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CERTIFICATE

CDC Group plc

v.

Republic of the Seychelles

Annulment Proceeding
(ICSID Case No. ARB/02/14)

I hereby certify that the attached document is a true copy of the Decision on the Application for Annulment of the Republic of Seychelles signed by the Members of the *ad hoc* Committee.

Roberto Dañino
Secretary-General

Washington, D.C., June 29, 2005

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

IN THE PROCEEDING BETWEEN

CDC GROUP PLC
(CLAIMANT)

and

THE REPUBLIC OF SEYCHELLES
(RESPONDENT)

(ICSID Case No. ARB/02/14)

DECISION OF THE AD HOC COMMITTEE ON THE APPLICATION FOR ANNULMENT OF THE REPUBLIC OF SEYCHELLES

Members of the Committee
Judge Charles N. Brower, President
Mr. Michael Hwang, SC
Mr. David A.R. Williams, QC

Secretary of the Committee
Mr. Ucheora Onwuamaegbu

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Date of dispatch to the Parties: June 29, 2005

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I. INTRODUCTION

1. The Award which this annulment proceeding reviews arose out of two Loan Agreements and two related sovereign Guarantees. The Respondent Republic of Seychelles ("Republic") agreed to guarantee timely performance of two loans Claimant CDC Group plc ("CDC") made to the Public Utilities Corporation ("PUC"), an entity organized in the Republic responsible for, *inter alia*, the generation of electric power. PUC did not timely perform its obligations to CDC, which then sought payment from the Republic under the Guarantees. When the Republic in turn failed to satisfy its assumed obligations under the Guarantees, CDC submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes ("ICSID"). A Tribunal, consisting of a sole Arbitrator, Sir Anthony Mason AC KBE, heard the case and rendered an Award in favor of CDC.[1] The Republic now seeks annulment of that Award under Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention" or "Convention"). The present *ad hoc* Committee was constituted pursuant to Article 52(3) of the Convention and has performed a number of functions assigned to it by the Convention and the ICSID Arbitration Rules.[2] For the reasons set forth hereinafter, we dismiss Republic of Seychelles' Application for Annulment of Award submitted 30 March 2004.[3]

II. FACTUAL AND PROCEDURAL HISTORY

2. CDC is a public company incorporated under the Companies Act 1985 in England and Wales. It was founded in 1948 as the United Kingdom ("UK") governmental instrumentality for investing in developing countries. At the relevant times, CDC was wholly owned by the UK Government, but acted on a day-to-day basis without Government

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[1] Award in *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14 (17 Dec. 2003) ("Award"), *available at* http://ita.law.uvic.ca/otherinterinvestmentcases.htm.

[2] *See, e.g.*, Decision on Whether or Not To Continue Stay and Order in *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14 (14 July 2004) ("Decision"), *available at* http://ita.law.uvic.ca/otherinterinvestmentcases.htm.

[3] Application for Annulment of Award in *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14 (30 March 2004) ("Application").

instruction or operational involvement.[4] The Republic of Seychelles comprises an Indian Ocean archipelago, with a population of approximately 80,000 people. Throughout this arbitration, CDC has been represented by Mr. Stephen Jagusch and Mr. Anthony Sinclair of Allen & Overy, while the Republic has been represented by the Attorney-General of the Republic of Seychelles, Mr. A.F.T. Fernando, and his colleague Mr. Ronnie James Govinden.

3. The record discloses that CDC and the Republic had had some dealings prior to negotiation of the two Loan Agreements and two Guarantees at issue in this case. No specific details of that antecedent relationship were adduced before the Tribunal, however, beyond the simple fact that CDC had been involved in a hotel project and at least one prior power generation project in the Republic.

4. In 1990 and 1993, CDC and PUC negotiated the two Loan Agreements, the proceeds of which were to finance improvements to the Republic's electric power generation infrastructure. Under the first agreement, dated 20 September 1990 and amended by letters of 10 January 1991 and 3 July 1992 (collectively, the "1990 Loan Agreement"), PUC borrowed £450,000. Pursuant to the second agreement, dated 5 February 1993 and amended and rescheduled by an agreement dated 25 January 1996 (collectively, the "1993 Loan Agreement"), PUC borrowed an additional £1,800,000. Both Loan Agreements were conditioned on the Republic's agreement to guarantee PUC's performance thereof. This resulted in the two Guarantees, executed roughly contemporaneously with the Loan Agreements, the first dated 6 November 1990 ("1990 Guarantee") and the second dated 17 March 1993 ("1993 Guarantee"). Each Guarantee provided that any dispute arising under it between the Parties be referred to ICSID for arbitration. At no point in the process of this arbitration did the Republic contest its liability under the 1990 Guarantee. At issue therefore was only its liability under the 1993 Guarantee.

5. The Republic applied the proceeds of the 1993 Loan Agreement, at least in part, to the purchase of a gas turbine generator for its Victoria A power station from a company known as EGT. The Republic admits that it had approached CDC with the idea of purchasing a gas turbine generator. Both parties also agree, and the record clearly indicates, that that gas turbine generator project was not successful. What has been contested are the reasons for the

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[4] Since the commencement of this arbitration CDC has been restructured. Actis Capital LLP is the resulting entity owning the loans made by CDC to PUC and the Guarantees provided by the Republic. Actis Capital is 40% owned by the UK Government.

project's failure, specifically, whether the EGT generator was generally unsuited for PUC's needs, as the Republic contends, or whether the failure resulted from problems arising from the manner of its use and maintenance, including the use of contaminated fuel, as CDC contends.

6. Ultimately, PUC failed timely to repay the principal and interest due under the Loan Agreements, in part, undoubtedly, because as a practical matter the problems with the project prevented it from generating the cash with which PUC had expected to finance such repayment. CDC thus demanded payment from the Republic under the Guarantees. When the Republic did not comply with such demand CDC filed its Request for Arbitration in this case (which also served as its Memorial before the Tribunal) on 22 August 2002 seeking an Award against the Republic. On 19 December 2002, a Tribunal, consisting of a sole Arbitrator, Sir Anthony Mason AC KBE, was constituted to hear the case. In its Counter-Memorial, submitted on 17 March 2003, the Republic claimed (1) that ICSID lacked jurisdiction over the dispute, and (2) that in any event its non-performance should be excused, or, alternatively that the amount of damages awarded to CDC should be reduced, because of CDC's wrongful conduct in connection with its decision to grant the 1993 loan, which resulted in substantial, but unspecified, financial losses on the part of the Republic. The specific legal grounds upon which the Republic has relied have taken various forms throughout the proceedings. Ultimately, however, the Republic alleged a misrepresentation, arising from CDC's approval of the 1993 loan, that the EGT gas turbine project was suitable and viable for PUC's needs at the Victoria A power station, and inequality of bargaining power between the Republic and CDC at the time the 1993 Loan Agreement and Guarantee were negotiated.[5] It is the view of the Republic that CDC therefore should bear at least partial responsibility for the Republic's losses attributable to the project.

7. Following receipt of the Republic's Counter-Memorial,[6] in which it had outlined the defenses on which it relied at that time, CDC proposed, via letter dated 26 March 2003, that

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[5] It is interesting to note that the Republic objects to the 1993 Guarantee based on inequality of bargaining power (which includes the element of unfairness) but has made no such objection to the 1990 Guarantee, which, in substance, is virtually identical to the 1993 Guarantee.

[6] The Counter-Memorial failed to include written statements from any Republic witnesses, except Mr. P.S.G. Morin, and to this extent did not comply with the Tribunal's directions at the first session of the Arbitral Tribunal, held in Sydney on February 10, 2003. *See* Minutes of the first session of the Arbitral Tribunal in *CDC Group plc v. Republic of Seychelles*,

the Tribunal hold a special, preliminary hearing to test two legal issues in the case: first, whether jurisdiction existed for ICSID to hear the parties' dispute, and second, whether or not any of the Republic's then-claimed defenses, if proven, was capable of constituting a good defense at law. CDC sought such a preliminary hearing in the hopes that if it were successful on both points it would avoid the additional costs of responding more fully to the Republic's defenses. In a letter dated 31 March 2003, the Republic opposed CDC's proposal, arguing that such a departure from what it described as normal ICSID arbitration procedure was unnecessary and inappropriate. CDC attempted to clarify its reasoning for the request in a letter of 7 April 2003, citing Article 44 of the Convention, which allows the parties to consent to any modification of the "typical" procedure. The Tribunal issued a Decision on 17 April 2003 in which it noted that the Republic had failed to submit all written witness statements with its Counter-Memorial as it had been directed to do in the Minutes of the first session and invited the Parties to provide additional argument on CDC's proposal. The Tribunal also pointed out that it could not render a decision on CDC's proposal until CDC filed its Reply Memorial outlining its response to the Republic's legal contentions. Although it was CDC's right not to submit its Reply Memorial until such time as the Republic had submitted all witness statements, which the Tribunal by its direction at the first session (and as reflected in the Minutes) had required to be submitted with the Republic's Counter-Memorial, CDC

ICSID Case No. ARB/02/14 (10 March 2003) ("Minutes"). The Minutes state that "insofar as a party intends to rely on witnesses ... those witnesses ... shall be identified in any relevant pleading by that party and written statements ... shall accompany such pleading." Upon receipt of the Counter-Memorial, CDC objected that the Republic had not supplied statements of all witnesses identified therein. The Republic responded by way of letter dated 22 April 2003 with a request for "the indulgence of the Tribunal" in which it asked to be given until 2 May 2003 to file witness statements of Mr. Graham Dilliway and Mrs. Danielle Polson. The letter stated that the Republic no longer intended to rely on the evidence of Mr. Francis Chang-Leng, who had been referred to in the Republic's Counter-Memorial. The Republic filed Mr. Dilliway's witness statement on 29 April 2003. A statement from Mrs. Polson was never filed. On 24 June 2003, the Republic requested permission to file the witness statement of Mr. Chang-Leng. CDC objected to Mr. Chang-Leng's witness statement because it was filed three months after witness statements were due and two months after CDC was informed that the Republic would not be relying on Mr. Chang-Leng's testimony, and it did not include any evidence upon which the Tribunal could base a decision. Thus, with respect to witness statements, only one statement, that of Mr. Morin, was filed in compliance with the Tribunal's direction at the first session, which was recorded in the Minutes. The witness statements of the additional two witnesses who gave oral evidence at the preliminary hearing, Mr. Dilliway and Mr. Chang-Leng, were submitted more than one and three months, respectively, after the deadline for their submission. The Tribunal nevertheless, extending itself to accommodate the Republic, allowed those two witnesses to testify at the preliminary hearing and considered their evidence.

nevertheless proceeded to prepare its Reply Memorial, which coincidentally was also submitted on 17 April 2003.

8. In an attempt to comply with the Tribunal's Decision of 17 April 2003, the Republic submitted its Rejoinder Memorial on 13 May 2003 in which it developed the legal and equitable bases for its defense and formally consented to the preliminary hearing CDC had proposed: "The Respondent has no objection to a preliminary hearing ... on the two issues raised by the Claimant in its letter dated 26th March 2003 and depending on the determination to be made at such hearing proceeding to a hearing on the merits on a subsequent date to be agreed by the parties and the Tribunal." The Republic reiterated its consent to the preliminary hearing in a letter of 26 May 2003.

9. With the consent of the Parties in hand, the Tribunal on 5 June 2003 issued a Second Decision related to CDC's proposal and (in paragraph (1)) ordered that

> A preliminary hearing will be held to determine two questions, namely (i) Respondent's objection to jurisdiction based on Article 25 of the ICSID Convention; and (ii) whether the defence pleaded by Respondent in its counter-memorial pages 6-11 (inclusive) is capable of constituting a defence in law to Claimant's claim or otherwise is capable of providing a basis in law for the Tribunal to order Respondent to pay Claimant a reduced sum in satisfaction of its claims.

The Tribunal further discussed the potential consequences of the preliminary hearing, noting that "in the event that Claimant succeeds on the two questions set out in para. (1) above, an Award can be made in favour of Claimant." The Tribunal also stated that only in the situation where "Claimant succeeds on question (i) in para. (1) but fails on question (ii), [will it be] necessary to fix a new date for the hearing on the merits." The stated rationale behind structuring the case in this way was the hope that the time and expense of a hearing on the merits, which would likely have involved the "attendance of witnesses and the presentation of documentary evidence," might be avoided if legally unwarranted. Finally, the Tribunal directed the Republic to provide the particulars of the legal and equitable principles "on which it proposes to rely at the preliminary hearing both by way of defence and by way of reduction of the amount to be awarded in satisfaction of Claimant's claim." Clarification was necessary because "Respondent's counter-memorial is so generally expressed that it does not enable Claimant to know the legal basis of Respondent's case on this point." Clarification came, finally, in the Republic's Addendum to its Rejoinder Memorial, submitted 27 June 2003.

10. There then followed a discussion as to whether or not the preliminary hearing should actually be a full hearing on the merits as the Republic expressed a desire to present testimony from its witnesses at such a preliminary hearing. By its letter of 10 July 2003 the Republic wrote that the "questions of law ... is [sic] inextricably linked to the facts set out in the Counter Memorial ... The Respondent suggests that at the commencement of the Respondent's case the testimony of the Respondent's witnesses be taken before legal arguments on the questions of law are heard." To this the Tribunal responded by directing, via letter from the Tribunal Secretary of 11 July 2003, that "If the Respondent contends that the second question cannot be resolved without evidence, the Respondent should have available to give evidence its witnesses who can deal with that aspect of the case ... Whether the Respondent's witnesses should give evidence before legal argument on the questions of law begins is a matter to be decided at the hearing."

11. Approximately five days before the hearing, the Republic withdrew its objections to jurisdiction, leaving only the second legal question for resolution.[7] Thus, after receiving written argument (consisting of CDC's Memorial, the Republic's Counter-Memorial, CDC's Reply Memorial, and the Republic's Rejoinder Memorial and Addendum thereto) and three witness statements the Tribunal was prepared to hear whether or not one or more of the Republic's claimed defenses amounted to a good defense at law.

12. The preliminary hearing was held in London on 22-23 July 2003. At the outset of the preliminary hearing, the Tribunal described its purpose: "We now have one question only for decision, the jurisdiction question having disappeared." As will be discussed again later in this Decision, the Tribunal then turned to the question of whether or not the Tribunal needed to receive oral testimony at the preliminary hearing: "The question arises as to how we should go about disposing of [the sole remaining legal question], which relates to the arguability of the respondent's defence on the merits. The respondent wants to call evidence in relation to that." As noted above, the Tribunal Secretary's letter of 11 July 2003

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[7] The Republic's letter of 18 July 2003, which included this withdrawal, also addressed the procedure to be used at the preliminary hearing. The Republic reiterated its claim that "its Defence on the merits could best be understood only after the evidence of its witnesses is placed before the Tribunal ...." The Republic then concluded its letter by stating that "The Respondent wishes to place on record that the Respondent had not agreed for limiting the hearing to the two questions of law referred to in the Tribunal's decision of 5th June 2003," despite the fact that its letters of 13 May 2003 and 26 May 2003 had agreed to exactly that. Later on 18 July 2003, however, the Republic submitted another letter in which it stated that the aforementioned sentence was included as "a result of an oversight" and should be deleted.

specifically had reserved this decision for the preliminary hearing. Initially at that hearing, the Tribunal wondered whether such testimony was necessary given the legal question at issue and the fact that the Republic finally had, as of 24 June 2003, completed its submission of comprehensive witness statements. The Republic reacted vigorously, arguing that it would be unfair for the Tribunal not to hear the testimony of its witnesses, who had traveled all the way from the Seychelles. The Tribunal ultimately agreed to receive the Republic's oral evidence at the preliminary hearing, which was given by Messrs. Morin, Chang-Leng and Dilliway.

13. At the conclusion of the preliminary hearing, the Tribunal once again confirmed that both Parties understood the purpose and potential consequences of such hearing. The following segment of the transcript makes plain that both Parties did in fact understand that the case potentially could be disposed of based on the evidence and argument presented at that preliminary hearing:

> Arbitrator: Now Mr. Fernando, you agree that in the event that I find that the evidence does not support the defences that you have raised, then that will lead to an award in favour of the claimant?
> Mr. Fernando: Yes.
> ...
> Arbitrator: So, both of you see that it is now a straightforward case of deciding whether or not the evidence supports defences that are valid defences in law to this claim?
> Mr. Jagusch: Yes.[8]

14. Following the preliminary hearing and some post-hearing correspondence, the Tribunal issued its Award on 17 December 2003, concluding that the Republic's defenses did not amount to good defenses at law and ordering that the Republic pay to CDC the amounts owed under the Guarantees, including simple interest, as well as CDC's and ICSID's expenses and costs.[9]

15. The Republic filed its Application for Annulment of Award ("Application") on 30 March 2004 (within the time limit provided in the Convention) arguing that the Tribunal manifestly had exceeded its powers, that it had seriously departed from a fundamental rule of procedure, and that the Award failed to state the reasons on which it was based. Following

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[8] Transcript of Preliminary Hearing in *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14 at 134-35 (23 July 2003).

[9] Award, *supra* note 1, at 22-23.

registration of the Republic's Application 30 April 2004 this *ad hoc* Committee was duly constituted on 28 May 2004 with Judge Charles N. Brower as President of the Committee, Mr. Michael Hwang SC and Mr. David A.R. Williams QC as Members of the Committee, and Ms. Martina Polasek as Secretary of the Committee.[10] Since constitution of the *ad hoc* Committee, Ms. Polasek has been replaced as Secretary of the Committee by Mr. Ucheora Onwuamaegbu.

16. On 14 July 2004 this Committee issued a Decision and Order on the question of whether or not to continue the automatic stay of enforcement of the Tribunal's Award that had been in place pursuant to Article 52(5) of the Convention. Subsequently, after the submission of argument and affidavits, the Committee decided, and accordingly ordered on 14 July 2004, that the stay be terminated because the Republic had not provided the required security or a satisfactory explanation why such security should no longer be required.[11]

17. The Republic submitted its Memorial on 28 July 2004. CDC submitted its Counter-Memorial on 11 October 2004. The Republic submitted its Reply Memorial on 5 November 2004.

18. The hearing on the Republic's Application was held on 17 and 18 January 2005 in London.

III. THE AWARD

A. Jurisdiction

19. As a preliminary matter, the Award considered the Tribunal's jurisdiction over the dispute, concluding that jurisdiction existed because both of the Guarantees at issue in the case included an arbitration clause requiring that the Parties submit to ICSID any dispute arising under either Guarantee, both the UK and the Republic were Contracting States to the ICSID Convention, and the conditions in Article 25(1) of the Convention were fulfilled.[12] As previously noted, the Republic, which initially had contested jurisdiction, withdrew such objection prior to the preliminary hearing.

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[10] Letter from Acting Secretary-General of ICSID in *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14 at 1 (28 May 2004).

[11] *See generally* Decision, *supra* note 2.

[12] Award, *supra* note 1, at 2 para. 4.

B. The Arguments of the Parties

20. The Award then turned to a discussion of the particulars of the dispute and the Parties' arguments on the merits. The Award noted with respect to CDC's contentions that:

> CDC claims that the Republic is in breach of its obligations under the Guarantees. CDC claims:
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> (i) Under the 1990 Guarantee, the Republic guaranteed to CDC punctual payment of all principal monies and interest becoming due and payable by Public Utilities Corporation ("PUC"), a statutory corporation incorporated in the Republic of the Seychelles, to CDC under a Loan Agreement between PUC and CDC dated September 20, 1990 (as amended by letters dated January, 10 1991 [sic] and July 3, 1992) together the "1990 Loan Agreement." By that Agreement CDC agreed to lend £450,000 to PUC.
>
> (ii) Under the 1993 Guarantee, the Republic guaranteed to CDC the due and punctual payment of all principal monies and interest becoming due and payable by PUC to CDC under a Loan Agreement between PUC and CDC dated February 5, 1993 (as amended and re-scheduled by an amending and re-scheduling Agreement dated January 25, 1996) (together the "1993 Loan Agreement"). By the 1993 Loan agreement, CDC agreed to lend £1,800,000 to PUC.
>
> (iii) PUC is in default of its obligations to CDC under the 1990 Loan Agreement and the 1993 Loan Agreement (together the "Loan Agreements") in the manner specified in CDC's letter to the Republic dated January 2, 2002 (to which was attached CDC's letter to the Republic dated December 17, 2001 on the same subject).
>
> (iv) The Republic has failed to meet CDC's demands for the Republic to honour the Republic's obligations under the Guarantees.[13]

21. The Award also described the relief sought by CDC in its Request for Arbitration:

> (i) an order that the Republic shall pay to CDC the sum of £2,103,379.32 being the total amount due and owing to CDC under the Guarantees as at 4 December 2001;
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> (ii) an order that the Republic shall pay to CDC the further amounts due and owing to CDC under the Loan Agreements (and, hence, the Guarantees) from 5 December 2001 to the date of the Award (as to which CDC will provide calculations and such further evidence as is necessary, in the course of the proceedings);
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> (iii) an order that the Republic shall make payment to CDC of all legal and other expenses incurred by CDC in connection with this arbitration, including fees and expenses of its counsel and its solicitors, fees and expenses of the Arbitral Tribunal and any other expenses howsoever incurred in connection with this arbitration; and

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[13] *Id.* at 3-4 paras. 7-10.

(iv) an order for such further or other relief as to the Arbitral Tribunal seem just or appropriate.[14]

22. The Award also recited the arguments made by the Republic in its defense. Primarily, the Republic argued, with respect to the 1993 Guarantee, that "the poor performance and ultimate abandonment of the 4MW gas turbine generator purchased under the 1993 Loan Agreement" affected the Republic's ability to perform its obligations under the 1993 Guarantee and had generally negative consequences for the Republic's economy.[15] (As noted previously, the Republic's Counter-Memorial did not contest liability under the 1990 Guarantee.) The Republic argued that its non-performance under the 1993 Guarantee was excusable because CDC represented that it had "thoroughly appraised" the underlying project, and the Republic therefore sought dismissal of "the claim on the ground that CDC should bear its share of the responsibility for the failure of the project and the consequential damage to the Seychelles economy."[16] The Republic had stated, in its Rejoinder Memorial, that it "would be relying for its defence on the principles of equity, contractual fairness, inequality of bargaining power, contributory negligence and the emerging jurisprudence in relation to international trade and investments between developed and developing countries." The Republic had not, however, in the opinion of the Tribunal, provided the "full and detailed particulars" of the principles "on which it proposes to rely at the preliminary hearing both by way of defence and by way of reduction of the amount to be awarded in satisfaction of Claimant's claim." Accordingly, the Republic had submitted the Addendum to its Rejoinder on June 27, 2003 (just three and a half weeks before the preliminary hearing), wherein it alleged that its agreement to guarantee the loan was made in reliance on "the representation made by [CDC] to the [Republic] that [CDC had] made a thorough appraisal of the project proposals in connection with the loan that was granted to PUC. [CDC] implied that the 4 MW gas turbine generator being purchased from the loan would be suitable and viable for PUC."[17] The Award noted at this point in its rehearsal of the Republic's arguments that this Addendum was the first time in the pleadings that the Republic had appeared to base its defense on alleged misrepresentations by CDC on which CDC knew the Republic would rely. Additionally, the Republic had alleged in its Rejoinder Memorial that its non-

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[14] *Id.* at 6-7 para. 20.

[15] *Id.* at 7 para. 22.

[16] *Id.* at 8 para. 24.

[17] *Id.* at 10 para. 33 (citing the Republic's Addendum to its Rejoinder at para. 30).

performance should be excused because of inequality of bargaining power between it and CDC.

C. The Preliminary Hearing

23. The Award next describes the 22-23 July 2003 preliminary hearing held in London. The Republic called three witnesses (CDC called none). The Managing Director of PUC, Mr. P.S.G. Morin, an electrical engineer, was the first witness.[18] He testified that PUC paid CDC £22,500, which he believed was for an analysis of the gas turbine project at Victoria A power station, although he admitted under cross-examination that he had never seen an appraisal of the project nor had he had any confirmation of his belief other than the granting of the loan. He noted that neither he nor any of his colleagues at PUC had had any experience dealing with gas turbine technology and that PUC had not hired independent consultants to provide it with advice. He testified that he believed that CDC was PUC's "partner," "assessor" and "adviser" in the project, and he stated that he thought that PUC and CDC were unequal in their respective bargaining power.

24. The next to testify was Mr. Francis Chang-Leng, the Governor of the Central Bank of the Republic.[19] He stated that the Republic relied on the expertise of CDC in making its determination with respect to the purchase of the gas turbine generator for Victoria A power station. He also testified that he believed that CDC was the Republic's "partner" in the project, and as such he did not characterize the relationship between the Parties as an ordinary one between a borrower and a lender. But for its belief that CDC considered the project viable, the Republic, Mr. Chang-Leng stated, would not have proceeded with it. He admitted, however, that he had not participated in the negotiations leading to the 1993 Loan Agreement and Guarantee.

25. The final witness was Mr. J.G. Dilliway, an expert in gas turbine power generation not involved with the case at the time the 1993 Loan Agreement and Guarantee were signed, who testified that the type of turbine employed at the Victoria A power station was not suited to the uses to which it was put.[20]

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[18] *Id.* at 11-13 paras. 35-39.

[19] *Id.* at 13-14 paras. 40-41.

[20] *Id.* at 14 para. 42.

D. Analysis

26. After determining that the Parties had agreed that English law governed resolution of the dispute, and noting as well that the Republic had failed to adduce any legal authority or argument with respect to "the emerging jurisprudence in relation to international trade and investments between developed and developing countries" despite its reference to such law in its Rejoinder Memorial, the Award proceeded to its analysis of the merits of the case.

27. The Award first addressed the Republic's contention that "there was an implied representation by CDC to both PUC and the Republic arising from the appraisal which it carried out of the Victoria A project that the project as well as the product (the EGT gas turbine) was suitable and viable for PUC. It is not in dispute that CDC conducted an appraisal." As the Award described the Republic's argument, the defense allegedly arose from PUC's application for the loan from CDC coupled with CDC's appraisal and making of the loan as well as the Republic's payment of the £22,500 fee under clause 15(1) of the 1993 Loan Agreement. After noting that that clause imposes no duty on CDC to make an appraisal for "the benefit of PUC or the Republic or at all," the Award concluded that the sum of £22,500 was, as is the "common practice of lenders," to compensate CDC for the time and expense incurred in deciding whether it would make the loan the Republic sought, and not as payment for CDC to execute a study of the project as a whole to determine for the benefit of PUC or the Republic whether or not it was suitable for PUC's needs.[21]

28. Given the absence of any duty to make an appraisal for the benefit of PUC or the Republic, the absence of any evidence indicating that PUC or the Republic or any of their officers received any such appraisal from CDC, and the absence of any credible evidence indicating that CDC was aware of any reliance by the Republic on CDC's decision to make the requested loan, the Award determined that the Republic's defense was not legally sufficient, citing the principle of English law that a borrower cannot rely on the fact of a loan (in the absence of a representation or the lender's knowledge that the borrower is relying on the loan decision) to recover from the lender on the ground that the use to which the loan

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[21] *Id.* at 16 para. 47. Clause 15(1) states that:

> By way of recompense for the time spent and expenses incurred by CDC in considering proposals for the Project and in negotiating the terms and conditions of the Agreement, the Borrower shall within thirty days after the date hereof or, if earlier, upon the making of the first advance by CDC

proceeds were to be (and were) put was not a good one.[22] The Award noted additionally that two clauses of the 1993 Loan Agreement and the 1993 Guarantee, respectively, made the Republic's contention even more untenable: "[t]he obligations of the Borrower to pay ... shall be in no way impaired or affected by reason of impossibility to carry out the Project or any part thereof or for any other reason" and "[t]here are no representations ... with respect to this guarantee and affecting the liability of the Government hereunder other than those contained herein."[23] There were, the Award concluded, no express representations in the Guarantee, and based on the aforementioned disclaimers, there could be no implied representations.

29. The Award also rejected the Republic's related argument that CDC owed a duty of care to the Republic to make an accurate appraisal of the project,[24] because there was no evidence that CDC had made any representation to the Republic that could create such a duty of care and, in fact, all evidence (such as the aforementioned clauses of the 1993 Loan Agreement and the 1993 Guarantee) indicated that CDC specifically disavowed making any representations. As part of this analysis, the Tribunal concluded that the prior relationship between CDC and the Republic and PUC as embodied in the 1990 Loan Agreement and Guarantee was simply that of a lender and a borrower and hence that CDC was not acting as a partner, assessor, or adviser. Therefore, the general principle stated above governed the defense and precluded its use by the Republic.

30. Finally, the Award addressed the Republic's argument that there was an inequality in bargaining power between CDC and the Republic such that the Republic could be relieved of its responsibility under the 1993 Guarantee.[25] After observing that proof of unfairness is a prerequisite to the application of this doctrine, the Award concluded that there was nothing unfair about the 1993 Guarantee.

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hereunder pay to CDC twenty-two thousand five hundred pounds sterling (£22,500).

[22] *Id.* at 17-18 paras. 51-54.

[23] *Id.* at 18 para. 55 (quoting clause 17.8 of the 1993 Loan Agreement and clause 2.4 of the 1993 Guarantee).

[24] *Id.* at 19-20 paras. 56-57.

[25] *Id.* at 20 para. 59.

E. Conclusion and Order

31. The Award therefore concluded that "the defences raised by the Republic do not amount to a good defence to CDC's claim based on the Guarantees."[26] The principal amounts as well as the rate of interest were not contested, so the Tribunal ordered the Republic to pay £1,771,096.75 in principal (in total for both Guarantees), £672,915.45 in interest as of 25 August 2003, and £611 in interest daily after 25 August 2003. The Tribunal also Awarded CDC £100,000 in reimbursement for legal fees and disbursements and $40,000 in reimbursement for fees and expenses of the Tribunal and ICSID paid by CDC.

IV. ANALYSIS

32. Article 52 of the ICSID Convention, which the Application of the Republic invokes, allows for annulment of an ICSID Award as follows:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;
>
> (b) that the Tribunal has manifestly exceeded its powers;
>
> (c) that there was corruption on the part of a member of the Tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.

The Republic invokes (b), (d) and (e).[27]

A. Article 52(1) Generally

33. As an initial matter, *ad hoc* Committees have taken the position that the Convention should be "interpreted in accordance with the law of treaties."[28] As such, the ordinary meaning of its terms in their context and in light of its object and purpose provide the touchstone for its interpretation.[29]

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[26] *Id.* at 21 para. 61.

[27] Application, *supra* note 3, at 2-3.

[28] David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal*, 7 ICSID REV. 21, 33 (1992) (collecting cases). [CDC's Exhibit E-4]

[29] *See* Vienna Convention on the Law of Treaties, January 27, 1980, art. 31, 1155 U.N.T.S. 331, *available at* http://www.un.org/law/ilc/texts/treaties.htm.

34. As the ordinary meaning of the terms of Article 52(1) indicates, the ICSID annulment procedure is concerned with determining whether the underlying proceeding was fundamentally fair: Article 52(1) looks not to the merits of the underlying dispute as such, but rather is concerned with the fundamental integrity of the tribunal, whether basic procedural guarantees were largely observed, whether the Tribunal exceeded the bounds of the parties' consent[30], and whether the Tribunal's reasoning is both coherent and displayed. To borrow Caron's terminology, annulment is concerned with the "'legitimacy' of the process of decision" rather than with the "substantive correctness of decision."[31] Because of its focus on procedural legitimacy, annulment is "an extraordinary remedy for unusual and important cases."[32] That annulment is not the same thing as appeal is a principle acknowledged, although applied unevenly, in the various decisions of *ad hoc* Committees.[33] Additionally, the Convention specifically recognizes this distinction by rejecting, in Article 53, any right to appeal.

35. Two early decisions of *ad hoc* Committees have been widely criticized for reviewing the propriety of the underlying tribunals' factual and legal determinations (and thus appearing to exercise more of an appellate function).[34] Since those two Decisions, *Klöckner I*[35] and *Amco Asia I*,[36] *ad hoc* Committees consistently have taken a much more restrictive view of

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[30] Decision of the *ad hoc* Committee in *Maritime International Nominees Establishment v. The Republic of Guinea*, Case No. ARB/84/4) at para. 5.03 (2 December 1989), *reprinted in* 4 ICSID Rep. 79 ("*MINE*" or "*MINE* Decision"). [CDC's Exhibit F-3]

[31] Caron, *supra* note 28, at p. 24. Appeal, on the other hand, is commonly concerned with both the legitimacy of the process and the correctness of the decision.

[32] C.H. Schreuer, *Three Generations of ICSID Annulment Proceedings* in ANNULMENT OF ICSID AWARDS 17, 42 (Emmanuel Gaillard and Yas Banifatemi eds. 2004) ("Schreuer, *Three Generations*"). [CDC's Exhibit E-17]

[33] *Id.* at 17 (collecting cases).

[34] *See, e.g.*, M.B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV. 85 (1987) [CDC's Exhibit E-7]; D.A. Redfern, *ICSID – Loosing its Appeal?*, 3 ARB. INT. 98 (1987) [CDC's Exhibit E-14]; W.M. Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739 [CDC's Exhibit E-15]

[35] Decision of the *ad hoc* Committee in *Klöckner Industrie-Anglagen GmbH et al. v. United Republic of Cameroon and Societe Camerounaise des Engrais S.A.*, Case No. ARB/81/2 (3 May 1985), *reprinted in* 2 ICSID Rep. 95 ("*Klöckner I*" or "*Klöckner I* Decision"). [CDC's Exhibit F-2]

[36] Decision of the *ad hoc* Committee in *Amco Asia Corporation, Pan American Development Ltd. and P.T. Amco Indonesia v. The Republic of Indonesia*, Case No. ARB/81/1 (16 May

the role of the *ad hoc* Committee and the annulment process. The so-called "second" and "third" generation annulment decisions (*MINE*, *Vivendi*,[37] and *Wena Hotels*[38] are the published examples) have further crystallized the now apparently generally accepted proposition that "annulment is not a remedy against an incorrect decision" alone.[39] Thus there has been an evolution in the ICSID annulment case law and scholarship away from *Klöckner I* and *Amco Asia I* that has culminated, in our view correctly, in *ad hoc* Committees reviewing arbitral proceedings only to the extent of ensuring their fundamental fairness, eschewing any temptation to "second guess" their substantive result.[40]

36. This mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID Convention's drafters' desire that Awards be final and binding, which is an expression of "customary law based on the concepts of *pacta sunt servanda* and *res judicata*,"[41] and is in keeping with the object and purpose of the Convention. Parties use ICSID arbitration (at least in part) because they wish a more efficient way of resolving disputes than is possible in a national court system with its various levels of trial and appeal, or even in non-ICSID Convention arbitrations (which may be subject to national courts' review under local laws and whose enforcement may also be subject to defenses available under, for example, the New York Convention[42]). Procedural protections are, however, all the more necessary in order to ensure

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1986), *reprinted in* 1 ICSID Rep. 509 ("*Amco Asia I*" or "*Amco Asia I* Decision"). [CDC's Exhibit F-1]

[37] Decision of the *ad hoc* Committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnia Générale des Eaux) v. Argentine Republic*, Case No. ARB/97/3 (3 July 2002), *reprinted in* 6 ICSID Rep. 340 ("*Vivendi*" or "*Vivendi* Decision"). [CDC's Exhibit F-4]

[38] Decision of the *ad hoc* Committee in *Wena Hotels Ltd. v. Arab Republic of Egypt*, Case No. ARB/98/4 (5 February 2002), *reprinted in* 6 ICSID Rep. 129 ("*Wena Hotels*" or "*Wena Hotels* Decision"). [CDC's Exhibit F-5]

[39] *MINE*, *supra* note 30, at para. 4.04.

[40] Schreuer, *Three Generations*, *supra* note 32, at 17.

[41] A. Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev. 321, 324, 324-34 (1991) (discussing the debates surrounding adoption of the Convention). [CDC's Exhibit E-3]

[42] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, *available at* http://www.kentlaw.edu/perritt/conflicts/nucmain.htm. It is interesting to note that following the decisions in *Amco Asia I* and *Klöckner I* some commentators predicted the obsolescence of the ICSID system precisely because the more searching review in which those particular *ad hoc* Committees engaged indicated that awards might not be as

that the resulting award is truly an "award," *i.e.*, a result arrived at fairly, under due process and with transparency, and hence in the basic justice of which parties will have faith.

37. Keeping the object and purpose of the Convention as well as these underlying policy considerations in mind, we note that the *ad hoc* Committees operating during the last two decades have considered that a Committee has discretion to determine not to annul an Award even where a ground for annulment under Article 52(1) is found to exist.[43] The *Vivendi* Committee, for example, stated that an award should be annulled in whole or in part only if annulment is "appropriate in the circumstances."[44] We thus should "consider the significance of the [alleged annullable] error relative to the legal rights of the parties."[45]

38. By our reckoning, the Republic has raised at least 19 separate arguments for annulment and has done so generally without specifically indicating in each case which ground for annulment set forth in Article 52(1) it believes to be applicable. In the following sections of this Decision, however, we set forth each of the Article 52(1) grounds invoked, describing each one generally and then addressing the Republic's particular contentions that appear to relate to it. Where an argument made by the Republic can be analyzed under more than one of the Article 52(1) grounds we have disposed of the argument primarily in one section and have referred to it only briefly in any other applicable section, adding any such additional analysis as may be necessary to understand its disposition under such other section.

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final and binding as was previously thought. *See, e.g.*, Reisman, *supra* note 34, at 749, 785-787, 804-805. *But see* Caron, *supra* note 28, at 22-23; Broches, *supra* note 41, at 376-77 (stating that despite the misconceptions of the *Klöckner I* Committee, "the ICSID annulment process is 'on track' and will fulfil the limited purposes for which it was established").

[43] Schreuer, *Three Generations*, *supra* note 32, at 19 ("A good example for the movement towards this more balanced approach is the position taken by *ad hoc* Committees on their obligation or discretion to annul once they have found a ground for annulment. In *Klöckner I*, the *ad hoc* Committee had still held that a finding that there existed a ground for annulment would have to automatically lead to the annulment of the award. Subsequent *ad hoc* Committees have rejected this 'hair trigger' standard in favor of a 'material violation' approach. *Wena* and *Vivendi* contain further confirmation of this cautious attitude.")

[44] *Vivendi*, *supra* note 37, at 358 para. 66 (citing C.H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1018-1023 (2001) ("SCHREUER, THE ICSID CONVENTION"), and emphasizing *MINE*, *supra* note 30, at paras. 4.09-4.10).

[45] *Id.*

B. Article 52(1)(b) – Manifest Excess of Powers

1. Manifest excess of powers generally

39. Article 52(1)(b) allows for annulment of an award where the Tribunal "manifestly exceeded its powers." That is, a tribunal (1) must do something in excess of its powers and (2) that excess must be "manifest." It is a dual requirement. The *ad hoc* Committee in *MINE* noted that the requirement that the excess be manifest "necessarily limits an ad hoc Committee's freedom of appreciation as to whether the tribunal has exceeded its powers."[46]

40. Common examples of such "excesses" are a Tribunal deciding questions not submitted to it or refusing to decide questions properly before it.[47] Failure to apply the law specified by the parties is also an excess of powers.[48] Essentially, a Tribunal's legitimate exercise of power is tied to the consent of the parties, and so it exceeds its powers where it acts in contravention of that consent (or without their consent, *i.e.*, absent jurisdiction).

41. As interpreted by various *ad hoc* Committees, the term "manifest" means clear or "self-evident."[49] 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.[50] As one commentator has put it, "If the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive."[51]

42. This interpretation conforms with other interpretations of the term "manifest" (or a variation thereof) where it is employed elsewhere in the Convention. For example, Article 36(3) states, in pertinent part, that "The Secretary-General shall register the request [for arbitration] unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre." Schreuer has noted that, in Article 36(3), the term "manifestly" means "easily recognizable."[52] He further observes that "If the Secretary-General has doubts in the matter he will register the request." Similarly,

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[46] *MINE, supra* note 30, at 85 para 4.06.

[47] Schreuer, *Three Generations*, *supra* note 32, at 25-26.

[48] *Id.* at 28-29.

[49] *Wena Hotels*, *supra* note 38, at 135 para. 25.

[50] *Id.*

[51] Feldman, *supra* note 34, at 101.

[52] SCHREUER, THE ICSID CONVENTION, *supra* note 44, at 462.

Article 57 provides, in pertinent part, that "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." With respect to this article, the arbitral tribunal in *Amco Asia I* held that "manifest" means "highly probable" and not simply "possible."[53] These interpretations of the term "manifest" confirm that its use in the Convention sets a high bar to the application of any provision so conditioned.

43. The Republic argues, with respect to this ground, that the Tribunal acted in excess of its powers by failing to apply English law.[54] CDC contends that the Republic actually takes issue with the Tribunal's actual application of English law, which, even if truly erroneous, is not an appropriate basis for annulment.[55] As the *ad hoc* Committee in *MINE* noted, "Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment."[56]

2. Alleged failure to apply English law

44. The Republic cites a number of English judicial decisions that it contends the Tribunal "ignores" in its Award: *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd,* [1964] AC 465[57]; *Esso Petroleum Co. Ltd v. Mardon,* [1976] QB 801[58]; and *Howard Marine and Dredging Co. Ltd v. A. Ogden & Sons (Excavations) Ltd,* [1978] QB 574.[59] The Republic also cites the Tribunal's failure explicitly to cite the Misrepresentation Act 1967[60] as an annullable error. It argues as well that the Tribunal improperly relied on an inapplicable

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[53] Decision on Jurisdiction in *Amco Asia Corporation, Pan American Development Ltd. and P.T. Amco Indonesia v. The Republic of Indonesia*, ICSID Case No. ARB/81/1 (25 September 1983), *reprinted in* 1 ICSID Rep. 389.

[54] The Republic also argues that that Tribunal manifestly exceeded its powers by failing to answer the question put to it. We consider this argument in part IV.C.4., *infra*, ultimately determining that the Tribunal answered the appropriate question.

[55] Annulment Counter-Memorial in *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14 at para. 147 (11 Oct. 2004) ("Counter-Memorial").

[56] *MINE, supra* note 30, at 87 para. 5.04.

[57] *See* Annulment Memorial in *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14 at 10 para. 24 (28 July 2003) ("Memorial").

[58] *Id.* at 40-41 para. 33.

[59] *Id.* at 41-43 para. 34.

[60] *Id.* at 50-51 para. 37.

English legal authority, *National Commercial Bank (Jamaica) Ltd. v. Hew*.[61] Finally, the Republic maintains that the Tribunal erred in failing to apply the equitable doctrine of inequality of bargaining power, as described by Lord Denning in *Lloyd's Bank v. Bundy*, [1975] QB 326.[62]

45. We cannot agree that the Tribunal improperly "ignored" the cases cited to it by the Republic. Rather, it appears to us that the Tribunal's citation to authority was consistent with its legal determinations (1) that CDC made no representation to the Republic or PUC as was alleged and (2) that CDC was unaware of any reliance by the Republic or PUC on its approval of the 1993 loan. The Tribunal did not ignore the cases the Republic cited, but simply found them inapplicable considering the facts as established by the Republic's evidence. The Tribunal then cited the relevant precedent, the case of *Smith v. Bush*, which stands for the proposition that "a lender who makes an appraisal of the viability of a loan for its own purposes as lender owes no duty of care to the borrower ... in relation to that appraisal."[63] Regardless of our opinion of the correctness of the Tribunal's legal analysis, however, our inquiry is limited to a determination of whether or not the Tribunal endeavored to apply English law. That it did so is made plain by its explicit statement in the Award that it did as well as by its repeated citation to relevant English legal authorities. This same analysis applies to the Republic's contention with respect to the Misrepresentation Act 1967; the Act is not applicable to this case given the Tribunal's unreviewable determination that there was no representation.

46. The Republic also takes issue with the Tribunal's citation to, and reliance on, the *National Commercial Bank* case,[64] which the Republic likewise did not cite in its submissions to the Tribunal.[65] That case, however, seems to us to be entirely on point.

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[61] *National Commercial Bank (Jamaica) Ltd. v. Hew*, [2003] UKPC Appeal No. 65 of 2002, 30 June 2003 ("*National Commercial Bank*").

[62] *Id.* at 52-54 para 39.

[63] *Smith v. Eric S. Bush*, [1988] QB 835, 851-52, *aff'd* [1990] 1 AC 831, 864. The Republic also contends, in paragraph 36 of its Memorial, *supra* note 57, that the Tribunal's citation of the *Smith v. Bush* case amounts to a failure to state reasons. As we discuss in greater detail below, this case seems perfectly applicable to the facts as found by the Tribunal for the purposes of its legal determination. Thus, the case is not irrelevant, and the Tribunal's reliance on it does not lead to the Award being contradictory or absurd.

[64] *National Commercial Bank*, *supra* note 61.

[65] Memorial, *supra* note 57, at 44-48 para 35.

There, a bank provided an overdraft facility to a customer for use in a land development project. When the customer defaulted on the obligation, he defended his non-performance by stating that he relied on the bank's granting of the loan in his land development decision-making. The Privy Council held, however, that such reliance was not a defense to non-performance absent the bank's actual provision of advice or undertaking of an obligation to give such advice. The Republic contends that the instant case is distinguishable because "CDC granted the loan only after a thorough appraisal of the project proposals submitted to it by PUC. Thus CDC assumed an obligation to advise as to the viability of the project and failed to advise that it was not, as cited in the privy council case." Given the Tribunal's determination based on all the evidence that there was nothing in the 1993 Loan Agreement (particularly considering clause 15(1)) nor in the antecedent relationship between CDC and PUC indicating that CDC had agreed to analyze the suitability of the project for PUC or to become PUC's partner, assessor, or adviser, this case would seem to be directly on point. Again, however, such a determination is not the responsibility of this Committee. Our review is limited to a determination of whether or not the Tribunal endeavored to apply English law to its factual findings. As noted by the *Wena Hotels* Committee: "The Tribunal did not consider that there was sufficient evidence to prove such a claim. It is therefore not a question of the applicable law but of evidence, the evaluation of which relates to the merits of the case and is not a matter for the ground of annulment related to a purported excess of power by the Tribunal."[66]

47. As for the Republic's contention that the Tribunal ignored principles of equity,[67] we have no difficulty rejecting this argument, for it is plain on the face of the Award that the Tribunal considered the applicability of equitable principles (and actually cited in paragraph 58 thereof the case upon which the Republic relies) before making the legal determination that the 1993 Loan Agreement and Guarantee were not "unfair," proof of which fact is necessary to the establishment of a claim of inequality of bargaining power. Additionally, the Tribunal determined that the *Lloyd's Bank* case was not the final word in English law on the subject. It cited a more recent precedent, which observed that the proposition for which the *Lloyd's Bank* case was cited has not been generally accepted. As we noted previously, however, it is not the duty of this Committee to parse the meanings of English legal

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[66] *Wena Hotels*, *supra* note 38, at 139-140 para. 47.

[67] Memorial, *supra* note 57, at 52-54 para. 39.

authorities. Rather, we are supposed to make a procedural review to determine whether or not the Tribunal honored the intent of the parties to have their dispute decided under English law. Clearly it did.

C. Article 52(1)(d) – Serious Departure from a Fundamental Rule of Procedure

1. Serious departure from a fundamental rule of procedure generally

48. The next basis for annulment raised by the Republic is Article 52(1)(d), which provides that annulment may be appropriate where there has been a "serious departure from a fundamental rule of procedure" in the underlying proceeding. As with the requirement that a Tribunal's "excess of power" be *manifest*, here the departure must be *serious* and it must be from a *fundamental* rule of procedure. It is a dual requirement. Not just any departure from any rule of procedure will support annulment.[68] Prior *ad hoc* Committees have held that it is the duty of the party seeking annulment to "identify the fundamental rule of procedure" and to show that any departure from it "has been serious."[69]

49. A departure is serious where it is "substantial and [is] such as to deprive the party of the benefit or protection which the rule was intended to provide."[70] In other words, "the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed."[71] As for what rules of procedure are fundamental, the drafters of the Convention refrained from attempting to enumerate them, but the consensus seems to be that only rules of natural justice – rules concerned with the essential fairness of the proceeding – are fundamental. Not all ICSID Arbitration Rules are fundamental in this sense.[72] As the *ad hoc* Committee in *Wena Hotels*

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[68] *MINE*, *supra* note 30, at 85 para. 4.06.

[69] *Wena Hotels, supra* note 38, at 142 para. 56.

[70] *Id.* at 87 para. 5.05.

[71] *Wena Hotels*, *supra* note 38, at 142 para. 58. Given this statement of the requirement that a violation of a rule of fundamental procedure be serious it would seem that we might not in fact have discretion to conclude that annulment is not appropriate where that requirement is met. This is because, as we have already noted, our discretion with respect to annulment is constrained by an investigation into the impact of an error on the legal rights of the parties. Where, as is the case with Article 52(1)(d), prejudice is found as a necessary element of the decision on the availability of annulment, an *ad hoc* Committee has, it seems, *ipso facto* made the determination that the error significantly impacted the legal rights of the parties, thus requiring annulment. *See*, *supra*, para. 37.

[72] *MINE, supra* note 30, at 87 para. 5.06.

stated, Article 52(1)(d) makes applicable to ICSID arbitrations the "minimal standards of procedure to be respected as a matter of international law." For example, "It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defence and to produce all arguments and evidence in support of it."[73] Other examples of such fundamental rules are impartiality of the Tribunal and meaningful deliberation by the Tribunal.[74]

50. With respect to this ground for annulment, the Republic argues that the Tribunal committed numerous errors seriously violating fundamental rules of procedure. It contends that the Tribunal failed, in multiple situations, to apply English law (we have disposed of this argument in the previous section, concluding that the sole Arbitrator did in fact apply English law); that the Tribunal lacked impartiality[75]; that the Tribunal failed to address questions put to it by the parties as required by Article 48(3)[76]; that there was an absence of real deliberation because the Tribunal failed to consider relevant matters, instead considered irrelevant matters, and because there was an alleged discrepancy in the Award's reasoning suggesting such an absence of deliberation[77]; that the Tribunal failed to follow rules of evidence[78]; and that the Tribunal failed to issue its Award within the time limit provided for in ICSID Arbitration Rule 46.[79] CDC responds generally that the Republic was afforded a "full and fair opportunity" to prove its case and maintains that the Tribunal did not depart at all, much less seriously, from any fundamental rule of procedure.

2. Alleged lack of impartiality

51. We first consider the Republic's very serious allegation that the sole Arbitrator lacked impartiality. The Republic is of the opinion that the Tribunal evidenced a lack of impartiality when it heard argument on whether or not testimonial evidence needed to be heard at the preliminary hearing because "whether the witnesses should be called to testify on its behalf

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[73] *Wena Hotels*, *supra* note 38, at 142 para. 57.

[74] Schreuer, *Three Generations*, *supra* note 32, at 29-32.

[75] Memorial, *supra* note 57, at 56-58 para. 41.

[76] *Id.* at 29 para. 24.

[77] *Id.* at 31 para. 25, 32 para. 26, 33 para. 27, 33 para. 28, 34 para. 29, 34-35 para. 30, and 35-37 para. 31.

[78] *Id.* at 5.

[79] *Id.* at 54-56 para. 40.

before the Arbitrator was entirely for the Republic."[80] It also cites a number of pages of the transcript where, it contends, the Tribunal illustrated its partiality by interjecting "always in favour of CDC or when the question is framed in a way which indicates that the Arbitrator is expecting an answer favourable to CDC."[81] At the hearing before the Committee, the Republic also stated that the very Award itself, when coupled with these other factors, demonstrates the Tribunal's partiality.

52. CDC responds that the Tribunal's discussion of the necessity of adducing oral testimony at the preliminary hearing was reasonable given the terms of the pre-hearing correspondence (see, *supra*, paragraph 10) and the fact that written witness statements had in fact finally been submitted to the Tribunal before the preliminary hearing.[82] Additionally, CDC states that the Tribunal's questioning was completely appropriate and betrays not a lack of impartiality, but only the involvement of a suitably engaged judge. Finally, CDC notes that the sole Arbitrator is a respected former Chief Justice of the High Court of Australia and that the Republic's unsupported allegations of professional misconduct should be treated as being "prima facie implausible."

53. As an initial matter, the Republic's allegation appears vulnerable to the point that it failed to challenge Sir Anthony's alleged improper conduct at any time prior to the issuance of the Award, even though all of the conduct to which objection now is made (excluding the fact of the Award itself) occurred not later than during the preliminary hearing. It is arguable that a timely objection or challenge under Article 57 of the Convention and ICSID Arbitration Rule 9 would have been the appropriate remedy and that this complaint effectively has been waived and is therefore simply inadmissible. This conclusion is confirmed by Note B. to ICSID Arbitration Rule 9 (last published in 1975 as part of ICSID/4/Rev.1 ("ICSID Regulations And Rules"))[83]:

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[80] *Id.* at 56-58 para. 41.

[81] *Id.*

[82] Counter-Memorial, *supra* note 55, at 38-40 paras. 158-166. (quoting *Klöckner I*, *supra* note 35, at 130 para. 94).

[83] Prefacing the texts of the various Regulations and Rules set forth therein this volume states that

> Though these ["explanatory Notes prepared by the Secretariat of the Centre"] do not constitute part of the Rules and have no legal force, the Administrative

> A proposal to disqualify an arbitrator must be filed promptly, and in any event before the proceeding is declared closed (see Rule 38). Promptness must be measured relative to the time when the proposing party first learns of the grounds for possible disqualification. If it receives this information so late that it can no longer make a proposal before the proceeding is declared closed, its remedy is to request an annulment of the award pursuant to Article 52 of the Convention (Rule 50).

In the absence of having challenged Sir Anthony on the basis now asserted at any time during the 147 days that followed the conclusion of the preliminary hearing on July 23, 2003 and issuance of the Award on December 17, 2003 the Republic must be deemed to have waived any such objection.[84] Although the Republic claimed at the hearing before the Committee that its allegation of lack of impartiality is based also on the totality of circumstances including the Award itself, which contention, it necessarily suggests, escapes the potential bar just discussed, the absence of any earlier objection to the alleged bias nevertheless gives rise to questions regarding the bona fides of the objection.

54. Apart from these obstacles, we have closely reviewed the record of this case, from the time Sir Anthony was appointed until the issuance of the Award, including the contents of the Award itself, and state categorically that Sir Anthony's conduct of the case was entirely appropriate. Rather than evincing a lack of impartiality, the record unequivocally demonstrates that Sir Anthony served as an unbiased, independent sole Arbitrator whose conduct was entirely appropriate and designed to ensure that the case was vigorously argued and rigorously decided.

55. As noted briefly above, the Republic points in particular to Sir Anthony's conduct at the beginning of the preliminary hearing when he discussed whether or not the oral testimony of the Republic's witnesses needed to be heard. The Republic believes that this discussion demonstrates Sir Anthony's bias against it. We frankly profess some astonishment at this contention, as the facts clearly support the opposite conclusion. We note that 11 days before the preliminary hearing, on 11 July 2003, Sir Anthony had expressly reserved for decision at the outset of the preliminary hearing itself the question of whether or not the Republic's witnesses would need to be heard. Then, as noted in paragraph 12 above, when on the first day of the preliminary hearing on 22 July 2003 the Republic first sought leave to call

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> Council considered that they might be useful to the parties to proceedings and should therefore be published together with the texts of the Rules.

[84] The proceedings in fact were never formally closed prior to the issuance of the Award. *See*, *infra*, paras. 62-65.

witnesses the Tribunal indeed did voice doubt as to whether such testimony was necessary. The Republic nevertheless succeeded in persuading Sir Anthony to the Republic's desired position which, if anything, is strong evidence that Sir Anthony approached the issue (and the case as a whole) with a fully open mind. He clearly was at pains to accommodate to the maximum extent humanly possible the desires of a very small developing state, even though the Respondent persistently had failed to comply with his directions, as recorded in the Minutes, and later his Decision of 17 February 2003, regarding the filing of witness statements.

3. Alleged failure to answer the question put to the Tribunal

56. The Republic also argues that the Tribunal seriously violated a fundamental rule of procedure by answering the wrong question, *i.e.*, determining whether the 1993 Loan Agreement obligated CDC to conduct an appraisal "for the benefit of PUC or the Republic...."[85] That is, the Republic contends that the only question the Tribunal should have answered was whether CDC was obligated to conduct an appraisal. That fact alone, the Republic believes, coupled with the loan decision, established CDC's liability.[86]

57. The specific terminology used by the Republic in its Memorial cannot define the question the Tribunal was obliged to answer. Rather, the Tribunal was required to answer a legal question, or to put it another way, come to a conclusion about the Parties' rights and liabilities. In this case, the legal question for the Tribunal's determination was whether or not the Republic's claimed defenses protected it from liability under the 1993 Guarantee. This question necessarily entailed, under English law as the Tribunal understood it, the determination, *inter alia*, of whether the Republic was entitled to rely on CDC's loan decision as a representation regarding the substance of the project it financed. The Tribunal answered the question in the negative, thereby answering the proper legal question before it.

4. Alleged lack of deliberation

58. The Republic has made a multifaceted argument that there was a failure to deliberate amounting to a serious violation of a fundamental rule of procedure.[87] The Republic premises this argument on the Tribunal's alleged failure to consider relevant matters, alleged

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[85] Memorial, *supra* note 57, at 30 para. 24.

[86] *Id.* at 30 para. 29.

[87] It is a neat philosophical or metaphysical question as to whether a Sole Arbitrator can be subject to an accusation of failure to "deliberate."

actual consideration of irrelevant matters,[88] and alleged discrepancies and inconsistencies in the Award assertedly indicating a failure to deliberate.[89] These arguments are discussed in the section of this Decision dealing with Article 52(1)(e), inasmuch as such alleged errors are more commonly understood to implicate a Tribunal's duty to state the reasons for its decision.

5. Alleged failure to follow rules of evidence

59. The Republic complains that the Tribunal failed to follow rules of evidence, thereby seriously departing from a fundamental rule of procedure. The Republic has provided no authority for its position that any rules of evidence were fundamental or that the Tribunal's alleged violation thereof was serious. In any event, we are convinced that the Tribunal did not, in fact, violate any rules of evidence to the prejudice of the Republic.

60. The Republic's contention arises from the fact that CDC did not proffer testimony from witnesses contradicting the testimony of the Republic's witnesses. This failure, argues the Republic, compelled the Tribunal to accept the Republic's evidence as true. (The Republic overlooks the fact that CDC did cross-examine the Republic's witnesses and it also presented non-testimonial evidence to the Tribunal.) The Republic again is insensitive to the fact that a trier of fact may in such circumstances nonetheless find a party's evidence not to be credible.

61. Essentially, however, CDC was under no obligation to present evidence from its own witnesses to contest the Republic's evidence at the preliminary hearing held, since the agreed object of that hearing, which was designated from its inception as a "preliminary" one, was simply to determine whether the Republic was able to make out a *prima facie* case or whether instead, on the Republic's evidence and English law, there was "no case to answer." Only had the Republic succeeded in persuading the Tribunal that it had put forward "a case to answer" would the Tribunal have proceeded to a full evidentiary hearing as the parties had agreed. Because the Republic did not make out a *prima facie* case, CDC was not required to respond.

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[88] *Id.* at 29 para. 24, 31 para. 25.

[89] *Id.* at 33 para. 28.

6. Alleged untimely issuance of the Award

62. We turn finally (with respect to Article 52(1)(d)) to the Republic's argument that the Tribunal seriously departed from a fundamental rule of procedure by its allegedly tardy issuance of the Award. The Republic argued initially that the Award, issued by the Tribunal on 17 December 2003, is a nullity because it was not issued within 60 days after the closure of proceedings in the case (as provided, it contended, by ICSID Arbitration Rule 46), which it maintains occurred at the end of the hearing on 23 July 2003 when the Tribunal stated "All right, well, we will wrap it up." The Republic admits, however, that correspondence of the Parties and the Tribunal on the merits of the case continued well into October 2003. CDC responds that the Tribunal did not violate Rule 46 because the version of those Rules that the Parties agreed would apply in the case allows 120 days plus an additional 60 days (at the election of the Tribunal) for issuance of the Award.[90] The Republic later conceded the applicability of the 120-day (plus 60 days) rule.[91]

63. The record indicates that there was no post-hearing formal closure of proceedings in this case. One reason might have been that to have done so following the preliminary hearing and prior to issuance of the Award, thereby foreclosing further proceedings, would itself have constituted a dispositive conclusion adverse to the Republic telegraphing the eventual Award. In the circumstances the proceedings must be regarded as having been closed only upon issuance of the Award, thereby eliminating this issue from further consideration.

64. Even accepting (for the purposes of argument only), however, the Republic's contention that the proceedings were closed at the end of the hearing, the Award was still timely issued. A total of 147 days passed from the conclusion of the preliminary hearing to the Tribunal issuing its Award. In our view, its conduct thus would fall squarely within the rule, which allows for 180 days in total for the issuance of an Award if the Tribunal is unable to do so in 120 days.[92]

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[90] Counter-Memorial, *supra* note 55, at 50-52 paras. 209-219.

[91] Reply to the Counter-Memorial in *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14 at 14-15 para. 57 (5 November 2004) ("Reply").

[92] ICSID Arbitration Rule 46 provides, in pertinent part, that "[t]he award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award." The Committee would not regard a

65. Even had the Tribunal erred in issuing the Award when it did, the Committee would see no basis for annulling the Award as a result. Specifically, the Republic was unable to communicate to the *ad hoc* Committee how it had been prejudiced by the allegedly impermissible delay. Therefore, we must conclude that annulment on this ground could not be appropriate.

D. Article 52(1)(e) – Failure to State Reasons

1. Failure to state reasons generally

66. Annulment under Article 52(1)(e) is permissible where a tribunal fails to state the reasons on which its award is based. This ground for annulment has been a cause of great concern to commentators since, unlike (b) and (d), it does not include any limiting terms such as "manifest," "serious" or "fundamental." Early on, *ad hoc* Committees interpreted this clause in such a way that it appeared to allow inquiry into the sufficiency or substance of the reasons offered. In *Klöckner I*, for example, the *ad hoc* Committee stated that it was bound to determine whether the reasons given by the Tribunal were "reasonably sustainable and capable of providing a basis for the decision."[93] Similarly, in *Amco Asia I* the *ad hoc* Committee held that its duty was to determine whether there was a "reasonable connection between the basis invoked by the tribunal and the conclusions reached by it."[94] As we have already noted, however, both of these decisions have been criticized as too closely resembling the work of appellate bodies and thus going beyond the ambit prescribed for *ad hoc* Committees.[95]

67. Later *ad hoc* Committees, beginning with the *MINE* Committee, have interpreted Article 52(1)(e) more restrictively. The *MINE* Committee was of the view that this provision of the Convention requires only that the reader of an award be able "to follow the reasoning

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Tribunal's failure expressly so to extend and to notify the parties of such extension as either a serious departure or one from a rule of procedure of a fundamental character.

[93] *Klöckner I*, *supra* note 35, at 139 para. 120.

[94] *Amco Asia I*, *supra* note 36, at 520 para. 43.

[95] Schreuer observes that "The formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal (see paras. 8-12 *supra*) becomes blurred." SCHREUER, THE ICSID CONVENTION, *supra* note 44, at 990. While the Decisions referred to have more frequently been criticized for wrongly basing annulment on excess of powers, some commentators have criticized their formulation of the standard of review to be employed under Article 52(1)(e). *See, e.g.*, *id.* at 992.

of the Tribunal on points of fact and law." Investigation into "the adequacy of the reasoning is not an appropriate standard of review ... 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."[96] Given this concern, the *MINE* Committee determined that "the requirement is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to the conclusion, even if it made an error of fact or of law."[97] The Committee did note, however, that "the minimum requirement is in particular not satisfied by either contradictory or frivolous reasons."[98]

68. The *Vivendi* Committee followed the lead of the Committee in *MINE* and interpreted Article 52(1)(e) as allowing for annulment where there is "a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons."[99]

69. Similarly, the *Wena Hotels* Committee stated that "[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."[100]

70. It thus appears that the more recent practice among *ad hoc* Committees is to apply Article 52(1)(e) in such a manner that the Committee does not intrude into the legal and factual decision-making of the Tribunal.[101] That is to say, Article 52(1)(e) requires that the

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[96] *MINE*, *supra* note 30, at 88 para. 5.08.

[97] *Id.* at 88 para. 5.09.

[98] *Id.*

[99] *Vivendi*, *supra* note 37, at 358 para. 64.

[100] *Wena Hotels*, *supra* note 38, at 146 para. 79.

[101] Some scholars have opined that some investigation into the Tribunal's factual findings may be appropriate where "the way in which the fact was found [] is at the centre of criticism" or where "the fact itself [] needs a fresh determination in order to decide whether a certain criticism is justified." P. Mayer, *To What Extent Can an* Ad Hoc *Committee Review the Factual Findings of an Arbitral Tribunal?* in ANNULMENT OF ICSID AWARDS 243, 244 (Emmanuel Gaillard and Yas Banifatemi eds. 2004). An example of the latter situation is where "a certain factual finding is so obviously wrong, considering the evidence adduced, that it shows an obvious lack of impartiality, which would constitute a serious departure from a fundamental rule of procedure." *Id.* (citing Peter D. Trooboff, *To What Extent May an* Ad Hoc *Committee Review the Factual Findings of an Arbitral Tribunal Based on a Procedural Error*, in ANNULMENT OF ICSID AWARDS 251 (Emmanuel Gaillard and Yas Banifatemi eds.

Tribunal have stated reasons, and that such reasons be coherent, *i.e.*, neither "contradictory" nor "frivolous," but does not provide us with the opportunity to opine on whether the Tribunal's analysis was correct or its reasoning persuasive. This conclusion is reinforced by reference to three other provisions of the Convention: Article 49(2), Article 50, and, as noted in the *MINE* decision, Article 53. As the Committee in *Wena Hotels* observed:

> when the reasons stated in the award give rise to doubts about its meaning, either party may request interpretation of the award under Article 50. In the case where the Tribunal omitted to decide on a question or where the award contains an error, either party may request the award be rectified, according [to] Article 49(2). These remedies confirm the understanding that any challenge as to the substance of reasons given in the award cannot be retained as a ground for annulment under Article 52(1).[102]

Similarly, Article 53 specifically disclaims the existence of a right to appeal in an ICSID case and, therefore, can be read as necessarily limiting the permissible scope of review by an *ad hoc* Committee in an annulment proceeding.

71. Later *ad hoc* Committees have also observed that the failure to answer all questions put to the Tribunal, while perhaps a violation of Article 48(3), does not necessitate annulment under Article 52(1)(e) unless "the failure to deal with a particular question rendered the award unintelligible."[103] This makes sense given the twin aims of finality and fairness.

72. In the instant case, the Republic argues that the Award merits annulment under Article 52(1)(e) for a number of reasons, including that it ignores relevant matters, considers irrelevant matters, is contradictory, and also arbitrary.[104] The Republic also contends that the

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2004)). An example of the former is where "the applicant claims that there was no arbitration clause and that by declaring that it had jurisdiction, the tribunal manifestly exceeded its powers." Mayer, *supra* at 244. Mayer concludes that a Committee "should limit its review to the evidence which was already before the tribunal" and "should not too easily come to the conclusion that the tribunal erred in its factual finding; it should use self-restraint." *Id.* at 249. Trooboff notes that the "ICSID Convention does not permit a party to argue that its claims have been ignored and that the grounds for annulment exist if the tribunal finds that the evidence submitted does not as a matter of law support that claim or defense." Trooboff, *supra* at 265. Here the Republic is attempting to do exactly that, however, and therefore should not be given "another opportunity to make the case it could have made but that the tribunal found had not been made as a matter of law." *Id.*

[102] *Wena Hotels*, *supra* note 38, at 146 para. 80.

[103] SCHREUER, THE ICSID CONVENTION, *supra* note 44, at 1001 paras. 308-309 (citing *MINE*, *supra* note 30, at 89 para. 5.13).

[104] *See*, *supra*, note 77.

Tribunal failed adequately to state reasons for its decision on costs. CDC responds to each of these contentions, concluding that the Republic's application is "in substance an appeal as to the substantive correctness of the Tribunal's reasons (as opposed to an investigation into their existence and sufficiency) ... However, Article 52(1)(e) does not provide the Republic, which is merely a dissatisfied party, with a free opportunity to launch an appeal into the merits of the Award."[105]

2. Alleged errors in the Tribunal's interpretation of clause 15(1) of the 1993 Loan Agreement

73. The Republic contends that the Tribunal's interpretation of clause 15(1) of the 1993 Loan Agreement dealing with payment of the £22,500 fee by the Republic to CDC "has taken into consideration irrelevant matters and failed to take into consideration relevant matters and [its] interpretation is so faulty that it does not come up to the standard of reasons that should be set out in an Award as contemplated by Article 52(2) [sic] and 48(3) of the ICSID Convention."[106] Clause 15(1) of the 1993 Loan Agreement provides as follows:

> By way of recompense for the time spent and expenses incurred by CDC in considering proposals for the Project and in negotiating the terms and conditions of this Agreement, the Borrower shall within thirty days after the date hereof or, if earlier, upon the making of the first advance by CDC hereunder pay to CDC twenty-two thousand five hundred pounds sterling (£22,500).

The Republic points to the phrase "considering proposals for the Project" in the clause, maintaining that it clearly creates the obligation on the part of CDC to conduct an appraisal of the project upon which the Republic was entitled to rely. This position is contrary to the Tribunal's decision that the Agreement created no such obligation. The Republic additionally objects to the Tribunal's conclusion that CDC had no duty to perform an appraisal of the project "*for the benefit of PUC or the Republic*," arguing that the identity of the beneficiary of the alleged obligation is irrelevant because the fact of the appraisal taken together with the granting of the loan created an "implied representation that the project as well as the product was suitable and viable for PUC." Finally with respect to clause 15(1), the Republic takes issue with the Tribunal's determination that the charging of a fee for expenses related to the loan was in keeping with the ordinary practice of lenders because, the

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[105] Counter-Memorial, *supra* note 55, at 74 para. 323.

[106] Memorial, *supra* note 57, at 29 para. 24. This argument has been addresses as well in part IV.B.2., *supra*, of this Decision.

Republic maintains, the fee was paid in consideration for the execution of an appraisal of the project. Nowhere in its discussion of this clause does the Republic cite to any authority indicating that erroneous conduct of the kind alleged against the Tribunal necessitates annulment of the Award.

74. CDC defends the Tribunal's Award, stating that the Republic is attempting to take issue with the Tribunal's interpretation, based on the evidence, of this clause's meaning, and does so by reading paragraph 50 of the Award out of context.[107] The Tribunal considered all relevant evidence, in CDC's opinion, before coming to the conclusion that, despite the Republic's contention otherwise, clause 15(1) deals with payment for expenses related to the loan transaction (and consideration of the project as a part of that loan transaction) and not for an appraisal of the suitability of the project for PUC's needs made for PUC's or the Republic's benefit. This factual determination by the Tribunal is thus, according to CDC's submission, not subject to review under Article 52(1)(e).

75. As noted above, Article 52(1)(e) simply requires that the Tribunal have stated its reasons in such a fashion that the parties are able to follow the reasoning to its conclusion, not that it state any particular reasons or that the reasons be convincing to the Committee. Thus, even if this Committee were to disagree with the Tribunal's legal conclusions, Article 52(1)(e) does not allow annulment on that basis alone.

76. We can find nothing in the Award with respect to clause 15(1) of the 1993 Loan Agreement that demonstrates a failure to state reasons such that annulment might be permissible. The Tribunal weighed the evidence (including the self-interested testimony of Mr. Morin and Mr. Chang-Leng) before making its determination. The reasons stated in the Award are not "contradictory or frivolous."

3. Alleged instances of contradiction, inconsistency, consideration of irrelevant matters and failure to consider relevant matters

77. The Republic objects to the Award's statement, in paragraph 50, that "there is a remarkable absence of evidence on the subject of CDC making an appraisal or feasibility study of the project ...."[108] The Republic contends that CDC admitted that it had appraised the project, and that the Tribunal ignored this evidence. With respect to this contention we are of the opinion that the Republic fails to appreciate the distinction, made by the Tribunal,

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[107] Counter-Memorial, *supra* note 55, at 60-63 paras. 259-271.

[108] Memorial, *supra* note 57, at 32, para. 26.

between an appraisal of the loan application (as a part of the loan-making decision process) and an appraisal of the project (to determine whether or not the project was suitable or viable for the needs of PUC and the Republic). In essence, the Tribunal decided that an appraisal of the project (to determine its viability and suitability for PUC's needs or those of the Republic) was a condition to the availability of the Republic's proffered defense that CDC represented that the project was, in fact, appropriate. Once this distinction is acknowledged (as it must be, given the standard of review), it is plain that the Tribunal's statements are consistent. The Tribunal did not ignore relevant evidence; it simply came to a conclusion, with which the Republic disagrees, about what the evidence means. The Tribunal's decision in this regard is not reviewable by this Committee under Article 52(1)(e) (or Article 52(1)(d) for that matter).

78. The Republic also contends that the Award's statement, in paragraph 48, that "there is [nothing] in the Clause [15(1)] or in the 1993 Loan Agreement to suggest that CDC was assuming the role of adviser, assessor or partner" was "absurd" because the relationship between the parties could only "be gathered from the antecedent relationship that existed" between them.[109] Thus the Tribunal considered irrelevant matters (the Loan Agreement) and ignored relevant matters (the antecedent relationship). Again, the Republic cites no authority for the proposition that such an alleged error necessitates annulment. CDC notes, with respect to this contention, that the Tribunal expressly did consider the antecedent relationship between CDC, on the one hand, and PUC and the Republic on the other (to the extent that any evidence of the relationship was in the record) as embodied in the 1990 Loan Agreement and Guarantee before concluding, based on all the evidence (including the testimony of Mr. Morin and Mr. Chang-Leng), that CDC was not an adviser, assessor, or partner in the project.[110]

79. We are unable to comprehend how the Tribunal's consideration of whether or not the 1993 Loan Agreement created a particular relationship between CDC and PUC (as a part of its inquiry into whether or not CDC was a partner, assessor, or adviser to PUC with respect to the project) can be criticized as being an unreasoned decision. The Republic raised the issue of the relationship between CDC and PUC, so it was reasonable (and necessary given the requirement of Article 48(3)) for the Tribunal to consider whether that alleged relationship

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[109] *Id.* at 33 para. 27.

[110] Counter-Memorial, *supra* note 55, at 68 paras. 296-300.

was created by contract or by the prior interactions of the parties. Having considered all the evidence, the Tribunal determined that the relationship between CDC and PUC and the Republic was only that incident to a normal loan transaction. This conclusion does not indicate a lack of deliberation and the Tribunal's statement of reasons in respect to this issue was easily comprehensible and therefore legally sufficient under Article 52(1)(e).

80. We turn now to the Republic's allegation that the Award contradicted itself, in paragraph 57, by stating first that "[t]he Republic then relied upon that assumed favourable assessment in proceeding with the project" and later that "the evidence does not establish ... that PUC or the Republic was relying on CDC's appraisal for their own purposes."[111] CDC responds that any lack of clarity in this portion of the Award results not from a contradictory statement but simply a "drafting oversight."[112] As CDC interprets the Award, the allegedly contradictory portion of the Award should read as follows: "[T]he evidence does not establish that such a representation was ever made or that *CDC was aware that* PUC or the Republic was relying on CDC's appraisal for their own purposes." CDC's position is that the inclusion of the phrase "CDC was aware that" eliminates any potential contradiction and makes the latter part of the paragraph consistent with the first sentence, which discusses the situation where "the lender makes a representation to the borrower that the appraisal shows that the proposed transaction is viable and suitable for the borrower or *it appears that the lender is aware that the borrower is relying on the vendor's appraisal for its own purposes.*"[113]

81. We believe that the allegedly contradictory statements are in fact not so when read in context. The first statement, at paragraph 51 of the Award, *i.e.*, that "The Republic then relied upon that assumed favourable assessment," refers to CDC's own "favourable assessment *of the loan"* recorded in the previous sentence, and *not* "of a *project* for the benefit of the borrower" (paragraph 52) (emphasis added). Paragraph 57, then, in stating that "the evidence does not establish ... that PUC or the Republic was relying on CDC's approval for their own purposes," seen in this context, is a finding that the evidence before the Tribunal did not, in its assessment thereof, support a conclusion that any such reliance was justified in the sense of giving rise to a liability on the part of CDC. In construing awards, as

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[111] Memorial, *supra* note 57, at 33 para. 28.

[112] *Id.* at 70-71 paras. 309-314.

[113] Award, *supra* note 1, at para. 57 (emphasis added).

in construing statutes and legal instruments generally, one necessarily should construe the language in issue, whenever possible, in a way that results in consistency, which seems perfectly possible here.

82. Next, the Republic takes issue with the Award's allegedly contradictory statements, in paragraph 38, first that the Republic's witness, Mr. Morin, "did not know whether CDC made an appraisal or not," and later that Mr. Morin testified that CDC "were conducting their own assessment of the project" and that "if CDC had not done an appraisal of the project, PUC would not have bought the turbine from EGT."[114] CDC responds that the Tribunal's comments were not contradictory because Mr. Morin, in fact, testified initially that he thought CDC would appraise the project because the 1993 Loan Agreement said they would (although the Tribunal disagreed with Mr. Morin's interpretation of the Loan Agreement) but later admitted that he never received confirmation of this supposition nor saw an appraisal prepared by CDC.

83. Throughout the Republic's Memorial there seems to be some confusion about the difference between evidence offered to the Tribunal and conclusions about that evidence reached by the Tribunal after full consideration. We believe this to be one of those situations. The Republic believes that the Award is inconsistent because it states that there was evidence (Mr. Morin's testimony) that CDC "were conducting their own assessment of the project" but later also states that Mr. Morin did not *know* whether CDC conducted the assessment or not. The Award is consistent; it was Mr. Morin's testimony that was inconsistent. The Tribunal simply and appropriately concluded based on all of the evidence (Mr. Morin's testimony that he thought CDC would appraise the project based on the 1993 Agreement, the fact that the loan was granted, and his admission that he in fact never received any appraisal or knew of the conclusions of any such appraisal) that Mr. Morin did not truly know whether or not CDC had conducted an appraisal of the project. This conclusion is consistent with the evidence and is therefore not an example of the Tribunal failing to state reasons (or failing to deliberate or manifestly exceeding its powers).

84. The Republic complains next that the Award contradicts itself, in paragraph 54, by noting that "there was no evidence of CDC's awareness of [the Republic's] reliance," given Mr. Morin's testimony that CDC knew of PUC's reliance because PUC had always relied in

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[114] Memorial, *supra* note 57, at 34 para. 29.

the past on CDC's expertise.[115] Also, the Republic contends that the Award erred in stating that "[i]t was not suggested that it was other than a loan transaction," when the Award acknowledged testimony from Mr. Chang-Leng that he "regarded the relationship between the Republic and CDC as one of partnership in relation to the two projects and as one to be distinguished from the ordinary relationship between a borrower and a bank." CDC responds to these arguments by stating that the Tribunal did not ignore any evidence, but rather simply came to a conclusion, based on all of the evidence, that was different from the Republic's.

85. As noted above there is a distinction between evidence and findings of fact based on that evidence. It appears that the Tribunal considered the self-interested testimony of Mr. Morin and Mr. Chang-Leng (which latter, with respect to whether CDC knew of PUC's asserted reliance, was speculative and offered without personal knowledge) before concluding that CDC was unaware of any reliance by PUC on its alleged appraisal of the project and that the antecedent relationship between the Parties as embodied in the 1990 Loan Agreement was consistent with that of an ordinary loan transaction. The Award is thus not contradictory.

86. Finally, the Republic contends that because the "uncontroverted" evidence was that CDC did know of the Republic's reliance on its expertise, the Tribunal erred in not finding the existence of a duty of care owed by CDC.[116] Again, the Republic fails to recognize the distinction between offering evidence and meeting the burden of proof.[117] The only evidence that CDC knew of the Republic's reliance was the self-interested testimony of Mr. Morin. Mr. Morin admittedly had no personal knowledge of the facts to which he testified, however. After considering this fact as well as the relevant documentary evidence, the Tribunal determined that there was a failure of proof on this point and thus found, based on all of the evidence, that CDC did not know of the Republic's asserted reliance. The Tribunal did not ignore relevant evidence. Rather, the Tribunal considered the evidence, came to a non-

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[115] *Id.* at 34-35 para. 30.

[116] *Id.* at 35-37 para. 31.

[117] This distinction is discussed in BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 329 (1987):

> Burden of proof, however closely related to duty to produce evidence, ... implies something more. It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want or insufficiency or proof.

contradictory conclusion with respect to that evidence, and logically stated the reasons for its conclusion.

4. Alleged failure to state reasons with respect to costs

87. The Republic takes issue with what it regards as the Tribunal's failure to state reasons for its Award of costs to CDC. Here it must be said that quite commonly reasoned awards do not extend their reasoning to the area of costs. It therefore may be doubted whether Article 52(1)(e) was intended to embrace such an issue. Assuming *arguendo*, that it does, however, we reject the idea that annulment is either permissible or appropriate on this point. It is clear from paragraph 63 of the Award that CDC was awarded about 80 percent of its demand over the unparticularized objections of the Republic. Thus the Award in this respect "speaks for itself." Moreover, it would be impossible to conclude, based on all the circumstances, that the result was affected by any failure to state reasons, in which event annulment, even if permissible, would not be appropriate.

V. COSTS

88. CDC seeks to recover its costs and expenses, which total £83,345.61 (of which £79,911.35 represents fees). While claiming costs itself, and denying any entitlement of CDC to costs as a general matter, the Republic has not commented specifically on the amount of costs claimed by CDC although it was given an opportunity to do so. This is perhaps not surprising in light of the fact that its own request was for an award of £140,000 in costs (of which £125,000 represents the claimed value of the time of the Attorney General and his staff), or a sum 68 percent higher. Both parties claim also all of the costs of ICSID and the Committee.

89. With respect to this request we find ourselves in a difficult position. On the one hand, we are not insensitive to the fiscal circumstances of the Republic, which, as the Republic itself has described them in these proceedings, can be summarized as impecunious. On the other hand, however, we must be mindful of our determination, founded upon careful consideration of all arguments advanced by the parties in this proceeding, that the Republic's case before this Committee was fundamentally lacking in merit. While we refrain from going so far as to say that it was frivolous, we can state unequivocally that, taking into account the presumption of finality in ICSID arbitration and the restrictive grounds of challenge available in the annulment process, the Republic's case was, to any reasonable and impartial observer, most unlikely to succeed.

90. The *ad hoc* Committee in *Vivendi* decided that each of the parties should bear its own costs and expenses and its own share of ICSID's expenses because "the dispute raised 'a set of novel and complex issues not previously addressed in international arbitral precedent.'"[118] The Committee also observed that "both parties had prevailed to some extent." We are not faced with the same or even remotely similar circumstances. We therefore are, in the end, compelled to require that CDC receive the total amount of its claimed costs and expenses (which the Committee does not find unreasonable in the circumstances) and that the Republic bear the entirety of the costs of ICSID and the Committee, as well as its own costs and expenses.

VI. DECISION

91. For the foregoing reasons, the Committee DECIDES:

(1) The Tribunal committed no annullable errors in arriving at its Award and the Republic's Application therefore is dismissed.

(2) The Republic shall pay to CDC, in addition to the amounts due under the Award, EIGHTY-THREE THOUSAND THREE HUNDRED FORTY-FIVE BRITISH POUNDS STERLING AND SIXTY-ONE PENCE (£83,345.61) for CDC's legal expenses and costs incurred in connection with this annulment proceeding.

(3) The Republic shall bear the full costs and expenses incurred by ICSID in connection with this annulment proceeding.

Judge Charles N. Brower
President

Mr. Michael Hwang, SC
Arbitrator

Mr. David A.R. Williams, QC
Arbitrator

Date: 27 June 2005

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[118] *Vivendi*, *supra* note 37, at 45 para. 117.