

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

In the proceeding between

MR. TZA YAP SHUM
(Respondent)

v.

REPUBLIC OF PERU
(Applicant)

ICSID Case No. ARB/07/6
(Annulment Proceeding)

DECISION ON ANNULMENT

Members of the ad hoc Committee

Judge Dominique Hascher (President)
Prof. Donald M. McRae
Prof. Kaj Hobér

Secretary of the ad hoc Committee

Ms. Luisa Fernanda Torres

Representing the Applicant

Mr. Stanimir Alexandrov
Ms. Marinn Carlson
Sidley Austin LLP
Washington, D.C.
USA

Representing the Respondent

Mr. Carlos Paitán
Estudio Paitán & Abogados
Lima, Peru

Date of Dispatch to the Parties: 12 February 2015

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I. PROCEDURAL HISTORY

1. On 3 November 2011, the Republic of Peru (or the “Applicant”) filed a timely application for annulment of the Decision on Jurisdiction and Competence rendered on 19 June 2009 (“the Decision on Jurisdiction and Competence”), or, alternatively, of the Award rendered on 7 July 2011 (“the Award”) in ICSID Case No. ARB/07/6 in favor of Mr. Tza Yap Shum, a Chinese national, by an Arbitral Tribunal composed of Mr. Judd L. Kessler (President), Professor Juan Fernández Armesto and Mr. Hernando Otero (Co-Arbitrators) (“the Application for Annulment”). The Application for Annulment was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and National of Other States (“the ICSID Convention”), and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (“the ICSID Arbitration Rules”).
2. The Decision on Jurisdiction and Competence of 19 June 2009 decided: (A) that the International Centre for Settlement of Investment Disputes (“ICSID”) did have jurisdiction and the Tribunal competence to try the expropriation dispute filed by Mr. Tza Yap Shum under the Agreement Between the Government of the Republic of Peru and the Government of the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investments of 9 June 1994 (“the Peru-China BIT”); (B) to schedule the subsequent proceedings after hearing both Parties, in accordance with Rule 41(4) of the ICSID Arbitration Rules; and (C) to postpone a decision on costs and expenses to a later time of the proceedings.
3. The Award of 7 July 2011 decided: (1) to declare the existence of a measure tantamount to expropriation breaching the terms of Article 4 of the Peru-China BIT, taken by the Republic of Peru against Mr. Tza Yap Shum’s investment; (2) to order the Republic of Peru to pay Mr. Tza Yap Shum the sum of US\$ 786,306.24 as compensation for the application of the measure tantamount to expropriation; (3) to order the Republic of Peru to pay interest on the amount determined in the previous part, accruing from 28 January 2005 until the date of effective payment, at the average monthly rate published by the United States Federal Reserve for ten-year Treasury Bonds compounded semi-annually, which as of the date of the Award amounted to US\$ 227,201.30; (4) to order that the amounts indicated in parts 2 and 3 be paid to an

account of Mr. Tza Yap Shum at his discretion, net of taxes or other charges; (5) to order each party to bear its own costs and attorneys' fees and that common expenses incurred in connection with the arbitration be divided equally between the Parties; and (6) to dismiss all other claims presented by the Parties.

4. The Application for Annulment is based on the grounds enumerated in Article 52(1)(b), (d) and (e) of the ICSID Convention, namely that the Arbitral Tribunal (i) manifestly exceeded its powers, (ii) seriously departed from a fundamental rule of procedure and (iii) failed to state reasons on which the Decision on Jurisdiction and Competence or the Award are based. In the Application for Annulment, the Republic of Peru requested annulment of the Decision on Jurisdiction and Competence "*in its entirety*" with the consequent annulment of the Award "*in its entirety*," or in the alternative, in the event that the Committee did not grant the annulment of the Decision on Jurisdiction and Competence, the Republic of Peru asked for independent annulment of the Award in its entirety.¹ The Republic of Peru later made clear that it was only seeking "*partial annulment of the Decision on Jurisdiction with respect to the Tribunal's conclusion that all of Claimant's expropriation claims were within the scope of Article 8(3) of the BIT.*"²
5. On 9 November 2011, the Secretary-General of ICSID registered the Application for Annulment of the Award and, in accordance with Rule 50(2) of ICSID Arbitration Rules, transmitted the Notice of Registration to the Parties. In the Notice of Registration, the Secretary-General advised the Parties that the Chairman of the ICSID Administrative Council would be asked to appoint the *ad hoc* Committee that would consider the application.

A. THE *AD HOC* COMMITTEE

6. On 11 January 2012, the Secretary-General of ICSID notified the Parties of the constitution of the *ad hoc* Committee composed of Judge Dominique Hascher, a

¹ Republic of Peru's Application for Annulment (3 November 2011) [hereinafter Application for Annulment], paras. 3-5.

² Reply on Annulment (2 November 2012) [hereinafter Reply], para. 85. The Republic of Peru explained it was not challenging the Decision on Jurisdiction and Competence "*insofar as it held that the Claimant can be considered an investor pursuant to the BIT, that he had an investment at the time the dispute arose, that he made a sufficient prima facie case of expropriation, and that the MFN clause of Article 3(2) of the BIT cannot be used to extend the Tribunal's jurisdiction.*" *Id.*, n. 177.

national of France, as President, Professor Donald M. McRae, a national of Canada and New Zealand, and Professor David A.R. Williams, a national of New Zealand, as Members. The Parties were also informed that Ms. Anneliese Fleckenstein, Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

7. On 8 November 2012, the Secretary of the Committee notified the Parties that Professor Williams had informed the Secretary-General of ICSID of a potential conflict of interest arising after Sidley Austin, the law firm representing the Republic of Peru in this annulment proceeding, including Mr. Stanimir Alexandrov, was retained to act as co-counsel with Professor Williams in another arbitration proceeding. In his communication to the Secretary-General of ICSID, Professor Williams offered to resign if either Party had any concerns about his situation. The Parties were asked to submit any observations on Professor William's disclosure by 14 November 2012.
8. On 10 November 2012, Mr. Tza Yap Shum requested an extension of the deadline to provide observations on Mr. William's disclosure. On 12 November 2012, the Republic of Peru replied expressing confidence that Professor Williams would be able to act impartially. On 14 November 2012, the Committee extended the deadline for observations until 30 November 2012, at Mr. Tza Yap Shum's request. On 26 November 2012, Mr. Tza Yap Shum expressed disagreement with Professor Williams' continuing involvement in this annulment proceeding. In consequence, on 3 December 2012, Professor Williams resigned and the proceeding was suspended in accordance with ICSID Arbitration Rules 10(2) and 53.
9. On 4 December 2012, the Secretary-General of ICSID informed the Parties that it would proceed to recommend to the Chairman of the ICSID Administrative Council the appointment of Professor Michael C. Pryles, a national of Australia. On 11 December 2012, the Parties were informed that Professor Pryles had accepted his appointment and that the vacancy in the Committee was filled. The Committee was thus reconstituted and the proceeding resumed on that same day, pursuant to ICSID Arbitration Rules 12 and 53.
10. On 30 May 2013, Professor Michael Pryles tendered his resignation due to health reasons, and the proceeding was suspended a second time in accordance with ICSID

Arbitration Rules 10(2) and 53.

11. On 5 June 2013, the Secretary-General of ICSID informed the Parties that it would recommend to the Chairman of the ICSID Administrative Council the appointment of Professor Kaj Hobér, a national of Sweden. On 10 June 2013, the ICSID Secretariat informed the Parties that Professor Hobér had accepted his appointment, and that the vacancy in the Committee was filled. The Committee was thus reconstituted and the proceeding resumed on that same day, pursuant to ICSID Arbitration Rules 12 and 53.
12. On 15 January 2014, the Secretary-General of ICSID informed the *ad hoc* Committee and the Parties that Ms. Luisa Fernanda Torres, Counsel, ICSID, had been appointed to serve as Secretary to the *ad hoc* Committee.

B. THE STAY OF ENFORCEMENT

13. The Application for Annulment contained a request (paragraph 86), pursuant to Article 52(5) of the ICSID Convention, for a stay of enforcement of the Award pending the *ad hoc* Committee's decision on the Application for Annulment. In accordance with Rule 54(2) of the ICSID Arbitration Rules, enforcement of the Award was provisionally stayed on 9 November 2011 by the Secretary-General of ICSID.
14. On 20 March 2012, Mr. Tza Yap Shum requested the lifting of the provisional stay of enforcement of the Award by the *ad hoc* Committee, or, in the alternative, an order that the Republic of Peru issued a guaranty to ensure compliance with its monetary obligation under the Award.
15. On 26 March 2012, the ICSID Secretariat informed the Parties that the *ad hoc* Committee had decided to continue the provisional stay of enforcement of the Award until it had given each Party an opportunity to present its observations, as envisaged in Rule 54(4) of the ICSID Arbitration Rules. In the same letter, the *ad hoc* Committee also invited the Republic of Peru to submit its observations on Mr. Tza Yap Shum's application for the lifting of the provisional stay of enforcement of the Award by 9 April 2012. The Parties were also informed that the Committee would hear oral submissions on the stay of enforcement during the First Session of the Committee scheduled for 21 April 2012.

16. On 9 April 2012, the Republic of Peru filed its reply to Mr. Tza Yap Shum's request for the lifting of the provisional stay of enforcement of the Award. The Republic of Peru requested that the stay of the enforcement of the Award be continued during the pendency of the annulment proceeding, without any conditions. This communication was accompanied by a letter of the President of the Special Commission that Represents the State in International Investment Disputes, Mr. Carlos José Valderrana Bernal, addressed to the President of the *ad hoc* Committee, in which the Republic of Peru committed itself unconditionally to make full payment of its pecuniary obligation under the Award within 30 days from the notification of the Decision on Annulment, in the event that the Award were not annulled. The communication of 9 April 2012 was also accompanied by a Memorandum of Law in support of the Republic of Peru's request for continuation of the stay of enforcement.
17. A hearing on the stay of enforcement of the Award was scheduled to take place in Washington, DC on 21 April 2012. At the First Session on 21 April 2012, Mr. Tza Yap Shum stated that it would no longer pursue the application to terminate the stay of enforcement of the Award, in light of the letter sent by the Republic of Peru to the President of the Committee on 9 April 2012. The Committee took note of Mr. Tza Yap Shum's statement in the Minutes of the First Session of the Committee. The Committee also took note that the stay was to continue until it issued its decision on the Application for Annulment. The Republic of Peru made an application for costs and fees relating to the application for termination of the stay of enforcement. The Committee decided to reserve the issue of costs regarding the application for termination of the stay of enforcement until the end of the annulment proceeding.
18. On 25 April 2012, the Republic of Peru filed a written document to memorialize its application for an award on costs and fees relating to the First Session. On 30 April 2012, Mr. Tza Yap Shum filed a reply. On 11 May 2012, the Parties were informed that, in accordance with the Minutes of the First Session, the Committee would consider the issue of costs at the end of the annulment proceeding.

C. THE FIRST SESSION

19. As required by Rules 13 and 53 of the ICSID Arbitration Rules, and by agreement of

the Parties, the First Session was held on Saturday, 21 April 2012, in Washington DC, at the Park Hyatt Hotel, located at 1201 24th Street, NW Washington DC 20037, from 9:00 a.m. until 11:11 a.m. Participating in the session were:

Members of the *ad hoc* Committee:

Judge Dominique Hascher, President of the Committee

Prof. Donald McRae, Member

Prof. David Williams, Member (joined by video conference)

ICSID Secretariat

Ms. Anneliese Fleckenstein, Secretary of the Committee

Representing Mr. Tza Yap Shum:

Mr. Carlos Paitán Contreras, Estudio Paitán & Abogados

Mr. Christian Carbajal Valenzuela, Estudio Paitán & Abogados

Representing the Republic of Peru:

Mr. Stanimir A. Alexandrov, Sidley Austin LLP

Ms. Marinn Carlson, Sidley Austin LLP

Mr. Andrew C. Blandford, Sidley Austin LLP

Mr. Carlos José Valderrama Bernal, Ministry of Economy and Finance of Peru

Ms. Yesenia Cabezas, Counselor-Diplomatic Officer Embassy of Peru

Interpreters

Mr. Charles Roberts

Ms. Nancy Rocha

20. During the session, the Committee and the Parties discussed a number of procedural matters, including the schedule for the written pleadings. The Parties confirmed their agreement on certain procedural matters and made oral submissions on certain points of disagreement.
21. On 23 April 2012 the President of the *ad hoc* Committee issued the Minutes of the First Session of the *ad hoc* Committee recording the procedural rules that would govern the Annulment Proceeding.

D. THE PARTIES' PLEADINGS

22. In accordance with the agreed schedule for the written pleadings recorded in the Minutes of the First Session, the Republic of Peru filed its Memorial on Annulment on 29 June 2012, and Mr. Tza Yap Shum filed his Counter-Memorial on the Request for Annulment on 7 September 2012. The Republic of Peru filed its Reply on

Annulment on 2 November 2012.

23. On 11 December 2012, Mr. Tza Yap Shum inquired whether the deadline to file its Rejoinder on Annulment, due on 28 December 2012, was affected as a result of the suspension of the proceeding between the resignation of Professor Williams and the appointment of Professor Pryles. On that same day, the Republic of Peru opposed to any extension, on the ground that the suspension had not impaired Mr. Tza Yap Shum's ability to prepare its Rejoinder. By letter of 12 December 2012, the ICSID Secretariat communicated to the Parties that the *ad hoc* Committee had granted Mr. Tza Yap Shum a six-day extension to file its Rejoinder on Annulment, in light of the suspension of the proceeding resulting from the vacancy in the *ad hoc* Committee created by Professor Williams' resignation.
24. Mr. Tza Yap Shum filed his Rejoinder on Annulment on 3 January 2013.

E. THE HEARING ON ANNULMENT

25. The Hearing on Annulment was initially scheduled to take place in February 2013 (20-22 or 25-27 February 2013) at the seat of the Centre in Washington, DC. (See point 16.1 of the Minutes of the First Session). On 31 May 2012, the Parties agreed on a two-day hearing.
26. On 27 June 2012, prior consultation with the Parties, the ICSID Secretariat confirmed that, due to the unavailability of one Committee Member, the Hearing on Annulment was now scheduled for 14-15 February 2013.
27. On 12 December 2012, the ICSID Secretariat informed the Parties that, due to the unavailability of one Committee Member, the Hearing on Annulment had to be rescheduled. On 4 February 2013, following consultation with both Parties, the ICSID Secretariat informed the Parties that the Hearing on Annulment was postponed to 28-29 August 2013.
28. On 12 March 2013, following exchanges between the Parties, the *ad hoc* Committee decided on the agenda for the Hearing on Annulment.
29. On 20 June 2013, as a result of the unavailability of one Committee Member, the

ICSID Secretariat informed the Parties that the Hearing on Annulment had to be rescheduled to September 2013.

30. On 26 June 2013, the Parties wrote a joint letter informing of their unavailability on the proposed new dates, and indicating they would only be available for a Hearing on Annulment on 16-18 January 2014, 6-9 February 2014 or 19-23 March 2014.
31. By letter of 8 July 2013, the ICSID Secretariat informed the Parties that the Hearing on Annulment was rescheduled to 17-18 January 2014.
32. On 22 November 2013, as a result of health concerns of one Committee Member, the Parties jointly agreed to postpone the Hearing on Annulment to two days within the window of 20-23 March 2014. Accordingly, on 16 January 2014, the ICSID Secretariat confirmed to the Parties that the Hearing on Annulment would take place on Friday, 21 March and Saturday 22 March 2014, at the seat of the Centre in Washington, DC.
33. On 25 February 2014, the ICSID Secretariat reminded the Parties that, pursuant to the *ad hoc* Committee's decision of 12 March 2013, the agenda for the Hearing on Annulment would be as follows:

Day 1

- 9:00 - 9:30 – Introductions
- 9:30 -12:30 – Respondent's Opening (3 hours)
- 12:30 - 1:30 – Lunch
- 1:30 - 4:30 – Claimant's Opening (3 hours or less)
- 4:30 - 6:30 – Expert Testimony of Prof. Reisman (1 hour per party)

Day 2

- 9:30-12:00 – Respondent's Closing (2.5 hours)
- 12:00-1:00 – Lunch
- 1:00-3:30 – Claimant's Closing (2.5 hours or less)
- 3:30-5:30 – Questions from the Committee

The Parties were invited to provide any further observations regarding the agenda for the Hearing on Annulment by 28 February 2014, and to inform the *ad hoc* Committee whether a teleconference on the organization of the hearing would be necessary.

34. On 25 and 26 February 2014, the Parties confirmed their agreement to preserve the established agenda for the Hearing on Annulment, and informed the Committee that

there would be no need for a teleconference on the organization of the hearing.

35. On 12 March 2014, the Republic of Peru submitted three additional legal authorities that it intended to use at the Hearing on Annulment, which had not yet been referred to in the Parties' written submissions.
36. The Hearing on Annulment was held at the World Bank Headquarters on Friday, 21 March – Saturday, 22 March 2014. Present at the Hearing were:

Members of the *ad hoc* Committee:

Judge Dominique Hascher, President of the Committee
Prof. Donald McRae, Member
Prof. Kaj Hóber, Member

ICSID Secretariat

Ms. Luisa Fernanda Torres, Secretary of the Committee

Representing Mr. Tza Yap Shum:

Mr. Carlos Paitán Contreras, Estudio Paitán & Abogados
Mr. Christian Carbajal Valenzuela, Estudio Paitán & Abogados
Mr. José Salcedo, Estudio Paitán & Abogados

Representing the Republic of Peru:

Mr. Stanimir A. Alexandrov, Sidley Austin LLP
Ms. Marinn Carlson, Sidley Austin LLP
Mr. Andrew C. Blandford, Sidley Austin LLP
Mr. Gavin Cunningham, Sidley Austin LLP (support team)
Mr. Carlos José Valderrama Bernal, President of the Special Commission that Represents the State in International Investment Disputes. Ministry of Economy and Finance
Ms. Erika Lizardo, Embassy of the Republic of Peru in the United States

Experts

Professor Michael Reisman, McDougal Professor of International Law, Yale Law School, expert on behalf of the Republic of Peru

Interpreters

Ms. Silvia Colla
Ms. Daniel Giglio
Ms. Judith Letendre

Court Reporters

Mr. Leandro Iezzi
Mr. Dionisio Rinaldi
Ms. Gail Inghram Verbano

37. Mr. Alexandrov and Ms. Carlson addressed the Committee on behalf of the Republic

of Peru. Mr. Paitán and Mr. Carvajal argued on behalf of Mr. Tza Yap Shum. The hearing was recorded and a verbatim transcript was made and circulated to the Parties.

38. At the conclusion of the Hearing of Annulment, the President of the *ad hoc* Committee indicated that the Parties would be notified of the Decision on Annulment through the ICSID Secretariat.
39. On 9 April 2014, the Parties submitted joint corrections to the transcript of the Hearing on Annulment.
40. On 14 April 2014, the ICSID Secretariat was informed that, as of 31 March 2014, Mr. Christian Carbajal was no longer representing Mr. Tza Yap Shum in this proceeding.
41. The *ad hoc* Committee met to deliberate in Washington, D.C. on 23 March 2014 and continued its deliberations thereafter by various means of communication.
42. On 23 December 2014, pursuant to Rule 28 of the ICSID Arbitration Rules, the *ad hoc* Committee invited the Parties to submit their respective statements of costs by 9 January 2015. The Republic of Peru filed and Mr Tza Yap Shum filed their respective statements on that date, and in response to questions from the *ad hoc* Committee, the Republic of Peru filed a correction on 14 January 2015.
43. In accordance with ICSID Arbitration Rules 38(1) and 53, the annulment proceeding was declared closed on 15 January 2015.

II. FACTUAL BACKGROUND

44. The dispute between Mr. Tza Yap Shum, a Chinese national, and the Republic of Peru arises from alleged violations of the Peru-China BIT that affected Mr. Tza Yap Shum's investment in TSG Perú S.A.C. (or "TSG"), a company incorporated in Peru in 2001 which engaged in the manufacturing of food products derived from fish and their exportation to Asian markets.
45. In 2004, the National Superintendence of Tax Administration ("SUNAT") started to conduct a series of actions that, according to Mr. Tza Yap Shum, destroyed the commercial operations and the economic viability of TSG. SUNAT considered TSG

as an industrial company rather than as a service company operating as a financing source for the Peruvian industrial fisheries, as claimed by Mr. Tza Yap Shum. As it was claimed, the immediate cause of the impact on TSG was the illegal and arbitrary attachment of the company's accounts that prevented it from operating uninterruptedly.

46. The audit of TSG conducted by SUNAT in 2004 resulted in the issuance in 2005 of 95 retroactive taxation decisions, resolutions and fines arising from breaches of the income tax ("IT") and general sales tax ("GST") laws totaling approximately US\$ 45 million. The administrative complaints made by TSG before SUNAT against these decisions led to a reduction of TSG's tax debt by 13,5%. On appeal, the Peruvian Tax Court reduced TSG's debt by 31,3%.
47. On 28 January 2005, SUNAT issued an Enforcement Resolution to freeze TSG's bank accounts up to the amount of S/. 3,535,791 and notified fifteen Peruvian banks of its decision. On the same day, SUNAT also issued two other Enforcement Resolutions to attach three vehicles and to freeze, in the form of withholdings by third parties, up to S/. 8,000,000. These Enforcement Resolutions were notified to seven companies which were customers of TSG.
48. The administrative complaint by TSG before SUNAT against these bank seizures was rejected, and so was the appeal before the Peruvian Tax Court against the administrative decision. While this appeal was pending, TSG applied for a declaration of preventive bankruptcy in March 2005.
49. Under the circumstances described, on 29 September 2006, Mr. Tza Yap Shum together with TSG submitted a Request for Arbitration against the Republic of Peru before ICSID. The Request for Arbitration claimed that the following provisions of the Peru-China BIT had been violated:
 - "Obligation to accord investments fair and equitable treatment";
 - "Obligation to protect investments";
 - "Obligation to compensate in the event of adopting expropriatory or similar measures";

- “Obligation to allow the transfer of capital and returns”.³

50. On 12 February 2007, following TSG’s withdrawal from the Request in January 2007, the Secretary-General of ICSID registered Mr. Tza Yap Shum’s Request for Arbitration against the Republic of Peru. The Arbitral Tribunal was constituted on 1 October 2007, and it rendered its Decision on Jurisdiction and Competence on 19 June 2009 and its Award on 7 July 2011.

III. DECISION ON JURISDICTION AND COMPETENCE OF 19 JUNE 2009

A. THE PARTIES' SUBMISSIONS

a. The Applicant’s Submissions

i. Manifest Excess of Powers

51. The Republic of Peru first claims that the Arbitral Tribunal committed a manifest excess of powers under **Article 52(1)(b)** of the ICSID Convention by finding jurisdiction. The Applicant contends that the Arbitral Tribunal disregarded the plain meaning of the Peru-China BIT to assume jurisdiction over expropriation-related claims beyond “*the amount of compensation for expropriation*” to which Article 8(3) of the Peru-China BIT limits the jurisdiction of the Arbitral Tribunal.⁴

52. The Republic of Peru explains that the Arbitral Tribunal manifestly erred in interpreting the arbitration clause of Article 8(3) of the Peru-China BIT by:

- “ignoring the plain meaning of the text to assume jurisdiction over claims beyond ‘the amount of compensation for expropriation’;
- noting, but then disregarding, the unrebutted testimony of the Chinese and Peruvian negotiators of the [Peru-China] BIT, both of whom agreed that the Contracting Parties intended to limit ICSID jurisdiction to disputes about the ‘amount of compensation’;

³ Decision on Jurisdiction and Competence, para. 31.

⁴ Respondent’s Memorial on Annulment (29 June 2012) [hereinafter Memorial], para. 162.

- considering, but then disregarding, China’s notification to ICSID (contemporaneous with its negotiations of the [Peru-China] BIT) that confirmed the narrow scope of its consent to jurisdiction;
- misrepresenting the jurisprudence that it claimed supported its interpretation of the term ‘the amount of compensation’; and
- basing its interpretation of the arbitration clause not on the arguments developed by the parties, but rather on its own undeveloped theories that the parties had no opportunity to address –e.g., the Tribunal’s *sua sponte* contextual analysis of the [Peru-China] BIT’s fork-in-the-road provision, which was (mis)represented so broadly that it necessarily would have barred this very dispute (had the Tribunal applied its own logic to the case before it).”⁵

According to the Republic of Peru, each of these errors is manifest, and taken together, they constitute an “*unmistakable case of manifest excess of powers because the [Arbitral] Tribunal founded its jurisdiction on multiple patent errors and misrepresentations.*”⁶

ii. Failure to State Reasons

53. Second, the Republic of Peru argues that, under **Article 52(1)(e)** of the ICSID Convention, in the Decision on Jurisdiction and Competence the Arbitral Tribunal fails to state reasons with respect to the ordinary meaning of Article 8(3) of the Peru-China BIT for:

- “why it *sua sponte* decided to focus solely on a single treaty term - ‘involving’ - and largely ignored ‘the amount of compensation’;
- why it ignored other possible definitions for ‘involving,’ and seized on only one possible definition, ‘to include’;
- why it construed ‘including’ as ‘including but not limited to’; and

⁵ Reply, para. 2.

⁶ Reply, para. 2.

- why only expropriation claims – and not, for example, fair and equitable treatment claims – would be included in disputes ‘including but not limited to’ the amount of compensation for expropriation.”⁷

54. The Republic of Peru adds that, with respect to the context of Article 8(3), the Arbitral Tribunal failed to state reasons for:

- “why it *sua sponte* decided to focus on the fork-in-the-road provision when neither party had argued that the provision was relevant to the interpretation of the arbitration clause;
- why it interpreted the term ‘dispute’ so broadly that the fork-in-the-road provision would have barred even Claimant’s [Mr. Tza Yap Shum’s] claims here (if the Tribunal had considered the question) – constituting a clear contradiction in the Tribunal’s reasoning;
- why it did not consider the standard jurisprudence applying a fork-in-the-road provision to bar only an identical dispute in which the parties and claims are the same; and
- why it presumed that all disputes about compensation for expropriation necessarily involve a *judicial* determination of whether or not expropriation has taken place - failing to consider at all situations where, for example, an expropriation might arise from Peru’s Expropriation Act, which Claimant [Mr. Tza Yap Shum] had quoted in its written submission.”⁸

55. The Republic of Peru further contends that the Arbitral Tribunal failed to state reasons with respect to the Peru-China BIT’s object and purpose for:

- “taking a policy-based approach to override the plain meaning of Article 8(3);”⁹
- “erecting a presumption that *the arbitration clause in particular*, had the sole

⁷ Reply, para. 95.

⁸ Reply, para. 96.

⁹ Reply, para. 97.

objective to benefit investors”,¹⁰ or put another way, for the Tribunal’s “skepticism about whether such a [limited dispute settlement] mechanism could possibly help to attract foreign investors”,¹¹ and

- “ignoring the absurd result that either all early Chinese BITs have essentially no object and purpose or the arbitration provision in all of them must be read broadly regardless of the plain meaning of their texts.”¹²

56. The Republic of Peru further argues that, while the Arbitral Tribunal invoked Article 32 of the Vienna Convention on the Law of Treaties (“VCLT”) and looked at the circumstances of the Peru-China BIT’s negotiations, it failed to state reasons with respect to the circumstances of the Peru-China BIT’s negotiations for:

- “why it ignored all of the unrebutted evidence regarding the Contracting Parties’ intentions, as provided by the Chinese and Peruvian negotiators’ identical accounts of their communications and shared intention;
- contradicting itself by first emphasizing the importance of engaging the *travaux* and then ignoring the clear outcome of that inquiry; and
- why it refused to examine the significance of China’s 1993 notification under Article 25 of the ICSID Convention, which was the basis for the Tribunal’s own jurisdiction in this ICSID case.”¹³

57. The Applicant also contends that, with respect to its “*interpretation of Article 8 on the basis of other decisions and arbitral awards*”, the Arbitral Tribunal failed to state reasons for:

- “rejecting prior decisions cited by Peru due to lack of *travaux*, even while disregarding the clear and unrebutted evidence submitted to it regarding the *travaux* of the China-Peru BIT;
- misrepresenting three inapt decisions as supporting its interpretation of Article

¹⁰ Reply, para. 97.

¹¹ Reply, para. 19 (quoting Decision on Jurisdiction and Competence para. 153).

¹² Reply, para. 97.

¹³ Reply, para. 98.

8(3); and

- why it considered *European Media Ventures* to be persuasive when, in fact, the English High Court’s focus on the preparatory work and the term ‘amount’ favors Respondent.”¹⁴

iii. Serious Departure from a Fundamental Rule of Procedure

58. Third, the Republic of Peru claims that, under **Article 52(1)(d)** of the ICSID Convention, the Arbitral Tribunal committed a serious breach of a fundamental rule of procedure by assuming jurisdiction where jurisdiction was lacking.¹⁵

59. The Applicant also contends that the Arbitral Tribunal committed a serious breach of a fundamental rule of procedure by deciding in the face of extensive evidence to the contrary that had not been rebutted by the opposing party, and doing so without giving any appropriate explanation.¹⁶ The Republic of Peru also alleges that the failure of the Arbitral Tribunal to state reasons for its Decision on Jurisdiction and Competence constitutes a serious breach of the fundamental rule of procedure that a tribunal must address the material questions presented by the parties.¹⁷

60. The Republic of Peru further alleges that it was denied the opportunity to express its views regarding two distinct issues that the Arbitral Tribunal considered critical, but which neither party raised in their written submissions or during the hearing. According to the Applicant:

- “First, the Tribunal formulated its broad interpretation of the term ‘involving’ in a *sua sponte* manner, as Claimant [Mr. Tza Yap Shum] did not advocate such an interpretation. Instead, Claimant [Mr. Tza Yap Shum] had conceded

¹⁴ Reply, para. 99.

¹⁵ Reply, para. 101. The word “*fundamental*” / “*fondamentale*” present in the English and French texts of Article 52(1)(d) of the ICSID Convention does not appear in the Spanish text of said provision. The Committee notes, however, that both Parties have used the word “*fundamental*” in their pleadings, and neither Party has raised this as an issue with the Committee. See Memorial, §§IV(C), V(B)(3) and VI(B)(3) (English); Counter-Memorial, §§II(D) and III(C) (Spanish and English); Reply §§II(B)(3) and III(B)(3) (English); Rejoinder §§II(C) and IV(C) (English). In light of the Parties’ conduct and considering the use of the word “*fundamental*” in both the English and French texts of Article 52(1)(d) of the ICSID Convention, the Committee will use it in its discussion of this ground for annulment in both the English and Spanish language texts of its Decision on Annulment.

¹⁶ Reply, para. 102.

¹⁷ Reply, para. 103.

that, in Article 8 as read literally, Peru consented only to jurisdiction over disputes about the amount of compensation for expropriation.

- Second, the Tribunal decided *sua sponte* that the BIT’s fork-in-the-road provision required a broad interpretation of the arbitration clause, because (according to the Tribunal), it necessarily barred all ICSID arbitration after any related litigation occurred in domestic court. Had Peru been given the opportunity to address this issue, it would have pointed out the numerous flaws in the Tribunal’s haphazard interpretation of the fork-in-the-road provision.”¹⁸

61. The Republic of Peru concludes that the Decision on Jurisdiction and Competence must be annulled “*insofar as it held that the dispute with respect to the existence of an expropriation was within the scope of Article 8(3) of the BIT.*”¹⁹ The Republic of Peru asks the Committee to require Mr. Tza Yap Shum to “*bear all costs and fees, including attorney fees, associated with this annulment proceeding.*”²⁰

b. The Respondent’s Submissions

i. No Manifest Excess of Powers

62. Mr. Tza Yap Shum stresses that the scope of review of an annulment committee does not entitle it to re-examine the conclusions reached by the Tribunal in light of the rules of interpretation in the VCLT, nor should an *ad hoc* committee impose its own assessment of the evidence.²¹ He argues that the sequence of interpretation followed by the Tribunal observed the order required by the VCLT and included all relevant factors. For Mr. Tza Yap Shum, the Arbitral Tribunal interpreted Article 8(3) of the Peru-China BIT according to the methodology established in the VCLT, finding the ordinary meaning of the term “*involving the amount of compensation for expropriation*”, examining the context, object and purpose of the Peru-China BIT, and confirming the interpretation adopted by supplementary means such as: (i) China’s

¹⁸ Reply, para. 104.

¹⁹ Memorial, para. 260. *See also*, Reply, para. 181.

²⁰ Memorial, para. 260.

²¹ Claimant’s Counter-Memorial on the Request for Annulment (7 September 2012) [hereinafter Counter Memorial], para. 63-64. *See also*, Claimant’s Rejoinder on Annulment (3 January 2013) [hereinafter Rejoinder], para. 20.

notification to ICSID when it submitted the ratification instruments on 7 January 1993, (ii) the evidence on the preparatory work and the circumstances under which the final Peru-China BIT was drafted contained in the witnesses statements of Mr. Fan and Ms. Vega, (iii) the investment treaties signed by China before the Peru-China BIT and (iv) the declaration of Professor Chen, the Republic of Peru's Chinese legal expert.²²

63. Mr. Tza Yap Shum further contends that the Tribunal also responded to the Republic of Peru's arguments on the interpretation of Article 8(3).²³ He argues that "*the interpretation by the Tribunal is valid and reasonable, is supported by appropriate grounds, and [...] cannot be regarded as an error of interpretation of the law on the Treaty, and certainly not a manifest error that would warrant the annulment of the Decision on Jurisdiction.*"²⁴

ii. No Failure to State Reasons

64. Mr. Tza Yap Shum contends that the Tribunal did state the reasons for its Decision on Jurisdiction and Competence.

65. On the *sua sponte* approach to the term "*involving*", Mr. Tza Yap Shum says that, faced with conflicting interpretations from the Parties in relation to the meaning of "*involving the amount of compensation*", it was fair for the Tribunal to exercise its competence to review the Treaty. Mr. Tza Yap Shum stresses that an *ad hoc* committee is not entitled to examine whether a tribunal should have chosen one possible meaning over others or to conduct a re-examination of the possible meanings of an ambiguous term of the Treaty, as doing so would involve revising the merits which have been decided by the tribunal. He adds that an interpretation of Article 8(3) of the Peru-China BIT as that made by the Tribunal is a valid option in accordance with international case law, and allows the reader to understand the Decision on Jurisdiction and Competence.²⁵

66. On the *sua sponte* approach to the fork-in-the-road provision that, according to the

²² Counter Memorial, paras. 43-48, 55-58. *See also id.*, 63-64, 79, 141-145.

²³ Counter Memorial, paras. 49-54.

²⁴ Rejoinder, para. 21.

²⁵ Counter-Memorial, paras. 67, 70-71; Rejoinder, paras. 38-43.

Applicant, had not been subject to discussion between the Parties, Mr. Tza Yap Shum remarks that: (i) although the term was not expressly referred to by the Parties, it was the Republic of Peru and its expert, Prof. Chen, who raised the issue before the Tribunal and (ii) its concept, scope and consequences were subject to debate between the Parties during the arbitration process.²⁶

67. In respect of the Republic of Peru’s allegation that the Decision on Jurisdiction and Competence was contradictory because the broad interpretation of the term “*involving*” adopted by the Tribunal would have allowed inclusion of disputes concerning the fair and equitable treatment standard for which the Tribunal had declined jurisdiction, Mr. Tza Yap Shum notes that as “*it is evident from a simple reading of Article 8 (3), the standard applies specifically to the case of expropriation, and not to other protection standards*”²⁷ and adds that the Decision on Jurisdiction and Competence details at paragraph 152 “*the other assumptions related to expropriation claims on which the Tribunal would have jurisdiction,*” such as “*illegal expropriation, the [existence of] public interest as [a] basis for expropriation, the non-existence of discrimination, and the payment of compensation for expropriation.*”²⁸
68. In respect of the alleged disregard of evidence presented by the Applicant relating to the preparatory work for the negotiation of the Peru-China BIT and the witness statements of the negotiators, Mr. Tza Yap Shum underlines that the Tribunal noted that the *travaux préparatoires* and the witness statements were not conclusive evidence that Article 8(3) of the Peru-China BIT limited jurisdiction to claims for compensation for expropriation, and argues that the Tribunal’s conclusion is a valid and reasonable conclusion adopted in full exercise of its autonomy to give probative value to the evidence produced by the Parties.²⁹ Further, for Mr. Tza Yap Shum, the Arbitral Tribunal’s examination of China’s notification pursuant to Article 25(4) of the ICSID Convention in the exercise of its autonomy to assess evidence is also fully reasonable and properly grounded.³⁰

²⁶ Counter-Memorial, paras. 77-78; Rejoinder, paras. 45-47.

²⁷ Counter-Memorial, para. 73.

²⁸ Counter-Memorial, para. 74.

²⁹ Counter-Memorial, paras. 81-82; Rejoinder, paras. 60-65.

³⁰ Rejoinder, paras. 68-73.

69. Concerning the Applicant’s contention that the Decision on Jurisdiction and Competence relied on inapt awards, Mr. Tza Yap Shum points out that “*the different interpretation of arbitration case law is [also] subject to the autonomy the Tribunal enjoys to assess the various evidence submitted by the parties; [and] therefore it does not constitute grounds for annulment.*”³¹ In any case, the Respondent points out that each of the decisions relied upon by the Republic of Peru in its submissions on annulment (*RosInvest, Berschader and Austrian Airlines*) deals with jurisdiction clauses which differ in an evident and essential manner from Article 8(3) of the Peru-China BIT. For Mr. Tza Yap Shum, the interpretation of other arbitration case law by the Arbitral Tribunal supports the broad interpretation of Article 8(3).³²
70. All in all, Mr. Tza Yap Shum asserts that:³³
- a. “The Tribunal did state the reasons for [its] interpretation of the terms ‘involving’ and the derived concept ‘involving but not limited to’, as had been discussed by the parties during the arbitration process;
 - b. The Tribunal did state the reasons for why [it] chose a broad meaning of the term ‘involving’ in accordance with a contextual and teleological interpretation of the BIT;
 - c. The Tribunal did state the reasons [for] why [it] is competent only for disputes concerning expropriation and not for other disputes, such as those concerning fair and equitable treatment;
 - d. The Tribunal did state the reasons for [its] interpretation of the ‘fork-in-the-road’ clause contained in Article 8(3) of the BIT and its relation to the arguments of both parties;
 - e. The Tribunal did conduct a valid interpretation of Article 8(3) of the BIT, without overlooking an alleged ‘plain meaning’ of this article [...], because the term ‘involving’ was ambiguous and needed to be interpreted by the Tribunal;
 - f. The Tribunal did not rely on an alleged presumption that arbitration, and the

³¹ Counter-Memorial, para. 87. *See also*, Rejoinder, para. 74.

³² Rejoinder, paras. 80-83.

³³ Rejoinder, para. 90.

arbitration clause in particular, only benefits the investor; since it favors the promotion of investments in general, it benefits both investors and States;

- g. The Tribunal stated the reasons why the various clauses in other China's BITs may be interpreted differently, namely, because they contain a very different wording from that contained in the BIT Peru-China;
- h. The Tribunal did not overlook the *travaux préparatoires* or the witness statements deposited by the negotiators of the BIT; in fact, they were discussed at length. They just did not persuade the Tribunal to adopt [the Republic of Peru's] restrictive interpretation, and the Tribunal did state the reasons for such disagreement;
- i. The Tribunal did not overlook China's notification to ICSID in 1993, but the Tribunal only held, pursuant to the ICSID Convention, that such act did not condition the consent and had no direct legal consequences on the BIT signed eventually, and adequately stated the reasons;
- j. Having stated that arbitral case law is not binding, the Tribunal interpreted properly the arbitration case law cited by the parties, as well as that brought by the Tribunal, and assessed them as [it] deemed appropriate and the conclusions reached had adequate grounds, wherewith [the Republic of Peru] just did not agree."

iii. No Serious Departure from a Fundamental Rule of Procedure

- 71. Mr. Tza Yap Shum finally takes the view that in the Decision on Jurisdiction and Competence the Tribunal did not seriously depart from any fundamental rule of procedure. He argues that interpretation of the term "*involving*" to mean "*including but not limited to*" may not be dissociated from the Parties' arguments during the hearing. He adds that the reference by the Tribunal to the fork-in-the-road matter was made for explanatory and supplementary purposes in light of all the circumstances of the case and although an explicit reference to the fork-in-the-road issue was not formally mentioned, the subject was fully elaborated on by the Parties during the

debates.³⁴ He finally notes that the Republic of Peru's allegation that there is a breach of a fundamental rule of procedure as a direct consequence of a its challenge under the other grounds for annulment (manifest excess of power and failure to state reasons) fails because those other grounds have not been established either.³⁵

B. THE COMMITTEE'S ANALYSIS

a. Article 52(1)(B): Manifest Excess of Powers

72. The challenge to the Decision on Jurisdiction and Competence hinges upon the interpretation by the Arbitral Tribunal of the dispute settlement clause at Article 8 of the Peru-China BIT, which reads in pertinent part:

"1. Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.

3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the International Center for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed in Washington D.C. on March 18, 1965. Any disputes concerning other matters between an investor of either Contracting Party and the other Contracting Party may be submitted to the Center if the parties to the dispute so agree. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.

³⁴ Counter-Memorial, paras. 93, 96-97.

³⁵ Rejoinder, paras. 92-93.

4. [...].”³⁶

73. The Republic of Peru essentially challenges the Decision on Jurisdiction and Competence for manifest excess of powers on the ground that the Arbitral Tribunal disregarded the plain meaning of the Peru-China BIT to assume jurisdiction for expropriation-related claims beyond “*the amount of compensation for expropriation*” set out in the arbitration provision of Article 8(3) of the BIT.³⁷ The Republic of Peru argues that the terms of its offer to arbitrate in Article 8 are clear and unambiguous. As a result, only disputes about the amount of compensation owed to an investor after a finding of wrongful expropriation can be submitted to ICSID arbitration.³⁸
74. The Republic of Peru challenged the jurisdiction of the Arbitral Tribunal precisely because the dispute with Mr. Tza Yap Shum over the principle of indirect expropriation required an additional expression of consent which the Republic of Peru did not give.³⁹ This notwithstanding, the Arbitral Tribunal found the ordinary meaning of the arbitration clause to be ambiguous and interpreted the words “*a dispute involving the amount of compensation for expropriation*” in the first sentence of Article 8(3) as granting it jurisdiction over a dispute including, but not limited to, the amount of compensation for expropriation. The Arbitral Tribunal held:

*“Firstly, the Tribunal refers to the specific words used by the third paragraph of Article 8. The BIT uses the word ‘involucra’, which according to the definition given by the Dictionary of the Real Academia Espanola, means ‘abarcar, incluir, comprender’. A good faith interpretation of this term indicates that the only requirement in the BIT is that the dispute should ‘include’ the determination of an amount of compensation and not that the dispute should be restricted to this element. Obviously, other formulations were available such as: ‘limited to’ or ‘exclusively’, but the wording used in this provision says ‘involving’”*⁴⁰

According to the Republic of Peru, the Arbitral Tribunal rendered meaningless the

³⁶ Agreement between the Government of the Republic of Peru and the Government of the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, signed 9 June 1994, entered into force 1 February 1995 [hereinafter Peru-China BIT], Art. 8 (Exh. RA-004).

³⁷ Memorial, para. 162.

³⁸ See Memorial, paras. 89-120. See also, Republic of Peru’s Post-Hearing Submissions on Objections to Jurisdiction (18 November 2008), paras. 81-85.

³⁹ Memorial on Objections to Jurisdiction and Admissibility (28 March 2008), paras. 105-145, cited at Decision on Jurisdiction and Competence, para. 129.

⁴⁰ Decision on Jurisdiction and Competence, para. 151.

limiting words “*amount of compensation for expropriation*” in the arbitration clause. It also rendered meaningless the second sentence of Article 8(3) according to which arbitration for “[*a*]ny disputes concerning other matters” requires the consent of the parties to the dispute, because in the Arbitral Tribunal’s interpretation, such “*other matters*” would already be within the Arbitral Tribunal’s automatic jurisdiction so long as it was presented alongside an expropriation claim.⁴¹

75. The Republic of Peru’s allegations that the Arbitral Tribunal decided *sua sponte* on the interpretation of Article 8(3) on the basis of theories that the Parties had no opportunity to address will be dealt with in the section below on the serious departure from a fundamental rule of procedure. In the context of Article 52(1)(b) of the ICSID Convention, the Committee is only concerned with the Republic of Peru’s arguments that the analysis of the Arbitral Tribunal discarded the Contracting Parties’ mutually agreed text and altered in this manner the legal regime of the Peru-China BIT.⁴²
76. The Committee agrees with the Republic of Peru that, because jurisdiction of an arbitral tribunal rests on the parties’ consent, ignoring the terms of the parties’ agreement as expressed in the arbitration clause constitutes an excess of powers. More generally, an excess of powers occurs every time the powers exercised by the arbitrators are not those which have been granted to them. It follows that an arbitral tribunal usurps its powers whenever it attributes to the parties agreements and declarations which they have not made.
77. The Republic of Peru points out that “[*c*]ertain types of egregious errors made by a tribunal with respect to the scope of its jurisdiction may, if the facts warrant it, be characterized as a ground of annulment.”⁴³ At the hearing, the standards of annulment were discussed at the Republic of Peru’s initiative. Its Expert-Witness, Professor Reisman, was examined and cross-examined by the Parties, and questioned by Members of the Committee.⁴⁴
78. The Committee notes that the text of Article 52(1)(b) of the ICSID Convention makes

⁴¹ Reply, para. 15.

⁴² Memorial, para. 87.

⁴³ Memorial, para. 161 (citing W. Michael Reisman, Opinion on Annulment on the Grounds of Excès de Pouvoir and Failure to States Reasons of the Decision on Jurisdiction (27 June 2012) [hereinafter Reisman Opinion] (Exh. RA-001), para. 15).

⁴⁴ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 208:19 – 287:14.

no distinction between decisions of the arbitral tribunal on competence or substance.⁴⁵ This has also been recognized with consistency by decisions of other *ad hoc* committees.

79. In *Soufraki v. UAE*, the *ad hoc* Committee held that it saw

*“no reason why the rule that an excess of power must be manifest in order to be annulable 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 [...]. 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 an excess of power, whether on a matter related to jurisdiction or to the merits, is there a basis for annulment.”*⁴⁶

In *Lucchetti v. Peru*, the *ad hoc* Committee observed that:

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

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

⁴⁵ See also, Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 269: 3-11 (Reisman examination).

⁴⁶ *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment (5 June 2007) [hereinafter *Soufraki v. UAE*], paras 118-119 (Exh. RA-LA-041).

jurisdiction are concerned.”⁴⁷

Deference to the legal and factual findings of an arbitral tribunal is the same for any decision. It follows that the standards of the review are the same for competence as those which *ad hoc* committees apply when they review any other matters decided by an arbitral tribunal.⁴⁸

80. The Committee recognizes that there would not be a binding award in the meaning of Article 53 of the ICSID Convention if an award could be annulled because the arbitral tribunal misinterpreted the language of the treaty. As one *ad hoc* Committee remarked, “[t]reaty interpretation is not an exact science, and it is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several.”⁴⁹ In the view of the Committee, misinterpretation of the arbitration clause does not amount to a manifest excess of powers. Interpretation, as it has been said, leaves room for discussion:

*“When a tribunal engages in interpretation of a written instrument of consent in light of the surrounding circumstances or in the context of other documents, its final construction of the meaning of the document in the light of all the evidence and submissions of the parties is unlikely to amount to a manifest excess of powers. Interpretation, which leaves room for discussion [...], is not likely to give rise to a manifest excess of powers.”*⁵⁰

81. Among the annulment cases which have been cited by the Parties in their respective submissions, the Committee identifies the decision of the *Klöckner v. Cameroon I* Committee which early on underlined that:

*“since the answers seem tenable and not arbitrary, they do not constitute the manifest excess of powers which alone would justify annulment under Article 52(1)(b).”*⁵¹

⁴⁷ *Industria Nacional de Alimentos, S.A. and Indalsa Peru, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (5 September 2007) [hereinafter *Lucchetti v. Peru*], paras. 100-101 (Exh. RA-LA-045).

⁴⁸ *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (19 October 2009) [hereinafter *MCI v. Ecuador*], para. 55 (Exh. CA-LA-2.14)

⁴⁹ *Lucchetti v. Peru*, para. 112 (Exh. RA-LA-045).

⁵⁰ *Duke Energy International Peru Investments No. 1 Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment (1 March 2011) [hereinafter *Duke v. Peru*], para. 160 (Exh. CA-LA-2.4).

⁵¹ *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise*

The *CDC v. Seychelles* Committee confirmed that:

*“Any excess apparent in a Tribunal’s conduct, if susceptible of argument ‘one way or the other,’ is not manifest.”*⁵²

And the *Lucchetti v. Peru* Committee stressed that an *ad hoc* committee should not substitute its own decision for that of the arbitral tribunal:

*“[...] The interpretation [...] adopted by the Tribunal is clearly a tenable one. Clearly also there are other tenable interpretations. The Committee is not charged with the task of determining whether one interpretation is ‘better’ than another, or indeed which among several interpretations might be considered the ‘best’ one [...]”*⁵³

In a similar vein, the *Duke v. Peru* Committee expressed that:

*“An ad hoc committee will not therefore annul an award if the tribunal’s disposition on a question of law is tenable, even if the committee considers that it is incorrect as a matter of law. The existence of a manifest excess of powers can only be assessed by an ad hoc committee in consideration of the factual and legal elements upon which the arbitral tribunal founded its decision and/or award based on the parties’ submissions. Without reopening the debates on questions of fact, a committee can take into account the facts of the case as they were in the record before the tribunal to check whether it could come to its solution, however debatable. Is the opinion of the tribunal so untenable that it cannot be supported by legal arguments? A debatable solution is not amenable to annulment, since the excess of powers would not then be ‘manifest.’”*⁵⁴

The *Fraport v. Philippines* Committee was also:

*“convinced that the jurisprudence of ICSID ad hoc Committees on the ‘tenable’ standard for review on issues of jurisdiction is to be interpreted to like effect.”*⁵⁵

des Engrais, ICSID Case No. ARB/81/2, Decision on Annulment (3 May 1985) [hereinafter *Klöckner v. Cameroon I*], para. 52(e) (Exh. RA-LA-055).

⁵² *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment (29 June 2005) [hereinafter *CDC v. Seychelles*], para. 41 (Exh. CA-LA-2.2).

⁵³ *Lucchetti v. Peru*, para.112 (Exh. RA-LA-045).

⁵⁴ *Duke v. Peru*, para. 99 (Exh. CA-LA-2.4).

⁵⁵ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment (23 December 2010) [hereinafter *Fraport v. Philippines*], para. 44 (Exh. CA-LA-2.8).

82. The existence of a clear and unambiguous textual meaning must be evident, in compliance with the standards adopted by decisions of *ad hoc* committees for manifest excess of powers. As remarked, “*manifest*” does not refer to the gravity of the excess but to the clarity with which the excess of powers can be ascertained. The Committee in *Soufraki v. UAE* held that “*a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.*”⁵⁶ The prevailing practice of *ad hoc* committees is explicit as appears from the decisions which the Parties have brought forward in support of their argumentation. In *Wena v. Egypt*, the *ad hoc* Committee ruled that:

*“[t]he excess of powers must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of powers is no longer manifest.”*⁵⁷

In *CDC v. Seychelles*, the *ad hoc* Committee similarly reminds us that:

*“the term ‘manifest’ means clear or ‘self-evident.’ Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy.”*⁵⁸

The same approach has been adopted by the *ad hoc* Committee in *Patrick Mitchell v. Congo*:

*“[i]f an excess of powers is to be the cause of an annulment, the ad hoc Committee must so find with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award.”*⁵⁹

The Committee in *MCI v. Ecuador* underlined that:

*“the manifest excess requirement in Article 52(1)(b) suggests a somewhat higher degree of proof than a searching analysis of the findings of the Tribunal.”*⁶⁰

⁵⁶ *Soufraki v. UAE*, para. 40 (Exh. RA-LA-041).

⁵⁷ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment (8 December 2000) [hereinafter *Wena v. Egypt*], para. 25 (Exh. RA-LA-096).

⁵⁸ *CDC v. Seychelles*, para. 41 (Exh. CA-LA-2.2).

⁵⁹ *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (1 November 2006), para. 20 (Exh. RA-LA-070).

⁶⁰ *MCI v. Ecuador*, para. 49 (Exh. CA-LA-2.14).

83. The Republic of Peru alleges that the Arbitral Tribunal misapplied the VCLT at every step of its interpretative analysis of Article 8(3) of the Peru-China BIT, leading to an untenable broadening of its jurisdiction beyond the consent of the Contracting Parties to the Treaty.⁶¹

84. The Republic of Peru criticizes the application by the Arbitral Tribunal of Article 31(1) of the VCLT. This provision sets out four interpretative criteria: good faith, the ordinary meaning of the treaty's terms and the context of such terms, the object and purpose of the Treaty:

*“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.”*⁶²

85. The Arbitral Tribunal considered the interaction of the last sentence of Article 8(3) of the Peru-China BIT⁶³ with the provisions of Article 8(2). In reading these two provisions together,⁶⁴ as a result of its contextual approach, the Arbitral Tribunal found that if a party chooses to submit a claim to a competent court, as envisaged by Article 8(2), access to ICSID arbitration would be barred:

*“[i]n fact, the last sentence [of Article 8(3)] leaves no doubt that an investor (of any Contracting Party), when trying to choose a course of action to settle a dispute in accordance with Article 8, finds himself with an irrevocable forum selection clause, also known by the phrase ‘fork in the road’. An investor ‘shall be entitled to submit the dispute to the competent court of the Contracting Party’ (emphasis added) in accordance with Paragraph 8(2), but if the investor does so, in accordance with Paragraph 8(3), such investor could not under any circumstances resort to ICSID arbitration to settle a dispute ‘involving the amount of compensation for expropriation.’”*⁶⁵

86. The Republic of Peru argues that the Arbitral Tribunal committed a grave error in asserting jurisdiction on the basis of an incorrect reading of the fork-in-the-road

⁶¹ Memorial, para. 164.

⁶² Vienna Convention on the Law of Treaties (1969) [hereinafter VCLT], Art. 31(1) (Exh. RA-LA-088).

⁶³ Peru-China BIT, Art. 8(3) (Exh. RA-004) (“The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.”)

⁶⁴ Decision on Jurisdiction and Competence, paras. 155-157.

⁶⁵ Decision on Jurisdiction and Competence, para. 159.

provision in the last sentence of Article 8(3).⁶⁶ The decision of the Arbitral Tribunal, the Republic of Peru contends, ignored the fact that domestic litigation regarding the existence of an expropriation does not necessarily involve the amount of compensation. For the Applicant, the Arbitral Tribunal also wrongly assumed that only the Peruvian judiciary could establish an expropriation when, quite to the contrary, complaints under the BIT about non-judicial expropriations (legislative or executive actions) would not be barred by the fork-in-the-road provision of Article 8(3) because they would not have been submitted to a domestic court.⁶⁷

87. In the Applicant's view, the Arbitral Tribunal also misinterpreted the object and purpose of the Peru-China BIT in order to advance the objective of helping investors. The Arbitral Tribunal stated:

*“Presumably, in conformity with the wording of the preamble of the BIT, the objective sought when including the right to refer certain disputes to ICSID arbitration is to confer certain benefits for investment promotion. In the event that the Contracting Parties really had the intention to exclude the important issues listed in Article 4 from the arbitration process, the Tribunal of course would so determine, although with a certain level of scepticism [sic] about whether such a mechanism could possibly help to attract foreign investors.”*⁶⁸

According to the Republic of Peru, the Tribunal's analysis leads to an absurd result because either all Chinese BITs have essentially no object and purpose, or the arbitration provision in all of them must be read expansively regardless of the plain meaning of their texts. The Applicant notes that until 2003, most Chinese contemporaneous BITs restricted jurisdiction of investment arbitration tribunals to disputes concerning the amount of compensation for expropriation.⁶⁹

88. The Republic of Peru then criticizes the Arbitral Tribunal for failing to apply the canons of interpretation of Article 32 of the VCLT by ignoring the supplementary evidence that contradicted the Tribunal's broad reading of Article 8(3).⁷⁰ Even if the arbitration clause were ambiguous, the Republic of Peru continues, the Tribunal's

⁶⁶ Reply, para. 36.

⁶⁷ Memorial, paras. 108-113; Reply, paras. 42-43; Reisman Opinion, para. 51 (Exh. RA-001).

⁶⁸ Decision on Jurisdiction and Competence, para. 153.

⁶⁹ Reply, paras. 20, 22-23.

⁷⁰ Memorial, para. 164, Reply, paras. 45-46.

analysis of the supplementary means of interpretation of Article 32 of the VCLT should have lead it to conclude that the Contracting Parties to the Peru-China BIT intended to limit jurisdiction solely to disputes about the amount of compensation.⁷¹

89. Article 32 of the VCLT on the “Supplementary Means of Interpretation” provides that:

*“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”*⁷²

90. In the Republic of Peru’s view, the Arbitral Tribunal more precisely noted but discarded identical accounts of the Contracting Parties’ intentions from the Chinese and Peruvian negotiators of the Peru-China BIT, which clearly indicate the Contracting Parties’ intent to limit investor-state jurisdiction to the amount of compensation for expropriation.⁷³ The Republic of Peru principally refers to the testimony of Mr. Fan, the Chinese negotiator of the Peru-China BIT, who declared before the Arbitral Tribunal:

*“I remember that we gave [to the Peruvian negotiators] a clear and straightforward example, which we used in a number of negotiations: ‘you can submit a dispute to arbitration without our consent in the event that our courts decide that there has been an expropriation of your investment and that you are owed \$ 6 but you think that the debt is \$ 10’. This example reflects the outer limit of the consent of the Republic of China regarding international arbitration.”*⁷⁴

91. The Applicant adds that Ms. Vega, a chief negotiator of the BIT for Peru, stated that “negotiations essentially began and ended on the basis of the wording used in the Chinese proposal,”⁷⁵ which she quoted in response to a proposal by Peru that the

⁷¹ Memorial, para. 88.

⁷² VCLT, Art. 32 (Exh. RA-LA-088). *See also*, Reisman Opinion, paras. 26-33 (Exh. RA-001).

⁷³ Memorial, paras. 125-128, 163; Reply, paras. 47-51, 59, 60.

⁷⁴ Decision on Jurisdiction and Competence, para. 167 (quoting Mr. Fan’s Statement, para. 28).

⁷⁵ Decision on Jurisdiction and Competence, para. 168.

choice of the competent court or arbitration by an investor would be irrevocable. The Chinese response to this proposal was:

*“Honestly, though China is a signatory to the ICSID Convention, the reality is that at this moment it is not able to agree to submit all disputes between a foreign investor and the Chinese Government in accordance with its laws and we believe that you can understand our position.”*⁷⁶

92. The Republic of Peru contends that, in the following passage of the Decision on Jurisdiction and Competence, the Arbitral Tribunal dismissed the evidence as “*not conclusive*” without further explanations:⁷⁷

*“Although this exchange shows that China was not willing to accept the proposal of Peru on ICSID arbitration on all matters that might have arisen between a foreign investor and the Government of China (and clearly the position of China was in this sense more restrictive than that of Peru), this is not conclusive evidence of the scope of paragraph three of Article 8 of the BIT. In particular, it does not establish clearly if China’s consent was limited to disputes about the amount of compensation for expropriation or if according to the final wording of the BIT it would include disputes involving other topics as well under Article 4 of the BIT.”*⁷⁸

93. According to Rule 34 of the ICSID Arbitration Rules, an arbitral tribunal is the judge of the admissibility of the evidence adduced and of its probative value. It may also be deduced from Rule 36 of the ICSID Arbitration Rules (under which an arbitral tribunal is empowered to admit evidence given by a witness or expert in a written declaration) that an arbitral tribunal is also the proper judge to evaluate evidence given in the form of a witness or expert declaration. As the *Duke v. Peru* Committee remarked, it would not be proper for an *ad hoc* committee to re-evaluate such evidence,⁷⁹ a conclusion also buttressed by the decisions of the Committees in *Rumeli v. Kazakhstan*⁸⁰ and *CDC v. Seychelles*.⁸¹ The task of this *ad hoc* Committee is to

⁷⁶ Decision on Jurisdiction and Competence, para. 170.

⁷⁷ Memorial, para. 140, Reply, paras. 61-65.

⁷⁸ Decision on Jurisdiction and Competence, para. 171.

⁷⁹ *Duke v. Peru*, para. 214 (Exh. CA-LA-2.4).

⁸⁰ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri v. Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment (25 March 2010) [hereinafter *Rumeli v. Kazakhstan*], para. 96 (Exh. CA-LA-2.17).

⁸¹ *CDC v. Seychelles*, paras. 46 and 77 (Exh. CA-LA-2.2).

determine whether there was any manifest excess of powers when the Arbitral Tribunal assessed the evidence presented to it. In the view of the Committee the answer is clearly no.

94. The Republic of Peru claims that the Arbitral Tribunal misunderstood the significance of China's notification to ICSID when it joined the Convention in 1993, which was cited at paragraph 163 of the Decision on Jurisdiction and Competence:

*“Pursuant to Article 25 (4) of the Convention, the Chinese Government would only consider to submit itself to the jurisdiction of the International Centre for Settlement of Investment Disputes with respect to disputes arising in relation to the compensation that results from expropriation and nationalization.”*⁸²

Instead, the Republic of Peru argues, the Arbitral Tribunal ignored this evidence by holding that:

*“it would be questionable to interpret the consent of the Parties to the BIT in Article 8, based on a notification that deals with a completely different Treaty such as the ICSID Convention, and which does not even condition the consent of China in the Convention.”*⁸³

95. The Republic of Peru refutes this interpretation of the Arbitral Tribunal.⁸⁴ It argues, *inter alia*, that the ICSID Convention cannot be dismissed as an entirely different treaty as it was referenced in the Peru-China BIT, which was the treaty under which the Tribunal was sitting.

96. The Republic of Peru finally contends that the weight of case law favors its position, relying on the decisions in *Rosinvest Co. v. The Russian Federation*, *Berschader v. The Russian Federation*, and *Austrian Airlines v. Slovak Republic*, in which, according to the Applicant, arbitral tribunals have concluded that arbitration clauses restricted to disputes concerning the amount of compensation for an expropriation should be interpreted exactly as they are written.⁸⁵ The Republic of Peru adds that the

⁸² Decision on Jurisdiction and Competence, para. 163 (quoting Professor Chen's Opinion).

⁸³ Decision on Jurisdiction and Competence, para. 165.

⁸⁴ Memorial, paras. 129-137, Reply, paras. 52-59.

⁸⁵ Memorial, paras. 143-152, Reply, paras. 67-74.

Arbitral Tribunal distorted the jurisprudence it cited to support its decision.⁸⁶ It contends that the Arbitral Tribunal relied on inapt sources which it misrepresented, such as the decisions in *Saipem S.p.A v. Bangladesh, Telenor Mobile Communications A.S. v. Hungary, Franz Sedelmayer v. The Russian Federation*, where an objection to jurisdiction based on the language limiting dispute settlement to compensation for expropriation similar to Article 8(3) was never examined. Furthermore, the Applicant contends that, the reasoning in the English Judgment *Czech Republic v. European Media Ventures* about the arbitration clause in the Belgium/Luxembourg-Czechoslovakia BIT which, unlike that of the Arbitral Tribunal, emphasized the importance of the preparatory work and did not ignore the results of its analysis under Article 32 of the VCLT, favors its case and not that of Mr. Tza Yap Shum.⁸⁷

97. The Arbitral Tribunal concluded that a narrow reading of the Peru-China BIT was not justified by the awards in *Berschader*⁸⁸ or *RosInvest*⁸⁹ and found more persuasive the separate opinion in *Berschader*.⁹⁰
98. The Committee is of the opinion that the Arbitral Tribunal committed no manifest excess of powers in its interpretation of Article 8 and in finding that the word “*involving*” is ambiguous.⁹¹ On their face, the words of the first sentence of Article 8(3) of the Peru-China BIT which read “[i]f a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to

⁸⁶ Memorial, paras. 143, 153-159.

⁸⁷ *Id.* See also, Reply, paras. 75-81; Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 107:9–110:5.

⁸⁸ *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award (21 April 2006), para. 153 (Exh. RA-LA-090) (“[...] *It is only a dispute which arises regarding the amount or mode of compensation to be paid subsequent to an act of expropriation already having been established, either by acknowledgment of the responsible Contracting Party or by a court or arbitral tribunal, which may be subject to arbitration under the Treaty.*”)

⁸⁹ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (October 2007), para. 110 (Exh. RA-LA-076) (“[...] *Though no documents from the negotiations of the BIT have been produced, the Parties including the Claimant agree that the rather complicated wording in Article 8 presented a compromise between the UK’s intention to have a wide arbitration clause and the Soviet intention to have a limited one. If that is so, it is hard to arrive at an interpretation all the same that the clause is so wide as to include all aspects of an expropriation.*”)

⁹⁰ *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Separate Opinion (7 April 2006), fn. 4 (Exh. RA-LA-090) (“*As demonstrated by the fact that neither party led any evidence concerning the negotiation and ratification of the Treaty (such as travaux préparatoires or contemporaneous legislative or executive statements), the first and best evidence of discerning what the Treaty drafters meant is to [be] found in the terms of the Treaty*”); Decision on Jurisdiction and Competence, paras. 173-186.

⁹¹ Decision on Jurisdiction and Competence, para. 145 (“*Apparently, said wording sought to create certain limitations. However, the precise scope of these limitations constitutes a central issue that must be determined.*”)

negotiations [...]” do not include the question of the legality of expropriation, but equally do not refer to disputes exclusively limited to the amount of compensation. Out of context, the meaning of the phrase is not textually obvious. The Arbitral Tribunal interpreted the expression “*dispute involving the amount of compensation for expropriation*” in the overall context of Article 8.⁹²

99. The Arbitral Tribunal went through an interpretative process mandated by the VCLT. It looked at the ordinary meaning of the word “*involving*”, considered the context of Article 8(3) and then looked at subsidiary sources.⁹³ It is not for the Committee to replace the Arbitral Tribunal’s judgment by its own. A body that had appellate jurisdiction might well find fault as a matter of law with some aspects of the Arbitral Tribunal’s application of the VCLT, but an *ad hoc* committee does not have such powers. The Republic of Peru’s request for annulment on the basis of manifest excess of powers is accordingly dismissed.

b. Article 52(1)(E): Failure to State Reasons

100. The Republic of Peru criticizes the Arbitral Tribunal for failing to state reasons in the analysis of Article 8(3) of the Peru-China BIT, which led to the conclusion that this provision should receive a broad interpretation.⁹⁴ The Republic of Peru essentially challenges the incompatibility between the Arbitral Tribunal’s analysis of Article 8(3) and the ordinary meaning of this same provision as well as of the other terms of the BIT. In its challenge under Article 52(1)(e) of the ICSID Convention, the Applicant essentially reiterates the grievances against the reasoning of the Arbitral Tribunal which it already made in the context of Article 52(1)(b). As already stated, the Committee reserves for discussion under Article 52(1)(d) the arguments of the Republic of Peru concerning the Arbitral Tribunal’s *sua sponte* approach to the interpretation of the term “*involving*” in Article 8(3) of the Peru-China BIT and of the “fork-in-the-road” provision of the same treaty.⁹⁵

101. The Committee in *Klöckner I* recognized that:

⁹² Decision on Jurisdiction and Competence, paras. 146-161.

⁹³ Decision on Jurisdiction and Competence, paras. 146-172.

⁹⁴ Memorial, paras. 165-170.

⁹⁵ Memorial, paras. 166-167.

“Interpretation of the concept of ‘failure to state reasons’ is therefore decisive. It is especially delicate because of the absence of any previous interpretations of the Washington Convention and the lack of sufficiently clear or consistent indications from prior international practice. [...] The text of [Article 52(1)(e)] requires a statement of reasons on which the award is based. This does not mean just any reasons, purely formal or apparent, but rather reasons having some substance, allowing the reader to follow the arbitral tribunal’s reasoning, on facts and on law.”⁹⁶

This Committee notes that the reasons of the Arbitral Tribunal for its construction of Article 8(3) of the Peru-China BIT can be read in paragraphs 143 to 188 of the Decision on Jurisdiction and Competence. The Republic of Peru objects to the quality of the reasoning rather than a quantitative absence of reasons. Indeed, control over a tribunal’s reasons would be pointless if it did not involve a minimum of control over the relevance of the reasons of the decision or award. As remarked by the *CDC v. Seychelles* Committee, Article 52(1)(e) of the ICSID Convention requires that the reasons of the Arbitral Tribunal not be frivolous.⁹⁷

102. Contradiction in the reasoning was approached by the *Klöckner I* Committee in a manner which has been accepted by subsequent *ad hoc* committees:⁹⁸

“[a]s for ‘contradictory 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.”⁹⁹

The Committee in *Vivendi v. Argentina* cautioned, however, that:

“[i]t is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal’s reasons could more truly be said to be but a reflection of such

⁹⁶ *Klöckner v. Cameroon I*, paras.118-119 (Exh. RA-LA-055).

⁹⁷ *CDC v. Seychelles*, para. 70 (Exh. CA-LA-2.2).

⁹⁸ Reisman Opinion, paras. 67, 71-74 (Exh. RA-001).

⁹⁹ *Klöckner v. Cameroon I*, para. 116 (Exh. RA-LA-055).

conflicting considerations.”¹⁰⁰

103. In the present matter, the Arbitral Tribunal concluded its analysis of Article 8 of the Peru-China BIT with the following words:

*“in order to give meaning to all elements of the Article, the words ‘involving the amount of compensation for expropriation’ must be interpreted to include not only the mere determination of the amount but also other issues that are normally inherent in an expropriation, including whether the property was actually expropriated in accordance with the standards and requirements of the BIT, and the determination of the amount of compensation due, if applicable. In the opinion of the Tribunal, a contrary conclusion would undermine the provision for arbitration before ICSID since according to the final sentence of Article 8(3), to submit the investment dispute to the courts of the host State would definitely preclude the possibility of access to arbitration under the ICSID Convention. Therefore, since Claimant has filed a prima facie claim for expropriation, the Tribunal, in accordance with Articles 25 and 41 of the ICSID Convention and Rule 41 of the Rules of Arbitration, believes it has jurisdiction to hear, on the merits, the claim filed by Claimant.”*¹⁰¹

104. The Committee finds that this is a reasoned conclusion within the meaning of Article 52(1)(e) of the ICSID Convention. The Arbitral Tribunal reached its conclusion after having noted at paragraph 150 of the Decision on Jurisdiction and Competence that the phrase “‘involving the amount of compensation for expropriation’ is susceptible to a variety of possible meanings.” The Arbitral Tribunal interpreted this first sentence of Article 8(3), which “presents the central problem of interpretation,”¹⁰² with the grammatical inference to be given to the word “involving”. It held:

*“The BIT uses the word ‘involucra’, which according to the definition given by the Dictionary of the Real Academia Española, means ‘abarcar, incluir, comprender.’ A good faith interpretation of this term indicates that the only requirement in the BIT is that the dispute should ‘include’ the determination of an amount of compensation and not that the dispute should be restricted to this element.”*¹⁰³

¹⁰⁰ *Compañía de Aguas del Aconquija S.A & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) [hereinafter *Vivendi v. Argentina*], para. 65 (Exh. RA-LA-024).

¹⁰¹ Decision on Jurisdiction and Competence, para. 188.

¹⁰² Decision on Jurisdiction and Competence, para. 149.

¹⁰³ Decision on Jurisdiction and Competence, para. 151.

105. This reasoning is linked to (i) the Arbitral Tribunal’s analysis of Article 4 of the Peru-China BIT on expropriation,¹⁰⁴ which, in the Arbitral Tribunal’s view, envisions claims following expropriation on aspects other than the amount of compensation; and (ii) the Arbitral Tribunal’s analysis of the context of Article 8(3), and in particular the investment promotion objectives of the Peru-China BIT, according to which the BIT would not be attractive to foreign investors if claims on expropriation other than the amount of compensation were excluded from arbitration.¹⁰⁵
106. Having thus already closed the door to the Republic of Peru’s narrow interpretation, the Arbitral Tribunal nonetheless considered further the Republic of Peru’s arguments in the global context of Article 8 which sets out three stages for dispute resolution. The Arbitral Tribunal concluded that, if the Republic of Peru’s interpretation were to be adopted, access to ICSID arbitration for the investor would be altogether denied because the fork-in-the-road provision in the last sentence of Article 8(3) would rule out arbitration on the amount of compensation if the investor has submitted the other issues of the dispute on expropriation to a competent court of the Contracting Party, in accordance with Article 8(2).¹⁰⁶
107. The Republic of Peru says that the Arbitral Tribunal interpreted the term “dispute” so broadly that the fork-in-the-road provision would have barred even Mr. Tza Yap Shum’s claims had the Arbitral Tribunal considered the question.¹⁰⁷ The Republic of Peru also claims in this regard that the Arbitral Tribunal failed to state reasons for ignoring the obvious case of expropriation by statutory decree, which would allow the investor to submit a dispute on the amount of compensation to international arbitration.¹⁰⁸ Since the Republic of Peru challenges the validity of the Decision on Jurisdiction and Competence under Article 52(1)(d) for deciding *sua sponte* to focus on the fork-in-the-road provision, the Committee considers that this grievance is subsumed in the denial of the right to be heard, which is to be dealt with at section c) below.

¹⁰⁴ Peru-China BIT, Art. 4 (Exh. RA-004) (“1. Neither Contracting Party shall expropriate, nationalize or take similar measures (hereinafter referred to as ‘expropriation’) against investments or investors of the other Contracting Party in its territory, unless the following conditions are met: (a) for the public interest, (b) under domestic legal procedure, (c) without discrimination, (d) against compensation.”)

¹⁰⁵ Decision on Jurisdiction and Competence, paras. 152-153.

¹⁰⁶ Decision on Jurisdiction and Competence, paras. 154-161.

¹⁰⁷ Reply, para. 96.

¹⁰⁸ Memorial, paras. 110-113; Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 50: 18-22.

108. The Arbitral Tribunal next turned to the supplementary means of interpretation envisaged by Article 32 of the VCLT. More specifically, it considered (i) the circumstances of the conclusion of the Peru-China BIT, namely, China's notification under Article 25(4) of the ICSID Convention, and (ii) the preparatory work of the Peru-China BIT, namely, the testimonies of the Chinese and Peruvian negotiators of the Treaty, which it found not conclusive of the Contracting Parties' intention to restrict their consent to arbitration to disputes about the amount of compensation only.¹⁰⁹ It also reviewed the BITs signed by China before the Peru-China BIT, without finding compelling evidence on the meaning of the words "*involving the amount of compensation for expropriation.*"¹¹⁰ It finally discussed investment arbitration cases (*Saipem, Telenor Mobile, Sedelmayer, Berschader* and *RosInvest*) as well as an English judgment (*European Media Ventures*) to buttress its finding of a broad interpretation of Article 8(3) of the Peru-China BIT.¹¹¹
109. The Republic of Peru argues that the negotiating history of the Peru-China BIT contradicted the Arbitral Tribunal's broad interpretation of Article 8(3), and that un rebutted evidence of both China's and Peru's negotiators of the Peru-China BIT as well as China's notification to ICSID were discarded by the Arbitral Tribunal.¹¹²
110. Although the Republic of Peru says that it is not necessary for the Committee to weigh the evidence on the record, the Committee finds that this is precisely what the Applicant is seeking. The Arbitral Tribunal did not reach its decision without considering the evidence submitted by the Republic of Peru, it simply was not convinced by the evidence put forward by the Republic of Peru. The relevance and weight of evidence before the Arbitral Tribunal cannot be reevaluated by the Committee which is not an appellate body. The Republic of Peru, therefore, cannot criticize the Arbitral Tribunal for (i) considering that the letter from Mr. Fan, which showed that China was not willing to accept Peru's proposal of ICSID arbitration on all matters, was not conclusive evidence of the scope of Article 8(3) of the Peru-China BIT, or (ii) for failing to make that determination with respect to all other pieces of

¹⁰⁹ Decision on Jurisdiction and Competence, paras. 162-171.

¹¹⁰ Decision on Jurisdiction and Competence, para. 172.

¹¹¹ Decision on Jurisdiction and Competence, paras. 173-186.

¹¹² Hearing on Annulment, 21 March 2014, Tr. Vol. 1 35:16-19, 38:11-39:2, 43:3-5.

evidence it had before it.¹¹³ Article 52(1)(e) of the ICSID Convention does not require that an arbitral tribunal explains itself in respect of each piece of evidence adduced by either party which is not outcome determinative or to give reasons for preferring some evidence over other evidence. Rather, the award has to enable the reader to see the reasons upon which the award itself is based.¹¹⁴

111. The Republic of Peru finally contends that the Arbitral Tribunal only asserted jurisdiction over expropriation-related claims and declined jurisdiction over other claims without giving any explanation for why those other claims were not covered by the wording “*disputes involving, but not limited to, the amount of compensation for expropriation.*”¹¹⁵ However, in the context of its demonstration that Article 3 of the Peru-China BIT could not be interpreted so as to extend the jurisdiction of the Centre, the Arbitral Tribunal stated its view that:

*“[...] the literal wording of Article 8 reflects that the Contracting Parties reached an agreement on two fundamental issues. First, as indicated above, they agreed to submit expropriation disputes to ICSID arbitration. Secondly, they specifically considered the possibility of submitting other types of disputes to ICSID arbitration and specifically reserved the right to do it only ‘if the parties to the dispute so agree.’ [...] As a result, the Tribunal hereby determines that the specific wording of Article 8(3) should prevail over the general wording of the MFN clause in Article 3 and Claimant’s arguments on the contrary must be dismissed.”*¹¹⁶

112. The reasoning of the Arbitral Tribunal meets, in the Committee’s opinion, the requirement of Article 52(1)(e) of the ICSID Convention which, as explained in the *MINE* Decision:

*“is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law.”*¹¹⁷

It is generally understood that one of the major purposes for giving reasons in a

¹¹³ Hearing on Annulment, 22 March 2014, Tr. Vol. 2, 398:1–399:14.

¹¹⁴ *Rumeli v. Kazakhstan*, para. 104 (Exh. CA-LA-2.17).

¹¹⁵ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 25: 13-19.

¹¹⁶ Decision on Jurisdiction and Competence, para.216.

¹¹⁷ *Maritime International Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment (14 December 1989) [hereinafter *MINE v. Guinea*], para. 5.09 (Exh. CA-LA-2.12).

decision, apart from assuring the parties that the issues before the tribunal were considered and understood, is to serve as a basis for review of the decision. In the context of the ICSID Convention, the purpose of the review is, however, constrained by Article 52(1)(e) which only provides for a limited scope of review, as is confirmed by a line of decisions of *ad hoc* committees. For example, in *CDC v. Seychelles*, the Committee held that:

*“[...] Article 52(1)(e) [...] does not provide us with the opportunity to opine on whether the Tribunal’s analysis was correct or its reasoning persuasive.”*¹¹⁸

The same conclusion was reached by the Committee in *Wena v. Egypt*:

*“[...] 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 decision were appropriate or not, convincing or not.”*¹¹⁹

113. The Republic of Peru submits sixteen propositions to establish that the Arbitral Tribunal failed to state reasons or why it failed to address a series of questions in relation to the meaning or context of Article 8(3) of the Peru-China BIT or the object and purpose of the BIT, the circumstances of the BIT’s negotiations and the choice of jurisprudence in support of its interpretation of Article 8(3).¹²⁰ It invites the Committee to review the reasons of the Arbitral Tribunal. However, the Committee considers the Arbitral Tribunal’s reasoning to be neither frivolous nor insufficient. The Committee considers that the Arbitral Tribunal did, in light of the evidence adduced by the Parties, explain why it reached its decision. This Committee would move beyond its powers under Article 52 of the ICSID Convention if it were to follow the Republic of Peru’s propositions. They are consequently rejected.

c. Article 52(1)(D): Serious Departure from a Fundamental Rule of Procedure

114. Under this head of Article 52, the Republic of Peru first criticizes the Arbitral Tribunal

¹¹⁸ *CDC v. Seychelles*, para. 70 (Exh. CA-LA-2.2).

¹¹⁹ *Wena v. Egypt*, para. 79 (Exh. RA-LA-096).

¹²⁰ Memorial, paras. 165-170; Reply, paras. 94-99.

(i) for assuming jurisdiction where jurisdiction was lacking and (ii) for deciding contrary to unrebutted extensive evidence without appropriate explanation.¹²¹

115. The Committee cannot share the view that, by assuming jurisdiction where it had none, an arbitral tribunal would seriously breach a fundamental rule of procedure. Article 25 of the ICSID Convention lays down the conditions for accessing the jurisdiction of the Centre. Article 41 of the ICSID Convention provides that the Tribunal shall be the judge of its own competence. In ruling on the interpretation of Article 8 of the Peru-China BIT, the Arbitral Tribunal acted in conformity with the ICSID Convention and with the mission entrusted upon it by the Parties. None of these provisions purport to achieve or protect due process before the arbitral tribunal. They aim at maximizing the effectiveness of the arbitration process by avoiding dilatory tactics which would otherwise occur if competence were an interlocutory question to be determined by another decision maker than the arbitral tribunal.
116. In the Committee's view, examination by the arbitral tribunal of the evidence adduced by the parties is one of the fundamental rules of procedure protected by Article 52(1)(d) of the ICSID Convention to achieve a fair trial. The Decision of the *ad hoc* Committee in *Wena v. Egypt* notes that Article 52(1)(d):

*“refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured at an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.”*¹²²

This is without prejudice to an arbitral tribunal's assessment of whether such evidence is relevant to its decision.

117. It is undisputed that all the evidence put forward by the Parties was discussed before the Arbitral Tribunal. China's notification under Article 25(4) of the ICSID Convention, the expert witness's testimony of Professor Chen, as well as the witness

¹²¹ Memorial, paras. 171-173.

¹²² *Wena v. Egypt*, para. 57 (Exh. RA-LA-096).

testimony of the negotiators of the BIT, Mr. Fan and Ms. Vega, were discussed and considered by the Arbitral Tribunal.¹²³ The Republic of Peru contends that the Arbitral Tribunal decided to ignore this evidence without explaining why.¹²⁴ But the Republic of Peru does not identify with regard to the unrebutted evidence it claims to have placed before the Arbitral Tribunal any grievance that could be a serious breach of the fairness of the arbitral proceedings, other than its dissatisfaction with the Decision on Jurisdiction and Competence. The Applicant's argument, which turns solely on the evaluation made by the arbitrators of such evidence, fails again in the context of Article 52(1)(d) of the ICSID Convention. Failing to assess evidence in the way that the Republic of Peru sets out in its submission does not constitute a serious departure from a fundamental rule of procedure.

118. The Republic of Peru next contends that the Arbitral Tribunal's failure to provide reasons for its Decision on Jurisdiction and Competence is also a serious breach of a fundamental rule of procedure.¹²⁵ The ground of Article 52(1)(d) of the ICSID Convention must be distinguished from other grievances concerning jurisdiction of the arbitral tribunal and from the relevance of the legal foundation of the decision. Professor Reisman, the expert witness for the Applicant, reminds us in his Opinion of 27 June 2012 on "Annulment on the Grounds of *Excès de Pouvoir* and Failure to State Reasons of the Decision on Jurisdiction" that the presence of reasons was important for the drafters of the Washington Convention, which they identified as an independent requirement for the validity of awards under Article 52 of the Convention:

"[t]he preliminary draft of Article 52(1) (Document 24) simply reproduced Professor Scelle's formula, which, it will be recalled, did not make express the need for reasons but, as Scelle's commentary makes clear, included the requirement among minimal procedural standards. The first ICSID Convention draft (Document 43) disaggregated the minimum procedure requirement by turning a 'failure to state reasons for the award, unless the parties have agreed that reasons need not be stated' into an express ground of annulment. In other words, at that stage, the drafters were sufficiently concerned about the need for reasoned awards to require them explicitly but they treated that requirement as dispositive: reasons were required

¹²³ Decision on Jurisdiction and Competence, paras. 160-172.

¹²⁴ Memorial, para.173; Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 39: 8-10.

¹²⁵ Memorial, para. 174.

*unless the parties decided to dispense with them. But the Revised Draft (Document 123), which became Article 52(1) of the Convention, suppressed the dispositive option and transformed the need for reasons into an explicit requirement that the parties could not opt out of, even by private agreement. Hence, whatever general international law may be on the matter, the ICSID Convention seems to make the requirement of a reasoned judgment a *lex specialis*.*"¹²⁶

Professor Reisman underlines that:

*"Scelle understood 'a serious departure from a fundamental rule of procedure' implicitly to cover a tribunal's failure to state reasons, whereas the ICSID Convention makes that requirement express and installs it in a separate section, Article 52(1)(e)."*¹²⁷

119. The Committee is of the opinion that the right to a reasoned and final determination of the dispute by an arbitral tribunal is one of the aspects of the right of access to an arbitral forum. As such, it is also a fundamental rule of procedure protected by Article 52(1)(d) of the ICSID Convention. The existence of reasons ensures that there has been a minimum respect of the fundamental exigencies of justice by the tribunal, which would not square with an arbitrary decision, and is consonant with Article 52 of the ICSID Convention which serves as a safety valve against aberrant awards.¹²⁸ Assuredly, the obligation to provide reasons does not require that a detailed answer be given to each of the parties' arguments. This has been expressed in numerous decisions of *ad hoc* committees. As the *ad hoc* Committee in *Klöckner I* explained, an arbitral tribunal is under no obligation to answer every argument of the parties when they are of no relevance to the outcome of the case:

*"These reasons must therefore be able to serve as a basis of the decision of the Tribunal and be 'sufficient' in this sense. The test of sufficiency must obviously be evaluated with especial care lest the request for annulment under Article 52 serve as a disguised appeal."*¹²⁹

The *Vivendi v. Argentina* Committee clarified, in a holding which has since been

¹²⁶ Reisman Opinion, para. 63 (Exh. RA-001).

¹²⁷ Reisman Opinion, para. 22 (Exh. RA-001).

¹²⁸ See *MCI v. Ecuador*, para. 49 (Exh. CA-LA-2.14).

¹²⁹ *Klöckner v. Cameroon I*, para. 118 (Exh. RA-LA-055) as cited in Reisman Opinion, para. 69 (Exh. RA-001).

confirmed by a line of other *ad hoc* Committee decisions,¹³⁰ that an arbitral tribunal only has to address the parties' arguments which:

*“are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with.”*¹³¹

120. However, the Republic of Peru cannot simply assume that one count of annulment is met by establishing that another has been met, as it does with its allegation that the failure by the Arbitral Tribunal to state reasons for its Decision on Jurisdiction and Competence constitutes a breach of a fundamental rule of procedure that the Tribunal must address the material questions posed by the Parties, in violation of Article 52(1)(d) of the ICSID Convention.¹³² There has to be a proper demonstration of the violation of each ground listed in Article 52(1) of the ICSID Convention.¹³³ Such demonstration is absent here. Further, the Republic of Peru did not establish a failure to state reasons and in consequence it cannot succeed in its related argument that such alleged failure also amounts to a serious departure from a fundamental rule of procedure. The Applicant's grievance complaint is unfounded.
121. The Republic of Peru finally argues that the Arbitral Tribunal committed a serious departure from a fundamental rule of procedure by denying the Republic of Peru the opportunity to express its views on (i) the Tribunal's broad interpretation of the term “*involving*” in the first sentence of Article 8(3) of the Peru-China BIT and (ii) the interpretation of the fork-in-the-road provision in the last sentence of Article 8(3), which were the dispositive issues of the Decision on Jurisdiction and Competence.¹³⁴ The Applicant alleges that this is a serious violation of the adversarial nature of the procedure because the Arbitral Tribunal decided these matters “*sua sponte*”.¹³⁵

¹³⁰ *Wena v. Egypt*, para. 101 (Exh. RA-LA-096); *CDC v. Seychelles*, para. 71 (Exh. CA-LA-2.2); *Lucchetti v. Peru*, para. 128 (Exh. RA-LA-045); *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment (14 June 2010), para. 36 (Exh. CA-LA-2.9); *Rumeli v. Kazakhstan*, paras. 81, 84 (Exh. CA-LA-2.17).

¹³¹ *Vivendi v. Argentina*, para. 87 (Exh. RA-LA-024).

¹³² Memorial, para. 174.

¹³³ See also Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 285:4–286:21; 22 March 2014, Vol. 2, 363:8–364:19.

¹³⁴ Memorial, para. 175, Reply, para. 104.

¹³⁵ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 46:1-8, 116:15–117:16; 22 March 2014, Vol. 2, 321:17–322:10.

122. The Republic of Peru contends that it was common ground between the Parties that the literal interpretation of the text of Article 8(3) of the Peru-China BIT¹³⁶ was narrow. The Applicant further argues that Mr. Tza Yap Shum, as Claimant in the arbitration proceedings, only argued about a broader interpretation of Article 8(3) based on policy grounds, not on a theory of textual interpretation such as that adopted by the Arbitral Tribunal.¹³⁷
123. The Committee identifies the following passages with respect to the interpretation of Article 8 in the record before the Arbitral Tribunal which are of relevance here. In his Counter-Memorial on Jurisdiction of the Centre, Competence of the Tribunal and Admissibility of the Claim of 25 July 2008, Mr. Tza Yap Shum, after explaining that Article 8 of the BIT not only covers the situation of direct expropriation but also that of indirect expropriation,¹³⁸ remarked that should access to ICISID arbitration be barred:

*“it would force a foreign investor affected by ‘de facto’ expropriation to turn to Peruvian Courts of Justice, since indirect expropriation is not addressed by Peruvian material and procedural law, thus impairing his right to defence, and the guarantee for his rights and interests.”*¹³⁹

Mr. Tza Yap Shum alleged the following:

“A literal and formalistic approach of the Peru-China BIT may lead to a number of conclusions that divert from the spirit of this instrument, which is to be applied with an integral and systematic interpretation of the will of the Contracting States, in the context of a global system of foreign investments, to address, protect and guarantee a number of investors’ rights in the host State. [...]

In addition, applying Article 31 of the Vienna Convention to the

¹³⁶ Peru-China BIT, Art. 8(3) (Exh. RA-004) (“If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the International Center for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed at Washington D.C. on March 18, 1965.”)

¹³⁷ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 27: 4-8, 29: 12-15; 22 March 2014, Vol. 2, 330: 2-10.

¹³⁸ Counter-Memorial on Jurisdiction of the Centre, Competence of the Tribunal and Admissibility of the Claim (25 July 2008) [hereinafter Counter-Memorial on Jurisdiction], paras 125-140.

¹³⁹ Counter-Memorial on Jurisdiction, para. 151.

*declaration of the Contracting Parties of the Peru-China BIT, the interpretation must be based on 'good faith, attributing to the terms of the Treaty their regular meaning in context, and taking into account their objective and purpose', and therefore the Claimant concludes that the determination of the legality of an action of indirect, **de facto** expropriation may not be left to the decision of a Court of Justice of the host State, but submitted to the competence of international Arbitral Tribunals, as they constitute the international guarantee in favour of investors, which both Contracting Parties of the BIT explicitly recognise in its preamble."*¹⁴⁰

124. At the Hearing on Annulment, counsel for Mr. Tza Yap Shum pointed to the references made in oral pleadings before the Arbitral Tribunal regarding the scope of Article 8 of the Peru-China BIT. The passages of the transcripts of the hearing on jurisdiction before the Arbitral Tribunal read in pertinent part:

*"So, we have analyzed whether a controversy involves the amount of expropriation or whether the legality of the expropriation act is also something that needs to be dealt with here. We were able to verify that Respondent reads the BIT in a literal manner [...]";*¹⁴¹

*"So, the legality of the acts of expropriation is something that needs to be interpreted in a comprehensive manner";*¹⁴²

*"The conclusions here, we analyzed the offer made by the State, which is comprehensive compensation and legality of the expropriation act."*¹⁴³

125. The Committee notes that Mr. Tza Yap Shum argued in his written and oral submissions before the Arbitral Tribunal that only a broad reading of Article 8(3) was consistent with the promotion and protection of investments which:

*"[...] will be conducive to stimulating investments, on the basis of equality and mutual benefits, as recognised in the preamble of the BIT in question."*¹⁴⁴

"So, if I invite foreign investors to come to my country, well, we have to have mechanisms that would perhaps help us solve problems

¹⁴⁰ *Id.*, paras. 152, 165 (emphasis in original).

¹⁴¹ Hearing on Jurisdiction, 15 October 2008, Tr. Vol. 1, 56:18 – 57:1.

¹⁴² Hearing on Jurisdiction, 15 October 2008, Tr. Vol. 1, 62:11-12.

¹⁴³ Hearing on Jurisdiction, 15 October 2008, Tr. Vol. 1, 63:21– 64:1.

¹⁴⁴ Counter-Memorial on Jurisdiction, para. 164.

*because of differences that may arise amongst the parties. And, of course, if that doesn't happen, there is a vacuum that goes against the rights of the investor.”*¹⁴⁵

*“I cannot go to the market and attract foreign investors and say, look, you know, you cannot access arbitration. You have to go the courts, the local courts of the judiciary of my country. This is a policy [which] is contradictory to the statement that was made, and it is also contradictory to most of ICSID arbitrations that have to do with indirect expropriation.”*¹⁴⁶

126. In its Post-Hearing Submission on Objections to Jurisdiction of 18 November 2008, the Republic of Peru, as Respondent in the arbitration proceedings, argued for a narrow interpretation of Article 8(3) of the Peru-China BIT:

“There is no ‘dispute involving the amount of compensation for expropriation’ between the parties. Since there has been no finding of wrongful expropriation on the part of Peru, there cannot be a dispute concerning the ‘amount of compensation for expropriation’ in this proceeding.

*The dispute that Claimant wants to submit to arbitration does not fall within the scope of Peru’s offer to arbitrate in the Peru-China BIT, and thus no agreement to arbitrate was perfected. Claimant’s purported acceptance of Peru’s offer to arbitrate is a nullity and cannot serve as a basis for exercising jurisdiction.”*¹⁴⁷

127. It is undisputed that, in accordance with Article 41 of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules, the Arbitral Tribunal had to rule on its jurisdiction over the claim for illegality of an alleged indirect expropriation as a result of SUNAT’s actions, pursuant to the objections raised by the Republic of Peru.¹⁴⁸ In particular, the Republic of Peru challenged the Arbitral Tribunal’s competence on the ground that the claim on the illegality of the expropriation was not within the scope of its offer to arbitrate in accordance with Article 8(3) of the Peru-China BIT.¹⁴⁹ According to the Republic of Peru’s allegations in the above cited Post-Hearing

¹⁴⁵ Hearing on Jurisdiction, 15 October 2008, Tr. Vol. 1, 63:15-20.

¹⁴⁶ Hearing on Jurisdiction, 16 October 2008, Tr. Vol. 2, 71:5-13.

¹⁴⁷ Republic of Peru’s Post-Hearing Submission on Objections to Jurisdiction (18 November 2008), paras. 98-99.

¹⁴⁸ Decision on Jurisdiction and Competence, para. 40.

¹⁴⁹ Decision on Jurisdiction and Competence, para. 129.

Submission, it was only after a finding of expropriation that any dispute “*concerning the amount of compensation for expropriation*” could be submitted to ICSID arbitration.¹⁵⁰

128. The Committee recognizes that interpretation must start from the ordinary meaning of a word, part of a phrase, a sentence or a paragraph. An interpretation of Article 8(3) of the Peru-China BIT could not come as a surprise for the Republic of Peru. According to Article 31(1) of the VCLT, which was discussed in the arbitration proceeding, interpretation involves text, context and object and purpose. When the authentic text exists in several languages, such as here (the Peru-China BIT was signed in Chinese, Spanish and English, English being the controlling language in case of divergence of interpretation),¹⁵¹ the ordinary meaning of the word or phrase may indeed be determined with a linguistic exegesis in order to dispel the ambiguity which may arise from only one linguistic version of the text of the treaty. A dictionary is a useful tool for the interpreter, but the Applicant chose not to provide one to the Arbitral Tribunal and cannot blame the Arbitral Tribunal for its linguistic analysis in interpreting the word “*involving*” at paragraph 151 of its Decision on Jurisdiction and Competence:¹⁵²

“The BIT uses the word ‘involucra’ which according to the definition given by the Dictionary of the Real Academia Española, means ‘abarcar, incluir, comprender’. A good faith interpretation of this term indicates that the only requirement in the BIT is that the dispute should ‘include’ the determination of an amount of compensation and not that the dispute should be restricted to this element [...].”

129. The Committee is of the view that in interpreting the word “*involving*” in the first sentence of Article 8(3), the Arbitral Tribunal did not rely on anything which neither of the Parties had argued nor on what they could not have reasonably expected, even if the reasons put forward by the Arbitral Tribunal might not have been anticipated. The Committee is not convinced that the interpretation of the word “*involving*” in the phrase “*involving the amount of compensation*” had not been at issue in the arbitration, and it is of the view that the Republic of Peru could have reasonably

¹⁵⁰ See Republic of Peru’s Post-Hearing Submission on Objections to Jurisdiction (18 November 2008), paras. 98-99.

¹⁵¹ Peru-China BIT (Ex. RA-004). See also, Hearing on Annulment, 22 March 2014, Tr. Vol. 2, 313:9-14.

¹⁵² Decision on Jurisdiction and Competence, para. 151.

anticipated that interpretation of the phrase “*involving the amount of compensation*” would be the key issue for any decision on the scope of Article 8(3).

130. The task of the Arbitral Tribunal was to decide on its own competence, and it could only do so in construing the terms of the arbitration clause of the BIT. The Parties’ submissions in the arbitration procedure were centered on this issue. If the Committee were to follow the Republic of Peru in its criticisms, it would create an obligation for arbitrators to submit the legal reasoning for discussion of the parties, with the consequence that no award could ever be adopted before the parties had the opportunity to argue about the relevance of the Tribunal’s legal reasoning. As remarked by the *Klöckner v. Cameroon I* Committee:

“As for the Tribunal itself, when in the course of its deliberations it reached the provisional conclusion that the true legal basis for its decision could well be different from either of the parties’ respective arguments, it was not, subject to what will be said below, in principle prohibited from choosing its own argument. Whether to reopen the proceeding before reaching a decision and allow the parties to put forward their views on the arbitrators’ ‘new’ thesis is rather a question of expedience. The real question is whether, by formulating its own theory and argument, the Tribunal goes beyond the ‘legal framework’ established by the Claimant and the Respondent [...] Within the dispute’s ‘legal framework,’ arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a ‘serious departure from a fundamental rule of procedure’. Any other solution would expose the arbitrators to having to do the work of the parties’ counsel for them and would risk slowing down or even paralyzing the arbitral solutions to disputes.”¹⁵³

131. The Republic of Peru’s argument provides us with an example of the reduction *ad infinitum* which is illustrated by Zeno’s paradox of motion: assuming that time is composed of a series of moments, the arrow which travels no distance during that moment, is not moving and will never reach the target. In similar fashion, an arbitrator will never be able to make an award because of the obligation to continuously submit the reasons for the award to the parties for their observations.

¹⁵³ *Klöckner v. Cameroon I*, para. 91 (Exh. RA-LA-055).

The Committee considers that the Parties had a full opportunity to make their arguments on the interpretation of “*involving*” before the Arbitral Tribunal.

132. The Republic of Peru finally contends that it never had the opportunity to reply to the Arbitral Tribunal’s flawed analysis according to which “*the fork in the road provision implied a necessarily broad arbitration provision.*”¹⁵⁴ According to the Republic of Peru, the Tribunal “*essentially*” concluded that “*if disputes [under Article 8(3)] are limited to the amount of compensation, the fork-in-the-road provision will not allow any disputes to be submitted to arbitration; but if disputes include the legality of the expropriation then the fork-in-the-road provision will allow their submission to arbitration.*”¹⁵⁵ The Republic of Peru argues that the Claimant would not have made the argument that the Arbitral Tribunal made because it would have meant that Mr. Tza Yap Shum’s own claims would have been barred by the fork-in-the road provision.¹⁵⁶ The Republic of Peru also argues that the Tribunal’s analysis was flawed because for the fork-in-the-road provision to operate, the dispute and the parties must be identical.¹⁵⁷
133. The Committee acknowledges that the Parties had a full opportunity to argue about the meaning of the whole of Article 8, so the question is did the Arbitral Tribunal have an obligation to go back to the Parties to ask about the last sentence of Article 8(3) on which the Parties had not focused? Given the importance of the analysis to the Arbitral Tribunal’s overall reasoning, one may be inclined to say that it should have. It is however possible to take the view that it did not have such an obligation, although the matter could have been handled better by the Arbitral Tribunal.
134. The Committee notes that the Republic of Peru argued before the Arbitral Tribunal that Article 8 of the Peru-China BIT establishes a three-step process,¹⁵⁸ which is summarized at paragraph 158 of the Decision on Jurisdiction and Competence. First, a cooling off period of six months in Article 8(1) which stipulates that:

“*[a]ny dispute between an investor of one Contracting Party and the*

¹⁵⁴ Memorial, para. 175.

¹⁵⁵ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 47: 13-19.

¹⁵⁶ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 80: 1-5.

¹⁵⁷ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 80: 10-21.

¹⁵⁸ Hearing on Jurisdiction, 15 October 2008, Tr. Vol. 1, 30:17 – 32:4.

other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute”.

Second, in the event the dispute is not settled accordingly, Article 8(2) opens an option to the investor to submit the dispute to the courts of the host State:

“[i]f the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.”

Third, according to the Republic of Peru, once the state court has found a wrongful expropriation, if the “*dispute involving the amount of compensation for expropriation*” still cannot be settled, the investor may then access international arbitration in accordance with Article 8(3).

135. The whole discussion of the Arbitral Tribunal in paragraphs 154-161 of the Decision on Jurisdiction and Competence hinges on the three step approach proposed by the Republic of Peru. The Arbitral Tribunal referred to this analysis when it stated:

“However, beyond the possible effects of such a provision, the Tribunal considers that if it were to accept Respondent’s interpretation of Article 8(3), a contextual interpretation of the BIT would lead to an incoherent conclusion – namely that the investor, in fact, could never have access to arbitration.”¹⁵⁹

136. In the course of its discussion of the interaction among the three sentences of Article 8(3), the Arbitral Tribunal also refers to Prof. Chen’s Opinion distinguishing two stages in a dispute over expropriation, existence of the expropriation first, and amount of compensation, next. The Arbitral Tribunal reasoned:

“The Tribunal recognizes that Prof. Chen’s Opinion argues and attempts to address the problem presented in the final sentence of Article 8(3). Prof. Chen states the following:

‘If the dispute cannot be settled amicably, either the investor or the

¹⁵⁹ Decision on Jurisdiction and Competence, para. 154.

host State can submit to a competent court in the State hosting the investment. If, after such court finds that the investment has been expropriated, a dispute arises between the investor and the State with respect to the amount of compensation owed to the investor for the value of the expropriated investment, either party may submit such dispute to ICSID arbitration. The treaty notes, however, that resort to international arbitration shall not be available to either party if they previously submitted the dispute involving the amount of compensation for expropriation to the local courts.”¹⁶⁰

137. For the Committee, the arguments about the last sentence of Article 8(3) of the Peru-China BIT were central to the Arbitral Tribunal’s reasoning. As already discussed, the Arbitral Tribunal was doing what the VCLT requires, *i.e.*, it considered the meaning of the word “*involving*” in the context of Article 8(3) as a whole. If the VCLT is properly applied, an interpreter, who has to consider the ordinary meaning in context, cannot reach a conclusion about the meaning and then see if it is supported by the context or the object or purpose. It is part of a single operation. In that sense, the arguments about the last sentence of Article 8(3) of the Peru-China BIT were central because referring to context should not be supplementary. However, for the reasons that follow, the Committee is not convinced that the Tribunal departed from a fundamental rule of procedure in connection with its analysis of the last sentence of Article 8(3).
138. The above mentioned analysis of the Republic of Peru and Opinion of Prof. Chen are descriptive of the mechanism of Article 8 and 8(3). True, the expression “*fork-in-the-road*” appears only in the Arbitral Tribunal’s words at paragraph 159 of the Decision on Jurisdiction and Competence and not in the Parties’ submissions. However, the Committee remarks that Prof. Chen’s Opinion, when stating “*that resort to international arbitration shall not be available to either party if they previously submitted the dispute involving the amount of compensation for expropriation to the local courts*”, describes a fork-in-the-road provision which is generally understood as the foreclosure of any possibility of electing another available route for dispute resolution once the choice of a particular dispute resolution procedure has been made.¹⁶¹ When it used the expression “*fork-in-the-road*”, the Arbitral Tribunal was describing the dispute resolution mechanism established under Article 8 of the Peru-

¹⁶⁰ Decision on Jurisdiction and Competence, para. 160 (emphasis in original).

¹⁶¹ See C. McLachlan, L. Shore, M. Weiniger, INTERNATIONAL INVESTMENT ARBITRATION (2010), § 3.30.

China BIT without interpreting the language of the BIT. Description is not interpretation. The fork-in-the-road provision qualifies the nature of the dispute settlement clause. It changes nothing that the expression was not mentioned as such by the Parties.

139. Article 8 of the Peru-China BIT, which was discussed by the Parties, was also the Treaty provision whose meaning had to be determined by the Arbitral Tribunal. At paragraph 159 of the Decision on Jurisdiction and Competence, the Arbitral Tribunal found that the three step approach suggested by the Republic of Peru was:

“directly contrary to the last sentence of Article 8(3). In fact, the last sentence leaves no doubt that an investor (of any Contracting Party), when trying to choose a course of action to settle a dispute in accordance with Article 8, finds himself with an irrevocable forum selection clause, also known by the phrase ‘fork-in-the-road’. An investor ‘shall be entitled to submit the dispute to the competent court of the Contracting Party’ [...] in accordance with Paragraph 8(2), but if the investor does so, in accordance with Paragraph 8(3), such investor could not under any circumstances resort to ICSID arbitration to settle a dispute ‘involving the amount of compensation for expropriation’. Therefore, in accordance with the interpretation stated by Respondent, in the event that one Party requests to submit the dispute to ICSID arbitration for the purposes of dispute resolution ‘involving the amount of compensation for expropriation’, it would be informed that the parties have not consented to submit themselves to such arbitration since the investor has been requested to first settle the dispute before the courts of the corresponding Contracting Party”.

140. The interrelation of the three paragraphs of Article 8 and of the three sentences of Article 8(3) was discussed by the Parties and more particularly by the Republic of Peru which put forward one interpretation of these provisions. The terms of Article 8(3) contain a fork-in-the-road provision from which the Arbitral Tribunal drew the following conclusion, opposite to that advocated by Prof. Chen:

“[t]he Tribunal unfortunately does not consider that the wording used in the final sentence of Article 8(3) of the BIT justifies differentiating between claims ‘involving the amount of compensation for expropriation’ and other claims. The sentence is categorical. It refers to any claim subject to ‘the competent court of the other Contracting Party’. Therefore, this argument does not

persuade the Tribunal.”¹⁶²

141. The Committee finds that the interpretation of Article 8(3) of the Peru-China BIT was at all times within the debate between the Parties. An interpreter is not limited by the arguments made by the parties when its interpretation, unlikely to be surprising to either party, is drawn from the terms of the provision which have been discussed by the parties and rests on a description of the mechanism of the arbitration provision. Therefore, the Committee concludes that, while the Republic of Peru has demonstrated that the legal argument on the fork-in-the-road provision in Article 8(3) relied upon by the Arbitral Tribunal was not explicitly articulated in the arbitration, it has not demonstrated that it could not have reasonably anticipated that such argument would be taken into consideration by the arbitrators.
142. The Committee finds that there is no serious departure from a fundamental rule of procedure. The Republic of Peru’s request for annulment on this ground is accordingly dismissed.

IV. THE AWARD OF 7 JULY 2011

A. THE PARTIES' SUBMISSIONS

a. The Applicant’s Submissions

143. In the alternative, the Republic of Peru seeks annulment of the Award in its entirety,¹⁶³ based on the finding that the preliminary precautionary measures imposed by SUNAT and upheld by the tax court constituted an indirect expropriation of Mr. Tza Yap Shum’s investment for which Peru must be held liable.

i. Manifest Excess of Powers

144. The Republic of Peru first alleges that the Arbitral Tribunal manifestly exceeded its powers (**Article 52(1)(b)** of the ICSID Convention) by deciding different claims than the claim of expropriation, when it had ruled in its Decision on Jurisdiction and Competence that the claim for expropriation was the only claim the Arbitral Tribunal

¹⁶² Decision on Jurisdiction and Competence, para. 161.

¹⁶³ Memorial, para. 260; Reply, para. 181.

was entitled to entertain. According to the Applicant, notwithstanding that decision, the Arbitral Tribunal adjudicated the reasonableness and propriety of the Peruvian tax authorities' actions beyond their allegedly expropriatory nature, thereby deciding the claims of Mr. Tza Yap Shum on fair and equitable treatment, arbitrary and discriminatory measures, and denial of justice that it had agreed were outside its jurisdiction. For the Republic of Peru, the Arbitral Tribunal also exceeded its powers by ignoring general principles of law requiring that the damage for which a State is held liable must be caused by the conduct of that State.¹⁶⁴

ii. Failure to State Reasons

145. The Republic of Peru next contends that the Arbitral Tribunal failed to state reasons (**Article 52(1)(e)** of the ICSID Convention) for:

- “ignoring Peru’s arguments regarding Claimant’s [Mr. Tza Yap Shum’s] failure to prove that the precautionary measures, rather than Claimant’s [Mr. Tza Yap Shum’s] own business and legal choices, caused the alleged harm to his investment;
- failing to recognize that TSG chose preventive bankruptcy, even though the Tribunal conceded that the full amount of SUNAT’s tax resolutions was more than matched by the GST refunds that SUNAT paid to TSG and that, rather than use the refunds to pay its taxes or to provide collateral in order to lift the precautionary measures, TSG found it [at paragraph 249 of the Award] ‘more beneficial from a financial standpoint to repay short term, high interest creditors’;
- why it was appropriate for an expropriation analysis to decide, in effect, whether Claimant [Mr. Tza Yap Shum] had been granted fair and equitable treatment, had been subject to arbitrary and discriminatory measures, or had been denied justice; and
- relatedly, how it could rely on legal sources with respect to its ‘arbitrary’ and denial of justice standards that had nothing to do with expropriation

¹⁶⁴ Memorial, paras. 250-252; Reply, paras. 169-171.

claims.”¹⁶⁵

146. The Republic of Peru also argues that the Arbitral Tribunal engaged in contradictory reasoning amounting to a failure to state reasons by:

- “finding that TSG was somehow [financially] devastated when the precautionary measures froze the sum of US\$ 172 for less than six months, even while finding that TSG made almost no use of the banking system, and that it may not have been mandatory to use the banking system in Peru;”¹⁶⁶
- “purporting to apply [at paragraph 160 of the Award] the rule from *LG&E* that ‘where the investment continues to operate, even its profits are diminished’ then an expropriation has not occurred, then acknowledging [at paragraphs 165 and 166 of the Award] TSG’s retention of control over its operations albeit with diminished profits, and yet concluding that the precautionary measures were expropriatory;”¹⁶⁷
- “citing *ADM and Tate & Lyle* [at paragraph 162 of the Award], where the tribunal had concluded that there was no expropriation because the investment continued to operate, conceding that SUNAT’s precautionary measures did not cause Claimant [Mr. Tza Yap Shum] to lose its capacity to operate, but concluding that the precautionary measures were nevertheless expropriatory;”¹⁶⁸
- “citing *S.D. Myers* [at paragraph 163 of the Award] ‘in which the closing of the Canadian border to exports of hazardous waste for 18 months was not considered to be an expropriatory measure,’ yet concluding that SUNAT’s precautionary measures – which were in effect for less than six months – were expropriatory;”¹⁶⁹
- “reasoning [at paragraph 173 of the Award] that, ‘under international law, a State *is not* liable for the loss of value of property or for other economic

¹⁶⁵ Memorial, para. 254. *See also*, Reply, para. 173.

¹⁶⁶ Reply, para. 174. *See also*, Memorial, para. 255.

¹⁶⁷ Memorial, para. 255. *See also*, Reply, para. 174.

¹⁶⁸ Memorial, para. 255.

¹⁶⁹ Memorial, para. 255; Reply, para. 174.

disadvantages that result from good faith imposition of general taxes ... or other conduct commonly accepted as part of the police powers of the state,’ but then holding that a state *is* liable for alleged economic disadvantages resulting from taxation – so long as its internal decision-making can be described as ‘arbitrary’ or the Tribunal purports to find a denial of justice;”¹⁷⁰

- “stating [at paragraph 95 of the Award] that ‘the exercise of administrative and regulatory powers of a State carries with it a presumption of legitimacy,’ which is ‘especially true where the State is acting in pursuit of an important public interest,’ but applying no such presumption in favor of Peru’s legitimate exercise of its taxation powers.”¹⁷¹

iii. Serious Departure from a Fundamental Rule of Procedure

147. The Republic of Peru finally argues that the Arbitral Tribunal seriously breached a fundamental rule of procedure (**Article 52(1)(d)** of the ICSID Convention) by exercising jurisdiction beyond the scope of the Parties’ consent to arbitration and by failing in multiple respects to state reasons for its Award.¹⁷²

b. The Respondent’s Submissions

148. Mr. Tza Yap Shum replies that the Arbitral Tribunal did not manifestly exceed its powers. He argues that the Arbitral Tribunal used several sources for the concept of arbitrariness, which is a general concept that is not exclusively restricted to the fair and equitable treatment standard. He contends that the Arbitral Tribunal did not import the arbitrariness standard to interpret the term “*expropriation*” in Article 4 of the Peru-China BIT, nor did it import the denial of justice standard in the expropriation claim.¹⁷³ In his view, the Award has therefore settled only an expropriation dispute.¹⁷⁴

149. Mr. Tza Yap Shum also contends that the Arbitral Tribunal stated the reasons on

¹⁷⁰ Memorial, para. 255; Reply, para. 174.

¹⁷¹ Memorial, para. 255.

¹⁷² Memorial, paras. 257-258; Reply, paras. 175-177.

¹⁷³ Counter-Memorial, paras. 107, 109-115; Rejoinder, paras. 119-134.

¹⁷⁴ Counter-Memorial, para. 151.

which it based its Award. He argues that the Arbitral Tribunal's analysis was based on contrasting the effects doctrine with the legitimate exercise by the Republic of Peru of the police powers on tax matters. For the regulatory powers of the State resulting in an act of expropriation to be considered a legitimate act, it is necessary to assess the State's behavior against criteria such as non-arbitrariness, non-discrimination, reasonability, protection of the public interest, good faith and due process, among others. Mr. Tza Yap Shum argues that the causal relationship between SUNAT's measures and the substantial deprivation of the investment in TSG has been proved and remarks that the Arbitral Tribunal considered the State's argument about the value of the investment before the imposition of tax liens and relied on the damages expert report produced by the Republic of Peru.¹⁷⁵

150. Mr. Tza Yap Shum further contends that (i) there is no contradiction in deciding an expropriation claim by analyzing the legitimacy requirements of a regulatory act; (ii) there is no contradiction between the effects of SUNAT's measures and the reasoning of the Arbitral Tribunal relating to the use of the banking system by TSG; (iii) there is no contradiction in the application as reference of the *LG&E* Award on substantial interference; (iv) there is no contradiction in the reference to the *ADM and Tate & Lyle* Award on the operational capacity of TSG; and (v) there is no contradiction in the reference to the *S.D. Myers* Award on the temporary impact of SUNAT's measures on the investment. Mr. Tza Yap Shum also contends that the application of the good faith standard is not contradictory.¹⁷⁶
151. Mr. Tza Yap Shum finally argues that the Arbitral Tribunal did not seriously depart from any fundamental rule of procedure. For Mr. Tza Yap Shum, the Tribunal settled the disputed issue of expropriation based on an analysis of the effects doctrine and once it was convinced that an expropriatory measure had occurred, it contrasted such measure against the Republic of Peru's police powers on tax matters. Therefore, Mr. Tza Yap argues, the Tribunal did not import criteria pertaining to fair and equitable treatment, arbitrary and discriminatory measures, and claims on denial of justice.¹⁷⁷

¹⁷⁵ Counter-Memorial, paras. 100-103, 117-118, 147; Rejoinder, paras. 98-104.

¹⁷⁶ Counter-Memorial, paras. 119-135; Rejoinder, paras. 105-118.

¹⁷⁷ Counter-Memorial, para. 137; Rejoinder, paras. 143-144.

B. THE COMMITTEE'S ANALYSIS

a. Article 52(1)(B): Manifest Excess of Powers

152. The Arbitral Tribunal found that the precautionary measures resulted in an indirect expropriation of Mr. Tza Yap Shum's investment in breach of Article 4 of the Peru-China BIT, for which he was not compensated.¹⁷⁸ Examining whether the Republic of Peru could nevertheless be exempt from liability based on public interest in the exercise of its taxation power, the Arbitral Tribunal recognized that:

*“under international law, a State is not liable for the loss of value of property or for other economic disadvantages that result from the good faith imposition of general taxes, regulations, or other conduct commonly accepted as part of the police powers of the state. The creation, administration, and collection of taxes form part of the taxation power of the states.”*¹⁷⁹

Having underlined earlier that States are not exempt from responsibility and from the obligation to pay compensation if their actions are arbitrary or discriminatory,¹⁸⁰ the Arbitral Tribunal ended the discussion with a declaration that arbitral awards involving allegations of indirect expropriation resulting from the actions of tax authorities:

*“reveal a substantial consensus that the imposition of taxation measures or their enforcement may be expropriatory if they are confiscatory, arbitrary, abusive, or discriminatory.”*¹⁸¹

153. This gives rise to the criticism of the Republic of Peru, which discerns a manifest excess of powers arguing that the Arbitral Tribunal used the word “*arbitrary*” to import the fair and equitable treatment standard into the expropriation analysis. According to the Republic of Peru, this is evidenced by the Arbitral Tribunal's reliance on non-expropriation sources (*Amto v. Ukraine*, *S.D. Myers v. Canada*, *EDF v. Romania*, *Lauder v. Czech Republic* and the ICJ Judgment in *ELSI*).¹⁸² The Applicant's criticism extends to the Arbitral Tribunal's analysis of the availability of

¹⁷⁸ Award, para. 170.

¹⁷⁹ Award, para. 173.

¹⁸⁰ Award, para. 148.

¹⁸¹ Award, para. 181.

¹⁸² Memorial, para. 224-225; Reply, paras. 149-155.

an adequate legal remedy and due process in the course of its examination of SUNAT's conduct,¹⁸³ from which the Arbitral Tribunal concluded that TSG had a formal rather than a substantive access to a legal remedy.¹⁸⁴ The Arbitral Tribunal, the Republic of Peru alleges, imported the inapplicable denial of justice standard into Mr. Tza Yap Shum's expropriation claim, when such standard would have been appropriate only if the Tribunal's jurisdiction extended to the Claimant's fair and equitable treatment claims.¹⁸⁵ However, the Applicant notes, the Arbitral Tribunal had already concluded in the Decision on Jurisdiction and Competence that it did not have jurisdiction over Mr. Tza Yap Shum's fair and equitable claims.¹⁸⁶

154. According to the Republic of Peru, in importing the arbitrary and discriminatory measures and fair and equitable treatment standards into the expropriation analysis to condemn SUNAT's actions as arbitrary, the Arbitral Tribunal violated its own Decision on Jurisdiction and Competence.¹⁸⁷ For the Applicant, the Arbitral Tribunal extended its jurisdiction to cover Article 3(1) of the Peru-China BIT on fair and equitable treatment¹⁸⁸ by relying on non-expropriation jurisprudence in order to find its "arbitrariness" standard and then hold Peru liable for expropriation.¹⁸⁹ The Arbitral Tribunal also erred, further submits the Republic of Peru, in applying a rule of law not found in the Peru-China BIT. The Applicant notes that the Peru-China BIT does not have a prohibition against arbitrary measures and argues that the Arbitral Tribunal would have had no jurisdiction over a claim based on such standard even if the Peru-China BIT prohibited such arbitrary measures.¹⁹⁰

155. The Committee notes that the Arbitral Tribunal discussed at length the notion of

¹⁸³ Award, paras. 223-240.

¹⁸⁴ Award, para. 238.

¹⁸⁵ Memorial, paras. 245-248; Reply, paras. 164-167.

¹⁸⁶ Memorial, para. 248. In the Decision on Jurisdiction and Competence, the Arbitral Tribunal found that Article 3(1) of the Peru-China BIT, which according to the Tribunal "*establishes the principle that investors of the Contracting Parties shall be granted fair and equitable treatment under the most favored nation clause ("MFN") contained in Article 3(2)*" could not be interpreted to extend the jurisdiction of ICSID to fair and equitable treatment and protection claims, or to provide the basis for an independent source for the competence of the Tribunal. Decision on Jurisdiction and Competence, paras. 189, 220.

¹⁸⁷ Memorial, paras. 224, 230.

¹⁸⁸ Peru-China BIT, Art. 3 (Exh. RA-004) ("*1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party. 2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.[...]*")

¹⁸⁹ Memorial, para. 225.

¹⁹⁰ Memorial, para. 222.

“*arbitrariness*”, which it considered as a fundamental concept recognized across legal systems.¹⁹¹ The Arbitral Tribunal explained and said that arbitrariness is a relevant concept, based on its review of relevant jurisprudence:

“*[h]aving studied numerous arbitral awards involving allegations of indirect expropriation resulting from the actions of tax authorities, the Tribunal recognizes that most have been rejected. These awards however also reveal a substantial consensus that the imposition of taxation measures or their enforcement may be expropriatory if they are confiscatory, arbitrary, abusive, or discriminatory.*”¹⁹²

156. The Republic of Peru attacks the reasoning of the Arbitral Tribunal and its interpretation of the jurisprudence and legal authorities in support of the finding that SUNAT’s measures did not result from the legitimate regulatory activity of the State, but were the result of arbitrary conduct and were therefore expropriatory. However, conduct relevant to the question of indirect expropriation could also be relevant to the question of fair and equitable treatment. Further, arbitrariness is one of the questions relevant to both fair and equitable treatment and indirect expropriation claims. It is no surprise then that the Arbitral Tribunal might refer in the present context to concepts that are relevant to both indirect expropriation and fair and equitable treatment. Thus, the Applicant’s criticism becomes a matter of interpretation relevant to the merits. For example, the Republic of Peru alleges that the tribunal in *EDF v. Romania* applied a good faith standard that contradicted the analysis of the Arbitral Tribunal.¹⁹³ While the Republic of Peru may disagree, it is for the Arbitral Tribunal to interpret the law. The Committee reiterates that its role is not to act as a court of appeal.

157. The Committee also finds that the Republic of Peru draws unwarranted conclusions from one footnote when it argues that “*the Tribunal apparently seized on the EnCana tribunal’s dicta regarding a tax that is ‘arbitrary in its incidence’ as the sole source of international law supporting its invasive standard of review.*”¹⁹⁴

158. The Republic of Peru further contends that “*in applying the ‘arbitrary’ standard that*

¹⁹¹ Award, paras. 186-195.

¹⁹² Award, para. 181.

¹⁹³ Memorial, para. 221.

¹⁹⁴ Memorial, para. 213. *See also, id.* para. 211-212 (referring to Award, para. 181, fn. 151 citing *EnCana v. Republic of Ecuador*, Award (3 February 2006), para. 177 (“*Only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence, would issues of indirect expropriation be raised.*”)).

*it had imported from the fair and equitable treatment and arbitrary and discriminatory measures jurisprudence, the Tribunal imposed its own view of how SUNAT should have conducted its own internal workings.”*¹⁹⁵ It goes on to argue that “(1) SUNAT plainly had discretion to implement the precautionary measures under the Peruvian Tax Code, yet (2) the Tribunal went beyond Peruvian law to judge SUNAT by its internal guidelines and preliminary drafts of internal memoranda.”¹⁹⁶ The Arbitral Tribunal decided that SUNAT’s behavior in imposing the preliminary precautionary measures provided by Section 56 of the Peruvian Tax Code was arbitrary, particularly with regard to the failure to observe internal procedures.¹⁹⁷ The Arbitral Tribunal also took account of the Republic of Peru’s contentions that SUNAT had discretion under Section 56 of the Peruvian Tax Code to implement the preliminary precautionary measures where such measures were indispensable based on the taxpayer’s conduct or when reasons existed to suspect that the collection process could become unsuccessful.¹⁹⁸ What the Republic of Peru is requesting is a retrial of issues already dealt with by the Arbitral Tribunal, but Article 52 of the ICSID Convention does not allow for such a retrial by the Committee.

159. The Arbitral Tribunal stressed “*that it does not sit nor seek to sit as a supranational court of appeals to add a further level of scrutiny over SUNAT’s actions [...].*”¹⁹⁹ The Republic of Peru nevertheless challenges the Arbitral Tribunal for its “*probing inquiry*” of SUNAT’s internal procedures,²⁰⁰ a criticism which the Committee takes note of but can take no action on in light of Article 53 of the ICSID Convention. Article 53 lays down the principle that an award shall not be subject to any appeal.
160. The same is true for the Republic of Peru’s continuing dissatisfaction with the Arbitral Tribunal’s reasoning on the availability for the investor of an adequate legal remedy and due process. The key question for the Arbitral Tribunal was whether these remedies were adequate and effective.²⁰¹ The conclusion of the Arbitral Tribunal that

¹⁹⁵ Memorial, para. 231.

¹⁹⁶ Memorial, para. 231. *See also*, Memorial, paras. 232-244.

¹⁹⁷ Award, para. 218.

¹⁹⁸ Award, paras 196-205.

¹⁹⁹ Award, para. 184.

²⁰⁰ Memorial, para. 214.

²⁰¹ Award, para. 183.

TSG did not have a reasonable opportunity to claim its legitimate rights²⁰² cannot be overturned by the Committee in view of its limited powers under Article 52 of the ICSID Convention.

161. All in all, the Committee cannot subscribe to the Applicant's theory according to which, under the guise of an expropriation analysis the Arbitral Tribunal actually decided a fair and equitable treatment and/or an arbitrary and discriminatory measures claim by ruling that SUNAT acted arbitrarily.²⁰³ The criticisms of the Republic of Peru bear on the reasons of the Award and are no basis for intervention by the Committee. The Applicant's objections based on the interpretation of the Peru-China BIT, the meaning of the Peruvian Tax Code and the actions of the Tax Court as assessed in the Award would require the Committee to re-decide the merits. Thus, the Committee cannot conclude that the Arbitral Tribunal made an award going beyond its authority.
162. The Republic of Peru finally argues that the Arbitral Tribunal exceeded its powers by ignoring "*general principles of law*"²⁰⁴ identified in the Articles on Responsibility of States for Internationally Wrongful Acts (the ILC Articles). In particular, the Applicant refers to Article 31 of the ILC Articles, requiring that the damage for which a State is held liable must be caused by the conduct of that State. The Republic of Peru asserts that, although the harm to TSG was caused by the investor's choice not to lift the preliminary precautionary measures instead of deciding to initiate preventive bankruptcy, the Arbitral Tribunal held the host State liable.²⁰⁵ The Committee notes that in the usual practice of *ad hoc* committees, failure to apply the applicable law has been considered as a manifest excess of power.²⁰⁶ However, a violation of Article 52(1)(b) of the ICSID Convention requires an egregious misinterpretation or misapplication of the applicable law.²⁰⁷ A mere error of law does not equal to an excess of powers, let alone a manifest excess of powers. The Committee finds that the Republic of Peru does not identify such a violation of Article 52(1)(b). Its objection relates more to a claim that the Tribunal failed to explain its reasoning or

²⁰² Award, para. 240.

²⁰³ Reply, paras. 158-163.

²⁰⁴ Memorial, para. 252.

²⁰⁵ Memorial, para. 252; Reply, para. 171.

²⁰⁶ *Klöckner v. Cameroon I*, para. 59 (Exh. RA-LA-055); *MINE v. Guinea*, para. 5.03 (Exh. CA-LA-2.12).

²⁰⁷ *Soufraki v. UAE*, para. 86 (Exh. RA-LA-041).

that there was a contradiction in the reasoning, which will now be examined.

b. Article 52(1)(E): Failure to State Reasons

163. The Republic of Peru essentially concentrates its attack on the section of the Award (paragraphs 152-170) corresponding to the Arbitral Tribunal's analysis of whether the preliminary precautionary measures imposed by SUNAT resulted in an expropriation of Mr. Tza Yap Shum's investment. The Republic of Peru (i) emphasizes that the Arbitral Tribunal contradicted itself by changing the legal standard to prove expropriation;²⁰⁸ (ii) claims that the Arbitral Tribunal did not analyze the actual facts, but hypothetical facts to which it applied its contradictory legal standard;²⁰⁹ and (iii) asserts that the Tribunal did not provide reasons for importing the arbitrariness standard into what was allegedly an expropriation analysis.²¹⁰

i. Change of the Legal Standard for Expropriation

164. In support of its first argument, the Republic of Peru claims that each source of law mentioned by the Arbitral Tribunal manifestly contradicts the conclusion that SUNAT's precautionary measures were expropriatory.²¹¹ For the Applicant, instead of the substantial deprivation standard, the Arbitral Tribunal applied a *de minimis* standard, in which any change to the level or the nature of the investment operations will constitute an expropriation.²¹²

165. The Republic of Peru further contends that, although conceding that no legal impediment existed during the bankruptcy proceeding to preclude TSG, which retained control of its operations, from carrying out its activities, the Arbitral Tribunal noted that TSG did not regain its original operating capacity before June 2006 when the bankruptcy proceeding concluded.²¹³ The Republic of Peru adds that, as a result of its alteration of the substantial deprivation standard as set out in *LG&E Energy*²¹⁴ and

²⁰⁸ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 55: 5-9.

²⁰⁹ Memorial, para. 206; Reply, paras. 125-138; Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 55: 5-14, 57: 5-16.

²¹⁰ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 73: 17-20.

²¹¹ Memorial, paras. 187-190, 194-195, 204-206; Reply, paras. 109-110.

²¹² Reply, paras. 116-119.

²¹³ Memorial, para. 190.

²¹⁴ *LG&E Energy Corp. et. al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 200 (Exh. RA-LA-057) ("Thus, the effect of the Argentine State's actions has not been

S.D. Myers,²¹⁵ the Arbitral Tribunal contradicted itself by relying on the 18-month standard set out in *S.D. Myers* and finding that SUNAT's precautionary measures were expropriatory, when their actual duration of less than six months was in fact too temporary.²¹⁶

166. More particularly, the Republic of Peru characterizes as an “*annullable error*” the application by the Arbitral Tribunal of contradictory standards concerning substantial deprivation and permanence for the finding of an expropriation at paragraph 168 of the Award.²¹⁷ This paragraph reads:

“[t]he Tribunal has studied the Respondent’s arguments to effect that TSG might have operated without making use of its bank accounts, or that TSG’s decision to seek protection through a reorganization proceeding resulted from financial difficulties which had nothing to do with the actions of SUNAT; and also that Claimant has failed to demonstrate that the impact of the measures was more than temporary. Additionally, during the bankruptcy proceeding, the company appears to have received a dramatically decreased amount of income (apparently from prior sales) and still somehow managed to repay some of its debts. By themselves, these events do not show that the company continued to exist and to operate as it had prior to the measures.”

167. As the Republic of Peru correctly reminds the Committee,²¹⁸ contradictory reasons constitute one of the aspects of the absence of reasons according to the consistent practice of *ad hoc* committees which has already been referred to.²¹⁹ It has already been mentioned that the *Klöckner v. Cameroon I* Committee identified an obligation on the part of the arbitrator to set forth reasons which are not contradictory.²²⁰

permanent on the value of the Claimants’ shares’, and Claimants’ investment has not ceased to exist. Without a permanent, severe deprivation of LG&E’s rights with regard to its investment, or almost complete deprivation of the value of LG&E’s investment, the Tribunal concludes that these circumstances do not constitute expropriation.”)

²¹⁵ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), paras. 283-284 (Exh. RA-LA-078) (“An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial and temporary. In this case, the closure of the border was temporary. SDMI’s venture into the Canadian market was postponed for approximately eighteen months [...] but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation [...].”)

²¹⁶ Memorial, para. 204, Reply, paras. 121- 124.

²¹⁷ Memorial, para. 195.

²¹⁸ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 57: 9-12.

²¹⁹ *Supra*, para. 102.

²²⁰ *Klöckner v. Cameroon I*, para. 116 (Exh. RA-LA-055).

However, the ground for annulment of Article 52(1)(e) is limited to discordance in the reasons which a reading of the award should make apparent.

168. But rather than focusing on a contradiction in the reasons, the Republic of Peru's argument is more concerned with an application of the law that is different from its own interpretation. Reopening the discussion of the *L&G E Energy* and *S.D. Myers* awards as interpreted by the Arbitral Tribunal in the context of a challenge under Article 52(1)(e) of the ICSID Convention would serve no purpose other than transforming the annulment review into an appeal. The Arbitral Tribunal simply drew from the analysis of the above cited cases the following conclusion, which is not the one the Republic of Peru wished to have been drawn:

*“[i]n contrast to the cases cited, SUNAT’s actions not only reduced the company’s rate of return, but instead also eliminated or substantially frustrated the operational capacity of the business.”*²²¹

169. The Republic of Peru contends that, although many tribunals insist that the measure must cause a total deprivation of the investor's rights in order to be actionable, the Arbitral Tribunal stated in conclusory fashion that it had “*examined the parties’ arguments and sources of law that emphasize that the effects of the measures on the investment must be of a severe nature*” with virtually no discussion of those sources of law.²²² The Republic of Peru criticizes the Arbitral Tribunal for failing to state reasons for why it chose to abandon the high expropriation threshold reiterated in the decisions which the Republic of Peru relied upon in the arbitration proceedings (*Sempra Energy International v. Argentine Republic*, *Pope & Talbot v. Canada*, *CMS Gas v. Argentine Republic*, *Telenor v. Republic of Hungary*, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, *Enron Corporation v. Argentine Republic*, *Tokios Tokelès v. Ukraine*) but which were not mentioned in the Tribunal's Award even in a footnote. It further notes that there is no mention of the *Feldman* award's conclusions that tax measures are not expropriatory even if their effects make it impractical for certain business activities to continue.²²³

170. It is sufficient to say that the Award makes clear that the jurisprudence in support of

²²¹ Award, para. 162.

²²² Memorial, para. 187.

²²³ Memorial, paras. 193, 224.

the Republic of Peru's position that no indirect expropriation occurred through SUNAT's precautionary measures²²⁴ was examined by the Arbitral Tribunal. The Tribunal held:

“[i]n our analysis of the character of SUNAT's measures, we have examined the parties' arguments and sources of law that emphasize that the effects of the measures on the investment must be of a severe nature.

For example, it has been drawn to our attention that the tribunal in LG&E Energy Corp. et al. v. Argentine Republic indicated that ‘[i]nterference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished’. In this case as in other awards in which no expropriation was found to have occurred, the investment in question maintained some level of operational viability though with its profitability comparatively lower.

According to TSG's financial statements, however, this was not the case with the investment in the instant case. Even with the protection of the bankruptcy proceeding that the company itself initiated, net sales of the company dropped from an average of approximately S/.80 million before the measures in 2003-2004, to approximately S/.3.4 million in 2005-2006.”²²⁵

171. The Applicant is simply inviting the Committee to discuss the correctness of the findings of the Arbitral Tribunal.
172. The Republic of Peru also criticizes the Arbitral Tribunal for dismissing in one sentence the *ADM and Tate & Lyle* award which had held that there was no expropriation because the investment continued to operate.²²⁶ However, the Republic of Peru fails to explain how footnote 124 of paragraph 162 of the Award, which reads “*[u]nlike the investment in the case of Archer Daniels Midland the measures in question affected the only business activity of TSG*”, would constitute insufficient

²²⁴ Counter-Memorial of Defense (12 April 2010), paras. 217-236.

²²⁵ Award, paras. 159-161.

²²⁶ *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007) (Ex. RA-LA-05), para. 246 (“*An alternative criterion regarding intensity is whether the host State measure affects most of the investment's economic value or renders useless the most economically optimal use of it [...] Using the abovementioned test, the tax was not sufficiently restrictive to support a conclusion that the Tax had effects similar to an outright expropriation*”); Memorial, para. 192.

justification in itself for the solution reached by the Arbitral Tribunal regarding the indirect expropriation of the investment. The Committee recalls that the *Vivendi v. Argentina ad hoc* Committee has already pointed out that:

*“[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.*

In the Committee’s view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision [...].”²²⁷

The Committee also takes the view that contradiction in the reasoning arises under Article 52(1)(e) when the conflicting reasons are substantial. Further, the requirement to state reasons (which purpose is to enable the parties, and more particularly the losing party, to understand the decision) applies only to reasons which constitute the basis for the conclusions of the Arbitral Tribunal. Peru’s challenge to the Arbitral Tribunal’s treatment of the *ADM and Tate & Lyle* award is unsupportable under either of these standards.

ii. Reliance on Hypothetical Facts

173. In support of its second argument that the Arbitral Tribunal’s expropriation analysis was based on hypothetical facts and not on the actual facts on the record,²²⁸ the Republic of Peru remarks that the Arbitral Tribunal based its decision on a hypothetical period of three years for the precautionary measures, when they were

²²⁷ *Vivendi v. Argentina*, paras. 64-65 (Exh. RA-LA-024) (emphasis in original).

²²⁸ Hearing on Annulment, 22 March 2014, Tr. Vol. 2, 353:5-9.

actually lifted after six months.²²⁹ The Republic of Peru also argues that the Arbitral Tribunal removed the causation requirement between SUNAT's precautionary measures, which were in effect for only six months (between 28 January and 11 July 2005) and froze only US\$ 172, and the alleged substantial deprivation of TSG.²³⁰

174. According to the Republic of Peru, the Arbitral Tribunal acknowledged that the preliminary measures imposed in January 2005 were lifted after six months, but held that they would have frustrated the operations of TSG and resulted in an indirect expropriation on the basis of the hypothetical of how long the freeze would have lasted had Claimant not had it lifted.²³¹ For the Applicant, the Arbitral Tribunal also ignored entirely the Republic of Peru's invocation of the ICJ Judgment in *ELSI*'s discussion of causation, and instead relied on the dissenting opinion in that case.²³²
175. The other “*annullable error*”, identified by the Republic of Peru in paragraph 168 of the Award, relates to the alleged failure by the Arbitral Tribunal to consider arguments regarding Mr. Tza Yap Shum's failure to prove that the precautionary measures caused harm to his investment. Instead of addressing this question, the Republic of Peru claims, the Arbitral Tribunal offered no clue as to what the “*general principles*” on the issue of causation to which it referred might be, and did not apply them to determine whether the measures caused the alleged harm to Mr. Tza Yap Shum.²³³ The passage in the Award, which is more particularly criticized, reads as follows:

*“[t]he Peru-China BIT, unlike other foreign investments treaties or agreements, does not include a provision expressly requiring proof of the causal connection between a certain measure and the resulting damage. International tribunals have generally addressed the issue based on general principles of international law, which, in this case are the ones applicable under Article 42 of the ICISD Convention.”*²³⁴

176. It can be remarked that, at footnote 134 of paragraph 167 of the Award, the Arbitral Tribunal referred to examples of awards and legal literature in relation to the “*general*

²²⁹ See Memorial, para. 205; Award, paras. 164, 169.

²³⁰ Reply, paras. 111-115.

²³¹ Hearing on Annulment, 22 March 2014, Tr. Vol. 2, 351:11 – 353:9.

²³² Memorial, para. 198.

²³³ Memorial, paras. 196-197.

²³⁴ Award, para. 167.

principles of international law” which responds to the point raised by the Applicant. The gist of the criticism here is really that the Arbitral Tribunal drew the wrong conclusion.

177. The Republic of Peru argues that the Arbitral Tribunal failed to explain at paragraph 168 of the Award, in a sentence which reads “[b]y themselves, these events do not show that the company continued to exist and to operate as it had prior to the measures”, why it considered that the precautionary measures caused the alleged substantial deprivation. It further contends that the Arbitral Tribunal reversed the burden of proof in rejecting Peru’s causation arguments, as it was for Mr. Tza Yap Shum, and not for the Republic of Peru, to show that the measures caused the alleged substantial deprivation.²³⁵
178. The Committee observes that the legal rules concerning the burden of proof are set out at paragraphs 71-73 and 151 of the Award.²³⁶ Allegations pertaining to the violation of said rules cannot give rise to annulment by this Committee under Article 52(1)(e) of the ICSID Convention, which deals only with the existence of reasons and not with the correctness of the application of the law.
179. Furthermore, the declarations of the Arbitral Tribunal in paragraph 168 of the Award, which refute the arguments of the Republic of Peru, must be read in conjunction with the reasoning in the section of the Award on the expropriatory effects of the preliminary precautionary measures and in light of footnote 139 of the Award at the end of the last sentence of paragraph 168.²³⁷ In the opinion of the Committee, the

²³⁵ Reply, paras. 114-115.

²³⁶ Award, para. 72 (“Accordingly, Claimant must principally show that there has been expropriatory conduct of its investment in breach of the Treaty. Respondent, in turn, is charged with demonstrating whether, as it has alleged, the conduct in question is permitted under the Treaty or international law”); Award, para. 151 (“The Claimant, of course, has the burden of proving [a] claim [of expropriation]. Even while the Claimant may have suffered an economic injury as a result of Respondent’s actions, the injury must be sufficiently severe so as to constitute expropriation under international law. If he does not demonstrate such a taking, appropriation, or the destruction of value of his property (‘taking’), the Claimant’s case must fail. Even if he proves an impact sufficient to constitute expropriation, the Tribunal must determine whether the Respondent is exempt of international responsibility given the important public interest involved in the exercise of taxation authority by States. In order to do this, the Tribunal must evaluate whether the actions taken were discriminatory or arbitrary.”)

²³⁷ Award, para. 168, fn. 139 (clarifying that TSG managed to pay its debts although it had received a dramatically decreased amount of income apparently from prior sales that “[i]n effect, it was not shown that these sales were the result of the procurement of new inventories. According to the explanation from Claimant, these corresponded to sales of existing inventory and the payment interest from advances to providers.”)

factual elements on which an arbitral tribunal relies in a chain of causality to reach its conclusion are not subject to review by an *ad hoc* committee because of its limited remit under Article 52(1)(e) of the ICSID Convention. This would otherwise transform the annulment procedure into an appeal.

180. In support of its allegations that SUNAT's measures did not harm TSG, the Republic of Peru asserts an absence of reasons in the Award for failing to recognize that TSG chose preventive bankruptcy on 11 March 2005, even though it could have paid its tax liabilities or pledged the tax refunds as a guarantee which would have allowed it to lift the precautionary measures. The Republic of Peru argues that the Arbitral Tribunal never considered that the choices of the investor caused the alleged damages to TSG.²³⁸ The Republic of Peru explained during the Hearing on Annulment that the tax debt was reduced to 3 million soles and that SUNAT reimbursed TSG for an amount of almost 33 million soles, so that TSG had the money to pay its tax debt, but chose instead to pay short term creditors because it was more beneficial to do so financially.²³⁹
181. Contrary to the Applicant's allegations, the Committee finds that the Arbitral Tribunal did provide reasons. The Award notes that the Republic of Peru presented evidence that TSG would have had the legal alternative of offering cash and other collateral in the full amount of the tax debt to have the precautionary measures lifted and to resume use of the Peruvian banking system.²⁴⁰ The Arbitral Tribunal evaluated the argument of the Republic of Peru in the following way:

“[a]dditionally, during the hearing it was suggested that the investor showed bad faith after the measures were imposed by SUNAT. Specifically, the Respondent questioned the decision to use the funds generated by TSG's tax rebates to repay third party creditors rather than to make payment of the tax claims of the SUNAT. It is not surprising that the investor might opt for this course of action in order to mitigate the damages caused to his investment. In effect, because of the way that the investment was financially structured, it was more beneficial from a financial standpoint to repay short term, high interest creditors. The other alternative (to use the rebates to pay off or guarantee its tax debt) would have required him, probably,

²³⁸ Memorial, paras. 202-203.

²³⁹ Hearing on Annulment, 21 March 2014, Tr. Vol 1, 61:16 – 63:11.

²⁴⁰ Award, para. 155.

to offer these funds as a guarantee to SUNAT for an indeterminate time. [...]”²⁴¹

182. The Award clarifies that TSG made use of the Peruvian banking system, not as a source of capital, but rather to receive operating capital, to process letters of credit issued by foreign purchasers and to transfer the repayment of its loans and interest.²⁴² The Arbitral Tribunal held that the declaration of preventive bankruptcy proceedings in March 2005²⁴³ was the right initiative in response to the precautionary measures imposed by SUNAT in January 2005, to regain access to the banking system and to operate as an automatic lift of the preliminary measures:

“[e]ven though the request [...] served to have the freezing of bank accounts and third parties’ withholding lifted in the short term in June 2005, the bankruptcy proceeding did not conclude until June 2006. It was not until the bankruptcy proceedings concluded in June 2006, at the behest of the company itself, that it regained its original operating capacity.

It is true, as the Respondent notes, that during the proceeding no legal impediment existed that precluded TSG from carrying on its business activity. The voluntary reorganization proceeding did not deprive the shareholders of control; although the business was subject to reorganization, it retained control of its operations. As an effect of the declaration of reorganization, the Bankruptcy Law requires the lifting of all preliminary precautionary measures so that SUNAT was forced to lift its measures, which occurred on July 11, 2005. The Tribunal, however, is convinced that the request for reorganization was the only effective remedy available to the Claimant to achieve, within a reasonable time period, the lifting of the preliminary precautionary measures that were stifling its ability to develop its business activity. As a result, the Tribunal finds that TSG’s decision to seek bankruptcy protection was reasonable and appropriate under the circumstances.”²⁴⁴

183. The Arbitral Tribunal noted that TSG continued to function during the bankruptcy procedure and carried out some minor activities. It determined that “*without this extraordinary protection from the bankruptcy proceeding [...] the company would*

²⁴¹ Award, para. 249.

²⁴² Award, para. 153.

²⁴³ Award, para. 110.

²⁴⁴ Award, paras. 165-166.

*simply have been unable to continue operating.*²⁴⁵ The Arbitral Tribunal indicated that even with the protection of the bankruptcy proceedings the net sales of the company dropped from S/80 million in 2003-2004, before the preliminary precautionary measures were put in place on 28 January 2005, to approximately S/ 3,4 million in 2005-2006.²⁴⁶

184. The Republic of Peru criticizes the Arbitral Tribunal for failing to respond to its explanation of Peruvian law regarding acceptable means of payment under a contract, which it presented to support its argument that the precautionary measures did not prevent TSG from carrying out transactions with the fishing industry. The Republic of Peru says that, instead, the Arbitral Tribunal gave an incomprehensible answer at footnote 115 of paragraph 156 of the Award.²⁴⁷ The footnote at issue reads:

“[t]he Respondent, based on the report and testimony of its tax law expert, José Galvez, suggests that TSG could have resorted to cash transactions such as account deposits with no need to use its bank accounts [...] This alternative would not have served SUNAT’s interest in this instance nor was it viable. To the contrary, channelling [sic] TSG’s financial operations through its bank accounts is far from incidental, and it allowed it to comply with the Peruvian ‘bankerization’ rules, to facilitate its operation of the business and even SUNAT’s audit operations.”

185. The Committee notes that footnote 115 refers to the following passage of paragraph 156, according to which SUNAT:

“[...] should have understood that the bank withholding measure would be a fatal blow on TSG’s ability to operate, choking off its normal sources of working capital and precluding it from resort to the banking system for processing of its letters of credit and repayment of its debts.”

186. The Committee concludes that the declarations of the Arbitral Tribunal should be considered in light of earlier declarations in the Award in which the Arbitral Tribunal explained:

²⁴⁵ Award, para. 157.

²⁴⁶ Award, para. 161.

²⁴⁷ Memorial, paras. 200-201.

“[i]n carrying out its operations, TSG made use of the Peruvian banking system. In so doing, TSG complied with the norms of ‘bankerization’ (‘Bancarizacion’ [i.e., a policy in favor of using the formal banking system]). While the use of the banking system may not have been mandatory, the ‘bankerization’ of TSG’s operations allowed it to irrefutably certify expenses, costs or credits in order to deduct them on its tax statements.”²⁴⁸

187. The Republic of Peru argues that the Arbitral Tribunal contradicted itself in finding that TSG was financially devastated by the freeze of US\$ 172 as a result of the precautionary measures which were in force for less than six months, while finding that TSG made use of the banking system and that it may not have been mandatory to use the banking system in Peru.²⁴⁹ The Tribunal held that:

“[t]he freeze in the form of bank withholdings was an utter failure. As a result of it, a total of approximately US \$172 was collected compared to a tax debt of approximately US \$ 4 million. In similar form, the withholding measure to third parties did not result in any collections whatsoever.”²⁵⁰

188. The Committee notes that the Arbitral Tribunal acknowledged in the Award that TSG, which principally had a financial role, used the Peruvian banking system to carry out its operations:

“[...] TSG’s principal role [...] was a financial one. Despite having a modest capital, TSG had access to short-term international financing, principally from business associates, friends and relatives of the investor. During the 2002-2004 period, these funds amounted to approximately US \$ 59 million. In a period when liquidity was scarce and business loans from Peruvian financial institutions were difficult to obtain, TSG used these funds not only to purchase raw fish and fish flour, but also to provide advances to fishing companies for fuel or equipment and to processing companies for refurbishing equipment and facilities. These advances were generally repaid, with interest, by deducting the payments due from the amounts payable by TSG to the fishing or processing companies.

In carrying out its operations, TSG made use of the Peruvian

²⁴⁸ Award, para. 101.

²⁴⁹ Reply, para. 174.

²⁵⁰ Award, para. 220.

*banking system. [...]”*²⁵¹

189. The Arbitral Tribunal further stated in relation to the efficacy of SUNAT’s measures:

“[a]s indicated previously, the measures, in contrast, did have an impact on the operational capacity of the business. During the period immediately after their imposition (2005-2006), a business whose previous revenues had reached S/. 90 million, reported average income of barely S/. 766,941 per year and essentially disappeared from the tax rolls.

*As indicated previously, it is true that TSG later continued operating in Peru. However, this was the product of a preventive bankruptcy proceeding initiated by the company itself, that culminated in late 2006 and because of it, TSG was able to restructure its finances, access the banking system, and operate free of precautionary measures affecting its assets. Specifically, it initiated the proceeding to recover the operating conditions that it had lost for a considerable period of time as a result of SUNAT’s actions. It would thus be illogical to allow SUNAT to benefit from these efforts of the taxpayer, in order to justify or minimize the impact of its own conduct.”*²⁵²

190. It is worth recalling an often cited passage of the decision of the *ad hoc* Committee in *MINE v. Guinea* which clarifies with respect to the reasoning of an award that:

“[...] the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal’s decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however is not a ground for annulment.

In the Committee’s view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous

²⁵¹ Award, paras. 100-101.

²⁵² Award, paras. 221-222.

reasons.”²⁵³

191. The Committee finds that the Arbitral Tribunal’s above cited reasons enable the Parties and any reader of the Award, including Treasury Officials or Parliament,²⁵⁴ to follow that TSG, which used the banking system for its financing of the fishing industry in Peru to export to China, decided to file bankruptcy proceedings in March 2005 in order to lift SUNAT’s precautionary measures. Such measures did not only freeze the current account with US\$172, but more seriously affected the checking accounts and the suppliers whose payments to TSG were withheld. The lift of the precautionary measures (that had been suspended with the bankruptcy proceedings) ended when the bankruptcy proceedings ended in June 2006. From there on, TSG regained its original operating capacity. However, as the Award makes clear at paragraph 164, SUNAT’s measures imposed on January 2005, which were to be effective for a one-year period until January 2006, were renewed twice for a one-year period, from January 2006 to January 2007, and from there to January 2008.²⁵⁵ As a direct consequence of SUNAT’s measures, TSG went outside the market as it had lost the contracts with its suppliers in the fishing industry: “*a business whose previous revenues had reached S/.90 million, reported average income of barely S/. 766,941 per year and essentially disappeared from the tax rolls.*”²⁵⁶
192. The Committee finds that it is therefore possible to follow from point A to point B and all the way to the conclusion of the Arbitral Tribunal that Mr. Tza Yap Shum was deprived of his investment in TSG. The Arbitral Tribunal did not jump over necessary reasons. This Committee, it bears recalling again, is not an appeal body.
193. In light of the preceding, the Committee does not consider it necessary to enter into a discussion regarding the Republic of Peru’s allegations that the Arbitral Tribunal failed to state reasons in its Award in accordance with Article 52(1)(e) in finding an expropriation despite its own finding that Mr. Tza Yap Shum could continue operating in Peru but simply chose to leave the market²⁵⁷ only because TSG failed to generate

²⁵³ *MINE v. Guinea*, paras. 5.08-5.09 (Exh. CA-LA-2.12).

²⁵⁴ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 218:18 – 219:8.

²⁵⁵ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 293:7-21; 22 March 2014, Vol. 2, 446:5 – 448:18.

²⁵⁶ Award, para. 221.

²⁵⁷ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 63:12 – 64:10, 68:9-19; Memorial, para. 191.

profits even before the precautionary measures were implemented.²⁵⁸ The Applicant's submission that the Arbitral Tribunal's attempt to find an expropriation based on purely hypothetical facts constitutes a manifest excess of powers²⁵⁹ is also rejected. The Arbitral Tribunal provided ample reasons and did not manifestly exceed its powers.

iii. Importing the Arbitrariness Standard into the Expropriation Analysis

194. The Republic of Peru finally asserts that the Arbitral Tribunal failed to state reasons for importing the arbitrariness standard into what was allegedly an expropriation analysis. The Republic of Peru contends that the Tribunal purported to apply the good faith standard, which is the correct standard to determine whether a state's core police powers are exempt from liability for expropriation, but contradicted itself by applying a stricter arbitrariness standard.²⁶⁰

195. The Republic of Peru argues that the Arbitral Tribunal had recognized the existence of a presumption of legitimacy in the exercise by the State of its regulatory powers.²⁶¹ The Tribunal held that:

*"[a]s argued by the Respondent, the exercise of administrative and regulatory powers of a State carries with it a presumption of legitimacy. This is especially true where the State is acting in pursuit of an important public interest like the protection of public policy, health or public morality (known as the 'police powers' of the State). In this sense, the taking or seizure of property for failure to pay taxes is recognized as a legitimate tool of tax administration, provided, however, that such actions are carried out pursuant to reasonable legal procedures and where such actions are not confiscatory, abusive or discriminatory."*²⁶²

However, the Republic of Peru complains, the Tribunal applied no such presumption in favor of Peru's legitimate exercise of its taxation powers.²⁶³ Such a basic principle,

²⁵⁸ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 66:14 – 67:2.

²⁵⁹ Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 64:10-12.

²⁶⁰ Memorial, paras. 226-228; Reply, paras. 156-157; Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 73:17-20.

²⁶¹ Memorial, para. 229.

²⁶² Award, para. 95.

²⁶³ Memorial, para. 229.

the Republic of Peru argues, “cannot hinge on trivia such as the formatting of drafts of SUNAT’s internal reports or whether SUNAT personnel followed every step of nonbinding departmental guidelines.”²⁶⁴

196. The Committee notes that the Award states in this regard:

*“[e]ven though the Tribunal recognizes that the regulatory authority of the State deserves deferential treatment, it is essential to do so without losing sight of the reasons why such deference is accorded.”*²⁶⁵

The Arbitral Tribunal concluded from the examination of SUNAT’s conduct that:

*“[...] even recognizing the importance of the functions that SUNAT exercises in tax administration and collection, SUNAT’s behaviour in imposing the preliminary precautionary measures on TSG, particularly the failure to observe its own procedures, must be considered arbitrary.”*²⁶⁶

197. The Republic of Peru discusses the probative weight of the evidence put forward before the Arbitral Tribunal regarding the conduct of the State of Peru. However, the relevance of the evidence produced by the Parties is a matter of assessment for the arbitral tribunal in the exercise of its discretion. At bottom, the position of the Republic of Peru is that there are no reasons because the Arbitral Tribunal did not agree with the Republic of Peru’s arguments.

198. The Committee finds that Peru’s challenge based on the Arbitral Tribunal’s failure to state reasons is in effect a legal and evidentiary appeal which is impermissible under Article 52(1)(e) of the ICSID Convention and is accordingly dismissed.

c. Article 52(1)(D): Serious Departure from a Fundamental Rule of Procedure

199. The Republic of Peru contends that the same arguments supporting its challenge to the Award for manifest excess of powers under Article 52(1)(b) of the ICSID Convention also support a challenge for serious departure from a fundamental rule of

²⁶⁴ Reply, para. 163.

²⁶⁵ Award, para. 180.

²⁶⁶ Award, para. 218.

procedure under Article 52(1)(d).²⁶⁷ The Applicant argues that the Tribunal in fact adjudicated claims for fair and equitable treatment, arbitrary and discriminatory measures and denial of justice, which were beyond its jurisdiction, thereby breaching a fundamental rule of procedure.²⁶⁸

200. For the Applicant manifestly exceeding the parties' consent is a serious departure from a rule of a fundamental rule of procedure.²⁶⁹
201. The Applicant's arguments have already been rebutted under Article 52(1)(b). Essentially for the same reasons set out in the previous section of this decision,²⁷⁰ the Committee denies the Applicant's challenge for serious breach of a fundamental rule of procedure. There must be a proper demonstration of the violation of each ground listed in Article 52(1) of the ICSID Convention, which is lacking here.²⁷¹
202. The Republic of Peru also contends that the Arbitral Tribunal's ignoring of Peru's evidence of the real causes behind TSG's poor financial performance amounts to a serious departure from a fundamental rule of procedure.²⁷² The Committee acknowledges that the right to be heard is one of the fundamental rules of procedure protected by Article 52(1)(d), but such right places no obligation on an arbitral tribunal to address each and every argument raised by the parties. Cast in other terms, an arbitral tribunal is under the obligation to decide in light of all the evidence adduced by the parties, but it has no obligation to explain itself on each and every piece of evidence.
203. The Republic of Peru more generally complains about the Award as being the result of a substantially flawed process.²⁷³ This is an assumption that the grounds of Article 52 are cumulative.
204. Finally, the Republic of Peru also argues, generally, that the same arguments giving rise to its challenge to the Award for failure to state reasons under Article 52(1)(e) also support a challenge to the Award for serious departure from a fundamental rule of

²⁶⁷ Memorial, para. 257; Reply, para. 176.

²⁶⁸ *Id.*

²⁶⁹ Hearing on Annulment, 22 March 2014, Tr. Vol. 2, 375:16–376:14.

²⁷⁰ *Supra*, paras. 152-161.

²⁷¹ *Supra*, para. 120.

²⁷² Hearing on Annulment, 21 March 2014, Tr. Vol. 1, 66:7-13.

²⁷³ Reply, para. 175.

procedure under Article 52(1)(d).²⁷⁴

205. The Committee recognizes that the same defects in an award may fall under several grounds of Article 52. However, this does not relieve an applicant of the obligation to demonstrate that it has a valid complaint under each separate ground. It is necessary to distinguish between the different grounds. Here, the grounds of annulment of Article 52(1)(b) and (e) are simply subsumed by the Republic of Peru in the ground of Article 52(1)(d). Its challenge is therefore denied.

V. COSTS

206. The Republic of Peru asks the Committee to find that Mr. Tza Yap Shum must bear all costs and fees, including attorney fees associated with this annulment proceeding,²⁷⁵ as well as the costs of the application regarding the termination of the stay of enforcement until the end of the annulment proceedings.²⁷⁶ Mr. Tza Yap Shum requests, in turn, that the Committee order the Republic of Peru to bear all costs and fees it is causing to the investor, not only in connection with the request for annulment but also in connection with the Jurisdiction and Merits stages, including attorneys' fees, counsel expenses, and other compensation the Committee may deem appropriate.²⁷⁷
207. The Committee notes that both the Parties and the Committee were well served by the high professionalism of the Secretariat which always acted in a tactful and efficient manner. The dismissal of the Application for Annulment of the Republic of Peru would not justify, in the Committee's view, deciding that the unsuccessful Applicant should carry the burden of the whole costs of the annulment proceeding. The Republic of Peru did raise serious questions for annulment. There was an important question of at what point the application of the VCLT rules is so misguided that there is a manifest excess of powers. The Committee also regrets that Mr. Tza Yap Shum only informed at the outset of the First Session of his decision to drop the application for termination of the Stay of Enforcement. Such application was a strong reason for holding an in person meeting in Washington, D.C. with all costs associated with such

²⁷⁴ Memorial, para. 258; Reply, para. 177.

²⁷⁵ Memorial, para. 260.

²⁷⁶ First Session Tr., 29:9-11, 32:2-5.

²⁷⁷ Counter-Memorial, para. 153.

meeting. Those costs were advanced by the Republic of Peru in accordance with Article 14(3)(e) of the ICSID Administrative and Financial Regulations.

208. On the basis of Articles 52(4) and 61(2) of the ICSID Convention, the Committee which has discretion to determine how and by whom the cost of the proceedings will be borne, finds that simply allocating all of the costs to the Republic of Peru would not give recognition to the above circumstances. In view of the preceding, the Committee decides that the Republic of Peru should bear 80% and that Mr. Tza Yap Shum should bear 20% of the full costs and expenses in connection with the annulment proceeding.²⁷⁸
209. With regard to Party costs, namely, cost for legal representation and expenses, the Committee would like to acknowledge the great assistance it received from counsel who presented their case with efficacy and civility. In accordance with the invitation of the Committee, the Parties submitted their statements of costs on 9 January 2015, with a correction received from the Republic of Peru on 14 January 2015. In exercise of its discretion under the ICSID Convention in connection with Party costs, the Committee decides that each Party should bear its own cost for legal representation and expenses for the fair and proper presentation of their positions.

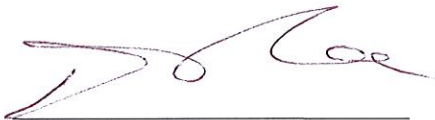
VI. DECISION

210. For the reasons given above, the *ad hoc* Committee decides that:
- The Republic of Peru's Application for Annulment is dismissed in its entirety;
 - The Republic of Peru shall bear 80% of all the costs of the proceedings incurred in connection with the Annulment proceeding and Mr. Tza Yap Shum 20% of the said costs;
 - Each Party shall bear its own Party costs incurred in connection with the Annulment proceeding;
 - Pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3), the stay of enforcement of the Award is terminated.

²⁷⁸ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account as soon as all invoices are received and the account is final.



Judge Dominique Hascher
President of the *ad hoc* Committee
Date: FEB 02 2015



Professor Donald M. McRae
Member of the *ad hoc* Committee
Date: JAN 15 2015



Professor Kaj Hobér
Member of the *ad hoc* Committee
Date: JAN 26 2015