INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

M.C.I. POWER GROUP L.C. AND NEW TURBINE INC.
Applicants

v.

REPUBLIC OF ECUADOR
Respondent

ICSID Case No. ARB/03/6
Annulment Proceeding

DECISION ON ANNULMENT

Members of the ad hoc Committee:

Judge Dominique Hascher, President
Judge Hans Danelius
Judge Peter Tomka

Secretary of the Committee: Ms. Natalí Sequeira

Representing M.C.I. Power Group L.C. and New Turbine Inc.:

Mr. Barry Appleton
Mr. Martin Endicott
Appleton & Associates International Lawyers

Mr. Edward M. Mullins
Mr. José Astigarraga
Astigarraga Davis Mullins & Grossman, P.A.

Representing the Republic of Ecuador:

Mr. Diego García Carrión
Procurador General del Estado

Mr. Álvaro Galindo
Director de Patrocinio Internacional de la Procuraduría General del Estado

Mr. Alberto Wray
Mr. Ernesto Albán-Ricaurte
Ms. Verónica Arroyo
Cabezas & Wray Abogados

Mr. Paul Reichler
Mr. Ronald Goodman
Foley Hoag L.L.P.

Date of dispatch to the parties: October 19, 2009

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I. PROCEDURAL HISTORY

1. On November 26, 2007, the International Centre for Settlement of Investment Disputes (*ICSID* or *the Centre*) received from M.C.I. Power Group L.C. and New Turbine Inc. (jointly referred to as *the Applicants*) an application for the partial annulment of the Award rendered on July 31, 2007 (hereinafter *the Award*) by the Arbitral Tribunal in the arbitration proceeding between M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador (ICSID Case No. ARB/03/6), composed of Professor Raúl E. Vinuesa, (Argentine), President; Judge Benjamin J. Greenberg, Q.C., (Canadian); and Professor Jaime Irarrázabal (Chilean). The Application for Annulment was submitted within the time period provided for by Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (*Washington Convention* or *the Convention*).

2. The Secretary-General of ICSID registered the Application for Annulment on December 6, 2007 and on the same date transmitted the Notice of Registration to the parties, in accordance with Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (*the Arbitration Rules*).

3. By letter of April 7, 2008, in accordance with Rule 52(2) of the Arbitration Rules, the parties were notified by the Centre that the *ad hoc* Committee (*the Committee*) composed of Judge Hans Danelius (Swedish), Judge Dominique Hascher (French), and Judge Peter Tomka (Slovak), had been constituted and that the annulment proceeding had begun on that date. The parties were also notified that Ms. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary of the Committee. By letter of April 11, 2008, the parties were notified that the Members of the *ad hoc* Committee had designated Judge Dominique Hascher as the President of the Committee. On May 15, 2009, Ms. Natalí Sequeira, Counsel, ICSID, was assigned as new Secretary of the Committee.

4. The First Session of the Committee and the parties was held at the offices of the World Bank in Paris on May 16, 2008. During the Session the Committee and the parties discussed a number of procedural matters, including the schedule for the written pleadings. It was also agreed that the annulment proceeding would be conducted in accordance with the ICSID Arbitration Rules in force since April 10, 2006.

5. In accordance with the agreed schedule, the Applicants filed their Memorial on Annulment on August 15, 2008, and the Respondent filed its Counter-Memorial on Annulment on November 24, 2008. At the request of the Applicants, and with the Respondent's agreement, the Committee granted a 21-day hiatus (from December 15, 2008 through January 2, 2009). The filings of the parties were accordingly postponed. The Applicants filed their Reply on February 6, 2009 and the Respondent filed its Rejoinder on April 27, 2009.

6. The Hearing on Annulment took place at the seat of the Centre in Washington D.C. on June 8, 2009. The Applicants were represented by Mr. Barry Appleton, Mr. Martin

Endicott, Appleton & Associates International Lawyers; Mr. Edward Mullins, Astigarraga Davis Mullins & Grossman, P.A.; Mr. Frank Borowicz, QC, Mr. Ivor Massey, and Mr. Richard Gorman. The Respondent was represented by Dr. Diego García Carrión, *Procurador General del Estado*, Dr. Álvaro Galindo Cardona, Dr. Luis Felipe Aguilar, Procuraduría General del Estado; Mr. Alberto Wray, Mr. Ernesto Albán, Ms. Paola Delgado, Ms. Verónica Arroyo, Cabezas & Wray; Mr. Paul S. Reichler, Mr. Ronald Goodman, Ms. Paz Zárate and Ms. Clara Elena Brillembourg, Foley Hoag, L.L.P.

II. FACTUAL BACKGROUND

7. M.C.I. Power Group L.C. and New Turbine Inc. are legal entities of the United States of America (*U.S.*) which own and control Seacoast, Inc. (*Seacoast*), also a U.S. entity, which on November 17, 1995 entered with the Instituto Ecuatoriano de Electrificacion (*INECEL)*, a state organ of Ecuador,[1] into a Contract (*Seacoast Contract*) for the sale of electricity and also a Memorandum of Clarification for the Execution of the Contract (*Clarification Contract*), relating to the scope of some of the clauses of the Seacoast Contract.

8. For purposes of the execution of the Seacoast Contract, M.C.I. Power Group L.C. and New Turbine Inc. (at that time operated under the name of Energy Services Inc. (*ESI*)) entered into a "joint venture" with Old Dominion Electric Cooperative (*ODEC*). At the end of 1995, MCI, ESI and ODEC, as investors in Seacoast, constituted two companies under the laws of the State of Virginia, collectively identified during the original arbitration proceeding as *Power Ventures*. Power Ventures incorporated Power Services Ecuador Ecuapower Cia. Ltda. (*Ecuapower*), a local subsidiary constituted under the laws of Ecuador.

9. As early as the beginning of 1996, the parties encountered differences with the execution of the Seacoast Contract relating to the date of commencement, the duration of the Contract, the payment for energy under the "take or pay" clause, the reimbursement for the cost of fuel and the imposition of fines and penalties.

10. On April 12, 1996, Seacoast suspended the operation of the plants and delivery of power, invoking the non-payment of invoiced amounts payable under the Seacoast Contract. On May 26, 1996, INECEL declared the Seacoast Contract terminated.

11. On July 12, 1996, the Seacoast equity interests were transferred to Ecuapower and on July 31, 1996, Seacoast submitted a claim before the Administrative Court of the District of Quito against INECEL, challenging the termination of the Contract and requesting the payment of approximately US$ 25 million of damages for breach of contract. The case was transferred on April 12, 1999 to the Judge of the Fifth Civil

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[1] Award, para. 225: "*The Tribunal finds that INECEL, in light of its institutional structure and composition as well as its functions, should be considered, in accordance with international law, as an organ of the Ecuadorian State. In this case, the customary rules codified by the ILC in their Articles on Responsibility of States for Internationally Wrongful Acts are applicable. Therefore, any acts or omissions of INECEL in breach of the BIT or of other applicable rules of general international law are attributable to Ecuador, and engage its international responsibility.*"

Court of Pichincha who held on October 21, 1999 that the claims submitted by Seacoast against INECEL were null and void due to the lack of standing of Seacoast's legal representative. The Superior Court of Justice of Quito decided on December 12, 2000 that it lacked jurisdiction to hear the appeal filed by the Attorney General.[2]

12. Pending judicial proceedings, the Liquidation Commission contemplated by Article 17 of the Seacoast Contract was established in August 1996. It held its first meeting on April 7, 1997 on the differences relating to the interpretation and enforcement of the Contract but, due to the intransigent positions of the parties, ceased to hold its meetings on or before March 31, 1999.[3]

13. On December 1, 1996, Seacoast's accounts receivable were sold to M.C.I., New Turbine and ODEC (subsequently ODEC transferred all its rights to M.C.I. and New Turbine in 1998), with Seacoast retaining responsibility to recover the amounts claimed against INECEL[4]. INECEL signed a contract with Ecuapower on January 24, 1997 after M.C.I., New Turbine and ODEC had sold their shares in Ecuapower to a third party (The Anglo Energy Company).

14. On December 16, 2002, M.C.I. and New Turbine started an ICSID arbitration against the Republic of Ecuador. M.C.I and New Turbine claimed having invested in Ecuador both before and after the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (*the U.S.-Ecuador BIT* or *the BIT*) entered into force on May 11, 1997. They affirmed that the Tribunal was required to apply the provisions of the U.S.-Ecuador BIT to the actions and omissions of Ecuador that harmed Seacoast after the signature of the BIT on August 27, 1993. They further argued that the Republic of Ecuador had breached its BIT obligations by continuous and composite acts. M.C.I. and New Turbine declared that the Republic of Ecuador acted in a manner inconsistent with Article II(3)(c) of the BIT[5] in that its actions and omissions constituted a failure to observe its contractual obligations. They claimed that the Republic of Ecuador breached the BIT through the actions of INECEL, its state organ, which did not observe its contractual obligations. In this regard, they alleged that the Republic of Ecuador failed to abide by the "take or pay" obligation because INECEL failed to pay Seacoast for the energy capacity of the plants, that the Republic of Ecuador failed to respect the duration of the Contract, unjustifiably imposed penalties, failed to pay fuel charges necessary to generate electricity and to fulfill the Liquidation Commission obligation in good faith. They further claimed that the Republic of Ecuador failed to negotiate the renewal of the Contract, yet immediately renewed it on even more favorable terms as soon as an Ecuadorian national bought the company. They claimed US$ 24,242,784 million as damages and interest from the initial Contract as well as losses from the failure to renew the Contract.

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2 *Id.*, paras. 341-348.

3 *Id.*, paras. 256, 258, 263, 271-275.

4 *Id.*, paras. 194-213.

5 Article II(3)(c) of the BIT provides that: "*Each Party shall observe any obligation it may have entered into with regard to investments.*"

15. M.C.I. and New Turbine also submitted that the Republic of Ecuador had breached the BIT through the actions of its Cabinet of Ministers which interfered with the Seacoast Contract and with Seacoast's ability to enforce its contractual rights. They pointed out that the Republic of Ecuador granted more favorable treatment to Ecuadorian nationals and their investments, breached its obligation to protect the Claimants' legitimate expectations in refusing to pay sums clearly due under the Contract and that they were forced to mitigate their damages by selling their interests in the power plants to the brother of the Ecuadorian Undersecretary of Energy and Mines. M.C.I. and New Turbine argued that the Republic of Ecuador had frustrated Seacoast's pursuit of its contractual remedies, first before the Liquidation Commission, then under a promised arbitration agreement, and finally in the Ecuadorian courts, when it obtained annulment of the lawsuit filed by Seacoast because of the cancellation of Seacoast's operating permit. They submitted that the Republic of Ecuador had acted in a manner inconsistent with Articles II(1)[6] and II(3)(a) and (b)[7] of the BIT in that such acts and omissions constituted a breach of its national treatment obligation, a failure to provide treatment in accordance with international law, including fair and equitable treatment and full protection and security, as well as a failure to provide treatment free from arbitrary and discriminatory conduct. M.C.I. and New Turbine also submitted that the Republic of Ecuador had acted inconsistently with Article III of the BIT in that its actions or omissions in expropriating Seacoast's contractual rights by its final refusal to pay at the Liquidation Commission in December 2007 and revoking Seacoast's operating permit constituted a taking of Seacoast's interests in property without just compensation and in violation of the international law standards of treatment required by Article II(3)(b) of the BIT.

16. The Republic of Ecuador raised objections to the jurisdiction of the ICSID Tribunal. It declared that the BIT has no retroactive effect and in support of its argument submitted that Article 18 (*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*) of the Vienna Convention on the Law of Treaties may not be used to impose specific norms of the BIT retroactively in violation of Article 28 (*Non-retroactivity of treaties*) of the same Convention, that the most-favored nation clause in other investment treaties cannot be invoked as a basis for the retroactive application of the U.S.-Ecuador BIT and that there is no internationally wrongful continuing or composite act. It contended that, at the time when the BIT came into force, the

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[6] Article II(1) of the BIT provides that: "*Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.*"

[7] Article II(3) of the BIT provides that: "*(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.*"

Claimants had no investments in Ecuador because the Seacoast Contract was terminated in May 1996 and they had sold their interests. The Republic of Ecuador added that the accounts receivable do not qualify as an investment under Article 25 of the Washington Convention. The Republic of Ecuador also alleged that had the BIT been applied, the arbitration option of the BIT would have been foreclosed because the Claimants had already presented their claim to an Ecuadorian court. In the event that the BIT was applicable, the Republic of Ecuador pleaded that the Claimants had not proved that it breached any of its obligations arising from that Treaty and even less that such breach occurred after the Treaty had entered into force.

17. In its Award of July 31, 2007 the Arbitral Tribunal decided:

"*a. To allow the Respondent's main objections to the Tribunal's Competence in respect of the non-retroactivity of the BIT;*

b. To reject the other objections to the Tribunal's Competence and consequently exercise its Competence over the Respondent's alleged violations of the BIT by acts or omissions after the entry into force of the BIT;

c. To reject the Claimants' claims on which the Tribunal previously decided that it had Competence, for it considers that the Claimants have failed to prove violation of the standards of fair and equitable treatment, including the obligation to act in good faith, or the standards of non-discriminatory or non-arbitrary treatment that the BIT requires of Ecuador as a State party.

d. To reject the Claimants' claim relating to the expropriation of their rights to the investment as a result of revocation of Seacoast's permit to operate in Ecuador.

e. To formally take note of the statements of the Respondent's attorneys as to the Claimants' right to take judicial action before the Ecuadorian courts to settle the outstanding disputes over what they allege to be contractual breaches.

f. Each party shall bear in equal portions the costs and expenses incurred in the arbitration proceedings on Jurisdiction and on the Merits.

g. Each party shall bear its own costs and expenses incurred for legal representation in the arbitration proceedings on Jurisdiction and on the Merits."

18. The Applicants request annulment of the Award for the alleged failure of the Arbitral Tribunal to *"[a]ddress the Claimants' US$ 24.2 Million claim that Ecuador breached the Ecuador-US BIT through its failure to pay accounts receivable that it owes to the Claimants - whether on a continuous basis or otherwise"*. In the alternative, they request that "*the Committee annul for manifest excess of powers and failure to state reasons the Tribunal's implicit decision that it had no jurisdiction over the treaty aspects of the claims under Article VI(1)(c) of the Ecuador-US BIT on the basis that it involved a dispute arising before the Treaty came into force.* Finally, and in any event, they request that *"the Committee annul for manifest excess of powers and failure to state reasons the Tribunal's decision that it had no jurisdiction over contractual*

aspects of the claim under Article VI(1)(a) of the Ecuador-US BIT on the grounds that it involved a dispute that arose before the Treaty came into force."[8]

19. In their Application for Annulment, the Applicants sought partial annulment of the Award on two grounds, set out in paragraphs (b) and (e), out of the five grounds provided for in Article 52 of the ICSID Convention. The relevant parts of Article 52 read as follows: "*Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: [...] (b) that the Tribunal has manifestly exceeded its powers; [...] (e) that the award has failed to state the reasons on which it is based.*"

20. Initially, the Applicants presented their request for annulment under Article 52(1)(b) of the Washington Convention as an alternative to annulment under Article 52(1)(e) and dependent on a finding that the Tribunal was considered to have implicitly dealt with the issue of the accounts receivable. Subsequently, the Applicants, when answering a question from the Tribunal, specified that they do not require a specific finding regarding Article 52(1)(e) of the Washington Convention as a precondition to annul the Award under Article 52(1)(b) and that their allegations relating to sub-paragraphs (b) and (e) of Article 52(1) are independent from each other. The Applicants also clarified at the hearing that they are finally seeking full annulment of the Award because the Tribunal's excess of power contaminated the whole award[9]. The Committee will first review its powers under Article 52 of the Convention. It will then turn to the grounds invoked by the Applicants in the order in which they are set out in Article 52.

III. THE COMMITTEE'S POWERS UNDER ARTICLE 52 OF THE WASHINGTON CONVENTION

A) PARTIES' SUBMISSIONS

21. The Applicants argue that the Committee should exercise wide discretion to annul the Award. They also point out that the grounds for annulment under Article 52 are not mutually exclusive. They refer to the Annulment Committee decision in *MTD v. Chile* which noted that "*annulment committees have a role to perform within the ICSID system in ensuring 'the fundamental justice of the arbitral process'*"[10] and to the decision of the Committee in *Klöckner (I)* which also noted that the ICSID system and rules of the Convention are designed to prevent "*in one of the parties an impression of injustice.*"[11]

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[8] Applicant's Memorial on Annulment (*Memorial*), para. 150.

[9] Transcripts of the Annulment Hearing held on June 8, 2009 (hereinafter referred to as Tr.), pp. 193, 199.

[10] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, March 21, 2007, 13 ICSID Reports 516, para. 54 (hereinafter referred to as *MTD v. Chile*).

[11] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, (ICSID Case No. ARB/81/2), Decision on Annulment, May 3, 1985, 2 ICSID Reports, para. 78 (hereinafter referred to as *Klöckner (I)*).

22. The Applicants consider that, if not annulled, the decision of the Tribunal would gravely compromise the coherence and legitimacy of bilateral investment treaties and the ability of ICSID tribunals to properly resolve BIT disputes. Moreover such a decision would create a divide between international investment law and well-settled international law on the point of the retroactive application of treaties and create false and dangerous precedents.[12]

23. The Republic of Ecuador contends that the Applicants are attempting to have the Committee act as though it were faced with an appeal and not only examine the Tribunal's conclusions with respect to the meaning and scope of applicable law but also reexamine the facts. Such an aim is foreign to the nature of annulment proceedings and violates the provisions of Article 53 of the Convention under which the award is binding on the parties and "*not be subject to any appeal.*"[13]

B) ANALYSIS OF THE *AD HOC* COMMITTEE:

24. It appears clearly from Article 53 of the Washington Convention that the only permissible remedies against an award are those provided for in the Convention, which include a request for annulment but not an appeal. *Ad hoc* committees are therefore not courts of appeal. Their mission is confined to controlling the legality of awards according to the standards set out expressly and restrictively in Article 52 of the Washington Convention. It is an overarching principle that *ad hoc* committees are not entitled to examine the substance of the award but are only allowed to look at the award insofar as the list of grounds contained in Article 52 of the Washington Convention requires.[14] This was reaffirmed by many committees, whose decisions are relied upon by the parties.[15] Consequently, the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness. The committee cannot for example substitute its determination on the merits for that of the tribunal and, as the *Lucchetti v. Peru* Committee emphasized: " *[…] it is no part of the*

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[12] The Applicants give an example of an award which cites with approval a certain passage from the M.C.I. Power Award, *i.e.* the award rendered in *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), May 8, 2008, para. 611 (hereinafter referred to as *Pey Casado v. Chile*).

[13] Article 53(1) of the Washington Convention.

[14] The *Klöckner (I)* Committee already explained that Article 52 "*is in no sense an appeal against arbitral awards*" and that "*[t]his provision permits each party in an ICSID arbitration to request annulment of the award on one or more of the grounds listed exhaustively in the first paragraph of Article 52 of the Convention.*" *Klöckner (I)*, Decision on Annulment, May 3, 1985, 2 ICSID Reports 97, para. 3 (emphasis in the original).

[15] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, September 25, 2007, paras. 43, 135-136 (hereinafter referred to as *CMS v. Argentina*); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002, para. 62 (hereinafter referred to as *Vivendi v. Argentina*); *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, May 16, 1986, 1 ICSID Reports 509, para. 23 (hereinafter referred to as *Amco I*); *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, December 22, 1989, 4 ICSID Reports 79, paras. 5.04-5.08 (hereinafter referred to as *MINE*); *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002, paras. 34-37 (hereinafter referred to as *Wena v. Egypt*); *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, November 1, 2006, para. 19 (hereinafter referred to as *Patrick Mitchell v. Congo*); *MTD v. Chile*, *supra* note 10, paras. 31, 52; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, June 5, 2007, para. 20 (hereinafter referred to as *Soufraki v. UAE*); *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.* (formerly *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.*) *v. Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, September 5, 2007, para. 101 (hereinafter referred to as *Lucchetti v. Peru*).

Committee's functions to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal, but merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention."[16]. The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of *"une jurisprudence constante",* as the Tribunal in *SGS v. Philippines* declared.[17]

25. In their submissions, the parties have relied on the arbitral jurisprudence of ICSID and other investment tribunals, even though according to Article 53 of the Washington Convention the award is only binding on the parties to the dispute. It does not constitute a binding precedent on other tribunals.[18] Nevertheless, an increasing number of awards and decisions of tribunals and annulment committees are published by ICSID with the parties' consent, as required by Article 48(5) of the Washington Convention and Rule 48(4) of the ICSID Rules. As a result, the reporting of cases and the commentaries of scholars and practitioners are extensive and undeniably promote the consistent application of investment law. The parties in the present case have also relied on past decisions of *ad hoc* committees which are referred to in this decision. Although there is no hierarchy of international tribunals, as acknowledged in *SGS v. Philippines,*[19] the Committee considers it appropriate to take those decisions into consideration, because their reasoning and conclusions may provide guidance to the Committee in settling similar issues arising in these annulment proceedings and help to ensure consistency and legal certainty of the ICSID annulment mechanism, thereby contributing to ensuring trust in the ICSID dispute settlement system and predictability for governments and investors.

IV. ARTICLE 52(1)(b): MANIFEST EXCESS OF POWERS

A) PARTIES' SUBMISSIONS:

26. The Applicants contend that the Tribunal failed to apply the proper law of the dispute by improperly refusing jurisdiction over the accounts receivable claim under the BIT. Although it recognized the accounts receivable as an investment under Article I(1)(a) of the BIT,[20] the

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16 *Lucchetti v. Peru*, *supra* note 15, para. 97. See also *MTD v. Chile*, *supra* note 10, para. 54.

17 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, para. 97 (hereinafter referred to as *SGS v. Philippines*).

18 *Id*.

19 *Id.*

20 Article I(1)(a) of the BIT provides: "*1. For the purposes of this Treaty, (a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes: (i) tangible and intangible property, including rights, such as mortgages, lions and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; (iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings; inventions in all fields of human endeavor; industrial designs; semiconductor mask works; trade secrets, know-how, and confidential business information; and trademarks, service marks, and trade names; and (v) any right*

Tribunal failed to address how the BIT, once it came into force, applied to the accounts receivable. The Applicants assert that jurisdiction over the accounts receivable is obvious from a review of Articles VI(4)[21] and XII[22] of the BIT which together grant the Tribunal jurisdiction over "any investment dispute" in relation to an investment existing at the time of entry into force of the BIT. Pursuant to Article XII of the BIT, the Treaty certainly applied to a situation which clearly did not cease to exist when the BIT took effect on May 11, 1997 and the Applicants point out that, from the Tribunal's own findings, it appears that the disputes arising out of the investment agreements actually went on long after the Treaty entered into force.

27. The Applicants point out that, unlike other Ecuadorian and U.S. BITs, the U.S.-Ecuador BIT does not limit the temporal scope of the term "*investment dispute*" defined at Article VI(1) of the BIT.[23] The Applicants compare the language of Article VI(1) with that of other BITs such as the Argentina-Spain BIT, the Panama-U.S. BIT and several other Ecuador BITs which contain specific clauses precluding their application to disputes arising prior to their entry into force. The absence of such temporally limited language in the U.S.-Ecuador BIT indicates in their opinion that the Contracting Parties did not intend to limit the temporal application of the Treaty in the way decided by the Tribunal. They further underline that Article XII of the U.S.-Ecuador BIT which prevents a tribunal from taking jurisdiction over disputes that have ceased to exist before the BIT came into force, is similar to that of the Honduras-U.S. BIT which has been explained by the U.S. Secretary of State as confirming that the principle of non-retroactivity of treaties simply prevents a tribunal from taking jurisdiction over disputes with respect to acts occurring before the treaty came into force, or to situations ceasing to exist before that time, but not from taking jurisdiction over a dispute arising before the treaty came into force, so long as the underlying cause of the dispute continued or

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conferred by law or contract, and any license and permits pursuant to law."

[21] Article VI(4) of the BIT provides: "*Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for: (a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and(b) an 'agreement in writing' for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ('New York Convention').*"

[22] Article XII of the BIT provides:

"*1. This Treaty shall enter into force thirty days after the data of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter. 2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination. 4. The Protocol and Side Letter shall form an integral part of the Treaty.*"

[23] Article VI(1) of the BIT provides: "*1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged broach of any right conferred or created by this Treaty with respect to an investment.*"

otherwise culminated past that date. The Applicants also add that the U.S.-Ecuador BIT is not written only in the future tense, in particular Article VI(1) to (3).[24] The Applicants conclude that neither Ecuador nor the United States included an implicit limitation on their consent to ICSID jurisdiction to disputes arising after the U.S.-Ecuador BIT came into force.

28. The Applicants argue that as a result of its erroneous interpretation of the principle of non-retroactivity of treaties, the Tribunal failed to apply Article VI(4) of the BIT through which the Contracting Parties agreed to submit to binding arbitration "*any*" investment dispute unmodified by the express temporal restrictions that appear in other BITs. They state that the Tribunal adopted a principle of treaty interpretation which overrides the express wording of Article XII of the BIT and abrogates the Treaty itself and runs counter to the most fundamental rule of treaty interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties.[25] They contend that in such case the misinterpretation of the treaty is so grave that the distinction between ignoring the law and interpreting it incorrectly breaks down.

29. The Applicants next assert that, in addition to failing to apply the terms of the U.S.-Ecuador BIT, the Tribunal manifestly exceeded its powers by citing no authority in support of its false legal conclusion that the principle of non-retroactivity of treaties prevented it from taking jurisdiction over disputes arising before the U.S.-Ecuador BIT came into force. The Applicants state that the Tribunal relied solely and exclusively on Article 28 of the Vienna Convention on the Law of Treaties[26] even though nothing in Article 28 prevents a tribunal from taking jurisdiction over disputes arising before a treaty comes into force, provided they do not cease to exist before such time. The Applicants argue that the Tribunal's incorrect statement of law finds no

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[24] Article VI(2) and VI(3) of the BIT provides: "*2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3.*

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) to the International Centre for the Settlement of Investment Disputes ('Centre') established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ('ICSID Convention'), provided that the Party is a party to such Convention; or (ii) to the Additional Facility of the Centre, if the Centre is not available; or (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute. (b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent."

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

[26] Article 28 of the Vienna Convention: "*Non-retroactivity of treaties: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*"

support in the International Law Commission commentary to Article 28 of the Vienna Convention on the Law of Treaties, the drafting history of the Washington Convention,[27] the position adopted by the Permanent Court of International Justice in the *Mavrommatis* case,[28] commentaries by legal scholars, including the President of the International Court of Justice,[29] State treaty practice[30] and investment treaty jurisprudence. The Applicants in particular state that *Mondev v. United States*[31] and other awards such as *UPS v. Canada*[32] and *SGS v. Philippines*[33] accepted jurisdiction over disputes that arose before the relevant treaty came into force and are not at all consistent with the erroneous ruling of the Tribunal. The Applicants distinguish the facts of the present case from the factual situation in *Lucchetti v. Peru*[34] or in *Jan de Nul v. Egypt,*[35] *Pey Casado v. Chile,*[36] and *Tradex v. Albania*[37] and the determination of the Tribunal on the principle of non-retroactivity of treaties from the findings in *Impregilo v. Pakistan*[38] and *Salini v. Jordan.*[39] There is no justice, they argue, in a process through which an unsupported and arbitrary reference to a non-existent rule of law is used to resolve a dispute.

30. In addition, the Applicants contend that the Tribunal failed to address the question of whether Ecuador breached the terms of its Contract with them according to the terms of the Contract itself. The Applicants underline that there are two types of investment disputes at issue in their claim. The first is an investment dispute arising under Article

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[27] Article 25(1): "*The jurisdiction of the Centre shall extend to any legal dispute arising out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre …*"

[28] "*The Court is of the opinion that, in case of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment […] The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation and, consequently, the correctness of the rule of interpretation enunciated above,*" Case of the Mavrommatis Palestine Concessions, PCIJ (1924) Series A, No. 2, p. 35 (hereinafter referred to as *Mavrommatis*).

[29] Stanimir Alexandrov, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals," 4 Laws and Practice of Int'l Courts and Tribunals 19; Lauterpacht, "The Development of International Law by the International Court" (1958, Stevens & Sons); J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems," (1995) 66 British Yearbook of International Law 415; Rosalyn Higgins, "Time and the Law: International Perspectives on an Old Problem" (1997) 46 Int'l & Comp. L. Q. 501.

[30] Herbert Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice," 93 Recueil des Cours I (1958).

[31] *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB (AF)/99/2), Award of October 11, 2002, para. 57 (hereinafter referred to as *Mondev v. United States*).

[32] *United Parcel Service of America Inc. v. Government of Canada*, Award of May 24, 2007, paras. 22-28 (hereinafter referred to as *UPS v. Canada*).

[33] *SGS v. Philippines*, *supra* note 17, para. 167.

[34] *Lucchetti v. Peru*, *supra* note 15.

[35] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB 04/13), Decision on Jurisdiction, June 16, 2006, para. 116 (hereinafter referred to as *Jan de Nul v. Egypt*).

[36] *Pey Casado v. Chile*, *supra* note 12, paras. 369, 613-623.

[37] *Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2), Decision on Jurisdiction, December 24, 1996, 14 *ICSID Rev.—FILJ* 161 (1999), pp. 179-180 (hereinafter referred to as *Tradex v. Albania*).

[38] *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, April 22, 2005, paras. 300, 313-315 (hereinafter referred to as *Impregilo v. Pakistan*).

[39] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction, November 29, 2004, para. 170 (hereinafter referred to as *Salini v. Jordan*).

VI(1)(c)[40] which is a dispute over an alleged violation of the terms of the BIT. The second is a dispute arising under Article VI(1)(a)[41] of the BIT, which is a dispute over the Seacoast Contract. They later specified in the Reply Memorial that there are two separate channels at issue, namely the BIT and the Contract, for resolving one dispute.

31. The Applicants submit that since contractual disputes must be resolved in accordance with the proper law of the contract or otherwise by customary international law (or the law of the host State), as opposed to the substantive provisions of the BIT, such disputes, so long as they continued to exist after the treaty entered into force, are unconstrained by the temporal limitations of the BIT which apply to Article VI(1)(c) but not to Article VI(1)(a) of the BIT. The Applicants assert that, based on normal treaty interpretation principles, the Tribunal has competence over the contractual claims because it is entirely irrelevant for the purpose of the Tribunal's jurisdiction under Article VI(1)(a) whether the act took place before or after the BIT entered into force so long as the dispute continued after its entry into force. Article VI(1)(a) cannot confine the Tribunal to applying the substantive provisions of the BIT which are temporally limited. Unlike Article VI(1)(c), Article VI(1)(a) functions in their view as a purely jurisdictional provision unrelated to the substantive provisions of the BIT. The Applicants argue that the Tribunal had an obligation to scrutinize its jurisdiction under all paragraphs of Article VI but, unfortunately, failed to do so. Because of its failure to apply the terms of the BIT, the Tribunal also failed to apply the proper law over the contractual aspect of the dispute to the alleged breaches of the umbrella clause of Article II(3) of the BIT which would have applied to the dispute regardless of when the Treaty entered into force. The Applicants conclude that the refusal to assume jurisdiction under the terms of the contract amounts to adopting an erroneous principle of treaty interpretation that overrides the express wording of the treaty itself.

32. The Applicants conclude by submitting that to properly exercise jurisdiction, a tribunal must first address its mind to each of the questions that it is called upon to answer. To not answer each question with a clear indication of its deliberation is to fail to exercise its jurisdiction and thereby to manifestly exceed its powers. A tribunal cannot avoid exercising jurisdiction. It must apply its powers properly. To not do so is to abuse its discretion and to manifestly exceed its powers. The Applicants state that they are arguing about an error of jurisdiction so fundamental that it undermines the entire analysis of the

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[40] Article VI(1)(c) of the BIT provides: "*For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to [...] (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.*"

[41] Article VI(1)(a) of the BIT provides: "*For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company [...].*"

case which is a type of error that falls within Article 52(1)(b). They allege that the test for the Tribunal to be deemed to have manifestly exceeded its powers is that the error must be textually obvious and substantively serious, as is apparent on the face of Article VI(1)(a) and Article VI(1)(c) of the BIT. It does not matter whether the mistake is readily noticeable or obvious at first sight, so long as it is obvious from the text.

33. In reply, the Republic of Ecuador indicates that in deciding that the BIT does not extend to disputes arising before it entered into force, the Tribunal has not manifestly exceeded its powers. The basic premise is that BITs must be interpreted in a manner consistent with the general principles and rules of international law. The general rule of interpretation of Article 31 of the Vienna Convention leads to the conclusion of the Tribunal that the BIT does not cover disputes which arose prior to the date of entry into force. In particular, Article XII of the BIT says absolutely nothing about retroactive application. For all events, the interpretation of the temporal scope is the direct application of the principle of non-retroactivity which is, according to the Respondent, "*a primary source of international law*" that does not require the support of any other source or authority. The Tribunal decided that there was no jurisdiction over this dispute because the test of application of Article 28 of the Vienna Convention and Article XII of the BIT is not whether a dispute arose before the BIT entered into force or continued thereafter but whether the facts or acts which gave rise to the dispute were committed and completed before the treaty entered into force or thereafter. Ecuador further points out that the whole of the U.S.-Ecuador BIT was clearly intended to govern the future. Abundant case-law, *Tecmed v. Mexico,*[42] *Pey Casado v. Chile,*[43] *Salini v. Jordan*[44] and *Tradex v. Albania,*[45] also demonstrates that even when treaties are silent regarding the temporal scope of an ICSID tribunal's jurisdiction, the language used in the BIT has constituted a strong indication that the parties agree that the treaty is directed at the future. Some tribunals (*Mondev v. United States,*[46] *Pey Casado v. Chile,*[47] *Impregilo v. Pakistan,*[48] *Generation Ukraine v. Ukraine*[49] and *S.G. v. Dominican Republic*[50]) have applied the

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42 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003, paras. 62-64 (hereinafter referred to as *Tecmed v. Mexico*).

43 *Pey Casado v. Chile*, *supra* note 12, paras. 582-584.

44 *Salini v. Jordan*, *supra* note 39, paras. 170-171.

45 *Tradex v. Albania*, *supra* note 37, pp. 179-180.

46 *Mondev v. United States*, *supra* note 31, para. 68.

47 *Pey Casado v. Chile*, *supra* note 12, paras. 369, 611, 613-623.

48 *Impregilo v. Pakistan*, *supra* note 38, para. 313-315.

49 *Generation Ukraine Inc. v. Ukraine*, (ICSID Case No. ARB/00/9), Award of September 16, 2003, para. 8.13 (hereinafter referred to as *Generation Ukraine v. Ukraine*).

50 *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction of September 19, 2008, paras. 70, 74 and 87 (hereinafter referred to as *S.G. v. Dominican Republic*).

principle of non-retroactivity of treaties to disputes arising prior to the entry into force of a BIT with the same meaning as the Tribunal in this case which clearly demonstrates that its interpretation is not absurd or so irrational that no sensible person could accept it. The Republic of Ecuador considers that the Applicants' reliance on the judgment of the PCIJ in *Mavrommatis* is misplaced and they invoke the judgment of the International Court of Justice in *Ambatielos*[51] rejecting retroactive application of a treaty to earlier events. The Republic of Ecuador argues that it is not necessary to know whether the Tribunal should have accepted certain contractual claims or not; it is sufficient to establish that this is a reasonable position that has been adopted by other tribunals or by part of the legal doctrine.

34. The Republic of Ecuador also alleges that the terms of the dispute resolution clause should not be understood to embody a broad consent to treaty-based arbitration of contracts and other claims based on local laws, as demonstrated in the decisions of other tribunals such as *SGS v. Pakistan.*[52] Contractual claims that are brought before a treaty-based tribunal must also amount to a violation of the treaty standards as emphasized in *Lesi-Dipenta v. Algeria*[53] and, therefore, in the absence of a specific provision, an arbitration clause, albeit broadly worded, cannot provide a basis for the jurisdiction of such tribunal over purely contractual claims. Ecuador also asserts that contractual jurisdiction under a BIT may only be in respect of an investment contract with the State itself and not with a separate entity such as INECEL and that an investor invoking contractual jurisdiction pursuant to an offer made by the State must itself comply with the contractual arrangements for dispute settlements with that State.

35. The Republic of Ecuador further submits that the temporal limitations of the BIT are applicable to both classes of disputes and adds that the decisions in *Lucchetti v. Peru,*[54] *Jan de Nul v. Egypt*[55] and *Pey Casado v. Chile*[56] indicate that if there was a dispute between M.C.I. and New Turbine, on the one side, and Ecuador, on the other, prior to the entry into force of the BIT, it would be necessary to consider the origin of the BIT claim and to establish whether the claim arose on or after the date of entry into force of the BIT. If the new claim and the old claim have the same origin or subject-matter, *i.e.*, an act that took place before the entry into force of the BIT, a decision by the Tribunal not to

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51 *Ambatielos Case (jurisdiction), Greece v. United Kingdom,* Judgment of July 1, 1952*: ICJ Rep. 1952,* p. 28 (hereinafter referred to as *Ambatielos*).

52 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, August 6, 2003, paras. 161-162 (hereinafter referred to as *SGS v. Pakistan*).

53 *Consorzio Groupement L.E.S.I.- Dipenta v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/8), Award of January 10, 2005, para. 25 (hereinafter referred to as *Lesi-Dipenta v. Algeria*).

54 *Lucchetti v. Peru*, *supra* note 15.

55 *Jan de Nul v. Egypt*, *supra* note 35, para. 116.

56 *Pey Casado v. Chile*, *supra* note 12.

exercise jurisdiction *ratione temporis* is well supported. Whether the case has been about a single dispute or whether it is related to two different disputes, the Tribunal's decision encompasses both situations because they both fall into the category of disputes that the Tribunal excluded from its jurisdiction, those arising prior to the entry into force of the Treaty. The claims related to a contract that had been terminated before the BIT entered into force and were therefore outside the jurisdictional scope of the Tribunal. Article VI is a merely introductory clause which is normally found in BITs and cannot be taken as a substantive clause that contains a broad consent to arbitration, whether on a treaty or contract basis. It would be curious if what had been intended was to provide an umbrella clause subject to Article 28, while at the same time considering Article VI(1)(a) as a jurisdictional provision that would not be subject to Article 28.

36. The Republic of Ecuador finally declares that, even assuming that the Tribunal had erroneously applied the principle of non-retroactivity of treaties and therefore had incorrectly interpreted the BIT, such an error of interpretation would not constitute an excess of power because this would otherwise amount to admitting an appeal of the arbitral award. The Republic of Ecuador declares that the non-application of the proper law is a question of interpretation which cannot constitute a ground for annulment. As the history of the Washington Convention reveals, an incorrect application of the law is not a basis for annulment. Moreover, the Republic of Ecuador argues that the excess of power must be manifest, obvious at first sight, and that, if an elaborate interpretation is necessary, the excess of powers is not evident. In this case, there was no error so outrageous that no reasonable person could admit it.

B) ANALYSIS OF THE *AD HOC* COMMITTEE

37. Failure to apply the proper law is not an independent ground for annulment under Article 52 of the Washington Convention. *Ad hoc* committee decisions however recognize that a tribunal's failure to apply the applicable law may constitute a manifest excess of powers pursuant to Article 52(1)(b).[57] In *Klöckner (I)*, the *ad hoc* Committee thus ruled that "*[e]xcess of powers may consist of the non-application by the arbitrator of the rules contained in the arbitration agreement.*"[58] While Article 42(1) of the Washington Convention is concerned with the law applicable to the merits of the dispute,[59] issues of jurisdiction are addressed in Article 25 of the Washington

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[57] See *e.g.*, Decisions of the Annulment Committees in *Klöckner (I)*, *supra* note 14, para. 59; *Amco I*, *supra* note 15, paras. 23 and 95; *MINE, supra* note 15, para. 6.40; *CMS v. Argentina*, *supra* note 15, para. 49; *Soufraki v. UAE*, *supra* note 15, paras. 37 and 85.

[58] *Klöckner (I)*, *supra* note 14, para. 59.

[59] In its Award, para. 217, the Tribunal held that there was no evidence of any agreement in the BIT on the law applicable to the dispute. Article 42(1) of the Washington Convention invites the Tribunal to "*decide a dispute in accordance with such rules of law as may be agreed by the parties."* The second sentence of Article 42(1) of the Washington Convention reads: *"In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."* Regarding the law applicable to the merits, the Award states: "*[…] the Tribunal considers that it must respect the*

Convention which provides: "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State), and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."* In the present case, Article VI(3)(a)(i) of the U.S.-Ecuador BIT identifies ICSID as a possible forum to be selected by the investor. According to this provision, the investor "*may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) to the International Centre for Settlement of Investment Disputes ('Centre') established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ('ICSID Convention'), provided that the Party is a party to such Convention* [...]," as is the case for both Ecuador and the United States. When a unilateral offer of ICSID arbitration is given in a BIT to qualified investors by the Contracting States, such as in Article VI(4) of the U.S.-Ecuador BIT,[60] the Tribunal which is established bases its competence on both Article 25 of the Washington Convention and the BIT for the conditions of consent. [61]

38. The main jurisdictional issue raised by Ecuador before the Tribunal was that of the temporal scope of its offer of arbitration. The crucial question concerned the effect of the BIT on events alleged to be prior and subsequent to its entry into force. The U.S.-Ecuador BIT which came into force on May 11, 1997 does not contain any provision on retroactivity apart from Article XII(1) which provides that the Treaty "*shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.*" The Tribunal noted in para. 57 of its Award M.C.I.'s and New Turbine's argument that the application of the U.S.-Ecuador BIT is not limited to disputes arising subsequent to its entry into force. Relying on Article 28 in the Convention on the Law of Treaties, the Tribunal concluded as follows: "*The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties.*"[62]

39. Relying on previous jurisprudence, the Tribunal further distinguished "*acts and omissions prior to the entry into force of the BIT from acts and omissions subsequent to that date as violations of the BIT"* and held that *"a dispute that arises that is subject*

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provisions of the second part of Article 42(1) of the ICSID Convention, i.e.*, in the absence of an agreement, the Tribunal shall apply Ecuadorian Law, including its rules of private international law and such rules of international law as may be applicable. With respect to the latter rules, the Tribunal finds that the rules contained in the BIT, as well as the other pertinent rules of general international law, are applicable in the present case. The Tribunal's Competence over the Merits of the disputes submitted is limited, in this respect, to considering the contentions of the Claimants relating to violation of the BIT after it came into force.*"

[60] Article VI(4) of the BIT provides that: "*[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3.*"

[61] *CMS v. Argentina*, *supra* note 15, para. 68 "*the applicable jurisdictional provisions are only those of the Convention and of the BIT, not those which might arise from national legislation.*" *Salini v. Jordan*, *supra* note 39, para. 62, 63. Award, paras. 157-160.

[62] Award., para. 61.

to its Competence is necessarily related to the violation of a norm of the BIT by act or omission subsequent to its entry into force."[63] The Tribunal also distinguished "*disputes arising prior to the entry into force of the BIT from disputes arising after that date that have the same cause or background with those prior disputes"*[64] and observed: "*[...] a prior dispute may evolve into a new dispute, but the fact that this new dispute has arisen does not change the effects of the non-retroactivity of the BIT with respect to the dispute prior to its entry into force. Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.*"[65]

40. The Tribunal finally held "*that it has Competence over events subsequent to the entry into force of the BIT when those acts are alleged to be violations of the BIT"* and that *"[p]rior events may only be considered by the Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.*"[66] Furthermore, the Tribunal accepted that Article XII of the BIT applies to investments existing at the time of its entry into force when it turned to Ecuador's subsidiary objection regarding the existence of an investment within the meaning of Article 25 of the Washington Convention[67] but decided that the suits submitted by Seacoast to the Ecuadorian courts on allegations of contractual breaches related to disputes which arose prior to the entry into force of the BIT and therefore remained outside its temporal competence.[68] In their oral arguments before the Committee, the Applicants clarified that their criticism of the Tribunal's failure to apply the proper law of the dispute to jurisdiction concerns the failure to apply Article VI(1)(a) of the BIT.[69] In this respect, the Committee notes that the law applicable to the merits of the dispute is without effect on the issue of the Tribunal's jurisdiction which is to be determined exclusively on the basis of Article 25 of the Washington Convention, the relevant jurisdictional clauses of the BIT and any applicable principles of international law.

41. In examining the implications of the principle of non-retroactivity of treaties for the temporal and jurisdictional provisions of the U.S.-Ecuador BIT, the Tribunal can be considered to have complied with its earlier declaration: "*The Tribunal will decide on the objections to Jurisdiction raised by the Respondent and rejected by the Claimants in accordance with the provisions of the ICSID Convention, the BIT, and the applicable norms of general international law, including the customary rules recognized in the Final Draft of the International Law Commission of the UN [...] Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries. […] For purposes of interpreting the treaties applicable to the objections submitted, the Tribunal will be guided by the rules contained in the 1969 Vienna Convention on the Law of Treaties [....] that reflect customary law on the subject. […] The Tribunal will refer to precedents that state the legal implications of*

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63 *Id.*, para. 62.
64 *Id.*, para. 65.
65 *Id.*, para. 66.
66 *Id.*, para. 93.
67 *Id.*, para. 162.
68 *Id.*, para. 189.
69 Tr. pp. 177-178, 200-202.

binding norms of conventional and customary international law that are applicable only to the extent that and insofar as they specially relate to the present case."[70] It is another matter – over which the *ad hoc* Committee has only a very limited competence – whether the Tribunal's application of the law was well-founded and legally tenable.

42. The non-application of the proper law which may be sanctioned by Article 52(1)(b) should indeed not be confused with the erroneous or incorrect application of the proper law which is not a ground for annulment as consistently underlined in numerous decisions of *ad hoc* committees.[71] The *Amco I* Committee, for example, held: "*The law applied by the Tribunal will be examined by the* ad hoc *Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the* ad hoc *Committee is not. The* ad hoc *Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention*".[72] A distinction should therefore be drawn between, on the one hand, what was decided by the tribunal, which concerns a manifest excess of powers, and, on the other hand, how it was decided by the tribunal, which in principle escapes the scrutiny of annulment under Article 52(1)(b) as concerning the reasoning of the tribunal.

43. However, the freedom which the tribunal enjoys in the application of the law is not unlimited, since the arbitrators are required to remain within their terms of reference as remarked upon in the *MINE* annulment decision[73] and not to exceed their powers. The *Soufraki v. UAE ad hoc* Committee recognized that "*[m]isinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law.*"[74] The Applicants agree that ignoring the law and interpreting the law incorrectly must be distinguished, but they argue that the Tribunal's interpretation of the principle of non-retroactivity of treaties was egregiously wrong and so grave as to be tantamount to an abrogation of the BIT.

44. In the Applicants' view, the relevant "*omission*" is Ecuador's failure to fulfill its obligation to pay US$ 24.2 million in respect of the "accounts receivable." The alleged payment obligation is essentially based on the Seacoast Contract. The alleged

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[70] Award, paras. 42-44.

[71] *Soufraki v. UAE*, *supra* note 15, para. 85; *Klöckner (I), supra* note 14, para. 60; *Amco I, supra* note 15, para. 23; *MTD v. Chile, supra* note 10, para. 47; *CMS v. Argentina, supra* note 15, paras. 49-52. In *MINE*, *supra* note 15, paras. 5.03-5.04, the *ad hoc* Committee expressed the view that: "*[a] tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision* ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.*"

[72] *Amco I*, *supra* note 15, para. 23.

[73] *MINE*, *supra* note 15, paras.5.03-5.04.

[74] *Soufraki v. UAE*, *supra* note 15, para. 86.

payment obligation started before the BIT had entered into force on May 11, 1997 but continued beyond that date. In the absence of special rules in the U.S.-Ecuador BIT, the only relevant temporal restriction is the limitation applicable to treaties in general, as reflected in Article 28 of the Vienna Convention on the Law of Treaties which excludes the retroactive application of a treaty to "*any act or fact which took place or any situation which ceased to exist before the entry into force of the treaty.*" Ecuador relied upon Article 28 in support of its main objection to the competence of the Tribunal because of the non-retroactivity of the BIT,[75] while M.C.I. and New Turbine pleaded that Article 28 only bars a tribunal's ability to examine conduct occurring before a treaty came into force to the extent that that conduct ceased to exist before the date on which the treaty came into force.[76]

45. Although Article 28 refers to an "*act*", it must be assumed that an "*omission*" which is claimed to be a breach of treaty obligations is to be assimilated to an "*act*". Several paragraphs of the Award in which the Tribunal refers to "*acts or omissions*" show that the Tribunal also assimilated "*omissions*" to "*acts*" (see for instance para. 97 of the Award). It is important to note that the relevant point in time in Article 28 is not when a dispute arose but the time when an act or fact took place or a situation ceased to exist. This is a distinction of considerable importance in the present case as the Republic of Ecuador acknowledged in the course of the oral hearing.[77] In its Award, the Tribunal nevertheless attached special weight to the fact that the dispute about the "accounts receivable" arose before the BIT entered into force. The Tribunal stated, *inter alia*, as follows: "*The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force.*[78] […] *Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.*"[79]

46. If it is accepted that the "accounts receivable" are protected as an "investment" under the BIT,[80] the Applicants contend that it would be logical to consider their alleged right to receive payment to be protected under the BIT as from the date of its entry into force. As stated above, the BIT was made applicable to investments already existing at the time of its entry into force.[81] Moreover, according to Article VI(1)(a) of the BIT, a dispute arising out of an investment agreement was to be regarded as an investment dispute. In response to a question from the Committee, the Applicants declared that "*Article VI(1)(a) is a prime rule*" which expresses "*a different intention [...] under Article 28*" of the Vienna Convention.[82] It would follow that, while the dispute arose before the BIT entered into force, Ecuador's failure to pay its alleged debt, which the Applicants consider to be a breach of both the Seacoast Contract and the BIT, continued after the entry into force of the BIT. In other words, the "claim to money", which before May 11, 1997 was exclusively a contractual claim, became an existing

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75 Award, para. 47.
76 *Id.*, para. 58.
77 Tr. p. 215.
78 Award, para. 61.
79 *Id.*, para. 66.
80 *Id.*, para. 164.
81 *Id.*, para. 162.
82 Tr. pp. 194-195.

"investment" protected under the BIT after its entry into force. Having regard to the language of Article 28 of the Vienna Convention, the situation regarding the "accounts receivable" could be considered not to have ceased to exist before the date of the entry into force of the BIT.

47. The said reasoning presupposes that Ecuador's failure to pay its alleged debt is not considered an instantaneous omission but is accepted as a continuous omission or as a durable situation. However, this is not the way the facts are interpreted by the Tribunal. On the contrary, after referring to Ecuador's conclusion that the alleged offence was consummated prior to the entry into force of the BIT in a completed act of refusal to recognize the rights claimed by Seacoast,[83] and after commenting on previous case-law[84] and the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts,[85] the Tribunal concluded that the acts and omissions alleged by the Claimants as having occurred prior to the entry into force of the BIT did not constitute continuing and composite acts under the BIT.[86]

48. It thus appears that the Tribunal did regard Ecuador's refusal to pay the alleged accounts receivable as an instantaneous act occurring before the date of the entry into force of the BIT rather than as a continuing omission extending beyond that date. This may explain the Tribunal's further conclusion that the present dispute falls outside the temporal limitations of the BIT, although the relevant element under Article 28 of the Vienna Convention would be the date when the act occurred or the situation ceased to exist rather than the date when the dispute arose.

49. In any case, what is required for annulment under Article 52(1)(b) of the Washington Convention is a "*manifest excess of powers*" which should be understood as tantamount to a safety valve allowing for the rejection of arbitrary or unreasonable decisions. In *MINE*, the *ad hoc* Committee ruled that "*Article 52(1)(b) does not provide a sanction for every excess of its powers by a tribunal but requires that the excess be manifest which necessarily limits an* ad hoc *Committee's freedom of appreciation as to whether the tribunal has exceeded its powers.*"[87] In *Wena v. Egypt*, the *ad hoc* Committee specified that "*[t]he excess of power must be self-evident rather than the product of elaborate interpretations one way or the other"* and that, when such interpretations are needed, *"the excess of power is no longer manifest.*"[88] In *CDC v. Seychelles*, the Committee also pointed out that "*the term 'manifest' means clear or 'self evident'"* and added: *"Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other' is not manifest.*"[89] The decision of the *ad hoc* Committee in *Patrick Mitchell v Congo*

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[83] Award, para. 81.

[84] *Id.*, para. 84.

[85] *Id.*, paras. 85-92.

[86] *Id.*, para. 97.

[87] *MINE*, *supra* note 15, para. 4.06. *See* also *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, June 29, 2005, para. 39 (hereinafter referred to as *CDC v. Seychelles*).

[88] *Wena v. Egypt*, *supra* note 15, para. 25.

[89] *CDC v. Seychelles*, *supra* note 87, para. 41.

also lends credence to such view: "*If an excess of powers is to be the cause of an annulment, the* ad hoc *Committee must find with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award.*"[90] In sum, 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.

50. The parties in the present case accept the principle of non-retroactivity of treaties as set out in Article 28 of the Vienna Convention on the Law of Treaties. The Tribunal noted in its Award that the Claimants did not "*deny the non-retroactive nature of the BIT.*"[91] The Tribunal also noted, however, the Claimants' argument that the Tribunal must consider events occurring before the BIT entered into force because Ecuador's actions, although starting before the BIT's entry into force, were of a continuing or composite nature, and thus were taking place also after the BIT had entered into force. The Claimants further submitted that events occurring prior to the entry into force of the BIT were important for determining the damages caused by Ecuador's actions after that date.[92] The Tribunal concluded that "[...] *the intention of the contracting Parties* [of the BIT] *with respect to its retrospective application is not evident from its clauses or in any other manner. In accordance with the norms of general international law codified in the Vienna Convention, and particularly in Article 28, the Tribunal notes that because of the fact that the BIT applies to investments existing at the time of its entry into force, the temporal effects of its clauses are not modified.*"[93] It is common ground that Article 28 is a dispositive rule and that the Contracting States may wish to derogate from it by conferring retroactive applicability to their BIT. The Applicants have for example expressly admitted during the hearing that it is not an intangible principle.[94]

51. The present case is not a case where the Tribunal admitted a legal principle and then willfully decided to disregard it. In *MTD v. Chile*, the *ad hoc* Committee emphasized that "*[t]he error must be 'manifest', not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.*"[95] As the *ad hoc* Committee in *Soufraki v. UAE* declared, "*[s]uch gross and consequential misinterpretation or misapplication of the proper law which no reasonable person (*'bon père de famille'*) could accept needs to be distinguished from simple error – even a serious error – in the interpretation of the law which in many national jurisdictions may be the subject of ordinary appeal as distinguished from, e.g., an extraordinary writ of* certiorari."[96] An egregious violation of the law would assume that there is a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations. Any other type of violation would not amount to a manifest excess of powers. Should more than one interpretation of a legal norm or rule be possible, no serious violation can ensue where one of these interpretations has

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90 *Patrick Mitchell v. Congo*, *supra* note 15, para. 20.

91 Award, para. 55.

92 *Id.*, para. 56.

93 *Id.*, para. 59.

94 Tr. pp. 194-196.

95 *MTD v. Chile*, *supra* note 10, para. 47.

96 *Soufraki v. UAE*, *supra* note 15, para. 86.

been chosen. As the *Lucchetti v. Peru* 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 several.*"[97]

52. Construction of the BIT has been approached by the Tribunal in terms of treaty interpretation. Both parties, which had already staked out irreconcilable positions before the Tribunal, have in these annulment proceedings exchanged contradictory pleadings on the retroactive application of the U.S.-Ecuador BIT and invoked, *inter alia,* the authority of ICSID awards and those of other investment tribunals as well as the judgment of the PCIJ in *Mavrommatis* in support of their respective interpretations of the BIT. The Applicants have relied on *Mondev v. United States*, *UPS v. Canada* and *SGS v. Philippines* to show that tribunals have accepted jurisdiction over a dispute that arose before its governing treaty came into force. The Republic of Ecuador has invoked the awards in *Lucchetti v. Peru*, *Jan de Nul v. Egypt, Pey Casado v. Chile, Mondev v. United States, Impregilo v. Pakistan* and *Generation Ukraine v. Ukraine* as well as the judgment of the ICJ in *Ambatielos,* to demonstrate that the Tribunal was right in declining jurisdiction over a dispute arising before the BIT came into force. The parties have argued over the significance of these awards and judgments and their relevance to the jurisdiction of the Tribunal over the accounts receivable dispute under the U.S.-Ecuador BIT and have also invoked legal doctrine. The Applicants further rely on the decision of the *Soufraki v. UAE* Committee which stated: "*Indeed, the Tribunal cited no authority whatsoever for its conclusion. But if the principle on which the Award is based does exist, there is in reality no ground for annulment [...]*."[98] The Applicants interpret such statement as meaning that, in the reverse, if the principle for which the Tribunal failed to provide authority was not in fact justifiable, the Tribunal's reliance on that principle would have involved a manifest excess of powers. The Applicants do not indicate why and how an opinion possibly different from those they rely upon is untenable and could not be supported by reasonable arguments. The parties' competing contentions and the investment cases referred to in one way or another in support of their positions provide sufficient evidence that temporal applicability of consent to disputes that arose before the coming into force may be subject to debate. Moreover, the Applicants' interpretation of Article VI of the BIT is not the only reasonable interpretation of the Treaty. Other views are also possible and could not necessarily be discarded as being fundamentally wrong. The refusal of the Tribunal to exercise jurisdiction over the accounts receivable appears to the *ad hoc* Committee to be a debatable solution, and notwithstanding that another solution would have been possible, the Committee cannot find in this respect any egregious violation of the law on the part of the Tribunal.

53. The Applicants suggest another interpretation of the principle of non-retroactivity of treaties which would be consonant with their own understanding that, absent an express non-retroactivity clause in the BIT, the Treaty governs disputes that arose before it came into force, provided that such disputes continued to exist at the time of its entry into force. The Applicants point out that the U.S.-Ecuador BIT differs from

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[97] *Lucchetti v. Peru*, *supra* note 15, para. 112.

[98] *Soufraki v. UAE*, *supra* note 15, para. 63.

many BITs which provide that disputes arising before the entry into force of the BIT are excluded from the application of the BIT. In support of their interpretation, they make a comparison with the language of these other investment treaties, in particular with those signed by Ecuador or the United States. However, whilst it is not the task of the Committee to make its own choice between different interpretations of the applicable BIT, special weight must be given to the Tribunal's interpretation which the Committee can only set aside in the narrow circumstances provided by Article 52 of the Washington Convention. The plain reading of Article VI(1)(a) and Article VI(1)(c) suggested by the Applicants is in fact an invitation to the Committee to revise the Tribunal's conclusions on the interpretation of the temporal application of the BIT; the Committee is, however, not free to do so on the basis of Article 52(1)(b).

54. More generally, the Committee would be treating the request as an appeal and not as a request for annulment if it accepted the Applicants' invitation to review the Tribunal's findings in light of the rules of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties or to discuss the Applicants' interpretation of Article VI(1)(a) whose language,[99] they also assert, extends to contractual disputes without any temporal limitation as opposed to Article VI(1)(c) which concerns violations of the BIT. The *ad hoc* Committee in *CMS v. Argentina* held that it had "*no jurisdiction to control the interpretation […] given by the Tribunal to* [an applicable provision]."[100] The Committee has also in mind that the *Klöckner (I)* annulment decision cautioned about "*the fine distinction between 'non-application' of the applicable law and mistaken application of such law*"[101] and that in *Wena v. Egypt*, the *ad hoc* Committee subsequently declared that it was mindful of "*the distinction between failure to apply the proper law and the error* in judicando *drawn in Klöckner (I), and the consequential need to avoid the reopening of the merits in proceedings that would turn annulment into appeal.*"[102] In combating the Tribunal's failure to "properly" apply the terms of the BIT which, in their opinion, place no temporal limitation on jurisdiction with respect to disputes arising out of or in relation to the Seacoast Contract, the Applicants are seeking a remedy which cannot be provided by the Committee acting under Article 52. The Committee would otherwise be superimposing its own views about the correct solution. As stated by the *ad hoc* Committee in *CMS v. Argentina*, "*the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal.*"[103].

55. It makes no difference that the issue in this case is about the Tribunal's jurisdiction, since jurisdiction does not give the *ad hoc* Committee a wider competence to assess the validity of the award under Article 52 but must be dealt with as any other issue. The standards for reviewing the Tribunal's decision about competence are therefore the same as those which *ad hoc* committees should apply when they review any other matters. In *Soufraki v. UAE*, the *ad hoc* Committee stated that it saw "*no reason why the rule that an excess of power must be manifest in order to be annullable should be*

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99 Article VI(1)(a) of the BIT, *supra* note 41.

100 *CMS v. Argentina*, *supra* note 15, para. 85.

101 *Klöckner (I)*, *supra* note 14, para. 60.

102 *Wena v. Egypt*, supra note 15, para. 22.

103 *CMS v. Argentina*, *supra* note 15, para. 136.

disregarded when the question under discussion is a jurisdictional issue." The Committee added: *"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.*"[104] In the already mentioned decision of the *ad hoc* Committee in *Lucchetti v. Peru*, a number of pertinent observations were made concerning the standard of "manifest excess of powers" in relation to the competence of the Tribunal to which this Committee adheres: "*[...] the requirements 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 jurisdiction are concerned.*"[105]

56. A decision that there is no jurisdiction may result in a manifest excess of powers when the Tribunal has acted outside the proper bounds of its competence. The *Lucchetti v. Peru* Committee declared: "*Where a tribunal assumes jurisdiction in a matter for which it lacks competence under the relevant BIT, it exceeds its powers. The same is true in the inverse case where a tribunal refuses or fails to exercise jurisdiction in a matter for which it is competent under the BIT. The* Ad hoc *Committee considers that these situations are analogous and should be assessed according to the same legal standards.*"[106]

57. In view of the above, the *ad hoc* Committee concludes that the Applicants have not shown that the Tribunal manifestly exceeded its powers by failing to exercise jurisdiction over the accounts receivable. Consequently, the Tribunal's Award cannot be annulled on the basis of Article 52(1)(b) of the Washington Convention.

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[104] *Soufraki v. UAE*, *supra* note 15, paras 118-119.

[105] *Lucchetti v. Peru*, *supra* note 15, paras. 100-101.

[106] *Id.,* para. 99.

V. ARTICLE 52(1)(e): FAILURE TO STATE REASONS

A) PARTIES' SUBMISSIONS:

58. The Applicants first contend that the Tribunal failed to state reasons for the Award by forgetting to address the question whether Ecuador breached the BIT by continuously refusing to pay the US$ 24.2 million outstanding accounts receivable owed to them whether on a continuous basis or only after the entry into force of the Treaty, which is, according to the Applicants, a failure to address an issue of sufficient importance affecting the outcome of the Award. The Applicants submit that, because the Tribunal found that the accounts receivable were a protected investment at the time the BIT came into force, the Tribunal was obliged to apply the procedural and substantive protection of the BIT to that investment. The Tribunal however did not deal with this matter on the merits and offered no reasons whatsoever for this deliberate omission. The Applicants contend that had the Tribunal turned its mind to the fact of Ecuador's refusal to honor the debt it owed to them for their accounts receivable, it may well have concluded that Ecuador violated the obligations observance clause under the BIT. This error was in the Applicants' view, of the utmost significance for the legal rights of the parties, and as a result they were denied a chance of redress and reparation.

59. The Applicants submit that their arguments on the continuous failure to pay the accounts receivable would have required the Tribunal to make a determination of when the refusal began, and more importantly, when it was consummated. They complain that the Tribunal, nonetheless, neglected to turn its mind to this important factual issue and, instead of looking at the concrete elements of this case, developed an analysis restricted to an esoteric discussion on the law of continuing and composite acts. The Applicants allege that the Tribunal, without engaging in any type of application of the legal rules concerning continuous breach to the facts of the case, dismissed their arguments in a perfunctory manner in ruling that the "*acts and omissions alleged by the Claimants as being prior to the entry into force of the BIT do not constitute continuing and composite wrongful acts under the BIT.*"[107]

60. The Applicants next assert that, if the Tribunal is deemed to have implicitly addressed the question of its jurisdiction over the accounts receivable claim, yet to have rejected it because the dispute arose before the U.S.-Ecuador BIT came into force, the reasoning is incoherent, frivolous and therefore amounts to a failure to state reasons. The Applicants argue in this regard that there is no connection

[107] Award, para. 97.

between the Tribunal's decision and its unsubstantiated reliance on Article 28 of the Vienna Convention on the Law of Treaties, where nothing suggests that tribunals do not have jurisdiction over disputes arising before the treaty came into force.

61. The Applicants finally contend that, to the extent that the Tribunal failed to assume jurisdiction over the contractual side of the dispute, the Tribunal also failed to state reasons on which the award is based. Instead, the Tribunal simply treated the channels for resolving the contractual and BIT disputes as one-and-the-same, and held that the principle of non-retroactivity of treaties precluded it from taking jurisdiction over the dispute. The Tribunal concluded that it need not determine whether Ecuador breached the *Seacoast Contract* because the U.S.-Ecuador BIT was not in force at the time when the alleged breaches took place. According to the Applicants, it gave no indication as to how it reached that conclusion and simply parroted its earlier finding that *"in accordance with the principle of non-retroactivity of treaties, [contractual] disputes remain outside the temporal Competence of this Tribunal.*"[108] The Applicants point out that such conclusion is inadequate, incoherent and patently wrong in law according to the plain language of Article VI(1)(a) of the BIT.

62. The Republic of Ecuador affirms that the Tribunal ruled clearly and explicitly on the issue of the accounts receivable. At the hearing before the *ad hoc* Committee, the Republic of Ecuador alleged that the Applicants made a contract claim and invoked Article VI(1)(a) of the BIT for the first time in the annulment proceedings and that furthermore the request for arbitration did not include such claim. The Republic of Ecuador nonetheless held that the Tribunal decided the claim under the Contract, even though it could have been excused for not deciding a question that was not presented to it by M.C.I. and New Turbine.

63. The Republic of Ecuador states that, with respect to everything that happened prior to the BIT's entry into force, including the accounts receivable, the Tribunal decided that it lacked jurisdiction because these were allegations that, if they came to be proven, would constitute "*intangible assets*" considered *prima facie* as an investment but which could not give rise to violations of the BIT because the BIT was not in force at the time the alleged contractual breaches took place. Their resolution does not fall within the scope of the jurisdiction of the Tribunal. The Republic of Ecuador observes that the Tribunal found that the accounts receivable were one of the points in a dispute that arose and ended prior to the entry into force of the BIT and that, in accordance with the principle of the non-retroactivity of treaties,

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[108] *Id.*, para. 189.

disputes that arose before the BIT came into force are outside its jurisdiction. The Republic of Ecuador affirms that the Tribunal dealt with the issue of the dismissal of the accounts receivable claim when asserting that, in accordance with customary international law, the relevant element to determine the very existence of an internationally wrongful act is the violation of a norm of international law existing at the time when the act begins. The BIT does not apply to acts or facts which are completed or to situations which have ceased to exist before the Treaty came into force.

64. The Republic of Ecuador maintains that the Tribunal considered the arguments of M.C.I. and New Turbine and expressly determined that the refusal to pay was not a continuous act, and that, therefore, there could be no beginning or consummation. Such a distinction is impossible when the act, such as Ecuador's refusal to recognize M.C.I.'s alleged right, is instantaneous. As case-law in *Mondev v. United States*[109] and *Impregilo v. Pakistan*[110] demonstrates, a conduct which gives rise to a dispute must be distinguished from its final effects. Ecuador's refusal to acknowledge Seacoast's rights constitutes only the final effects of a conduct which arose before the entry into force of the BIT. The fact that Seacoast insisted on its claim several times over the years and that Ecuador repeatedly responded each time that the claims were unfounded does not mean that the refusal was a continuing act. The Republic of Ecuador considers that the Applicants, by insisting on the same argument, only try to have the Committee review and reconstruct facts. However, the Tribunal's findings of fact are not the subject of annulment proceedings. The contractual claim is based on the same dispute, involving the same underlying facts which the Tribunal found to have occurred prior to the entry into force of the BIT and therefore fails for the same reasons as the treaty-based claim.

65. The Republic of Ecuador finally considers that the reasons provided by the Tribunal are sufficient, that the reasoning is clear and coherent and devoid of contradiction, and that this characteristic does not disappear even if it were to be admitted hypothetically that the Tribunal's point of departure that an express rule is required to make Article VI(4) of the BIT retroactive was mistaken, because it is not in the nature of the annulment proceedings to correct the supposed error[111]. The Republic of Ecuador asserts that the Applicants confuse absence of reasons with a discrepancy over the correctness of the reasons invoked, but the Tribunal has expressed its reasons which unquestionably make it possible to understand the grounds for its decision, and the fact that the

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[109] *Mondev v. United States*, *supra* note 31, para. 58.

[110] *Impregilo v. Pakistan*, *supra* note 38, para. 313.

[111] Award, paras. 59- 97.

Applicants do not agree with them does not constitute grounds for annulment.

B) ANALYSIS OF THE *AD HOC* COMMITTEE:

66. Failure to state reasons is a ground for annulment frequently invoked in applications for annulment. Although failure to deal with questions submitted to the Tribunal is not a separate ground for annulment under Article 52 of the Washington Convention, there is a pattern of past decisions of *ad hoc* committees that have considered that such failure amounts to a failure to state reasons. For example, the *ad hoc* Committee in *MINE* annulled the award for failure to deal with questions presented by the parties.[112] The Applicants concede that, "for the purposes of annulment, just as a tribunal's excess of power must be substantially serious, so too must a tribunal's failure to address a question at issue be more than a trivial or otherwise inconsequential oversight."[113] Their statement accords with the *ad hoc* Committee decision in *Wena v. Egypt* which specified that "*[t]he ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award.*"[114]

67. According to Article 48(3) of the Washington Convention, "*[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.*" The obligation in Article 48(3) of the Washington Convention to deal with every question applies to every argument which is relevant and in particular to arguments which might affect the outcome of the case. On the other hand, it would be unreasonable to require a tribunal to answer each and every argument which was made in connection with the issues that the tribunal has to decide, as acknowledged in the *Klöckner (I)* decision.[115] This explains why the tribunal must address all the parties' "questions" ("*pretensiones"*) but is not required to comment on all arguments when they are of no relevance to the award.

68. The *Wena v. Egypt* Committee also declared that Article 48(3) makes a distinction between the tribunal's duty to deal with every question submitted to it and the requirement that the award shall state the reasons upon which it is based: "*The ground for annulment of Article 52(1)(e) only refers to the latter element. In case a Tribunal has omitted to decide a question in the award, a party may request the Tribunal to decide such question, in an additional proceeding pursuant to Article 49(2) which is distinct from an annulment proceeding under Article 52.*"[116] The remedy in case of an omission to decide a question is not therefore always a request for the annulment of

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[112] *MINE*, *supra* note 15, para. 6.101, "*The Tribunal either failed to consider them, or it did consider them but thought that Guinea's arguments should be rejected. But that did not free the Tribunal from its duty to give reasons for its rejection as an indispensable component of the statement of reasons on which its conclusion was based.*" *See* also *Klöckner (I), supra* note 14, paras. 141, 151, 164; *MINE*, para. 6.108.

[113] Memorial, para. 60.

[114] *Wena v. Egypt*, *supra* note 15, para. 101. *See* also, *MINE*, *supra* note 15, para. 6.99.

[115] *Klöckner (I), supra* note 14, para. 131.

[116] *Wena v. Egypt*, *supra* note 15, para. 100.

the award; there is another remedy in Article 49(2) of the Washington Convention when there is an omission or error that can be corrected without reconsideration of the tribunal's award.

69. According to Article 49(2) of the Washington Convention, a request for a supplementary decision or correction has to be made within 45 days of the date when the award was rendered. The relationship between the annulment proceedings and the proceedings for completion or correction of an award has been analyzed in the *Amco I* decision. The *ad hoc* Committee stated that the obligation set out in Article 48(3) of the Convention can find its sanction under Article 52(1)(e) while Article 49 offers a remedy for unintentional omissions to decide any question.[117] In the present case, the Applicants did not initiate Article 49(2) proceedings, as pointed out by the Republic of Ecuador.[118] Answering a question from the Committee as to why they had not asked the Tribunal to render a supplementary decision, the Applicants explained that the findings of the Tribunal were an insurmountable obstacle to an application under Article 49(2).[119]

70. In their Notice for arbitration, M.C.I. and New Turbine specified that their request concerned an "*investment dispute*" within the meaning of Article VI of the BIT.[120] They stated in their Memorial that the Tribunal had jurisdiction under Article VI(2) of the BIT to hear their claim "*to pay sums properly due and owing under the Contract and to provide compensation upon expropriation.*"[121] M.C.I. and New Turbine claimed damages of US$ 24,242,784 in total for losses from the Seacoast Contract,[122] and they submitted that Ecuador had acted in a manner inconsistent with the umbrella clause of Article II(3)(c) of the U.S.-Ecuador BIT, which states that "*[e]ach Party shall observe any obligation it may have entered into with regard to investments.*" They claimed that Ecuador's actions and omissions constituted a failure to observe its contractual obligations as required by the BIT and international law.[123] This submission was reiterated in their Reply.[124] There is some confusion between the parties about the introduction of the non-payment of the accounts receivable as a contractual claim before ICSID,[125] while claims based on breach of the Seacoast Contract had already been raised against INECEL before the Administrative Court of the District of Quito on July 31, 1996.[126] In elevating the breach of a contractual obligation to treaty level, an umbrella clause increases the Contracting States' accountability, and this is particularly the case when the contract is signed by a State entity, such as here, INECEL, which the Tribunal recognized as an organ of the Republic of Ecuador.[127] When an umbrella clause exists, such as in the U.S.-Ecuador

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117 *Amco I*, *supra* note 15, paras. 32-34.
118 Counter-Memorial, para. 30.
119 Tr. pp. 175-176, 197-199.
120 Notice for arbitration, para. 13.
121 Claimants' arbitration Memorial, para. 275(c) and (d).
122 *Id*., para. 519.
123 *Id.,* para. 522(i)
124 Claimants' arbitration Reply, para. 275(b).
125 Tr. pp. 121-125, 202-206.
126 Award, para. 205.
127 *Id.*, para. 225.

BIT in Article II(3), the distinction between a treaty claim and a contract claim loses much of its interest. In oral argument, the Republic of Ecuador specifically stated that the Tribunal decided all questions regarding both treaty-based and contract-based claims.[128]

71. The Applicants seek to have the Award annulled with reference to Article VI(1)(c) as well as Article VI(1)(a) of the BIT, and it appears from the following passage of the Award that the Tribunal took cognizance of alleged Treaty breaches as well as contractual breaches: "*The Tribunal is aware that in the proceedings commenced before the Ecuadorian courts, Seacoast claimed for contractual breaches under the Seacoast Contract and the Clarification Contract. On the other hand, the present action submitted to the ICSID by the Claimants is based on breach of contract and of the BIT and takes account of events before, as well as after, the submission of the claim to the Ecuadorian courts.*"[129] In fact, according to Article VI(4) of the BIT,[130] the treaty-based Tribunal has competence on "*any investment dispute,*" regardless of the legal basis of the claim. As regards its jurisdiction, the Tribunal decided "*1. To allow the Respondent's main objections to the Tribunal's Competence in respect of the non-retroactivity of the BIT; and 2. To reject the objections to the Tribunal's Competence with respect to the non-existence of an investment and the preclusion of the 'fork-in-the-road' provision and consequently exercise its Competence over the Respondent's alleged violations of the BIT by acts or omissions after the entry into force of the BIT.*"[131] The Applicants' complaint is nonetheless that the Tribunal failed to address the issue of jurisdiction over their claims for the outstanding accounts receivable and for breach of the contract, which, they affirm, is an issue of sufficient significance, with the consequence that the Tribunal failed to state the reasons on which the Award is based.

72. As the Applicants emphasized in their oral argument, Article VI(2) which offers investors jurisdictional alternatives, including ICSID arbitration, presupposes that there must be an investment dispute before a claim can be raised.[132] Article VI(4) of the BIT allows the submission to arbitration of "*any investment dispute*" within the broad meaning of Article VI(1), regardless of whether the investment dispute is based on a violation of the BIT as envisaged by Article VI(1)(c) or originates in a violation of contract as foreseen by Article VI(1)(a). M.C.I. and New Turbine alleged in the arbitration that Seacoast and its intangible assets in Ecuador were an investment before and after the entry into force of the Treaty.[133] Ecuador replied that the requirements of the BIT and of Article 25 of the Washington Convention were not met, the concept of investment not being defined, or not being defined with precision, in either the Washington Convention or the BIT.[134] As pointed out in the Award,[135] Seacoast had

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[128] Tr. p. 125.

[129] Award, para. 188.

[130] Article VI(4) of the BIT provides that: "*Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration* [...]."

[131] Award, para. 191.

[132] Tr. p. 204.

[133] Award, para. 39.

[134] *Id.*, paras. 137-146. In its ruling in favor of M.C.I. and New Turbine on that count, the Tribunal answered the arguments of Ecuador that the existence of an investment presupposes certain conditions when it clarified that "*the requirements that were taken into account in some*

filed a suit with the Ecuadorian administrative courts on July 31, 1996 to request damages of approximately US$ 24.2 million for breach of contract. The claim included payment for available energy under the "take or pay" contract, payment for fuel consumed which had not been settled, return of amounts improperly withheld for fines, payment of interest and damages sustained. The "accounts receivable" are financial claims connected with the Applicants' investment, and the Tribunal accepted that they fall in principle under the definition of "investment" in Article 1(a) of the BIT. This Article contains the following language: "*(a) 'investment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes: (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; (iv) intellectual property [...] (v) any right conferred by law or contract, and any licenses and permits pursuant to law [...]*." The Tribunal thus interpreted Article 1(a) of the BIT as giving a broad definition of investment and decided that the rights and interests alleged by the Applicants to have subsisted after the entry into force of the BIT, including the intangible assets of "accounts receivable," would fit that definition.[136] The inclusion of their claims within the definition of "*investment*" in Article 1(a) did not mean that the "accounts receivable" were necessarily valid legal claims. Whether or not this was the case was in dispute between the parties. This did not exclude the Tribunal's competence but would be a matter to be examined at the stage of the merits of the proceedings. Indeed, the Tribunal found that "*for purposes of determining if it has Competence it is sufficient to consider the events as alleged by the Claimants insofar and inasmuch as, if proven true, they would constitute a breach of the BIT.*"[137]

73. When addressing the question of the temporal application of the BIT to the investments of Seacoast in Ecuador, the Tribunal remarked that "*[t]he Claimants' arguments with respect to the relevance of prior events considered to be breaches of the Treaty posit a contradiction since, before the entry into force of the BIT, there was no possibility of breaching it.*"[138] While recognizing that the subsistence of an investment on the date of entry into force of the BIT should be taken into account, the Tribunal did not conclude that it had competence over all claims of M.C.I. and New Turbine. The claims for breach of the Seacoast Contract, which included the failure to pay the alleged US$ 24.2 million outstanding accounts receivable that was presented to the Liquidation Commission sitting between April 1997 and March 1999,[139] had

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arbitral precedents for purposes of denoting an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence" and that *"[n]evertheless, the Tribunal considers that the very elements of the Seacoast project and the consequences thereof fall within the characterizations required in order to determine the existence of protected investments.*" (para. 165).

135 *Id.*, paras. 205 and 342.

136 *Id.*, para. 164.

137 *Id.*, para. 163.

138 *Id.*, para. 93.

139 *Id.*, paras. 209, 212.

arisen before the entry into force of the BIT as recognized in the statement of the Tribunal in paragraph 277 of the Award where it considered "*that the failure to agree on liquidation of the Contract was due to the prior existence of an unresolved dispute between the parties.*"

74. The Award records the allegation of M.C.I. and New Turbine that Ecuador breached its BIT obligations by continuing and composite wrongful acts.[140] The Applicants' argument is more specifically expounded in paragraph 70 of the Award: "*Ecuador's final refusal to pay occurred when the Liquidation Commission proceedings were considered terminated, after the BIT had entered into force. That Commission was an integral element of the Seacoast Contract. Therefore, the Claimants argue, expropriation of Seacoast's contractual rights was only complete after the Liquidation Commission proceedings were concluded.*" The Award also notes that Ecuador disagreed and replied that the dispute concerning the payment of amounts supposedly owed by INECEL to Seacoast had no relation at all to the concept of an internationally wrongful act or to wrongful acts of a continuing character and asserted that the offence alleged by the Claimants was consummated prior to the entry into force of the BIT in a completed act by which INECEL refused to recognize the rights claimed by Seacoast.[141]

75. The Tribunal examined the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts which had been invoked by M.C.I. and New Turbine,[142] in particular Articles 14 and 15 thereof.[143] It explained that wrongful acts must be internationally wrongful acts which, in its view, meant that "*they must be identified with the violation of a norm of international law*"[144] existing at the time when the act extending in time begins or when it is consummated.[145] It further found that "*[t]he non-retroactivity of treaties as a general rule postulates that only from the entry into force of an international obligation does the latter give rise to rights and obligations for the parties"* and that *"[t]herefore, for any internationally wrongful act to be considered as consummated, continuing, or composite, there must be a breach of a norm of international law attributed to a State.*"[146] In addition, the Tribunal examined the possible breach of a norm of customary international law before the entry into force of the BIT, but concluded, by reference to the NAFTA award in *Mondev v. United States* which distinguished from a substantive and procedural point of view between a NAFTA claim and a diplomatic protection claim for conduct contrary to customary international law, that the existence of such breach before a BIT enters into force would not give M.C.I. and New Turbine a right to have recourse to the treaty-based Tribunal.[147] Closing the discussion on the existence of continuing and composite acts, the Tribunal decided that "*[f]or the above reasons, and in accordance*

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140 *Id.*, para. 69.
141 *Id.*, paras. 79-81.
142 *Id.*, para. 71.
143 *Id.*, paras. 86-92.
144 *Id.*, para. 90.
145 *Id.*, para. 82.
146 *Id.*, para. 94.
147 *Id.*, para. 96.

with the principle of non-retroactivity of treaties, the Tribunal holds that the acts and omissions alleged by the Claimants as being prior to the entry into force of the BIT do not constitute continuing and composite wrongful acts under the BIT."[148]

76. There is no reason to believe that the Tribunal's aforementioned conclusion in paragraph 97 did not include the refusal to pay the outstanding accounts receivable and, consequently, the Tribunal cannot be considered to have failed to give reasons in this respect. The *ad hoc* Committee in *Wena v. Egypt* declared: "*Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms in the decision [...]. It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the* ad hoc *Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the* ad hoc *Committee itself*."[149]

77. According to the above-mentioned passages of the Award on continuing and composite acts,[150] the Tribunal opined that the existence of such acts would have required a breach of the BIT, and this would not have been possible before the Treaty came into force on May 11, 1997. In addition, the breach of another norm of international law existing before the entry into force of the BIT would not, according to the Tribunal, have given a right to recourse to the BIT's arbitral jurisdiction.[151] The Tribunal's finding that the acts and omissions accepted by the Claimants as being prior to the entry into force of the BIT did not constitute continuing and composite wrongful acts under the BIT[152] would seem to imply acceptance of Ecuador's view that the refusal to pay the accounts receivable was an instantaneous and not a continuing act. While this is not clearly stated in the Award, it can be deduced from the Tribunal's reasoning. Thus, the Tribunal's finding that acts and omissions prior to May 11, 1997 cannot constitute continuing and composite wrongful acts under the BIT was "*not bereft of any reference to the specific issue of the outstanding accounts receivable*

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148 *Id.*, para. 97.

149 *Wena v. Egypt*, *supra* note 15, paras. 81 and 83. *See* also *CMS v. Argentina, supra* note 15, paras. 54-57, and *Soufraki v. UAE*, *supra* note 15, para. 24.

150 Award, paras. 82-97.

151 *Id.*, para. 96.

152 *Id.*, para. 97.

claim," as alleged by the Applicants.[153] It is of course another matter whether or not the reasons given by the Tribunal were convincing.

78. The Tribunal ended the discussion on acts and omissions prior to the entry into force of the BIT by stating: "*This Tribunal, following the opinion of the ILC in its Commentaries on the customary norms set out in Articles 13, 14 and 15 of its Draft Articles on State Responsibility, will take into account events prior to the date of entry into force of the BIT solely in order to understand and determine precisely the scope and effects of the breaches of the BIT after that date. […] The Tribunal reiterates its views on the possibility of exercising Competence over all acts or omissions alleged by the Claimants to have occurred after the entry into force of the BIT and as having been in violation thereof. Acts or omissions prior to the entry into force of the BIT may be taken into account by the Tribunal in cases in which those acts or omissions are relevant as background, causal link, or the basis of circumstances surrounding the occurrence of a dispute from the time the wrongful act was consummated after the entry into force of the norm that had been breached. The Tribunal, however, finds that it has no Competence to determine damages for acts that do not qualify as violations of the BIT as they occurred prior to its entry into force.*"[154]

79. The opinion of the Tribunal, which it expressed in the discussion of Ecuador's subsidiary objection on the existence of an investment, contains the following statement: "*[…] the principle of non-retroactivity of treaties limits the application of the BIT and its clauses on jurisdiction to those disputes that are alleged to be violations of that Treaty after it entered into force. […] For all these reasons, the Tribunal concludes that claims relating to the Seacoast Contract and the Clarification Contract, as well as the Ecuapower Contract, could not involve breaches under the BIT as the latter was not in force at the time that those alleged contractual breaches occurred. Applying the customary rules relating to State Responsibility, the contractual breaches prior to the entry into force of the BIT do not contain the elements necessary to amount to violations of the BIT. […] Regarding the events alleged by the Claimants to be breaches of the BIT after it entered into force, the Tribunal finds that the effects of an investment that was in existence before the treaty entered into force, continued,* prima facie*, after that date. The Tribunal, therefore, has Competence to hear the Claimants' arguments alleging breaches of the BIT by Ecuador for acts or omissions after it entered into force, which affected their investment.*"[155]

80. The Applicants allege that the Tribunal's analysis "*was restricted to a wholly esoteric discussion on the law of composite and continuing acts*."[156] However, for the purposes of Article 52(1)(e) of the Washington Convention, it is sufficient to point out that the Tribunal must be considered to have answered the Applicants' argument regarding continuing breaches by indicating that, in the Tribunal's opinion, there was no

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153 Memorial, para. 75.

154 Award, paras. 135-136.

155 *Id.*, paras. 167-169.

156 Memorial, para. 76.

continuing or composite act in respect of the refusal to pay the alleged accounts receivable. The Applicants actually criticize the Tribunal's interpretation of continuing and composite acts and propose another interpretation of the ILC Articles than that of the Tribunal. This Committee cannot from such a divergence of opinions conclude that the Tribunal failed to state reasons in its Award.

81. In the context of Article 52(1)(e), the *ad hoc* Committee in *MINE* declared as follows: "*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.*"[157] In *Vivendi v. Argentina,* also, the *ad hoc* Committee carefully observed: "*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.*"[158]

82. Contrary to the Applicants' complaint, the Tribunal answered that it had no jurisdiction to entertain claims relating to disputes arising before May 11, 1997 and gave reasons for this conclusion. In the examination of the present case in relation to Article 52(1)(e) of the Washington Convention, the Committee cannot review this conclusion, or express its agreement or disagreement with it, or examine whether or not the reasons given by the Tribunal are convincing. According to the *CDC v. Seychelles* Committee, 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.*"[159] Further, as stressed by the *ad hoc* Committee in *Wena v. Egypt*, "*[t]he ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the* ad hoc *Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not.*"[160] The *ad hoc* committee can only take the award as it is,[161] it may not substitute its judgment for that of the

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157 *MINE*, *supra* note 15, para. 5.08.

158 *Vivendi v. Argentin*a, *supra* note 15, paras. 64-65.

159 *CDC v. Seychelles*, *supra* note 87, para. 70.

160 *Wena v. Egypt*, *supra* note 15, para. 79.

161 *Klöckner (I)*, *supra* note 14, para. 73.

tribunal. Otherwise, this would make the award the commencement and not the end of litigation.

83. Insofar as the Applicants allege that the Tribunal did not state reasons for declining jurisdiction in respect of their contractual claims, it should be noted that the Tribunal, when commenting on the Applicants' alleged "fork-in-the-road" choice, stated that, in accordance with the principle of the non-retroactivity of treaties, the contractual disputes which had been submitted to the Ecuadorian courts remained outside the Tribunal's temporal competence.[162] It thus appears from the Award that the Tribunal's reasons for declining jurisdiction in regard to the BIT claim also applied to the contractual claims. Once the Tribunal decided that it did not have temporal jurisdiction, its decision applied to all claims concerning acts or omissions prior to the entry into force of the BIT, regardless of whether the claim was based on the Treaty or on contract. Consequently, no lack of reasons can be found in this regard.

84. *Ad hoc* committees have considered that insufficient, inadequate or contradictory reasons may be assimilated to a failure to state reasons. The *Klöckner (I) ad hoc* Committee, for example, declared: "*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. [...] [T]here would be a 'failure to state reasons' in the absence of a statement of reasons that are 'sufficiently relevant', that is, reasonably sustainable and capable of providing a basis for the decision.*"[163] The decision of the *ad hoc* Committee in *MINE* also stated: "*The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. [...] In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*"[164] In *Soufraki v. UAE*, the *ad hoc* Committee added that there may be a ground for annulment in the case of "*a total absence of reasons for the award, including the giving of merely frivolous reasons; a total failure to state reasons for a particular point, which is material for the solution; contradictory reasons; and insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.*"[165]

85. However, contradictory reasons should be distinguished from reasons which are claimed to be legally or factually wrong, the latter escaping, as already pointed out,

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[162] Award, para. 189.

[163] *Klöckner (I)*, *supra* note 14, paras. 119-120. *See* also *Amco I, supra* note 15, para. 43, "*Stated a little differently, there must be a reasonable connection between the bases invoked by a tribunal and the conclusions reached by it. The phrase 'sufficiently pertinent reasons' appears to this* ad hoc *Committee to be a simple and useful clarification of the term 'reasons' used in the Convention.*"

[164] *MINE*, *supra* note 15, paras. 5.08-5.09. *See* also *CMS v. Argentina*, *supra* note 15, paras. 55, 97; *Patrick Mitchell v. Congo*, *supra* note 15, para. 21; and *Lucchetti v. Peru*, *supra* note 15, para. 127.

[165] *Soufraki v. UAE*, *supra* note 15, para. 126.

from review by an *ad hoc* committee. The *ad hoc* Committee in *Klöckner (I)* explained: "*As for 'contradiction of reasons', it is in principle appropriate to bring this notion under the category '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.*"[166] In *MTD v. Chile*, the *ad hoc* Committee opined that "*outright or unexplained contradictions can involve a failure to state reasons.*"[167] In *Vivendi v. Argentina*, the *ad hoc* Committee cautiously declared: "*It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an* ad hoc *committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be a reflection of such conflicting considerations.*"[168]

86. The Applicants consider that the Award rests on contradictory reasons because none of the reasons given by the Tribunal can be identified as an adequate ground for its conclusion. However, to the extent that the Applicants' complaint is based on an alleged improper interpretation and application by the Tribunal of Article 28 of the Vienna Convention, it is not within the ambit of Article 52(1)(e) but that of Article 52(1)(b). The Award may reflect reasoning and contain a conclusion that is legally correct or incorrect, but the Committee's opinion on this matter is irrelevant for the scrutiny of the award under Article 52(1)(e) of the Washington Convention. The Tribunal answered – rightly or wrongly but without any apparent contradiction – the parties' respective contentions on jurisdiction regarding the accounts receivable, which is sufficient for the purposes of Article 52(1)(e).

87. Having found itself without competence to deal with the Applicants' claims regarding the accounts receivable, the Tribunal also implicitly rejected as a necessary consequence all factual or legal implications of these claims and examined only other acts subsequent to May 11, 1997.[169] In doing so, the Tribunal must be considered to have answered the arguments of the Applicants in respect of their accounts receivable claim, whether based on Treaty or contract. The Committee has not found that the Tribunal overlooked any particular point affecting the outcome of the Award. Consequently, the Committee finds no reason for annulling the Award on the basis of Article 52(1)(e) of the Washington Convention.

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[166] *Klöckner (I)*, *supra* note 14, para. 116. *See* also *Soufraki v. UAE*, *supra* note 15, paras. 122, 125; and *CMS v. Argentina*, *supra* note 15, para. 54.

[167] *MTD v. Chile*, *supra* note 10, para. 78.

[168] *Vivendi v. Argentina*, *supra* note 15, para. 65. *See* also *MTD v. Chile*, *supra* note 10, para. 50; and *CMS v. Argentina*, *supra* note 15, para. 54.

[169] Award, paras. 95, 226-229.

VI. COSTS

88. The parties have submitted their cost claims upon the invitation of the *ad hoc* Committee at the hearing and each party maintains that the other should be required to meet the total costs. It appears from Article 53 of the Washington Convention that an award becomes immediately binding on the parties who are therefore required to abide by and comply with its terms. The annulment action under Article 52 is an extraordinary means of recourse and cannot be considered as a normal continuation of the arbitration. At the financial level, in derogation from the rule that advances on costs are equally shared between the parties in arbitration proceedings, Regulation 14(3)(e) of the Administrative and Financial Regulations directs the applicant for annulment to make the whole advance payment to ICSID for the costs referred to in Regulation 14(2) of the said Regulations. A consequence of this rule, which imposes on the party who applies for annulment the financial burden of advancing the costs, should normally be that the applicant, when annulment is refused, remains responsible for these costs. In the present case, the *ad hoc* Committee therefore finds that M.C.I. and New Turbine shall finally bear the full costs and expenses incurred by ICSID in connection with this annulment proceeding.[170]

89. The Committee acknowledges that the annulment case was presented by both parties in an efficient and courteous manner and recognizes the great assistance it received from counsel on both sides. The parties' own costs for their representation are comparable in size, and there is no element in the conduct of the proceedings by either side that should justify an uneven division of these costs. The *ad hoc* Committee finds that each party shall bear its own costs for legal representation and expenses in the annulment proceeding.

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[170] See *CDC v. Seychelles*, *supra* note 87, para. 90; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on Annulment, January 8, 2007, para. 88.

VII. DECISION

For the foregoing reasons, the *ad hoc* Committee decides:

(1) to reject, pursuant to Article 52(1) of the Washington Convention, the application for annulment of the ICSID Tribunal's Award of July 31, 2007 (ICSID Case No. ARB/03/6),

(2) that M.C.I. Power Group L.C. and New Turbine Inc. shall jointly bear the full costs incurred in connection with this annulment proceeding,

(3) that each Party shall bear its own costs for legal representation and expenses in the annulment proceeding.

[*Signed*]

Judge Hans Danelius
Member of the *ad hoc* Committee
[*Date*]

[*Signed*]

Judge Peter Tomka
Member of the *ad hoc* Committee
[*Date*]

[*Signed*]

Judge Dominique Hascher
President of the *ad hoc* Committee
[*Date*]