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NEWS: AD HOC COMMITTEE CONFIRMS ARGENTINA IS ON THE HOOK TO AZURIX FOR US\$165 MILLION

By Elizabeth Whitsitt

Marking a final setback for Argentina in its protracted dispute with US-based water services firm Azurix Corp, on 1 September 2009 an ad hoc committee denied Argentina's application to annul an ICSID tribunal's previous decision awarding Azurix approximately US\$165 Million for breach of Argentina's obligations under the US-Argentina Bilateral Investment Treaty.

Problems between the US-based firm and Argentina began almost a decade ago when Azurix acquired the exclusive right to operate a water and sewage utility concession in the Argentine Province of Buenos Aires for a 30 year period. Less than a year after commencing operations in Argentina, concerns over water quality linked to the presence of algae was raised. As a result, the Province's water regulator ordered Azurix not to charge customers for water for a number of weeks in 2000 and to pay for its failure to maintain certain water-quality standards.

In response, Azurix denied liability and claimed that the conditions resulting in the algae outbreak predated its acquisition of the Concession. Specifically, Azurix alleged that liability lay with the provincial authorities who improperly constructed and maintained the water treatment system required for algae removal.

Subsequently, Azurix commenced arbitral proceedings against Argentina based upon the alleged violation of several articles of the US-Argentine

BIT. In its claim, Azurix contended that: (i) Argentina's treatment of Azurix's investment was tantamount to expropriation, (ii) Argentina failed to provide fair and equitable treatment, and full protection and security to Azurix's investment, and

"The committee confirmed that the standard of review applicable to all of Argentina's arguments is very high, thus making successful annulment applications under the ICSID Convention extremely rare."

(iii) Argentina did not observe the obligations that it had entered into with respect to Azurix's investment, had acted arbitrarily, and did not act transparently.

On 14 July 2006 the ICSID Tribunal unanimously found Argentina liable to Azurix on the basis of the latter two grounds.

Five months later, Argentina sought to annul that award. Under subparagraphs (a), (b), (d) and (e) of Article 52(1) of the ICSID Convention, Argentina identified numerous matters which it claimed were

NEWS: ORAL HEARINGS HELD IN NAFTA ARBITRATION OVER CANADIAN PESTICIDE BAN

By Fernando Cabrera Diaz

Chemtura Corporation's dispute with Canada over the phase-out of the agro-chemical Lindane headed to oral hearings in September after 8 years of legal wrangling.

Chemtura, a U.S.-based chemical manufacturer, claims that Canada violated Chapter 11 of the North American Free Trade Agreement (NAFTA) when it banned Lindane in response to alleged pressure from the United States. Canada, meanwhile, contends that the ban was made to protect the environment and public health, and was based on scientific evidence.

The dispute has its origins in a 1999 agreement between Chemtura's wholly owned Canadian subsidiary, Crompton, and the Canadian Pest Management Regulatory Agency (PMRA). Under the agreement, Crompton agreed to phase-out the use of Lindane in canola seed pesticides by July 2001, while the PMRA was to review the scientific evidence on the safety of the chemical and provide a scientific assessment of the product.

In its written filings, Chemtura argues that its subsidiary and other Lindane producers in Canada were pressured to sign these "voluntary" agreements by the PMRA. The PMRA, in turn, was under pressure from the United States, whose canola farmers were seen to be at a disadvantage because Lindane was not registered for use on canola in that country, according to Chemtura.

Chemtura claims it believed the PMRA's scientific review of Lindane would ultimately reveal the product as safe for use in canola and, as such, expected the phase-out would not be completed. However, the PMRA's review determined that Lindane was unsafe and banned it for all uses.

Chemtura insists that this decision lacked a sufficient scientific basis,

and was instead inspired by a desire to resolve the potential trade dispute between Canada and the United States. According to Chemtura, the United States and Canada ultimately struck a deal that included the cessation of manufacturing and sales of Lindane-based seed treatment products in Canada.

"At the end of the day, Chemtura seeks to hold the PMRA responsible for the fact that it can no longer profit from the sale of a toxic chemical that has been internationally banned based on demonstrated health and environmental concerns' concludes Canada's counter memorial."

Furthermore, Chemtura claims the "PMRA significantly delayed the registration of Crompton Canada's replacement product (Gaucho CS FL) to such an extent that Crompton essentially lost all of its canola seed treatment business," while the agency fast-tracked a Swiss competitor's product.

Chemtura says it was forced to go to court to compel the Canadian Minister of Health to call for an independent review of the PMRA's decision. The Review Panel concluded in August of 2005 that "PMRA's process leading to the Assessment and its conclusions therein were highly flawed and recommended that the PMRA re-evaluate Lindane properly in accordance with the Review Board's recommendations," says the company.

Based on these alleged acts, Chemtura accuses Canada of breaching several NAFTA Chapter 11 obligations, including those related to Minimum Standard of Treatment, Most-Favored Nation Treatment and Expropriation. The company seeks in excess of US\$83 million.

In its defence, Canada argues that Chemtura itself was responsible for informing U.S. authorities in September of 1997 that Lindane-treated canola products were being imported from Canada, despite the ban on Lindane in the United States. According to Canada, Chemtura did this in order to increase the market for its Lindane alternative, Gaucho.

In response, the U.S. Environmental Protection Agency (EPA) moved quickly to announce that imports of Canadian canola would stop effective June 1998. With the threat of losing their biggest market, Canadian canola producers urged the 4 Lindane pesticide manufacturers to agree to voluntarily phase-out the use of the chemical in order to convince the U.S. to postpone its border action.

According to Canada, all 4 Lindane producers including Chemtura agreed to the voluntary phase-outs, due to the threatened U.S. border closure.

Following these events, the PMRA conducted a Special Review of Lindane, which determined in 2001 that the continued use of the chemical was unacceptable. The PMRA then offered 3-year phase-outs of the chemical to the 4 manufacturers and all accepted, except Chemtura, which lost its registration in February of 2002 as a result.

According to Canada, the subsequent Review Panel of the PMRA decision concluded that the agency acted within "scientifically acceptable parameters", although it urged further consultation

NEWS: ADVOCATE GENERAL RENDERS OPINION ON FINLAND'S INVESTMENT TREATIES WITH NON-EU COUNTRIES; SWEDEN BEGINS COMPLIANCE WITH EARLIER ECJ DECISION

By Damon Vis-Dunbar

An Advocate General of the European Court of Justice (ECJ) has opined that some of Finland's bilateral investment treaties (BITs) with non-European countries are incompatible with European Community (EC) law. The opinion comes six months after the ECJ rendered a decision with respect to a number of Sweden's and Austria's BITs.

"Finland, along with Sweden, Austria and a number of other EU countries that intervened, maintain that the Commission's concern is hypothetical until the point that the European Council decides to restrict capital flows"

An opinion of an Advocate General provides guidance but is not binding on the full court. An ECJ ruling could still be several months away.

The case against Finland—as with Sweden and Austria—was led by the European Commission, which argues that BIT clauses that protect non-European investors' freedom to transfer investment-related capital out of the EU are incompatible with the European Council's legal right to restrict capital transfers in exceptional circumstances.

Finland, along with Sweden, Austria and a number of other EU countries that intervened, maintain that the Commission's concern is hypothetical until the point that the European Council decides to restrict capital flows. In the judgment involving Sweden and Austria, this line of argument was dismissed by the ECJ, which stressed that the European Council must be able

to act immediately to restrict capital flows if deemed necessary. That opinion has been affirmed by an advocate general in the case against Finland.

But Finland also introduced a new argument, which hinged on the following clause in Finland's BITs:

"Every contracting party guarantees under all circumstances, within the limits authorised by its own laws and decrees and in conformity with international law, a reasonable and appropriate treatment of investments made by citizens or companies of the other contracting party."

Finland argued that the "limits authorised by its own laws and decrees" includes the constraints set by European Community law, given that EC law forms an integral part of its domestic law. As such, Finland maintained that its treaties protect the right of the European Council to intervene to restrict capital flows.

However, the ECJ Advocate General countered that Finland could not guarantee that an arbitral tribunal would agree with this line of thinking. "The mere possibility that an international court or an arbitral tribunal might interpret the contested clause in that way does not suffice to discharge Finland's obligations," writes the ECJ Advocate General, Eleanor Sharpston.

Having arrived at the conclusion that BIT clauses that guarantee free movement of capital are incompatible with European Community law, the opinion recommends Finland "to take all appropriate steps to eliminate the incompatibilities ..." Similar instructions were left with Sweden and Austria, in the March 3rd ruling involving certain of their bilateral investment treaties.

The Swedish Ministry of Foreign Affairs tells ITN that it is working with its treaty partners to insert new text on capital transfers into the relevant bilateral investment treaties. Repeated queries to the Austrian Ministry of Finance, asking whether it was taking steps to address the ECJ judgment, were not returned.

The ECJ cases involving Austria, Sweden and Finland mark just one point of tension between the European Commission and EU member states over international investment agreements. While the ECJ cases center on BITs between EU member states and non-European countries, the Commission has also raised concern over the 150 or so BITs that exist between European countries.

A central concern of the Commission stems from the fact that BITs allow investors to settle disputes through international arbitration, rather than through domestic courts or the ECJ. The Commission warned in 2006: "This could lead to BIT arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States a possible outcome."

However, according to a recent memo from the EU's Economic and Financial Committee (EFC), most EU countries do not share this concern. After consulting with member states, the EFC concluded that the "clear majority of Member States preferred to maintain the existing agreements."

Correction: The original version of this article indicated that the ECJ had rendered a decision in the case Finland. In fact, an Advocate General has issued an opinion, which is not binding on the Court. The article has been revised accordingly.

NEWS: CLAIM BY CARGILL LEADS TO ANOTHER LOSS FOR MEXICO

By Elizabeth Whitsitt

Mexico has suffered another loss in a series of investor-state arbitral disputes involving its sugar industry. While attempts have been made by Mexico to consolidate similar cases involving its sugar trade, such efforts have been unsuccessful resulting in a number of separate arbitral decisions.

Most recently, a tribunal convened pursuant to a request for arbitration commenced under the ICSID Additional Facility Rules has found Mexico liable to an American company, Cargill Incorporated and its wholly-owned Mexican subsidiary, Cargill de Mexico S.A. de C.V., for violating several provisions of NAFTA.

Initiated some four years ago, Cargill's claim centered on a 20% tax Mexico imposed on any drink which used High Fructose Corn Syrup (HFCS) as a sweetener. As the HFCS tax was not imposed on beverages that used sweeteners made from sugar cane, Cargill argued that the imposition of the tax, whether considered in isolation or viewed as a series of discriminatory acts, eliminated the most significant market for HFCS produced by Cargill and distributed by Cargill Mexico. In addition, Cargill asserted that the HFCS tax substantially destroyed the value of its investments in the HFCS production and distribution built to serve the Mexican market.

On 18 September 2009 the Tribunal sided with Cargill, awarding it US\$77.3 million in damages plus interest and costs: the largest damages award issued to a successful claimant in a NAFTA Chapter 11 dispute to date.

The details of the tribunal's decision in this dispute are not yet public, and it is uncertain whether Mexico or Cargill will try to set aside the award or pursue other available remedies. It is also not certain how this decision in reasons as well as results accords with the other arbitral decisions relating to Mexico's sugar industry.

NEWS: ORAL ARGUMENTS HELD IN ICJ DISPUTE OVER PULP MILLS ON THE RIVER URUGUAY

By Fernando Cabrera Diaz

Oral arguments have been held at the International Court of Justice (ICJ) in the dispute between Argentina and Uruguay over the latter's authorization of paper mills on their shared River Uruguay. As per its custom, the ICJ released daily transcripts of the hearings which took place between 14 September and 2 October at The Hague.

The dispute centers on two pulp mills that Uruguay authorized in 2003 and 2005 to be built on its side of the River Uruguay, which forms part of the border between the two nations.

The pulp mill projects are intensely unpopular in Argentina, and on several occasions Argentinean protesters blockaded the important General San Martin Bridge joining the two countries, crippling two-way trade. The protests caused Spanish company ENCE to scrap its plans to build one of the two mills in 2006; however, Finnish company Oy Metsä-Botnia AB constructed the second mill, which it began operating in 2007.

Uruguay insists that it could be liable for damages under the Finland-Uruguay bilateral investment treaty if it shut down the Botnia project,

"The pulp mill projects are intensely unpopular in Argentina, and on several occasions Argentinean protesters blockaded the important General San Martin Bridge joining the two countries, crippling two-way trade."

according to press reports. Argentina opposes the mills on the grounds that they threaten the health of the river in violation of the Statute of the River Uruguay, a 1975 bilateral agreement governing the river's management. After repeated attempts

to resolve the dispute, including a failed mediation by Spain's King Juan Carlos, Argentina took Uruguay to the ICJ in May of 2006.

In her opening (September 14th) remarks to the ICJ on behalf of Argentina, Ms. Susana Ruiz Cerutti argued that the Statute of the River Uruguay requires that both sides inform each other, consult and ultimately make decisions by mutual agreement in regards to any work that is likely to cause damage to water quality, or the environment of the river and the areas affected by it.

Ms. Ruiz told the court that Uruguay authorized the construction of the ENCE pulp mill without properly notifying Argentina or the bilateral agency (CARU) charged with administering the Statute of the River Uruguay in "flagrant violation" of the Statute. Uruguay aggravated the situation in February 2005 when it again unilaterally authorized

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construction of the Botnia mill without proper notification, she added.

The result, according to Ms. Ruiz, is the largest pulp mill in the history of the river being placed near one of the most populated areas of the river, where it discharges large amounts pollutants into the water and air.

On the following day, Argentina's expert, Philippe Sands QC, a Professor of International Law at the University College London, summarized Argentina's view, saying:

"Argentina would like to be absolutely clear on one point: it has no a priori objection to a pulp mill as such and would almost certainly not have objected if the plant were located in a place where liquid effluents would be easily diluted and dispersed and air emissions would not interfere with daily life on Argentine territory. Argentina objects to the siting (sic) and operation of this plant at this location, since it is these waters and this environment that cannot cope with this kind of pollution at these levels."

Other Argentinean experts presented evidence suggesting that the Botnia mill was indeed polluting the river with toxic substances including dioxins, Lindane and nonylphenols, and that it had caused a rapid increase in the river's algae content in February.

Uruguay began its oral arguments on September 21, with Mr. Carlos Gianelli, Uruguay's Ambassador to the United States, telling the court that "because of its much larger territory, population, agriculture and industry, it is Argentina not Uruguay that makes by far the greatest use of the Uruguay river with its related environmental consequences."

According to Mr. Gianelli, independent environmental consultants hired by the International Finance Corporation, which help finance the Botnia mill, clearly established that the mill is operating to the highest international standards, and that it is not polluting the river.

With respect to Argentina's claims regarding a lack of a consultation by Uruguay, Mr. Gianelli responded that his country had in fact provided Argentina with massive amounts of information before any construction began, and that both sides met 12 times over a six-month period between 2005 and 2006.

In response to Argentina's specific pollution claims, Mr. Gianelli told the Court that the Lindane and nonylphenols found in the river were in fact a product of Argentina's farming and industry, rather than the Botnia mill, which did not use these chemicals (Uruguay banned Lindane over 20 years ago). He said that although dioxins were used in older pulp mills, new mills such as the Botnia plant no longer used them, which tests of the Botnia mill's effluent confirmed. Finally, Mr. Gianelli argued that the algal bloom was a normal event and had developed well upstream of the Botnia plant.

After hearings are completed on October 2, the ICJ will begin its deliberations. A decision may not be rendered until early next year.

As reported previously by ITN, Uruguay had asked the ICJ for provisional measures to require that Argentina "...take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between..." the two countries in response to protests and blockades erected by Argentinean protestors which were and continue to disrupt two-way trade. In January of 2007, the ICJ rejected that request finding that the protests posed no imminent risk of irreparable harm to Uruguay's rights.

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with the registrants, and ordered the PMRA to reconsider ways besides a ban to lower exposure. The PMRA did this by doing a second review between 2005 and 2008, which took into account the Review Panel's concerns, but reached the same conclusions, says Canada.

"At the end of the day, Chemtura seeks to hold the PMRA responsible for the fact that it can no longer profit from the sale of a toxic chemical that has been internationally banned based on demonstrated health and environmental concerns" concludes Canada's counter memorial.

NEWS: CLAIM BY TURKISH INVESTOR AGAINST PAKISTAN OVER HIGHWAY PROJECT DISMISSED ON THE MERITS

By Damon Vis-Dunbar

A claim by a Turkish investor against Pakistan has been dismissed on its merits after the Tribunal concluded that Pakistani government officials did not conspire in bad faith to expel the investor.

The Claimant, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S., was contracted to build a six-lane motorway between Islamabad and Peshawar by the National Highway Authority (NHA), an agency of the Pakistani government. But the project was marred over the course of 8 years by disagreement over delays in the construction schedule.

Bayinder blamed these delays on factors outside of its control, such as a lack of available land, while an independent engineer overseeing the project owed the slow progress to Bayinder's failure to invest sufficiently in equipment.

The dispute came to a head in 2001, when the NHA terminated its contract with the Turkish firm and the Pakistani army secured Bayinder's work site.

Bayinder initially responded by threatening arbitration under the contract, but in 2002 elected instead to settle the dispute under the Pakistan-Turkey Bilateral Investment Treaty. Bayinder claims that Pakistan breached a number of obligations, including the duty to provide fair and equitable treatment, Most Favoured Nation and National Treatment, and to provide compensation in the case of expropriation.

Bayinder's fair and equitable treatment (FET) claim faced a preliminary hurdle, due to the fact

that the Pakistan-Turkey BIT does not contain its own provision on FET. As such, Bayinder argued that a FET obligation could be imported from the numerous other Pakistani

"Bayinder blamed these delays on factors outside of its control, such as a lack of available land, while an independent engineer overseeing the project owed the slow progress to Bayinder's failure to invest sufficiently in equipment."

bilateral investment treaties that do contain FET clauses, on the grounds that it was owed such treatment under the Most Favoured Nation obligation.

Bayinder bolstered its argument by pointing to the preamble of the Pakistan-Turkey BIT, which states that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources."

While the Tribunal considered that the preamble did not establish an effective FET obligation, it took it as a signal that Pakistan and Turkey contemplated the importance of FET. Moreover, the Tribunal noted that the Pakistan-Turkey BIT does not explicitly prevent the MFN provision from applying to more favourable substantive standards of treatment

found in Pakistan's other BITs.

In the view of the Tribunal, the ordinary meaning of the MFN clause, combined with the language of the preamble, weakened Pakistan's argument that the lack of a FET clause in the Pakistan-Turkey BIT was an intentional decision. The Tribunal, therefore, permitted the use of the FET provision in the Pakistan-Switzerland BIT: a treaty signed a few months after to Pakistan-Turkey BIT.

Having determined that Bayinder could import an FET clause from another BIT, the Tribunal would go on to conclude that Pakistan had not treated Bayinder unfairly or inequitably.

Bayinder complained that its highway project was unpopular with General Pervez Musharraf's administration, prompting a government conspiracy to expel the Turkish investor.

However, Bayinder failed to convince the Tribunal that its dispute was more than a contractual disagreement with the NHS. After surveying the evidence, the Tribunal concluded that Bayinder had not demonstrated that the Pakistani government acted in bad faith; rather, the evidence suggested that Pakistan had reasonable concerns over Bayinder's performance, and the NHA's decision to terminate the contract was an entitled response.

The Tribunal also went on the dismiss Bayinder's other claims against Pakistan. Regarding the breach of National Treatment, Bayinder argued that it was expelled so that the highway project could be handed to local contractors on more favourable terms. However,

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NEWS: CHEVRON CLAIMS DENIAL OF JUSTICE IN INVESTMENT-TREATY CLAIMS AGAINST ECUADOR

By Damon Vis-Dunbar

The world's second largest oil company, Chevron Corporation, has served the government of Ecuador with a notice of arbitration for alleged breaches of United States-Ecuador bilateral investment treaty.

“Chevron’s claim relates to a multi-billion dollar lawsuit lodged in an Ecuadorian court, in which Ecuadorian citizens seek compensation for health and environmental harm in connection with oil-drilling in the Amazon.”

Chevron’s claim is in reaction to a multi-billion dollar lawsuit lodged in an Ecuadorian court, in which Ecuadorian citizens seek damages for health and environmental harm in connection with oil-drilling in the Amazon.

Since 1993, inhabitants of the Amazon have filed a number suits against Texaco, and then Chevron, claiming that the participation by its Ecuadorian subsidiary, TexPet, in exploration and production activities has left a legacy of cancer, birth defects, and miscarriages. Chevron inherited these claims when it bought Texaco in 2001.

In its defense, Chevron argues that it is released from liability under a series agreements from 1994-98, in which TexPet agreed to fund remediation in the affected areas of the Amazon. Chevron charges that Ecuador has colluded with the Ecuadorian plaintiffs, in breach of these agreements. The company also complains that it has been denied a fair trial by Ecuador’s courts.

In its notice of arbitration, dated 23 September 2009, Chevron alleges that Ecuador’s conduct amounts to numerous breaches of the U.S.-Ecuador BIT, including its obligations on fair and equitable treatment, national treatment, most favoured nation treatment, and the treaty’s umbrella clause.

Chevron has elected to arbitrate the dispute under the UNCITRAL rules of arbitration, and has already appointed its arbitrator: Horacio Grigera Naón, Director of the Center on International Commercial Arbitration at the American University’s Washington College of Law.

Previous ITN reporting:

“Chevron warns Ecuador on BIT claim as contract and environmental disputes persist”, By Damon Vis-Dunbar, July 26, 2006, available here: http://www.iisd.org/pdf/2006/itn_july26_2006.pdf

IN BRIEF: TELEFONICA AND ARGENTINA SETTLE DISPUT

The Spanish multinational Telefonica and Argentina have discontinued their arbitration at the International Centre for Settlement of Investment Disputes. The proceedings had been suspended since October 2006, as the parties worked towards a settlement agreement.

Telefonica initiated its claim in 2002, alleging breaches of the Spanish-Argentina Bilateral Investment Treaty. The Spanish firm held a multi-billion dollar stake in Argentina’s local phone company when in 2001 fixed line rates were frozen in response to the country’s financial crisis.

In recent years, the Spanish firm has seen a large boost in revenues outside of fixed-line telephone calls, particularly in the mobile phone market. Revenues in Argentina for the first half of 2009 totaled 1,332 million euros, according to Telefonica’s financial statements.

AD HOC COMMITTEE CONFIRMS ARGENTINA IS ON THE HOOK...

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grounds for annulment, relating to the Tribunal's jurisdictional findings, to its findings relating to the applicable law, to its consideration of evidence, to the constitution of the Tribunal, as well as to the Tribunal's calculation of the damages.

In considering those arguments the ad hoc committee was clear that "[a]n ICSID award is not subject to any appeal or to any other remedy except those provided for in the ICSID Convention." As a result, the ad hoc committee noted that it "is not a court of appeal, and cannot consider the substance of the dispute, but can only determine if the Tribunal's award should be annulled on one of the grounds delineated in Article 52(1) of the ICSID Convention."

Having so characterized its role, the ad hoc committee proceeded to reject all of Argentina's arguments for annulment. In so doing, the committee confirmed that the standard of review applicable to all of Argentina's arguments is very high, thus making successful annulment applications under the ICSID Convention extremely rare.

One example of the ad hoc committee's reasoning in this regard can be seen in its consideration of arguments raised by Argentina that the Tribunal was not properly constituted, within the meaning of Article 52(1)(a) of the ICSID Convention.

In earlier proceedings Argentina attempted to have Dr. Rigo Sureda, the President of the Tribunal, disqualified pursuant to Articles 57 and 14(1) of the ICSID Convention. Citing Dr. Rigo Sureda's relationship with a Houston law firm hired as counsel for foreign investors in other ICSID arbitrations, Argentina contended that Dr. Rigo Sureda was "immersed in various conflicts of interest" which "cast reasonable doubts on his impartiality." These arguments were rejected by the other two members of the Tribunal who determined that Argentina's application for disqualification failed on both procedural and substantive grounds.

In the subsequent annulment application, Argentina challenged this decision by contending that the Tribunal was not properly constituted, on account of the fact that "it was not possible for an objective observer to

be confident that [Dr. Rigo Sureda] could be relied upon 'to exercise independent judgment'". In rejecting Argentina's argument, the ad hoc committee notes that "Article 52(1)(a) cannot be interpreted as providing the parties with a de novo opportunity to challenge members of the tribunal after the tribunal has already given its award. A Committee would only be able to annul an award under Article 52(1)(a) if there had been a failure to comply properly with the procedure for challenging members of the tribunal set out in other provisions of the ICSID Convention."

Accordingly, a ground of annulment might exist under Article 52(1)(a) if an application for disqualification was made but not decided before an ICSID award was given, or if a decision on an application for disqualification was purportedly heard by a person or body other than an appropriate person or body prescribed by Article 58 of the ICSID Convention. Barring such manifest procedural errors, however, it seems clear that an ICSID tribunal decision is final and binding, not subject to further review pursuant to an annulment application.

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the Tribunal noted that the local contractors who took over the project did so in a different context from Bayinder. While the local contractors were given a more generous time allowance for completing the work, they were also offered different financial incentives, and had less experience with projects of this scope. As such, the local contractors could not be deemed to be in a "similar situation" to Bayinder.

Meanwhile, the claimed breach of the Most Favoured Nation obligation was dismissed for lack of evidence. Bayinder pointed to a press release from Pakistan's Minister of Communications, announcing that a large number of NHA projects were behind schedule, yet Bayinder was the only contractor subject to expulsion, which it characterized as evidence of discrimination. However, the Tribunal determined that Bayinder fell far short of the evidence required to substantiate an MFN claim, leaving it "in no position to proceed to any meaningful comparison between the different situations at issue."

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