is reasonably implied: "… the Committee must take great care to ensure that the reasoning of an arbitral tribunal is clearly understood, and must guard against the annulment of awards for trivial cause."[20]

27. The *ad hoc* Committee believes that annulment is usefully reserved "for egregious violations of … basic principles while preserving the finality of the decision in most other respects."[21]

28. It is only in exceptional cases – like the case under scrutiny – that ICSID tribunals have to review nationality documentation issued by state officials. This is explained by Oppenheim, who wrote that international tribunals are empowered to delve into issues of nationality, but only when there are strong reasons to doubt the accuracy of the official documents:

> "An international tribunal called upon to apply rules of international law based upon the concept of nationality has the power to investigate the state's claim that a person has its nationality. However, *this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only not manifestly groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that nationality*."[22]

29. It is with these considerations in mind that the *ad hoc* Committee begins its analysis of the grounds for annulment invoked by the Claimant.

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[19] *MINE*, para. 4. 10; *Wena*, paras 81 and 83; *Vivendi*, para. 66; *Seychelles*, para. 37.
[20] *Vivendi*, para. 63.
[21] Ch. Schreuer, *The ICSID Convention: A Commentary*, Cambridge, Cambridge University Press, 2001, pp. 892-893.
[22] R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., Harlow, Longman, 1992, p. 855. Emphasis added.

3. GROUNDS FOR ANNULMENT ASSERTED BY THE CLAIMANT

30. The Claimant invokes two of the grounds for annulment listed in Article 52(1) of the ICSID Convention. He submits that the Award must be annulled because of a manifest excess of power by the Tribunal and its failure to state reasons. However, the precise formulations of what is actually being attributed to the Tribunal under these two general headings tended to vary during the annulment proceedings and will therefore be restated as chronologically presented.

A. The different presentations of the grounds for annulment

31. In its Request for annulment, the Claimant first invokes Article 52(1)(b) of the Convention and states that the Tribunal had manifestly exceeded its powers in two ways: (i) it had assumed a jurisdiction it did not possess and; (ii) it had declined to exercise a jurisdiction it did possess. Secondly, the Claimant asserts violation of Article 52(1)(e), claiming that the Tribunal had failed to state reasons for its Award:

> "… the Tribunal 'manifestly exceeded its jurisdiction' in the sense of Article 52(1)(b) of the ICSID Convention, in two respects: first, it arrogated to itself a jurisdiction, which it did not possess to override or review the decisions of the Italian authorities in the application of Italian nationality laws and, secondly, it failed to exercise the jurisdiction, which it did possess to determine the merits of the claim. Moreover, the Tribunal failed to provide any legal basis for its decision to apply Italian nationality law, thereby exposing the Award to the ground of annulment in Article 52(1)(e)."[23]

32. In his subsequent submissions, the arguments of Mr. Soufraki under the first ground of annulment were somewhat elaborated on and a third complaint was presented under the heading of "manifest excess of power," *i.e.* failure to apply the proper law.

B. The admissibility of the different grounds for annulment

33. A preliminary question that must be examined is whether all the grounds for annulment were properly introduced in the Application. It is indeed accepted that because of the existence of strict time limits in the ICSID Convention, a new ground for annulment

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[23] Award, para. 10.

cannot in principle be admitted in the course of the proceedings, while of course new arguments fleshing out grounds already admitted can be developed.

34. The Committee examined whether the contention that the Tribunal also exceeded its powers by failure to apply the proper law, as presented separately in the Claimant's Memorial, was a new ground for annulment, or whether it could be considered as encompassed in the Application. Given the actual wording of the Application, the *ad hoc* Committee is satisfied that this claim [failure to apply the proper law] was already present therein, although intermingled with the assumption that the Tribunal had no jurisdiction to assess the Claimant's nationality. The first modality of manifest excess of power attributed by the Claimant to the Tribunal was expressed in the following terms: "First, it assumed a jurisdiction which it did not possess to apply Italian law in a manner radically at odds with the way it had been applied by the competent Italian authorities." It is clear to the Committee that this may, without excessive violence to words, be regarded as a reference both to the alleged inexistence of a power to determine the Claimant's nationality and to the failure to apply the proper law.

35. Despite the changes in the presentation of the Claimant's allegations, the *ad hoc* Committee believes that four distinguishable, albeit sometimes overlapping, arguments have been made under the two grounds for annulment provided for in Article 52(1)(b) and Article 52(1)(e), manifest excess of power and failure to state reasons. The Committee will deal with these contentions of the Claimant in its own order, and answer *seriatim* four questions:

1. *Did the Tribunal manifestly exceed its powers in exercising a power it did not have?* In other words, did it manifestly exceed its powers in asserting a power of ascertainment of the Claimant's nationality by going behind official state documents, a power which the Tribunal in Mr. Soufraki's case did not possess?

2. If the answer to the first question is no, *did the Tribunal manifestly exceed its powers in failing to apply the proper law* to the determination of Mr. Soufraki's nationality?

3. *Did the Tribunal manifestly exceed its powers in not exercising a power it did have?* In other words, did it exceed its powers in failing to exercise a jurisdiction it had in the case of Mr. Soufraki, as it wrongly decided that the Claimant was not Italian under Italian law?

4. *Did the Tribunal fail to state reasons in support of the conclusions reached in its Award?*

36. That rigorous separation of these different claims is scarcely feasible is attested to by the different ways in which they were presented to the *ad hoc* Committee during the course of the proceedings. However, these claims raise different problems which have all to be addressed independently. For instance, while the second question is linked to the first one, it is also different. If the *ad hoc* Committee considers that there is an excess of power because the Tribunal should have accepted the certificates of nationality as conclusive, this would be the end of the inquiry. However, if, to the contrary, the *ad hoc* Committee considers that the Tribunal had the power to assess the certificates of Italian nationality for the purposes of ICSID jurisdiction, it could still find a manifest excess of power in considering whether the Tribunal had failed to apply the proper law. The third question is probably a less "autonomous" question, as it necessarily implies that an affirmative answer has already been given to the first and/or the second question, and this is probably also attested to by the fact that the Claimant refrained from discussing the third question in its Post-Hearing Memorial. Also, it is quite evident that some arguments can be made either under one or the other ground for annulment. For example, a failure to deal with a question that was raised by the Parties can be considered as an excess of power, in the sense of a failure to use an existing power, or alternatively as a failure to state reasons. Where an argument presented by Mr. Soufraki has been analyzed under the two alleged grounds, or under different aspects of an alleged ground, the *ad hoc* Committee, in the interest of judicial economy, will dispose of it primarily under one ground or one aspect thereof and refer to it only briefly under the second ground, or second aspect of the same ground, adding a few more comments when necessary.

4. MANIFEST EXCESS OF POWER: ARTICLE 52(1)(B), GENERAL CONSIDERATIONS

A. The boundaries of the authority of ICSID tribunals

37. The notion of manifest excess of power implies that a tribunal has stepped entirely outside the scope of its authority. The *ad hoc* Committee has to determine whether the Tribunal manifestly disregarded the boundaries of its powers. Those boundaries are defined by objective criteria set out in the ICSID Convention, more precisely (a) in Article 25 relating to jurisdiction and (b) in Article 42 dealing with the applicable law, as well as (c) by subjective limits set by the Parties' consent. The basic architecture of ICSID arbitration consists of:

- the core elements of ICSID jurisdiction as set out in Article 25 that cannot be dispensed with either by the Parties' mutual consent, or by the unilateral decision of one of the Parties;
- the rule on the applicable law embodied in Article 42, which is binding on the tribunal and relies in part (Article 42, first sentence) on the Parties' choice or consent; and last but not least,
- the issues put to the tribunal for its decision that are in the Parties' discretion.

Thus, the structure within which an ICSID tribunal has to remain is defined by three elements: the imperative jurisdictional requirements,[24] the rules on applicable law, and the issues submitted to the arbitral tribunal. In respect of these three elements, the tribunal is bound not to manifestly exceed its powers.

B. The meaning of "manifest"

38. The *ad hoc* Committee turns now to the meaning of "manifest" in the context of ICSID annulment proceedings. Divergent views have been expressed on the meaning and scope of this concept by the Parties in this case. The Claimant has emphasized the "seriousness" of the excess of power, while the Respondent has insisted that a manifest

[24] For example, one of these jurisdictional requirements is that a dual national having both the nationality of the State party to the arbitration and another nationality cannot have standing before an ICSID tribunal. The Report of the Executive Directors on the Washington Convention of 18 March 1965 stated in para. 29, "this ineligibility is absolute and cannot be cured even if the State party to the dispute has given its consent."

excess has to be an "obvious" excess. In his Reply Memorial, the Claimant argued that a manifest excess of power has to be a serious departure from the granted powers, a departure capable of making a difference in the result reached by the Tribunal.[25] In its Counter-Memorial, the Respondent asserted that "(t)he word 'manifest' denotes not so much the *gravity* or degree of the excess, but indicates that the excess of power must be *obvious*. A manifest excess of power is one that may be recognized with little effort."[26]

39. The *ad hoc* Committee considers that the term "manifest" is a strong and emphatic term referring to obviousness. In its dictionary meaning,[27] "manifest" is substantially equivalent to "clear," "plain," "obvious," "evident":

> "- what is clear can be seen readily;
> - what is obvious lies directly in our way, and necessarily arrests our attention;
> - what is evident is seen so clearly as to remove doubt;
> - what is manifest is very distinctly evident."

In *Wena*, the *ad hoc* committee stated:

> "The excess of power must be *self evident rather than the product of elaborate interpretations one way or the other*. When the latter happens the excess of power is no longer manifest." [28]

The same approach was adopted by the *ad hoc* committee in *CDC v. Seychelles*, which stated that:

> "… even if a Tribunal exceeds its powers, *the excess must be plain on its face for annulment to be an available remedy*. Any excess apparent in a Tribunal's conduct, if susceptible of argument "one way or the other," is not manifest."[29]

It has been suggested by scholarly commentators that "it should not take a hundred pages to explain whether there has been a *manifest* excess of power, let alone to examine whether or not there has been a *failure* to state reasons."[30]

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[25] Claimant's Reply Memorial, paras 124-128.
[26] Respondent's Counter-Memorial, para. 177, emphasis in the original. However, there seems to have been an evolution in the Respondent's position, as it has been last stated in the Respondent's Post-Hearing Memorial that "'*(m)anifest*' is not concerned with the clarity of the decision. It is concerned with the *extent* of the excess of power. It is a qualitative matter," para. 59. Emphasis in the original.
[27] *Webster's Revised Unabridged Dictionary*, 1913.
[28] Respondent's Counter-Memorial, para. 25. Emphasis added.
[29] *Wena*, para. 41. Emphasis added. See also Ch. Schreuer: "An excess of powers is manifest if it can be discerned with little effort and without deeper analysis," *op. cit*. note 21, p. 933.
[30] J. Paulsson, "ICSID's Achievements and Prospects," 6 *ICSID Review – Foreign Investment Law Journal*, 1991, p. 380, at p. 392, emphasis in the original.

40. The *ad hoc* Committee, without insisting on particular rhetoric, agrees with the above approach. At the same time, the Committee believes that a strict opposition between two different meanings of "manifest" – either "obvious" or "serious" – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.

C. The meaning of "excess of power"

41. The *ad hoc* Committee must also ascertain what the concept of "excess of power" encompasses. To exceed the scope of one's powers means to do something beyond the reach of such powers as defined by three parameters, the jurisdictional requirements, the applicable law and the issues raised by the Parties.

42. Firstly, it can be said that there is an excess of power if a tribunal acts "too much." There is, in principle, an excess of power if a tribunal goes beyond its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis*. There is an excess of power if the tribunal:

- asserts its jurisdiction over a person or a State in regard to whom it does not have jurisdiction;
- asserts its jurisdiction over a subject-matter which does not fall within the ambit of the jurisdiction of the tribunal;
- asserts its jurisdiction over an issue that is not encompassed in the consent of the Parties.

43. Secondly, it has also been considered that there is an excess of power if a tribunal acts "too little" with regard to the same three parameters; it does not accept and exercise the powers granted to it and fails to fulfill its mandate. The *manifest* and *consequential* non-exercise of one's full powers conferred or recognized in a tribunal's constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as the overstepping of the limits of that power. The *ad hoc* committee in *Vivendi* explained this principle as follows:

> "It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b)."[31]

44. Thus, there is also an excess of power if the tribunal does "too little," as far as its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis* is concerned. There is an excess of power if the tribunal:

- does not exercise its jurisdiction over a person or a State in respect of whom it does have jurisdiction;
- does not exercise its jurisdiction over a matter that does fall within the ambit of the jurisdiction of the Centre;
- does not exercise its jurisdiction over a question that is encompassed in the consent of the Parties.

This means, for example, that a tribunal would manifestly exceed its powers if it did not exercise its jurisdiction over a company which has to be considered as a foreign investor under Article 25(2)(b) to which the BIT offers a recourse to ICSID arbitration. This means also, as far as a question posed to the tribunal is concerned, that a manifest excess of power would consist in answering some other question not raised by the parties, or in answering only a part of a question in fact raised by the parties.

45. Thirdly, one must also consider that a tribunal goes beyond the scope of its power if it does not respect the law applicable to the substance of the arbitration under the ICSID Convention. It is widely recognized in ICSID jurisprudence that failure to apply the applicable law constitutes an excess of power. The relevant provisions of the applicable law are constitutive elements of the Parties' agreement to arbitrate and constitute part of the definition of the tribunal's mandate.

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[31] *Vivendi*, para. 86.

46. The Claimant has argued that the Tribunal committed a manifest excess of power in the above mentioned three respects:

1. There was an assertion of power by the Tribunal to make its own determination on nationality, which it did not have;
2. Moreover, in wielding this power – that it did not posses – the Tribunal failed to apply the proper, Italian, law;
3. Because it wrongly applied Italian law, it denied its jurisdiction and therefore the Tribunal also exceeded its powers in not exercising its extant jurisdiction.

The *ad hoc* Committee will deal successively with these arguments of the Claimant in addressing the four questions raised in paragraph 35.

5. DID THE TRIBUNAL MANIFESTLY EXCEED ITS POWERS IN EXERCISING A POWER IT DID NOT HAVE?

A. The contentions of the Parties

47. The Claimant's fundamental proposition can be summarized as an insistence that national authorities should have the last word on the nationality of their citizens under their own laws, except in extremely limited circumstances. Claimant has acknowledged that international tribunals may consider whether the nationality bestowed by national authorities is sufficient for international law purposes, *i.e.* whether it has been granted in breach of international law or is not effective, as required by the International Court of Justice in the *Nottebohm* case. Mr. Soufraki concedes that, in addition to these exceptions based on international law, fraud can also be invoked by an international tribunal to disregard official documents granting or acknowledging a nationality in proceedings before it. However, in the absence of such international law objections, and failing any assertion that nationality documents are fraudulent or were obtained by fraud, it is not permissible, according to the Claimant, for tribunals to disregard these official documents. In short, the Tribunal is constrained to accept a State's certificates of nationality or passports, unless it is proven that on the national level the certificate or passport was obtained through fraud, or that on the international level, it should not be recognized because of a contradiction with principles or norms of international law. Thus, Mr. Soufraki's first argument is that, although an ICSID tribunal is competent to determine its own jurisdiction to hear a case, if this jurisdiction rests upon the nationality of the

Claimant, the tribunal must, in most cases and certainly in his case, accept the official Government's documents, such as certificates of nationality or passport, as conclusive evidence of his alleged nationality. The Claimant summed up his position in his Post-Hearing Memorial in the following manner:

> " … in the absence of such international law objections, and in the absence of any assertion that nationality documents are fraudulent or were obtained by fraud, it is not permissible for tribunals to delve behind such documents to determine whether national officials have made an error, or inadequately investigated the facts, or been confused."[32]

48. The principal contention of the Respondent starts from the premises that it is the task of the Tribunal to ascertain its jurisdiction, and that it has to determine for itself in case of doubt the nationality of an investor submitting a claim to ICSID arbitration. The U.A.E. accepts that certificates of nationality can be taken into account, but submits that they are only *prima facie* evidence of nationality, which cannot be conclusive upon the Tribunal, especially when it appears that they were given on the basis of an error of fact or law. The Respondent argues in respect of the scope of the Tribunal's power of determination: firstly, that the Tribunal cannot say that Italian officials may not treat Mr. Soufraki as an *Italian national for domestic purposes*; but, secondly, that it can decide *whether to recognize Mr. Soufraki's Italian nationality on the international level* and whether such nationality may be invoked *for purposes of ICSID proceedings.* In particular, the Respondent considers that an international tribunal may go behind official documentation of nationality where competent national authorities may have conducted a less than full investigation or analysis. The Respondent urges that this is the case here, as there is no evidence that the certificates of nationality – all granted either before the loss of nationality (as a result of the acquisition of the Canadian nationality) or after the coming into force of the new law of 1992 (which no longer implied the loss of Italian nationality upon acquisition of another nationality) – were granted with full knowledge of the precise situation of Mr. Soufraki.

49. In fact, when reduced to their core statements, the Parties' contentions on "manifest excess of power" differ only on one point, but it is a crucial point. It is common ground between the Parties that in exercising its task, the Tribunal had the duty to verify the nationality of the Claimant. They also both agree that the Tribunal could verify that the

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[32] Request for annulment, para. 21.

granting of nationality was in conformity with international law requirements before such nationality can have an effect on the international level. However, the remaining margin of inquiry into the national legal order which is open to the Tribunal, is appreciated differently by the two Parties. For the Claimant, only an allegation of fraud allows an ICSID tribunal to go behind a certificate of nationality granted by national authorities. For the U.A.E., an ICSID tribunal has the power to set aside a certificate of nationality granted by national authorities on more general grounds of errors of fact or erroneous application of national laws committed by such national authorities.

B. The analysis of the *ad hoc* Committee

i. The Tribunal had the competence to decide on its own competence

50. It is a general principle of international law that international tribunals have *compétence-compétence* (*Kompetenz/kompetenz*), *i.e.* that they are competent to determine whether they have jurisdiction over a dispute. This is reflected in Article 41 of the ICSID Convention which provides:

> "The Tribunal shall be the judge of its own competence. Any objection by any party that the dispute is not within the jurisdiction of the Centre … shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question, or join it to the merits of the dispute."

51. *Compétence-compétence* is, of course, not a license for judicial self-levitation. An ICSID tribunal cannot create jurisdiction for itself where none has been granted by the Convention and the Parties to the dispute. According to the ICSID Rules of Arbitration, jurisdiction is dependent upon compliance with the requirements of the ICSID Convention, as embodied in its Article 25(1):

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre. When the Parties have given their consent, no party may withdraw its consent unilaterally."

In order that the Centre may have jurisdiction over a dispute, three conditions must be met under Article 25:

- first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State;
- second, a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment;
- third, a condition *ratione voluntatis*, that is, a condition relating to *consent*: consent must be given by an investor and the Host State in writing.

Unless the parties have conferred jurisdiction on the Centre in accordance with Article 25, an ICSID tribunal lacks competence to hear the case. In this case, the central issue confronting the Tribunal was whether or not Mr. Soufraki could be considered as a "national of another Contracting State," that is, of Italy. As noted earlier, the nationality requirement of the ICSID Convention is an objective requisite that cannot be dispensed with either by the Parties' consent or by a unilateral decision of the State.

52. The *ad hoc* Committee is convinced that the Tribunal did not exceeded its powers in stating that it had to verify Mr. Soufraki's nationality in order to ascertain its competence over the case. The Tribunal said:

> "Under Article 41(1) of the ICSID Convention "the Tribunal shall be the judge of its own competence." Pursuant to that provision and Rule 41 of the ICSID Arbitration Rules, the Tribunal has to decide whether the dispute falls within the jurisdiction of the Centre. The Tribunal must determine whether Claimant is a national of Italy according to Article 25(2)(a) of the Convention and whether Claimant belongs to the class of investors to whom Respondent has offered consent to ICSID arbitration pursuant to the BIT."[33]

ii. The competence of the Tribunal depended on the possession by the Claimant of Italian nationality.

53. As stressed by the ICSID tribunal in *Mihaly v. Sri Lanka*, "(t)he nationality requirement of a claim before an ICSID Tribunal has in each case to be satisfied before an ICSID proceeding can be initiated or even registered."[34]

54. In order to be competent in the case of Mr. Soufraki, the Tribunal had to verify compliance with the nationality requirement of Article 25 of the ICSID Convention,

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[33] Award, para 21.
[34] *Mihaly International Corporation v. Democratic Republic of Sri Lanka*, (Case No. ARB/00/2), Decision, 15 March 2000, 17 *ICSID Review – Foreign Investment Law Journal*, 2002, p. 148, para. 20.

which is to be read alongside the pertinent jurisdictional provisions of the applicable BIT. Article 25(2)(a) of the ICSID Convention reads as follows:

> "(2) "National of another Contracting State" means:
>
> > (a) any natural person who had the nationality of the Contracting State other than the State party to the dispute on the date on which the Parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute."

Article 1(3) of the BIT defines an "investor of the other Contracting State" as a "natural person holding the nationality of that State in accordance with its laws." The combination of these two articles requires that Mr. Soufraki, a natural person, must have been holding Italian nationality in accordance with Italy's laws, on the "date on which the Parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered." Mr. Soufraki therefore had to prove to the Tribunal that he was an Italian national on the relevant dates. If he were unable to do so, it would be a manifest excess of power for the Tribunal to proceed to consider the merits.

55. In the Request for annulment, the Claimant stated that "no international tribunal has the power to grant or withdraw nationality."[35] This is correct, but this is not what the Tribunal did in its Award. The question before the Tribunal was not to grant or withdraw Mr. Soufraki's Italian nationality; it was rather to recognize or not his Italian nationality for international arbitration purposes. There is a notable difference between the *granting* of nationality on the national level – which is a *constitutive* act – and the *recognition* of nationality on the international level, – which is a *declaratory* act. The efficacy on the international level of the declaratory act is contingent upon the conformity of the grant of nationality both with the national law of the State of nationality and international law requirements such as effectiveness. International tribunals have consistently followed this approach and have distinguished between determinations of nationality for domestic law purposes – which they have considered to be reserved entirely for sovereign State officials – and the international effect of nationality determinations, for, *e.g.*, jurisdictional

[35] Request for annulment, para. 62.

purposes in international arbitral systems, which they have considered subject to review in certain limited circumstances.

56. The *ad hoc* Committee considers that the Tribunal correctly stated the applicable general principle, as far as issues of nationality are concerned, in paragraph 55 of the Award:

> "Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue."

iii. The Tribunal had to determine whether Mr. Soufraki possessed Italian nationality in accordance with Italian laws

57. It is clearly within the power, and the duty, of the Tribunal to decide on its jurisdiction and, as a consequence, to verify that Mr. Soufraki possessed Italian nationality, which was a prerequisite to its competence. According to the BIT, Italian nationality must be held or possessed in accordance with the requirements of Italian laws.

58. Both Parties agree that, in determining the nationality of Mr. Soufraki, the Tribunal had to apply Italian law. However, the Claimant asserts that only Italian authorities should be allowed to apply Italian laws on nationality and, therefore, that the certificates of nationality granted by the Italian State must in most cases be conclusive of the existence of Italian nationality according to Italian law. The U.A.E., on the contrary, considers that it is for the Tribunal ultimately to decide whether the application of Italian law warrants the conclusion that the Claimant had an Italian nationality that could be recognized on the international level, *i.e.* for ICSID arbitration purposes. What is at stake here is the extent to which an international tribunal may review and override the views of national authorities to reach, for purposes of ascertaining jurisdiction to proceed to ICSID arbitration, a different conclusion concerning the application of national laws on nationality in respect of a particular person.

59. To begin answering this question, the *ad hoc* Committee notes that it is a general principle that a State does not have the last word when a question is raised before an international tribunal concerning the interpretation of its national law, *when it comes to a question on which the jurisdiction of the Tribunal depends*. In the so called *Pyramids* case,

where the jurisdiction of the Tribunal was dependent on the interpretation of Article 8 of the Egyptian law on investment, the Tribunal was very explicit that:

> "*While Egypt's interpretation of its own legislation is unquestionably entitled to considerable weight, it cannot control the Tribunal's decision as to its own competence.* The jurisprudence of the Permanent Court of International Justice and the International Court of Justice makes clear that *a sovereign State's interpretation of its own unilateral consent to jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues* (*The Electricity Company of Sofia and Bulgaria (Preliminary Objection), P.C.I.J., Series A/B*, p. 64 (1939); *Aegean Sea Continental Shelf, Judgment, I.C.J., Reports 1978*, p. 3). Indeed to conclude otherwise would contravene Art. 41 of the Washington Convention which provides that: "The Tribunal shall be the judge of its own competence."[36]

The solution adopted for the national law governing the unilateral State consent to arbitration applies also as far as a statement on nationality – similarly a unilateral act of the State – is concerned.

iv. The certificates of nationality were not conclusive upon the Tribunal

60. Nationality is of course within the reserved domain of States, and due respect must be given to nationality laws of States. The international Commission in the *Flegenheimer* case referred to the "unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered as vested with its nationality."[37] Every State is sovereign in prescribing its laws on nationality and thus free to adopt rules based on *jus sanguinis* or *jus soli* or any combination thereof, which must be satisfied by an individual in order that he or she may be considered as its national. The consequence is that an international tribunal *cannot* decide that a nationality granted by a State *does not exist in the national legal order in which it has been created*. The Tribunal correctly stated this principle in its Award:

> "It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles by its own legislation, the rules relating to the acquisition (and loss) of nationality."[38]

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[36] *Southern Pacific Properties Ldt v. Arab Republic of Egypt*, (Case No. ARB/84/3), Decision on Jurisdiction, Award of 14 April 1988, *Yearbook Comm. Arb'n*, 1991, para. 38. Emphasis added.
[37] *Flegenheimer Case*, 1958, 25 *I.L.R.*, p. 97.
[38] Award, para. 55.

It follows that an international tribunal cannot set aside a substantive law on nationality upon the ground that it does not approve of this law or believes that there is a better or more modern rule.[39] This is common ground between the Parties, and was expressed by the U.A.E.'s counsel during the Hearing, in the following manner:

> "I accept if the Tribunal had said, for example, "The Italian law requires one year, but that's not long enough; let it be three years," that would have been a manifest excess of powers. The Tribunal did not have the function consistent with Article I(3) of the BIT to substitute for actual Italian law its own view of what Italian law should be."[40]

Yet, this principle does not mean, as Mr. Soufraki argues, that where there is a question as to whether a person has gained (or lost) nationality due to the automatic operation of law, such a question cannot be answered by an international tribunal. Respect for States' sovereignty approaches its limits when it comes to recognizing a nationality *in the international realm.* International tribunals have asserted their competence to verify that the nationality has indeed been granted in accordance with the national law requirements, as well as with the basic requirements of international law. In such situations, international tribunals have the right – and indeed the obligation – to determine the existence of the treaty-required nationality as a jurisdictional requirement by reference to the laws of the State whose nationality is claimed.[41]

61. According to the Claimant, the Tribunal may disregard a certificate of nationality only if there has been a fraud in the application of national law. The Claimant does not accept that an error entails the same consequence. Clearly, this submission could give rise to severe difficulties for an international tribunal. Should an international tribunal accept a nationality, based on a patently (or facially) erroneous application of national law by the national official issuing a nationality certificate, for international purposes?

62. A certificate of nationality can, in principle, only be as correct as the information disclosed. The truth has to prevail over the formal appearance. Sandifer, in his standard work on *Evidence Before International Tribunals*, treats consular certificates as evidence of nationality which are subject to investigation by an international tribunal, the more so

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[39] This has been stated in *Canevaro*: "… it is not the place of the tribunal to judge the provisions of the laws of 1889 and 1898 themselves, which provisions were indeed severe on Peruvian individuals …", *Italy v. Peru*, *A.J.I.L.*, 1912, p. 748.
[40] Transcript of the Hearing, vol. 1, p. 296.
[41] *William A. Parker Case (U.S. v. United Mexican States)*, 1926, 4 *R.I.A.A.* p. 38.

when they are not based on any inquiry in order to ascertain the true situation. According to him, certificates are entitled to weight "when the consular regulations require the exhibition of adequate evidence of citizenship as a prerequisite to registration … However, mere recognition by a consul of a person as a citizen in a matter not requiring a specific investigation of citizenship is not sufficient."[42] In the present case, Mr. Soufraki himself acknowledged that he never informed the Italian authorities issuing his certificates of nationality and passports that he had lost his nationality under the 1912 Law because he had acquired Canadian nationality.[43]

63. The Tribunal's Award is based on the refusal to consider the certificates of nationality as conclusive and binding, and their consideration as merely *prima facie* evidence, to be examined along with other evidence. It is quite true, as stated by the Claimant in his Memorial that "(o)n *that* question, the Tribunal did not engage in any substantive analysis. It made no reference to the extensive debates by the drafters of the Washington Convention about the *circumstances* under which the *prima facie* validity of Certificates of Nationality could be set aside. It made no reference to the practice of other international tribunals in accepting or disregarding official avowals of nationality. Indeed the Tribunal cited no authority whatsoever for its conclusion."[44] But if the principle on which the Award is based does exist, there is in reality no ground for annulment. The Claimant in his Post-Hearing Memorial submitted that "(b)y asserting a sweeping proposition about its authority to go beyond this system, while making no effort to explain the basis of such authority, the Tribunal committed annullable error under Article 52(1)(e), *whether or not* the proposition ultimately could be sustained."[45]. It appears to the Committee that "making no effort to explain the basis of such authority [to go beyond official certificates of nationality]" is in fact the same ground as "failure to state reasons [for an award]." Hence it is *apropos* to recall what the *ad hoc* Committee in *Wena* said persuasively:

> "(t)he Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can reasonably be inferred from the terms used in the decision … If the *ad hoc* Committee so concludes, on the basis of the knowledge it has received upon the

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[42] Sandifer, *Evidence Before International Tribunals*, University Press of Virginia, Charlottesville, 1975, pp. 222-223.
[43] See, para. 17 of this Decision.
[44] Claimant's Memorial, para. 51. Emphasis in the Memorial.
[45] Claimant's Post-Hearing Memorial, para. 8. Emphasis in the Memorial.

> dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself."[46]

64. Although the Tribunal indeed did not elaborate on this basic general statement, the principle is in fact well established that international tribunals are empowered to determine whether a party has the alleged nationality in order to ascertain their own jurisdiction, and are not bound by national certificates of nationality or passports or other documentation in making that determination and ascertainment. This principle is well supported by the case law of international tribunals including ICSID tribunals, as well as by scholarly commentary on the subject, as will be seen below.

65. As far as international case law is concerned, the *ad hoc* Committee notes that, contrary to the Claimant's statement that the Tribunal asserted a power that "no prior tribunal has attempted to assert,"[47] there are many cases where international tribunals have done so.[48] Some of these cases are discussed below. The pertinent cases in general did not make distinctions between certificates of nationality and certificates of naturalization, although the latter ones might arguably be more persuasive in their evidentiary effect than certificates of nationality.

66. One of the earliest cases, *Medina*, goes back to the 19th century. In the *Medina* case, Crisanto Medina was naturalized by the Court of Common Pleas of the City of New York, on 31 December 1859. This naturalization was challenged before the United States-Costa Rica Mixed Claims Commission on the ground that it was not granted in accordance with United States law. The Tribunal refused to accept the proposition that it must accept a "decree of naturalization" as final and conclusive, and that such decree could only be contested in the courts of the State which had issued the decree.[49] The Claims Commission looked at the facts and determined that, although a certificate of naturalization had been issued by a United States court, the claimant had in fact not fulfilled the requirements for its issuance and, therefore, was not a citizen of the United

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[46] *Wena*, paras 81 and 83.
[47] Claimant's Memorial, para. 6.
[48] There are of course also some cases to the contrary, as attested to by some cases decided by the Iran-United States Claims Tribunal.
[49] *Case of Medina*, United States-Costa Rica Mixed Claims Commission, 31 December 1862, *in* John Bassett Moore, *History and Digest of the International Arbitration to which the United States Has Been a Party* (hereinafter *Moore's Arbitration*), pp. 2587-8.

States for international claims purposes, notwithstanding the certificate. The evidentiary value of a declaration or certificate of naturalization was elaborated on by the Commission:

> "A declaration of naturalization, even if it were a definitive sentence, could not claim a particular privilege of being admitted there as an absolute truth, though its intrinsic falsity might be evident ... An act of naturalization be it made by a judge *ex parte* in the exercise of his *voluntario jurisdiction*, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle – *locus regit actum*, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter ... The certificates exhibited by them being made in due form, have for themselves the presumption of truth; *but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself* ."[50]

67. This approach of the United States-Costa Rica Commission was subsequently adopted by other international commissions, in the *Laurent* case (United States-Great Britain Commission),[51] the *Lizardi* case (United States-Mexico Commission),[52] the *Kuhnagel* case (United States-France Commission),[53] the *Angarica* case (United States-Spain Commission),[54] the *Criado* case (United States-Spain Commission),[55] as well as the often cited *Flutie* case.[56]

68. In *Flutie*, where the claimant's standing before the United States-Venezuela Claims Commission depended on Mr. Flutie's alleged United States citizenship *via* naturalization, the Commission stated:

> "The American citizenship of a claimant must be satisfactorily established as a primary requisite to the examination and decision of his claim. Hence, *the Commission, as the sole judge of its jurisdiction, must in each case determine for itself the question of the citizenship upon the evidence submitted in that behalf ... Whatever may be the conclusive force of judgments of naturalization under the municipal laws of the country in which they are granted, international tribunals, such as this Commission, have claimed and exercised the right to determine for themselves the citizenship of claimants from all the facts presented*."[57]

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[50] *Moore's Arbitration*, p. 2587. Emphasis added.
[51] *Moore's Arbitration*, p. 2671.
[52] *Moore's Arbitration*, p. 2589.
[53] *Moore's Arbitration*, p. 2647.
[54] *Moore's Arbitration*, p. 2621.
[55] *Moore's Arbitration*, p. 2624.
[56] *Flutie Case*, 1904, IX *R.I.A.A.*, p. 148.
[57] *Idem*, p. 151 and p. 152. Emphasis added.

Thus, the *Flutie* case, like the other cases cited, stands for the principle that an international tribunal is fully empowered to make its own nationality determinations, even if its decision contradicts official government documents.

69. In the present case, not only did the Tribunal use the same reasoning and come to the same conclusions in its Award as the international Commission in the *Flutie* case, but the two cases are almost perfectly analogous. The more striking similarities are:

- 1. Mr. Flutie produced a certificate of naturalization as evidence of his U.S. nationality. Mr. Soufraki produced certificates of nationality as evidence of his Italian nationality.

- 2. The *Flutie* Commission looked at all the evidence in the light of U.S. law and found that Mr. Flutie had not fulfilled one of the requirements of U.S. law for obtaining naturalization and that, therefore, despite the certificate of naturalization, he was not a United States national, for international jurisdictional purposes. The Tribunal looked at all the evidence before it in light of Italian law and found that Mr. Soufraki had not fulfilled the requirements of Italian law for regaining nationality and that, therefore, despite the certificates of nationality, he was not an Italian national, for international jurisdictional purposes.

- 3. The naturalization of Mr. Flutie had been granted to him on the basis of his residence, but the Commission examined the reality of such residence and concluded that it had not been established by the evidence presented. Thus, the naturalization granted on the basis of an unproven fact could not be recognized on the international level. The Italian nationality of Mr. Soufraki could only be reacquired on the basis of his claimed residence of one year in Italy, so the Tribunal examined the reality of such residence and concluded that it had not been established by the evidence presented. Thus, the nationality claimed on the basis of an unproven fact could not be recognized on the international level.

- 4. The Commission was not convinced by the evidence given by Mr. Flutie and described it in the following manner: “Indefiniteness, evasion, a manifest shaping of his statements to accord with the supposed necessities of his case … characterizes all his testimony on the subject of his residence …”[58] The Tribunal similarly was not

[58] *Idem*, p. 154.

> persuaded by the evidence given by Mr. Soufraki, although it refused to go as far as considering it fraudulent as is attested by paragraph 57 of the Award: "While the Respondent did not in terms maintain that evidence in support of Mr. Soufraki's acquisition or reacquisition of Italian nationality was fraudulent, counsel of the Respondent when cross-examining Mr. Soufraki did characterize the evidence that he submitted in support of his claim that he was resident in Italy for more than a year 1993-94 as 'bogus'. Nevertheless, the Tribunal wishes to make clear that, in its view, issues of alleged fraud need not be addressed."

70. This Committee is aware of Mr. Soufraki's assertion that a central issue in the *Flutie* case was indeed fraud, and that, therefore, it is inapposite to the present annulment case because here fraud has not been alleged. In the Committee's opinion, Mr. Soufraki mischaracterizes the *Flutie* case because *Flutie* did not principally deal with fraud. The only comment regarding fraud was *obiter*.[59] As a matter of fact, in the summary of the case, which highlights its main holdings, it was explicitly stated that certificates granted "by fraud *or mistake*"[60] should not be recognized.

71. That mistake as well as fraud can be a basis for disregarding a nationality at the international level has been reiterated in a more recent case. *Flegenheimer* stands for the proposition that it is a generally accepted international law principle that international tribunals, in the course of determining their own jurisdiction, are not only empowered, but duty bound, to make their own findings as to a contested nationality, even in the face of official nationality documents provided by one of the State Parties to the treaty establishing the jurisdiction of the tribunal. Although the *Flegenheimer* Commission's reasons for delving into nationality was alleged fraud, the Commission specifically rejected the submission that a tribunal may not examine issues of nationality if an official certificate of nationality has been issued, unless there has been a fraud or a violation of international law:

> "From the standpoint of form, international jurisprudence has admitted, without any divergence of views, that consular certificates as well as certificates issued by administrative bodies which, according to the national legislation of the subject State do not have absolute probative value, are not sufficient to establish nationality before international

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[59] *Idem*, p. 155.
[60] *Idem*, p. 148. Emphasis added.

> bodies, but that the latter are nevertheless entitled to take them into consideration if they have no special reasons for denying their correctness.
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> *From the standpoint of merit, even certificates of nationality the content of which is proof under municipal law of the issuing State, can be examined and, if the case warrants, rejected by international bodies rendering judgment under the Law of Nations*, when these certificates are the result of fraud, or have been issued by favour in order to assure a person a diplomatic protection to which he would not otherwise entitled, or *when they are impaired by serious errors*, or when they are inconsistent with the provisions of international treaties governing questions of nationality in matters of relationship with the alleged national State, or finally, when they are contrary to the general principles of the Law of Nations on nationality, which forbid, for instance, the compulsory nationalisation of aliens. It is thus not sufficient that a certificate of nationality be plausible for it to be recognised by international jurisdictions; the latter have the power of investigating the probative value thereof even if its 'prima facie' content does not appear to be incorrect."[61]

72. ICSID jurisprudence provides other examples of tribunals asserting power to verify the existence of a nationality asserted by a claimant. In *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/02/9), an ICSID tribunal was presented with a challenge to the nationality of three of the claimants who were natural persons. Although the tribunal was presented with conflicting and contradictory documents regarding the claimants' nationalities, it did not investigate the accuracy of any of them. Nonetheless, it did make its own independent determination as to the nationality of the claimants by considering the relevant facts and evidence in light of the applicable law, which was Egyptian law. After reviewing the facts and evidence, the tribunal concluded that the claimants were Egyptian nationals, as their father possessed Egyptian nationality at the time of their birth and they therefore acquired Egyptian nationality automatically in accordance with Egyptian law.[62]

73. Leading commentators support the international case law recognizing the authority of international tribunals to make their own nationality determinations in ascertaining their jurisdictional competence. An important statement of Aaron Broches, one of the founders of the ICSID Convention can be cited here as stating during the period of the drafting of the Convention:

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[61] *Flegenheimer Case*, 1958, 25 *I.L.R.*, p. 108. Emphasis added.
[62] *Champion Trading*, 19 *ICSID Review – Foreign Investment Law Journal*, 2004, p. 11.

> "There seemed to be a consensus at all four meetings that the certificate of nationality should be regarded merely as *prima facie* evidence rather than 'conclusive proof' and that it should be left to a tribunal, ultimately to decide questions of nationality."[63]

74. Also, the latest edition of Oppenheim states:

> "… notwithstanding the general principle that it is for each state to determine who are its nationals, a state's assertion that in accordance with its laws a person possesses its nationality is not conclusive evidence of that fact for international purposes. *An international tribunal called upon to apply rules of international law based upon the concept of nationality has the power to investigate that state's claim that a person has its nationality*."[64]

Other writers agree that ICSID tribunals enjoy the same power approved by Oppenheim:

> "It would, therefore, seem that if there is a real challenge from a contracting State as to the nationality of a foreign investor, *an ICSID Arbitral Tribunal will be bound to investigate the circumstances of the investor's acquisition of the nationality of a contracting State in order to satisfy itself that the investor is a genuine national of a contracting state and that it has jurisdiction over him.*"[65]

A last quote can be usefully made to Christopher Schreuer:

> "… the decision as to whether the investor meets the Convention's nationality requirements is incumbent upon the commission or tribunal in the same way as with the other objective requirements for ICSID's jurisdiction. A certificate of nationality will be treated as part of the "documents or other evidence" to be examined by the tribunal in accordance with Art. 43. Such a certificate will be given its appropriate weight but does not preclude a decision at variance with its contents."[66]

75. The *ad hoc* Committee notes that the Tribunal indeed did not accept the certificates as conclusive proof of nationality, and found that the presumption of nationality created by these certificates was not corroborated by other evidence tending to show that the Claimant had regained his claimed Italian nationality. The Tribunal stated that "the

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[63] *Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States Vol. II* (Washington D.C.: ICSID, 1968) (hereafter History, Vol. II) Document Z11 (9 July 1964) Regional Consultative Meetings of Legal Experts on Settlement of Investment Disputes, Chairman's Report on Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, p. 582.

[64] R. Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., Harlow, Longman, 1992, pp. 854-855. Emphasis added.

[65] *E.g.*, K.V.S.K. Nathan, *ICSID Convention: The Law of the International Centre for the Settlement of Investment Disputes*, New York, Juris, 2000, pp. 86-87. Emphasis added.

[66] Schreuer, *op. cit.* note 21, Article 25, p. 268.

Claimant cannot rely on any of the pleaded Certificates of Nationality to establish conclusively that he was a national of Italy on the dates of the Request for Arbitration and its registration,"[67] and required Mr. Soufraki to prove that he had resided in Italy for over a year after his loss of Italian nationality. The *ad hoc* Committee believes that in not considering the national documentation on nationality as conclusive and in ascertaining on its own the nationality of the Claimant, the Tribunal did not manifestly exceed its powers, but on the contrary asserted a power which it was bound to exercise in order to verify its competence under the ICSID Convention and the Italy-U.A.E. BIT.

76. Summarizing, the Tribunal had the power to determine whether it had jurisdiction to hear the dispute. In determining whether the jurisdictional requirements of the ICSID Convention and the BIT have been satisfied, the Tribunal is empowered to make its own investigation into the nationality of parties regardless of the presence of official government nationality documents. Certificates of nationality constitute *prima facie* – not conclusive – evidence, and are subject to rebuttal. *In fine*, the Tribunal did not manifestly exceed its powers in deciding that it had to determine for itself Mr. Soufraki's nationality.

77. If the certificates of nationality were not conclusive, the Tribunal had to make its own decision. This task raises some procedural questions related to the law applicable to the burden of proof and the rules of evidence, which will be addressed later.[68]

78. Meantime, prudential considerations require that the *ad hoc* Committee make crystal clear that it is addressing a very specific and limited situation: that is, the situation of an international tribunal vested with *competence-competence*, which must verify the reality of the claimed nationality of a natural person who is a party to a proceeding before it, if the Tribunal is to determine its own jurisdiction to go forward with that proceeding, when its jurisdiction is contingent upon that nationality. Further defining features of this situation are that the Claimant has presented certificates of nationality issued by local governmental or consular officials of the State whose nationality is claimed, under circumstances indicating that material error under the law of that State may have attended such issuances. The rulings of the *ad hoc* Committee should not be read as relating to other situations. The Committee is not here making statements of abstract principle. It is

[67] Award, para. 68.
[68] See, *infra*, paras 102 and ff.

not here purporting to pass upon the much broader question of the general conclusiveness for international tribunals of national official documentation, or of interpretations by national officials – judicial, executive or administrative – of their own national laws. In particular, the Committee is *not* passing upon the appropriate treatment to be accorded by an international tribunal to decisions of courts of a State party to a proceeding declaring what the national law of that State is.

6. DID THE TRIBUNAL MANIFESTLY EXCEED ITS POWERS BY FAILING TO APPLY THE PROPER LAW?

A. The contentions of the Parties

79. In the Claimant's Memorial, it is urged that "the conferral and recognition of *Italian* nationality is a matter of Italian law, within the exclusive competence of Italian authorities."[69] This position was first presented as a claim that an excess of power had been committed. However, the Claimant presented the same claim in somewhat different terms contending that the Tribunal, by conferring on itself the power to decide for itself, did not apply the proper law:

> " … the Tribunal in this case may be seen as applying the wrong law, in positing an unexplained power to "decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding." … It is not clear, given the absence of any analysis or authority, what source of law the Tribunal was applying in presuming its own authority to decide who was or was not an Italian under Italian law. But certainly, it was not applying *Italian* law …"[70]

The Claimant added that, even assuming that the Tribunal had such power, it had in various way manifestly misused it by failing to apply the proper law.

80. First, according to the Claimant, the Tribunal did not apply the proper law as it did not *apply* Italian law, but only *gave "great weight"* to Italian law. As stated in the Claimant's Memorial:

> "… the Tribunal states that it will "accord great weight" to Italian law. As discussed below, however, since the question which the Tribunal

[69] Claimant's Memorial, para. 80. Emphasis in the Memorial.
[70] Claimant's Memorial, para. 155. Emphasis in the Memorial.

> decided it had to determine was whether the Claimant possessed Italian nationality "in accordance with" the law of Italy, Italian law was not merely something to which "great weight" should be attached; it should have been decisive. The fact that the Tribunal wrongly concluded that Italian law was not decisive not only was a serious error in itself, but also paved the way for the Tribunal to adopt an erroneous approach to the decisions of Italian authorities in the interpretation and application of that law."[71]

81. The Claimant also submitted that the Tribunal had failed to apply the proper law, as it applied Italian law differently from what Italian courts would have done. The Claimant argued, for instance that although the Tribunal had accepted the theoretical difference between *residenza legale* and *residenza*, it had in fact confused the two concepts. In addition, the Tribunal disregarded the affidavits of two witnesses in favour of Mr. Soufraki, which, according to the Claimant, Italian courts would have admitted in evidence. Finally, the Claimant contends that the Tribunal had misinterpreted an Italian term of the art:

> "The Tribunal noted that the lease had a provision requiring it to be registered "in case of use" ("*in caso d'uso*"), and concluded that the fact that it was never registered demonstrated that the space was not, in fact, used as an office by Mr. Soufraki in 1993 and 1994, despite his having leased it expressly for that purpose."[72]

According to the Claimant, the correct interpretation of "*in caso d'uso"* in Italian law, is that registration is needed only to verify the date of the lease, if the document is to be used as an official act in a judicial or administrative proceeding.

82. Still further, according to the Claimant, the Tribunal failed to apply Italian law as it did not apply the Italian rules of evidence:

> "By ignoring Italian law on the critical burden of proof and evidentiary issues in the case, the Tribunal failed to apply the proper law within the meaning of Article 42(1) of the Washington Convention. The Award is subject to annulment on these grounds."[73]

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[71] Claimant's Memorial, para. 52.
[72] Claimant's Memorial, para. 171.
[73] Claimant's Memorial, para. 173.

B. The analysis of the *ad hoc* Committee

83. The *ad hoc* Committee turns to the four different arguments by the Claimant under the ground of "failure to apply the proper law." According to Mr. Soufraki, the Award must be annulled because the Tribunal:

- 1. Failed to apply the proper law in conferring on itself the power to decide for itself the existence of the Italian nationality of the Claimant, without any supporting legal source.
- 2. Failed to apply the proper law, as it only gave "great weight" to Italian law instead of applying Italian law.
- 3. Failed to apply the proper law, as it applied Italian law differently from what would have been done by Italian courts.
- 4. Failed to apply the proper law, as it did not apply the Italian rules of evidence.

84. The first argument of the Claimant having already been dealt with by the *ad hoc* Committee in the preceding section, it needs to refer only to the other three arguments.

i. The distinction between failure to apply the proper law and errors in the application of such law

85. ICSID *ad hoc* committees have commonly been quite clear in their statements – if not always in the effective implementation of these statements – that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment. As stated in *Klöckner I*, the distinction between "non-application" of the applicable law and mistaken application of that law is a "fine distinction."[74] In *Amco I*, the first annulment decision in the dispute concerning Amco, the committee had to determine whether the tribunal had applied the proper law. In making its determination, it stressed that the function of an *ad hoc* committee is clearly distinct from that of a court of appeals:

> "The law applied by the Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which

[74] *Klöckner I*, para. 60.

> such law has been applied. Such scrutiny is properly the task of a court of appeals, which the *ad hoc* Committee is not. The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law would constitute a manifest excess of power on the part of the Tribunal and a ground for nullity under Article 51(1)(b) of the Convention. The *ad hoc* Committee approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal."[75]

If the general statement to the effect that a wrong application or interpretation of the law is not a ground for annulment is quite uncontroversial and endorsed by this *ad hoc* Committee, its practical application to concrete sets of facts may at times not be self-evident.

86. Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law. Such gross and consequential misinterpretation or misapplication of the proper law which no reasonable person ("*bon père de famille*") could accept needs to be distinguished from simple error – even a serious error – in the interpretation of the law which in many national jurisdictions may be the subject of ordinary appeal as distinguished from, *e.g.*, an extraordinary writ of *certiorari*. In the present annulment proceedings, both Claimant and Respondent have acknowledged during the oral hearing that an egregiously wrong interpretation of the proper law – though nothing short of that – may amount to annullable error.[76]

87. It seems hardly necessary to add that failure to apply the proper law must also be distinguished from failure to apply the proper law to *the true or correct facts*. Errors in a tribunal's findings of facts, generated by, for instance, acceptance of evidence of no or insufficient probative value, do not provide a ground for annulment, save where such errors constitute or result in "a serious departure from a fundamental rule of procedure"

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[75] *Amco I* , para. 23.
[76] See Transcript of the Hearing, vol. 2, Professor Greenwood, pp. 373-374; Professor Crawford, p. 517.

under Article 52(1)(d) of the ICSID Convention, which ground for annulment has not been asserted here.[77]

88. How do these principles apply to the instant case? The two Parties are in agreement on certain uncontroversial points. They both accept that there would be a ground for annulment if the Tribunal had applied something *other* than Italian law to the determination of Mr. Soufraki's nationality, meaning not only that it could not have applied a different legal system, such as German law or U.A.E. law, but also that it could not have applied some undefined standard different from Italian law. The Tribunal had to apply Italian law, only Italian law and all pertinent Italian law. The *ad hoc* Committee will now examine if this is what the Tribunal did.

ii. The Tribunal applied substantive Italian law to the determination of the Claimant's nationality

89. The first question to be answered is: did the Tribunal apply substantive Italian law to the issues of nationality raised in this case? It is evident from the Award, in the view of the *ad hoc* Committee, that the Tribunal did apply Italian law as required under the BIT in determining Mr. Soufraki's nationality.

90. In determining whether the Claimant was a national of Italy, the Tribunal referred to three provisions of Italian law which it considered relevant to the facts of the present case:

Article 8, paragraph 1 of the Italian Law No. 555 of 1912 which reads as follows:

> "Loses the [Italian] citizenship:
> (1)whoever spontaneously acquires a foreign citizenship and establishes his residence abroad."

Article 17(1) of the Italian Law No. 91 of 1992 which provides:

> "17.-1 Who has lost the [Italian] citizenship according to articles 8 and 10, Law 13th June, 1912, n. 555, or because he/she has not adhered to the option provided for by article 5, Law 21st April, 1983, n. 123, may reacquire the citizenship if he/she submits a relevant declaration within two years from the entry into force of this law."

Article 13(1)(d) of the Italian Law No. 91 of 1992 provides:

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[77] See, in this connection, P. D. Trooboff, "To What Extent May an *Ad Hoc* Committee Review the Factual Findings of an Arbitral Tribunal based on a Procedural Error?" *in* E. Gaillard and Y. Banifatemi (eds.), *Annulment of ICSID Awards*, Huntington, N.Y, Juris, 2004, p. 264.

> "(1) whoever has lost his [Italian] citizenship reacquires it:
> (…)
> (d) one year after the date at which he established his residence in the territory of the Republic [of Italy], save in case of explicit renunciation within the same time-limit;"[78]

91. These provisions of Italian law were not only *quoted* by the Tribunal but also *applied* to the facts of the case. The following quotations from the Award illustrate that the Tribunal applied Italian law:

> a. "[T]he terms of Article 8, paragraph 1 of the Italian law No. 555 of 1912 are clear and leave no room for interpretation. As a consequence of his acquisition of Canadian nationality and residence in Canada, Mr. Soufraki, in 1991, lost his Italian nationality by operation of Italian law.[79]
>
> b. "The Tribunal must decide . . . whether Claimant reacquired automatically his Italian nationality according to Italian law after 1992."[80]
>
> c. "The concept of 'residence' as used in Article 13(1)(d) of Italian Law No. 91 is factual. It is different from the concept of 'legal residence'."[81]

92. The *ad hoc* Committee accordingly concludes that the Tribunal did apply the proper law, Italian law, to the determination of the Claimant's nationality.

iii. The Tribunal applied only substantive Italian law to the determination of the Claimant's nationality

93. The second question the *ad hoc* Committee needs to discuss in respect of applicable law is: did the Tribunal apply only Italian substantive law to the issue of nationality raised in this case, or did it also apply some other law or other discretionary legal standard, alongside Italian law or perhaps in lieu of some provisions of Italian law? This question is raised inferentially it is true, by the words used by the Tribunal in paragraph 55 of its Award when it said: "(i)t will *accord great weight to the nationality law* of the State in question *and to the interpretation and application of that law* by its authorities." Reading these words quite literally, Mr. Soufraki comments in his Memorial that "Italian law was

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[78] This is the sequence in which these articles were cited in the Award, para. 24.
[79] Award, para. 52.
[80] Award, para 47.
[81] Award, para 70.

not merely something to which 'great weight' should be attached; it should have been decisive."[82] In his Post-Hearing Submission,[83] Mr. Soufraki added that "there is no reason to suppose that this experienced Tribunal did not mean exactly what it said." The *ad hoc* Committee does not think it necessary to debate the appropriateness of Mr. Soufraki's reading of paragraph 55 of the Tribunal's Award. Examining that Award, it appears to the Committee that the Tribunal did *in reality* apply Italian law. Thus, the statement of paragraph 55 should be understood as meaning that the Tribunal "*will apply the nationality law of the State in question and accord great weight to the interpretation and application of that law by its authorities*." The Committee also considers that the statement of the Tribunal that it "will in the end decide for itself whether, on the facts and the law before it, [Mr. Soufraki] was or was not a national of [Italy]" must be considered in the context in which that statement was made. The Committee reads the Tribunal's statement as effectively saying that "it will in the end decide for itself whether Mr. Soufraki can or cannot be considered a national of Italy *for ICSID arbitration purposes*."

94. Finally, and in any event, it does not appear to the Committee that the Tribunal's statements in paragraph 55 of its Award had any material consequences for the outcome of the case.[84] If there is any ambiguity or inaccuracy in these statements, the Committee is satisfied that it does not amount to annullable error.

iv. The Tribunal applied all relevant substantive Italian law to the determination of the Claimant's nationality and strove in good faith to apply that law as an Italian court would have done.

95. The last question is: did the Tribunal apply all relevant substantive Italian laws to the issues of nationality raised in this case? The Claimant has not suggested that the Tribunal ignored an important provision of Italian law on nationality which omission effectively amounted to complete failure to apply the proper law. The heart of the complaint brought by Mr. Soufraki is that the Tribunal has not applied Italian law as an Italian court would have done.

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[82] Claimant's Memorial, para. 52.
[83] Claimant's Post-Hearing Memorial, para. 7.
[84] A similar approach was adopted by the *ad hoc* committee in *MTD Chile*, which, after pointing to some confusion in the tribunal's analysis held that such did not constitute ground for annulment as "the uncertainty in the Tribunal's handling of Article 3(1) [of the Malaysia-Chile BIT] was without incidence for its resolution of the case." *MTD Chile*, para. 64.

96. An international tribunal's duty to apply Italian law is a duty to endeavour to apply that law in good faith and in conformity with national jurisprudence and the prevailing interpretations given by the State's judicial authorities. A State's nationality law consists of its legislative and administrative provisions as well as the binding interpretations of those provisions by its highest court. Mr. Soufraki argues that a State's law also includes its interpretative case law, official government circulars, and the consensus of leading scholars that illuminate its application and meaning. The *ad hoc* Committee agrees that, when applying national law, an international tribunal must strive to apply the legal provisions as interpreted by the competent judicial authorities and as informed by the State's "interpretative authorities." These principles are embedded in, *e.g*., the case law of the Permanent Court of International Justice (PCIJ). In the *Serbian Loans* case, for instance, the Permanent Court said:

> "For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national Tribunal ... would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members."[85]

And it added: "It is French law, as applied in France, which really constitutes French law."[86] The *ad hoc* Committee agrees with this analysis, and considers, for present purposes, that it is Italian law, as applied in Italy, that really constitutes Italian law. In a similar vein, the PCIJ in the *Brazilian Loans* case ruled that:

> "Once the Court has arrived at the conclusion that it is to apply the municipal law of a particular country, there seems no doubt that *it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.*
>
> It follows that *the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case*."[87]

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[85] *Case Concerning the Payment of Various Serbian Loans Issued in France*, Permanent Court of International Justice, 12 July 1929, *PCIJ Reports*, Ser. A., No. 20, 1929, p. 36, available at www.worldcourts.com,
[86] *Idem*, pp. 46-47.
[87] *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, Permanent Court of International Justice, 12 July 1929, *PCIJ Reports*, Ser. A, No. 21, 1929, pp. 27-28, available at www.worldcourts.com. Emphasis added.

97. It is the view of the Committee that the Tribunal had to strive to apply the law as interpreted by the State's highest court, and in harmony with its interpretative (that is, its executive and administrative) authorities. This does not mean that, if an ICSID tribunal commits errors in the interpretation or application of the law, while in the process of striving to apply the relevant law in good faith, those errors would necessarily constitute a ground for annulment.

98. The claim raised here by Mr. Soufraki is that the Tribunal did not take into account the interpretation and application of the pertinent Italian legislation by national courts and authorities on several points. The Claimant highlights what he considers are three manifest errors, which he characterizes as "three core departures from Italian law" – *i.e.*, the alleged confusion between legal and factual residence, the alleged disregard of the two affidavits presented to prove his residence in Italy and the alleged misinterpretation of the *caso d'uso* clause. Although an error is not in principle a ground for annulment, the *ad hoc* Committee will address the alleged errors, considering the extensive submissions on these issues by the Parties, in order to verify that they cannot be considered as so egregious as to amount to a failure to apply the proper law.

99. Mr. Soufraki's argument that the Tribunal required him to prove legal residence instead of actual residence appears to the Committee as clearly unfounded. The Tribunal expressly noted that "[t]he concept of 'residence' . . . is factual. It is different from the concept of 'legal residence.' Consequently, actual residence for one year is a sufficient requisite for the reacquisition of Italian citizenship."[88] The Tribunal then stated that it would determine whether Mr. Soufraki satisfied the test for actual residence, which, according to Mr. Soufraki's own expert testimony, required that he had "his 'habitual abode' in Italy and that he manifested his 'intention' to fix in Italy the center of (his) own business and affairs."[89] This implied the presence of two factors, an objective factor – where one is actually living – and a subjective factor – where one intends to remain as a resident. The Tribunal was not convinced of the existence of either element. It considered that the objective fact of a one year residence had not been satisfactorily established, and

[88] Award, paras 70-71.
[89] Award, para. 73.

that proof of the subjective element was unconvincing, as in his cross-examination Mr. Soufraki had stated that, in January 1993, when he allegedly took up his residence in Italy, he "had no intention of being a resident again."[90] Assessing what the Claimant had submitted to prove these two elements, the Tribunal concluded that factual residence had not been proven and thus that Mr. Soufraki did not reacquire his lost Italian nationality on that basis. The *ad hoc* Committee finds no egregious error in the application of Italian law in this regard.

100. Mr. Soufraki's argument that the Tribunal disregarded evidence which the Italian authorities would not have disregarded really relates to what rules of evidence were binding upon the Tribunal, and is more efficiently dealt with in a succeeding portion of this Decision.[91]

101. The Claimant's contention that the Tribunal improperly interpreted an Italian legal term of art – the *caso d'uso* clause in the office lease agreement – and that this misinterpretation led the Tribunal to discount the weight of the lease agreement, could well be true. However, a misinterpretation of a legal term of art amounts here to no more than an error in the application of the law, an error quite marginal in reaching the final decision. Like in *MINE*, where the annulment committee considered that the failure to apply the agreed law was "technical and inconsequential,"[92] with little or no impact on the outcome of the case,[93] the *ad hoc* Committee does not see in this possible error of interpretation an error so egregious as to amount to a total failure to apply the proper law.

102. For these reasons, the *ad hoc* Committee considers that the Tribunal did strive in good faith to apply Italian law as it would have been applied by Italian courts, and in doing so did not commit any egregious error that could be considered as a failure to apply the proper law. It is the view of the Committee that the Tribunal did apply substantive Italian law, only substantive Italian law and all relevant substantive Italian law to the determination of Mr. Soufraki's nationality.

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[90] Transcript of cross-examination of Mr. Soufraki dated 12 March 2004 at p. 85.
[91] See, *infra*, para. 102 and ff.
[92] C. Schreuer, "Three Generations of ICSID Annulment Proceedings," *in* E. Gaillard and Y. Banifatemi (eds.), *Annulment of ICSID Awards*, Huntington, N.Y, Juris, 2004, p. 28.
[93] In *MINE*, the committee declined to annul an ICSID award despite the tribunal's erroneous citation of Article 1134 of the French Civil Code rather than Article 1134 of Guinea's "Civil Code de l'Union Francaise," which was based on the French law and was identical in content. *MINE*, para. 6.40.

v. The Tribunal applied correctly its own procedural rules in the determination of the Italian nationality

103. While, as already noted, it is not contested among the Parties that Italian law is determinative of the question of the Italian nationality of Mr. Soufraki, the Parties seem to disagree on the applicable procedural rules on evidence. The U.A.E. has consistently adverted to the international rules of evidence as set out in the ICSID Arbitration Rules, while the Claimant has presented conflicting propositions on this question. In his Memorial, the Claimant apparently considered that the Tribunal had failed to apply applicable Italian rules on evidence: "It … ignored Italian policy and practice … as to *proof* of nationality, considering itself free to interpose its own independent approach to nationality evidence, burdens and standards."[94] However, on other occasions, the Claimant seems to have concurred with the Respondent's position on this question. In the Legal opinion of Avv. Enrico Castellani and Guiseppe Curtò, presented on 7 May 2003 in the original proceedings, the Claimant's experts stated that certification of the lease was a prerequisite to introducing the document in Italian proceedings, but added that this "… has no relevance at all *in a judicial/arbitral proceeding where Italian civil procedural rules are not applicable*." The same approach was adopted in the Post-Hearing Memorial submitted to the *ad hoc* Committee, where the Claimant stated that "[he] accepts that under Convention Article 34, an ICSID tribunal ultimately determines for itself what evidence to admit and to credit, and that in making that determination, it is not bound by the *minutiae* of national rules of evidence."[95] Mr. Soufraki had earlier adopted a more emphatic position in his Post-Hearing Brief before the Tribunal, when he asserted that "*(t)his Tribunal is not an Italian Court, and not bound by rules of evidence in Italian civil procedure*."[96]

104. However variable his theoretical approach may have been, in practice the Claimant has insisted basically[97] that the certificates of nationality are conclusive in Italian law, and that, as a consequence, in not having considered them as conclusive but only as *prima*

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[94] Claimant's Memorial, para. 72. Emphasis in the Memorial.
[95] Claimant's Post-Hearing Memorial, 21 July 2006, para. 41.
[96] Claimant's Post-Hearing Memorial, 30 June 2003, para. 60. Emphasis added.
[97] Although Mr. Soufraki's counsel conceded at the Hearing that an Italian court would not have been bound by the certificates of nationality, Transcript of the Hearing, vol. 1, p. 15.

facie evidence, the Tribunal failed to apply Italian law on evidence, which is a ground for annulment. Without entering into an extensive discussion of the value in Italian law of certificates of nationality, the *ad hoc* Committee notes that the correctness of the Claimant's allegation as to what Italian law is on this precise point, is not free from substantial doubt in view of the position adopted by the Italian Supreme Court, which has declared that an Italian passport is only "presumptive evidence of Italian nationality."[98]

105. The first question to be confronted therefore is whether the Tribunal had to apply Italian procedural rules as part of the applicable law or whether it could use international procedural rules. International case law indicates that an international tribunal concerned with the application of national laws on nationality in connection with determination of its own jurisdiction, is not required to use the national law's approaches to the burden of proof and rules of evidence.

106. A threshold *caveat* must be noted. The rule recognized in the case law applies only to true procedural rules and not to procedural rules that are so closely associated with substantive rules that they should be treated as substantive. Professor Greenwood, during the Hearing insisted on this point, stating that "very often the difference between a substantive rule of law and an evidential or procedural rule may be very difficult to unpick."[99] This is probably not a very frequent occurrence but it can happen. There may in principle be situations where the proper law of evidence should be applied by the tribunal: for example, if in the proper law there are applicable irrefragable or conclusive presumptions, these should not be susceptible to being set aside by an international tribunal, although they are procedural rules. As another example, if in the proper law, in order to prove nationality, two affidavits are necessary and sufficient and a national court would be *bound* by these affidavits, it seems to this *ad hoc* Committee that such a rule of evidence would have to be applied by an international tribunal as an inseparable part of the applicable substantive law rule on nationality. This, however, is not the situation in Italian law and the Claimant has not asserted that it is so.

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[98] Supreme Court, 18 February 1985, N° 1359, cited in Giorgio Sacerdoti's Legal opinion dated 24 March 2003, which was before the Tribunal, p. 5.
[99] Transcript of Hearing, vol. 2, p. 382.

107. Apart from this specific situation of a procedural rule being bound up with a substantive rule, international tribunals have commonly used international procedural rules. The *Parker* case is particularly to the point, as the Claims Commission was quite clear in its statement of the principles to be applied in respect of both the burden of proof and the rules of evidence. On *the burden of proof*, the Commission reiterated a generally recognized principle:

> "While the nationality of an individual must be determined by rules prescribed by municipal law, still the facts to which such rules of municipal law must be applied in order to determine the fact of nationality must be proven as any other facts are proven."[100]

In assessing the proof of these facts, the Commission was also quite clear that it had to follow the *international law rules of evidence* and not the rules of evidence of any national system of law. The Commission expressed this as a general statement in the hope of providing guidance in future proceedings before it:

> "For the future guidance of the respective Agents, the Commission announces that, however appropriate may be *technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico* as applied to the conduct of trials in their municipal courts, they *have no place in regulating the admissibility of and in the weighting of evidence before this international tribunal*."[101]

108. In respect of the burden of proof, some general principles are widely followed in municipal courts and by international tribunals, and especially ICSID tribunals. Among these is the general principle that the party asserting a fact has to prove it. In his treatise on *General Principles of Law*, Bin Cheng explains:

> " … a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency of proof."[102]

This principle holds true for assertions of nationality. For example, in the *Expropriated Religious Properties Case*, the claimant was required to produce convincing evidence of nationality in order that the case could be heard on its merits.[103] In the *Hatton Case*, international jurisdiction was contingent on proof of nationality. Stressing the importance of such proof, a member of the Commission wrote that "it is proper to observe . . . that

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[100] *William A. Parker Case (U.S. v. United Mexican States)*, 1926, 4 *R.I.A.A.* p. 38.
[101] *Idem*, p. 39. Emphasis added.
[102] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius, 1987, p. 329.
[103] *In the Matter of the "Contested Property in Portugal*," Award dated 2 September 1920, reported (1921) 15 *A.J.I.L.* p. 99.

convincing proof of nationality is requisite not only from the standpoint of international law, but as a jurisdictional requirement."[104]

109. Clearly, Mr. Soufraki had the burden of proving to the Tribunal that he possessed Italian nationality as of the pertinent dates. This is consistent with general principles of law and has been constantly applied by ICSID tribunals.[105] If he failed to prove his nationality to the Tribunal, the latter could not have jurisdiction to hear the case on the merits. Mr. Soufraki had submitted to the Tribunal certificates of Italian nationality, which were *prima facie* evidence of the existence of such Italian nationality. Therefore, it would appear that the burden of proving the contrary should have shifted to the Respondent. In the proceedings before it, however, the Tribunal was presented with facts sufficient to throw significant doubt on the accuracy of the certificates: (a) it appeared from the certificates themselves that they where granted by different Italian municipal and consular officials without examining Mr. Soufraki's situation; (b) there existed some textual gaps and possible inconsistencies between the different certificates, which were never explained by the Claimant; [106] (c) the Claimant himself asserted he was Canadian in his dealings with the U.A.E.; and (d) the initial testimony of Mr. Soufraki did not mention residence in Italy. *Prima facie* evidence is indeed evidence which should stand unless effectively controverted by countering evidence or argument. Here, the file sets forth facts and omissions which, together, significantly attenuated the probative value of Mr. Soufraki's certificates. In other words, either the doubt concerning the truth of the certificates prevented the shifting of the burden of proof to the Respondent, or if it had shifted, reverted to the Claimant once more. The Tribunal thus, in the view of the *ad hoc* Committee, correctly applied the rule concerning the burden of proof in paragraph 58 of the Award:

> "In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts. *Claimant accordingly bears the burden of proving to the satisfaction of the Tribunal that he was resident in Italy for more than one year in 1993-94* and accordingly *that he was an Italian national on the relevant dates* and that, as a result, he belongs to the class of

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[104] *Hatton* Case, Mexico-United States General Claims Commission, 26 September 1928, IV *R.I.A.A*, p. 331 (1952).
[105] E.g., *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, Case No. ARB/87/3, Award, 27 June 1990 (1997) 4 *ICSID Reports*, p. 272, para. 58; *Hellas S.A. v. Republic of Albania*, Case No. ARB/94/2 Award, 29 April 1999 (2002) 5 *ICSID Reports*, p. 70, para. 74.
[106] See, para. 13 of this Decision.

> investors in respect of whom the Respondent has consented to ICSID jurisdiction."[107]

110. The burden of proof resting on the party asserting a fact has to be discharged under international rules of evidence. As far as these rules of evidence are concerned, a fairly elaborate explication on this point can be found in the *Flegenheimer* case:

> "The Commission is thus faced with the question of the law that is applicable to the evidence of disputed nationality. In the jurisprudence of the various States, this law is either the *lex fori* or the *lex causae*, namely, the law of the State with which, it is contended, the individual has a bond of citizenship."
>
> Now the Commission has no other *lex fori* than the provisions of the Treaty of Peace which it must apply and the general rules of the Law of Nations; and neither the former nor the latter contain any requirements as regards evidence of a disputed nationality. It must further notice that the application of the *lex causae* could constitute an obstacle to the jurisdictional mission entrusted to it by the signatory States of the Treaty of Peace, because this law could, by the operation of formal evidence, force it to recognize a nationality the actual existence of which it has the right and the duty to investigate."[108]

111. For ICSID tribunals, the rules of evidence to be used in determining whether the requirements of the burden of proof have been satisfied, are to be found in the ICSID Convention and the arbitral rules adopted by ICSID. Rule 34(1) of the ICSID Arbitration Rules provides tersely that "(t)he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." The Tribunal has to decide on the rules of evidence and is certainly the judge of the probative value of the evidence before it. *Ad hoc* committees which have controlled the manner in which ICSID tribunals have acted, have generally followed the line presented in *Parker* and *Flegenheimer*. By way of example, the *ad hoc* committee in the *Wena* case said:

> "… it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party."[109]

112. The Claimant did not demonstrate that the Tribunal had disregarded a mandatory rule of evidence of Italian law. The Claimant did not state that the Tribunal had rejected the two relevant affidavits of his employees as non-admissible; what he complained about

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[107] Emphasis added.
[108] *Flegenheimer Case*, 1958, 25 *I.L.R.*, p. 107.
[109] *Wena*, para. 65.

was that the Tribunal had "discounted" the evidentiary value of the two affidavits. In his Post-Hearing Memorial, Mr. Soufraki said:

> "*The Tribunal inferred that the affidavit did not constitute "disinterested" evidence, and by extension that the witnesses' testimony was unreliable* … It did so notwithstanding that the Italian legal system routinely accepts witness evidence from employees as well as family members of parties. As Claimant's Italian law experts informed the Tribunal, the *only* witness evidence that is barred in the Italian legal system is that from persons who have a "direct interest" in the outcome of the case … *The basis for discounting the evidence was thus an invention by the Tribunal*."[110]

"Routinely accept" is quite different from "bound." The affidavits from employees are indeed admissible in Italian law. They are, however, not always conclusive, as Italian courts can evaluate their probative value. The Tribunal adopted a similar approach: it did not declare the affidavits non-admissible, it considered them as admissible, but of insufficient probative value in the general context of the case. The Tribunal specifically said that it "(did) not find that the affidavit of Messrs. Casini and Nicotra . . . constitute(d) disinterested and convincing evidence."[111]

113. The Committee would also point out that, even if it were true that the Tribunal had satisfied itself, as stated by the Claimant during the Hearing, with "a blanket assertion that a person associated with the Claimant cannot be believed," this enters into the discretionary power of appreciating the evidence granted to the Tribunal by the ICSID Arbitration Rules. Rule 34(1) of these Rules gives broad freedom to the Tribunal in its evaluation of evidence. The Tribunal correctly stated the law applicable to the evidence, *i.e.* not Italian law but the international law rule as embodied in Rule 34:

> "The Tribunal agrees with Claimant that, as an international Tribunal, it is not bound by rules of evidence in Italian civil procedure.
>
> The "substantial" evidence rule, while it may well be required in an Italian court, has no application in the present proceedings.
>
> What weight is given to oral or documentary evidence in an ICSID arbitration is dictated solely by Rule 34(1) of the ICSID Arbitration Rules:
>
> > The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

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[110] Post-Hearing Memorial, para. 40. The word "only" was emphasized in the Memorial. For the rest, emphasis was added.
[111] Award, para. 78.

> In the present instance, it is thus for this Tribunal to consider and analyse the totality of the evidence and determine whether it leads to the conclusion that Claimant has discharged his burden of proof."[112]

114. The *ad hoc* Committee concludes that the Tribunal applied ICSID Arbitration Rule 34, which it was competent and bound to apply and therefore did not commit a failure to apply the proper procedural law.

7. DID THE TRIBUNAL MANIFESTLY EXCEED ITS POWERS BY REFUSING TO EXERCISE A POWER IT DID HAVE?

A. The contentions of the Parties

115. According to the Claimant, "the Tribunal ended up declining to exercise the jurisdiction that it properly did possess to determine the merits of the claim."[113] How did this happen? As stated by the Claimant, "(t)he Tribunal found that it lacked jurisdiction because it held that the Claimant was not a national of Italy as a matter of Italian law. For the reasons already set out in his Memorial, that conclusion was the result of a series of errors on the part of the Tribunal." Mr. Soufraki argues that the Tribunal in fact had jurisdiction and that, therefore, it did not have the power to refuse to exercise it.[114] The interpretation that Mr. Soufraki defends is that a "manifest" excess of power is one that is capable of making a difference in the award and that, therefore, a *denial* of existing jurisdiction is *always "manifest" error*. The Respondent, maintaining that the Tribunal had correctly found that Mr. Soufraki was not Italian for ICSID purposes, rejected the claim that the Tribunal had refused to exercise extant jurisdiction and had thereby committed a manifest excess of power.

B. The analysis of the *ad hoc* Committee

116. Firstly, the *ad hoc* Committee reiterates that it is not empowered to correct alleged "errors" committed by the Tribunal, and a series of errors is no more necessarily a ground for annulment than a single error.

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[112] Award, paras 59-62.
[113] Claimant's Memorial, para. 70.
[114] Claimant's Memorial, para. 141.

117. It may be useful briefly to note a potentially far reaching thesis presented by the Claimant to the effect that *any* jurisdictional mistake is necessarily a manifest excess of power, thus constituting a ground for annulment under Article 52(1)(b) of the ICSID Convention, as stated in the Claimant's Memorial:

> "The result is that an error of law by a tribunal in relation to jurisdiction – irrespective of whether it leads the tribunal to arrogate to itself a jurisdiction which it does not possess, or to deny a jurisdiction which the Convention and the BIT have conferred upon it – constitutes a manifest excess of powers within Article 52(1)(b). The correctness of a tribunal's findings as to jurisdiction (in marked contrast to most of its findings on the merits) is, therefore, subject to assessment by an *ad hoc* committee in annulment proceedings."[115]

This thesis was documented by a citation from Philippe Pinsolle:

> "If both Parties have consented to arbitration and the Tribunal does not exercise this jurisdiction, it deprives them of the neutral forum to which they agreed, and which, in the context of investment arbitration, is often the basis of the investor's decision to invest. In other words, when consent to arbitration is found to exist, refusing to give effect to this consent amounts to modifying the agreement between the Parties. Refusing to exercise jurisdiction where it exists would as a result necessarily entail committing a manifest excess of powers."[116]

118. The *ad hoc* Committee sees no reason why the rule that an excess of power must be manifest in order to be annullable should be disregarded when the question under discussion is a jurisdictional one. Article 52(1)(b) of the Convention does not distinguish between findings on jurisdiction and findings on the merits. As noted by the *ad hoc* committee in *MTD Chile*:

> " … the grounds for annulment do not distinguish formally … between jurisdictional errors and errors concerning the merits of the dispute and … manifest excess of powers could well occur on a question of merits."

119. It follows that the requirement that an excess of power must be "*manifest*" applies equally if the question is one of jurisdiction. A jurisdictional error is not a separate category of excess of power. Only if an ICSID tribunal commits a *manifest* excess of power, whether on a matter related to jurisdiction or to the merits, is there a basis for annulment.

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[115] Claimant's Memorial, para. 140.

[116] Ph. Pinsolle, "'Manifest' Excess of Power and Jurisdictional Review of ICSID Awards," *in* "Appeals and Challenges to Investment Treaty Awards," in 2 *Transnational Dispute Management*, April 2005, p. 28, at pp. 31-32.

120. Having already found that the conclusion reached by the Tribunal relating to the nationality of Mr. Soufraki was not the result of a manifest excess of power, the *ad hoc* Committee must also reject the Claimant's contention that the Tribunal's refusal to take jurisdiction, based on the inexistence of the Italian nationality of Mr. Soufraki for ICSID arbitration purposes, constituted a manifest excess of power.

8. FAILURE TO STATE REASONS: ARTICLE 51(1)(E), GENERAL CONSIDERATIONS

121. The failure to state reasons for an Award as a ground for annulment under Article 52(1)(e) of the ICSID Convention does not necessarily relate to the validity of the premises on which a Tribunal's reasoning is based.

122. The first point which should be made here is that there will probably never be a case where there is a *total absence of reasons for the award*. The *ad hoc* Committee must therefore try to determine more precisely what the concept of "failure to state reasons" encompasses. Perhaps the simplest form of an annullable failure to state reasons is that of a *total failure to state reasons for a particular point*, but even this might be a relatively rare occurrence. However, even short of a total failure, some defects in the statement of reasons could give rise to annulment. The *ad hoc* Committee considers that insufficient or inadequate reasons as well as contradictory reasons can spur an annulment.

123. *Insufficient or inadequate reasons* refer to reasons that cannot, in themselves, be a reasonable basis for the solution arrived at. *Ad hoc* committees have expressed this in different ways. In *Klöckner I* and *Amco I*, the *ad* hoc committees said that the reasons have to be "sufficiently relevant"[117] or "sufficiently pertinent."[118] In *Wena*,[119] the committee required that the reasons given by a tribunal must constitute a chain linking the

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[117] *Klöckner I*, pp. 138-139: "There would be a "failure to state reasons" in the absence of a statement of reasons that are "sufficiently relevant" that is, reasonably sustainable and capable of providing a basis for the decision." The criteria "reasonably sustainable" seems to go to the merits and has indeed been criticized for that, while the criteria "capable of providing a basis for the decision" is acceptable.

[118] *Amco I*, para. 43: "This *ad hoc* Committee finds the above reading of the *Klöckner I ad hoc* Committee convincing ... Stated a little differently, there must be a reasonable connection between the bases invoked by a tribunal and the conclusions reached by it. The phrase "sufficiently pertinent reasons" appears to this *ad hoc* Committee to be a simple and useful clarification of the term "reasons" used in the Convention."

[119] *Wena*, para. 79.

facts and the law of the case to the conclusion. Insufficient or inadequate reasons as a ground for annulment have thus to be distinguished from *wrong or unconvincing reasons.* The *ad hoc* committee in *Wena explained*:

> "The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not."[120]

124. The same approach was adopted in *Vivendi*:

> "A greater source of concern is perhaps the ground of "failure to state reasons," which is not qualified by any such phrase as "manifestly" or "serious." However, *it is well accepted* both in the cases and the literature *that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons.* It bears reiterating that an *ad hoc* committee is not a court of appeal. *Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e).* Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning."[121]

125. *Contradictory reasons* may also be considered as amounting to a failure to state reasons, following the analysis of the annulment committee in *Klöckner I*:

> "As for "contradiction of reasons", it is in principle appropriate to bring this notion under the category of "failure to state reasons" for the very simple reasons that *two genuinely contradictory reasons cancel each other out. Hence the failure to state reasons*. The arbitrator's obligation to state reasons which are not contradictory must therefore be accepted."[122]

The *ad hoc* committee in *MINE* approved this reasoning when it stated that "the minimum requirement is in particular not satisfied by either contradictory or frivolous reasons."[123]

126. In quick summary, the *ad hoc* Committee considers that there may be a ground for annulment in the case of:

- a total absence of reasons for the award, including the giving of merely frivolous reasons;

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[120] *Idem.*
[121] *Vivendi*, para. 64. Emphasis added.
[122] *Klöckner I*, para. 116. Emphasis added.
[123] *MINE*, para. 5.09:

- a total failure to state reasons for a particular point, which is material for the solution;
- contradictory reasons; and
- insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.

127. In appraising the sufficiency or adequacy of the reasons set out by a tribunal in its award, an ad hoc committee needs to maintain a balance between certain considerations. A relevant consideration is that the requirement of stating reasons in an award, and indeed the whole annulment procedure in ICSID, was not designed to drive arbitrators to reach for juridical perfection in the crafting of their awards. The limitation of recourse to the annulment mechanism to the few grounds listed in Article 52(1) serves to reinforce the finality and stability of ICSID awards, itself an important policy consideration in the absence of a standing appeals institution comparable to the Appellate Body of the World Trade Organization. Another, sometimes competing, consideration is that the requirement of stating reasons may, as a practical matter, frequently be the only way by which compliance with the fundamental prohibition of manifest excess of power and with the critical duty to apply the proper law may be observed. The more lucid and explicit the reasons set out by a tribunal, the easier it should be to observe what a tribunal is in fact doing by way of compliance.

128. It is scarcely necessary to note that reasons set out in an ICSID arbitral award do not become insufficient or inadequate under Article 52(1)(e) of the ICSID Convention simply because such reasons are not documented by citations to the relevant case law or literature. Lack of references supporting a proposition in an award is not, by itself, a ground for annulment,[124] particularly where such documentation is provided by the parties to the case in their memorials and counter-memorials, and relate to well-known propositions. It is also possible that a tribunal may give reasons for its award without elaborating the factual or legal bases of such reasons. So long as those reasons in fact

[124] In his analysis of *Klöckner I*, Christopher Schreuer stated that "(t)he Tribunal's reasoning was, no doubt, open to criticism on account of its laxity in citing sources and its failure to rely on specific legal authority. But this is a far cry from a failure to apply the proper law constituting an excess of powers. The function of annulment is to preserve the basic legitimacy of the arbitration process … Quality control over the reasoning of tribunals is not one of the functions of annulment.", *op. cit*. note 21, p. 953.

make it possible reasonably to connect the facts or law of the case to the conclusions reached in the award, annulment may appropriately be avoided. [125]

9. DID THE TRIBUNAL FAIL TO STATE REASONS FOR ITS AWARD OR ANY ESSENTIAL PROPOSITION THEREIN?

A. The contentions of the Parties

129. The Claimant's main complaint is that the Tribunal's assertion of power to examine his Italian nationality for ICSID purposes "was a bare affirmation bereft of any explanation. It failed to supply any reasoning or any authority to support that reasoning."[126] Thus, Mr. Soufraki contends that the Tribunal failed to state the reasons on which its Award was based since it did not identify the factual and legal premises that supported the Tribunal's decision, in a manner that permits one to follow the Tribunal's reasoning leading to the Award.

130. The Respondent asks the *ad hoc* Committee to reject Mr. Soufraki's claim and contends that there is no "missing link" between the stated premises of the Tribunal and the final conclusion reached by it in its Award.

B. The analysis of the *ad hoc* Committee

131. In the view of the *ad hoc* Committee, it has to verify the *existence* of reasons as well as their *sufficiency* – that they are adequate and sufficient reasonably to bring about the result reached by the Tribunal – but it cannot look into their *correctness*. It is of course not necessary for a tribunal to give a reason for an assertion which is in itself a reason. That would be to initiate an endless and regressive cycle of reasoning. Not every word has to be explained. Generally accepted propositions need not be extensively justified.

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[125] The same position was adopted in a recent decision on an application for annulment in *CDC v. Seychelles*: "Article 52(1)(e) requires that the Tribunal states reasons, and that such reasons be coherent, *i.e.*, neither "contradictory" nor "frivolous," but does not provide us with the opportunity to opine on whether the Tribunal's analysis was correct or its reasoning persuasive.", para. 70. The *ad hoc* Committee notes also the statement of the *CDC v. Seychelles*'s committee to the effect that *ad hoc* committees should "not intrude into the legal and factual decision making of the Tribunal," *idem*.

[126] Claimant's Memorial, para. 143.

132. Upon a close examination of the Tribunal's Award, the *ad hoc* Committee considers that the reasoning of the Award, although concise and not overburdened with citations to the cases and literature, is complete, with no essential point missing, and is not open to annulment under Article 52 (1)(e).

133. The Tribunal did set out the factual and legal premises, and the course of reasoning that resulted in its denial of jurisdiction. A succinct summary follows:

- In accordance with the ICSID Convention and the BIT, the Tribunal had jurisdiction to hear the dispute only if Mr. Soufraki had Italian nationality on the pertinent dates.[127]
- Under international law, the Tribunal was empowered to decide for itself whether Mr. Soufraki had Italian nationality and was not bound to accept certificates of nationality as conclusive evidence of that nationality.[128]
- Whether Mr. Soufraki had Italian nationality depended on whether he had satisfied the requirements of Italian nationality law.[129]
- Although Mr. Soufraki previously had Italian nationality, he lost it in 1991, when he acquired Canadian nationality.[130]
- Under Italian law, he could reacquire Italian nationality either by submitting a declaration of his intent to reacquire it, or by residing in Italy after 1992 for at least one year.[131]
- Mr. Soufraki did not submit a declaration.[132]
- Therefore, the issue of his nationality turned on whether he had reacquired it by residing in Italy for one year prior to the pertinent dates.[133]
- Mr. Soufraki failed to prove to the satisfaction of the Tribunal that he had resided in Italy for one year after 1992.[134]
- Therefore, Mr. Soufraki failed to prove that he had Italian nationality and the Tribunal, consequently, lacked jurisdiction.[135]

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[127] Award, paras. 21-23, 84.
[128] Award, para. 55 and para. 63.
[129] Award, para. 69.
[130] Award, para 52.
[131] Award, para. 27.
[132] Award, para. 28.
[133] Award, para. 69.
[134] Award, para. 81.
[135] Award, para. 84.

134. The reasoning set out by the Tribunal enables one easily to understand how the Tribunal reached its conclusion. There are no gaps, apparent to the *ad hoc* Committee, in the chain of reasoning and no internal inconsistencies. The Committee concludes that the Tribunal adequately stated the reasons upon which it based its Award.

135. The Claimant argued at the 12 March 2004 Hearing that "if this Award is allowed to stand, then it will seriously undermine the system of investor protection by [creating] … in any case … the possibility of a challenge to the nationality of the claimants on the basis of some question mark about their past."[136] The *ad hoc* Committee is not persuaded that such a dark future is ahead if the Award is not annulled. It may be recalled that Mr. Soufraki had presented himself as Canadian when he entered into his investment agreement with Dubai. The questions which arose appear quite predictable in hindsight when he thereafter presented himself as Italian after the Concession Contract was cancelled and initiated ICSID proceedings. The inquiry thrust upon the Tribunal in such a remarkable situation and under very specific circumstances need not open the floodgates to countless future challenges to nationality, so as to subvert ICSID arbitration.[137]

10. COSTS

136. The Claimant concluded its Reply Memorial by asking for all costs of the original case as well as of the annulment case:

> "For any and all of the reasons stated above and in Claimant's Request for Annulment and initial Memorial, the Committee should annul the Award rendered in this case (including its determination on costs), and order the Respondent to pay all costs (including Claimant's costs) of this proceeding and the prior proceeding on jurisdiction."[138]

The Respondent for its part concluded in its Rejoinder Memorial:

> "For the foregoing reasons, in addition to those set out in its earlier pleadings, the U.A.E. respectfully submits that Mr. Soufraki's

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[136] Transcript of the Hearing, vol. 1, p. 31.
[137] See the case of *Louisa H. de Zenea*, where the Commission stated that "notice of citizenship is necessary in order to maintain a claim for violation of rights attaching to such citizenship," *Moore's Arbitration*, vol. III, p. 2571. See also *Delgado* case, *Moore's Arbitration*, vol. III, p. 2572.
[138] Claimant's Reply Memorial, para. 203) .

> application to have the Award annulled must be rejected in its entirety. The U.A.E. seeks an order awarding it its costs in these proceedings."[139]

137. Firstly, because the Award has not been annulled, the ruling therein on costs incurred in the proceedings before the Tribunal stands. As decided by the Tribunal in its Award, the costs of those proceedings should be borne two-thirds by Claimant and one-third by Respondent.

138. It remains only to allocate the costs of the proceedings before the *ad hoc* Committee. As observed by the *ad hoc* committee in the recent case of *MTD Equity and MTD Chile v. Republic of Chile*:

> "In all but one of the concluded annulment proceedings, Committees have made no order for the parties' own costs and have held that ICSID's costs should be borne equally by the parties. They did so not only where the application for annulment succeeded in whole or part but also where it failed."[140]
>
> … in the interest of consistency of ICSID jurisprudence and in the circumstances of the present case, the Committee proposes to follow the existing practice."[141]

The *ad hoc* Committee thinks it appropriate to follow this developing practice, which it considers justified in this case.

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[139] Respondent's Rejoinder Memorial, paras. 121-122.
[140] A footnote in *MTD Chile* provides some details: "In the following seven cases, committees declined to order party costs against the unsuccessful party and split ICSID's costs of the proceedings: *Klöckner I* (1985) 2 *ICSID Reports* 4, 163; *Amco Asia I* (1986) 1 *ICSID Reports* 509, 542; *MINE* (1989) 4 *ICSID Reports* 79, 110; *Amco Asia II* (1992) 9 ICSID Reports 3; *Wena Hotels* (2002) 6 ICSID Reports 129, 152; *Vivendi* (2002) 6 *ICSID Reports* 340, 371; *Mitchell v DRC*, decision of 1 November 2006, para 67.
[141] *MTD Chile*, paras 110-111.

11. DECISION

139. For the foregoing reasons and after taking note of Mr. Omar Nabulsi's Separate Opinion and Statement of Dissent, the *ad hoc* Committee decides by a majority of its Members:

a. The Claimant's Request for annulment is dismissed;

b. Each Party shall bear one half of the costs incurred by the Centre in connection with this annulment proceeding;

c. Each Party shall bear its own costs of representation in connection with this annulment proceeding.

signed	*signed*
_____	_____
Brigitte Stern	Florentino P. Feliciano
Date: 22 May 2007	Date: 15 May 2007