

International Centre for Settlement of Investment Disputes

Washington, D.C.

(1) **AES SUMMIT GENERATION LIMITED**

(2) **AES-TISZA ERŐMŰ KFT.**

Applicants

v.

HUNGARY

Respondent

(ICSID Case No. ARB/07/22)

(Annulment Proceeding)

**DECISION OF THE *AD HOC* COMMITTEE ON THE
APPLICATION FOR ANNULMENT**

Members of the Committee

Professor Bernard Hanotiau, President

Professor Dr. Rolf Knieper, Co-Member

Judge Abdulqawi Ahmed Yusuf, Co-Member

Secretary to the Committee

Ms. Frauke Nitschke/Ms. Eloïse Obadia

Date of Dispatch to the Parties: 29 June 2012

Representing Applicants:

Mr. Stephen Jagusch
Mr. Anthony Sinclair
Mr. Jeffrey Sullivan
Ms. Orsolya Toth
Mr. Timothy Foden
Allen & Overy LLP

Representing Respondent:

Ms. Jean E. Kalicki
Mr. Dmitri Evseev
Ms. Mallory B. Silberman
Arnold & Porter LLP

and

Dr. János Katona
Law Office of János Katona

Table of Contents

I.	INTRODUCTION AND PROCEDURAL HISTORY	- 4 -
II.	PRELIMINARY REMARKS	- 6 -
III.	THE RELEVANT LEGAL STANDARDS	- 8 -
A.	Article 52(1)(b): Manifest Excess of Powers	- 8 -
	(a) Summary of the Parties' Positions	- 8 -
	(b) The <i>ad hoc</i> Committee's Analysis	- 11 -
B.	Article 52(1)(e): Failure to State Reasons	- 14 -
	(a) Summary of the Parties' Positions	- 14 -
	(b) The <i>ad hoc</i> Committee's Analysis	- 16 -
IV.	THE RELEVANCE OF AES'S PROFITABILITY	- 19 -
	(a) Summary of the Parties' Positions	- 19 -
	(b) The <i>ad hoc</i> Committee's Analysis	- 23 -
V.	AES'S LEGITIMATE EXPECTATIONS	- 26 -
	(a) Summary of the Parties' Positions	- 27 -
	(b) The <i>ad hoc</i> Committee's Analysis	- 30 -
VI.	DUE PROCESS	- 36 -
	(a) Summary of the Parties' Positions	- 37 -
	(b) The <i>ad hoc</i> Committee's Analysis	- 39 -
VII.	STABLE CONDITIONS	- 43 -
	(a) Summary of the Parties' Positions	- 43 -
	(b) The <i>ad hoc</i> Committee's Analysis	- 45 -
VIII.	LEGALITY UNDER HUNGARIAN AND EU LAW	- 47 -
	(a) Summary of the Parties' Positions	- 47 -
	(b) The <i>ad hoc</i> Committee's Analysis	- 49 -
IX.	COSTS	- 52 -
X.	DECISIONS	- 54 -

I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 19 January 2011, AES Summit Generation Limited and AES-Tisza Erőmű Kft. (together, the “Applicants” or “AES”) filed a timely application for annulment, pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention” or “Convention”), of the Award which was rendered on 23 September 2010 (the “Award”) in favour of Hungary (“Hungary” or “Respondent”) by an Arbitral Tribunal composed of Mr. Claus von Wobeser (President), Professor Brigitte Stern and J. William Rowley QC (the “Tribunal”).
2. The Award determined that the dispute between Applicants and Respondent (the “Parties”) related to an alleged violation by Respondent of its obligations under the Energy Charter Treaty (the “ECT”). Applicants’ original claim arose out of Hungary’s enactment of the 2006 Electricity Act Amendment, which provided for the re-introduction of regulated prices for electricity generators pursuant to two price decrees in December 2006 and February 2007 respectively. Administrative prices had been abolished as from 01 January 2004, pursuant to the Electricity Act 2001, prior to Hungary’s accession to the European Union. Specifically, Applicants alleged that Hungary violated its obligations under the ECT in the following respects: (i) breach of its obligation to provide fair and equitable treatment; (ii) impairment of AES’s investment by unreasonable and discriminatory measures; (iii) breach of its obligation to provide national treatment; (iv) breach of its obligation to provide most-favoured nation treatment; (v) breach of its obligation to provide constant protection and security; and (vi) expropriation.
3. Hungary did not question Applicants’ right to bring its claim to ICSID arbitration. In any case, the Tribunal found that it had jurisdiction over all the ECT claims brought in that arbitration, in accordance with the conditions contained in Article 25 of the ICSID Convention. The Tribunal found that Hungary had not breached Articles 10(1), 10(7) and 13 of the ECT, and dismissed all other claims. The Tribunal ordered the Parties to bear in equal shares the costs of the arbitration as well as their own costs and legal fees.

4. On 19 January 2011, Applicants filed the present Application for Annulment (the “Application” or “A-A”). The Application requests annulment of the Award in its entirety, under the grounds contained in Article 52(1)(b) (manifest excess of powers) and Article 52(1)(e) (failure to state reasons) of the ICSID Convention.
5. On 21 January 2011, the ICSID Secretariat confirmed receipt of electronic and hard copies of the Application on 19 January 2011 and 20 January 2011 respectively.
6. On 28 January 2011, the ICSID Secretariat registered the Application pursuant to Rule 50(2)(b) of the ICSID Rules of Procedure for Arbitration Proceedings (the “ICSID Arbitration Rules”), and informed the Parties accordingly.
7. On 21 March 2011, the ICSID Secretariat informed the Parties of the constitution of the *ad hoc* Committee comprising Professor Bernard Hanotiau (President), Professor Dr. Rolf Knieper and Judge Abdulqawi Ahmed Yusuf (the “*ad hoc* Committee” or “Committee”). On 22 March 2011, the ICSID Secretariat transmitted copies of the Committee Members’ signed declarations in accordance with Rules 53 and 6(2) of the ICSID Arbitration Rules.
8. On 11 May 2011, the First Session of the *ad hoc* Committee was held at the World Bank offices in Paris. During the First Session, various procedural matters were agreed between the Parties and the *ad hoc* Committee. The Parties agreed, *inter alia*, that the present proceedings would be governed by the 2006 ICSID Arbitration Rules and that they had no objection to the constitution of the *ad hoc* Committee as described above.¹ They also agreed on a provisional timetable. Applicants assured that their Application was to be considered as their Memorial on Annulment. Summary Minutes of the First Session were dispatched to the Parties by the ICSID Secretariat on 01 June 2011.

¹ See ¶ 7.

9. On 10 August 2011, Respondent filed its Counter-Memorial on Annulment (“Counter-Memorial on Annulment” or “A-CM”), together with accompanying exhibits and authorities.
10. On 19 October 2011, Applicants filed their Reply to Hungary’s Counter-Memorial on Annulment (“Reply on Annulment” or “A-Ry”), together with accompanying exhibits and authorities.
11. On 30 December 2011, Respondent filed its Rejoinder on Annulment (“Rejoinder on Annulment” or “A-Rj”), together with a single accompanying exhibit and a single accompanying authority.
12. By letter of 10 January 2012, the ICSID Secretariat invited the Parties to inform the *ad hoc* Committee of any joint proposal they would like to make with regard to the hearing’s agenda and related questions of procedure.
13. On 17 January 2012, the Parties submitted an agreed draft agenda for the hearing on annulment. The Parties also agreed that two days would be sufficient for the hearing, rather than three days, as previously proposed.
14. On 13 February 2012 and 14 February 2012, a hearing was held at the ICC Hearing Centre in Paris. The proceeding was closed on 14 June 2012 in accordance with ICSID Arbitration Rules 53 and 38(1).

II. PRELIMINARY REMARKS

15. As a preliminary matter, the Committee notes that the scope of its present task is limited to determining whether to annul either all or part of the Award, or to let the Award stand. As unambiguously expressed in Article 53 of the Convention, an award is not subject to an appeal. Annulment must therefore be different from appeal. It is well settled in international investment arbitration that an *ad hoc* committee may not substitute its own judgment on the merits for that of a tribunal. As such, the Committee has no competence to express any view on the substantive correctness of the Tribunal’s reasoning.

16. The grounds upon which annulment may be based are listed exhaustively in Article 52(1) of the ICSID Convention. In the present case, Applicants invoke two of these grounds, namely:
- (b) that the Tribunal has manifestly exceeded its powers;
 - and
 - (e) that the award has failed to state the reasons on which it is based.
17. The Committee is bound to interpret these terms of the Convention “in good faith in accordance with the ordinary meaning to be given to the terms ...in their context and in the light of its object and purpose”, as required by Article 31 of the Vienna Convention on the Law of Treaties of 1969. The text of the ICSID Convention is the result of long and profound debates. With respect to Articles 52 and 53 the drafters have taken great care to use terms which clearly express that annulment is an exhaustive, exceptional and narrowly circumscribed remedy and not an appeal. The interpretation of the terms must take this object and purpose into consideration and avoid an approach which would result in the qualification of a tribunal’s reasoning as deficient, superficial, sub-standard, wrong, bad or otherwise faulty, in other words, a re-assessment of the merits which is typical for an appeal. In this perspective, the ordinary meaning of a manifest excess of power is either an obvious transgression of a tribunal’s mandate or its obvious non-execution; and the ordinary meaning of a failure to state the reasons on which the decision is based is the absence of reasons or a presentation which is unintelligible in relation to the decision thus equating a lack of reasons.
18. In the analysis below, the Committee has not only considered the positions of the Parties as summarised in this Decision, but also the numerous detailed arguments made in their written submissions and at the hearing. To the extent that these arguments are not referred to expressly, they must be deemed to be subsumed in the Committee’s analysis.

III. THE RELEVANT LEGAL STANDARDS

A. Article 52(1)(b): Manifest Excess of Powers

19. Whilst the Parties do not disagree to a great extent regarding the applicable legal standard for annulment under Article 52(1)(b), nevertheless their submissions contain divergent emphases in various respects.

(a) Summary of the Parties' Positions

20. First, Applicants submit that the grounds for annulment under Article 52(1)(b) extend to instances where a tribunal has exceeded its jurisdiction both by exercising a power it does not have, and also by failing to decide claims that are properly before it.²

21. In support of this proposition, they cite passages from various annulment decisions. They refer, for instance, to the decision of the *ad hoc* committee in *Soufraki* which states that:³

The *manifest* and *consequential* non-exercise of one's full powers conferred or recognized in a tribunal's constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as the overstepping of the limits of that power.

22. Hungary, for its part, submits that very few cases have explored the "counterintuitive notion" that a tribunal may exceed its powers through a shortfall in the exercise of its jurisdiction, and that even if it is accepted in principle, its application should be narrowly circumscribed.⁴ Moreover, an award may only be annulled on these grounds where a tribunal has failed to decide a claim in its entirety, as opposed to mere "questions" or "arguments" in support of a claim.

² A-A, ¶ 95.

³ A-A, ¶ 97, referring to *Hussein Nuaman Soufraki v. U.A.E.*, Decision on Annulment, 5 June 2007, ¶ 43 ("*Soufraki*") (emphasis in original).

⁴ A-CM, ¶ 248.

23. Second, concerning the requirement that an excess of power be “manifest”, Applicants submit that the relevant criteria are that the excess of power be textually obvious and substantively serious. Again, they cite *Soufraki*:⁵

The Committee believes that a strict opposition between two different meanings of “manifest” – either obvious or serious – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.

24. Whilst Hungary does not dispute this definition, it nevertheless emphasises the limited scope of Article 52(1)(b) by citing the following passage from the annulment committee’s decision in *CDC*:⁶

As interpreted by various *ad hoc* Committees, the term “manifest” means clear or “self-evident”. Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal’s conduct, if susceptible of argument “one way or the other,” is not manifest. 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”.

25. Further, relying on the *Repsol* annulment decision, Hungary argues that an error is only manifest where the mistake is serious enough to “cast doubt on the legitimacy of proceedings”:⁷

Under Article 52(1) of the ICSID Convention, the Committee is empowered to annul awards containing manifest errors only when they are serious enough to cast doubt on the legitimacy of the proceedings.

⁵ A-A, ¶ 99, referring to *Soufraki*, ¶ 40.

⁶ *CDC Group plc. v. Republic of Seychelles*, Decision on Annulment, 29 June 2005, ¶ 41 (“*CDC*”), referring to *Wena Hotels v. Arab Republic of Egypt*, Decision on Annulment, 5 February 2002, ¶ 25 (“*Wena*”), and M.B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitration Awards*, 2 ICSID Rev. 85 (1987), p. 101.

⁷ *Repsol YPF Ecuador SA v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Decision on Annulment, 8 January 2007, ¶ 75 (“*Repsol*”).

26. Third, AES argues that grounds for annulment may exist under Article 52(1)(b) where a tribunal has disregarded the applicable law. However, it notes the decision of the *Enron* annulment committee, which states that:⁸

There is a distinction between *non-application* of the applicable law (which is a ground for annulment), and an *incorrect application* of the applicable law (which is not), although this is a distinction that may not always be easy to draw.

27. Hungary does not in principle contest AES's argument that grounds for annulment may exist where a tribunal has disregarded the applicable law. Hungary submits, however, that this can only be the case where a tribunal has disregarded the law agreed upon by the parties in its entirety. An award may not be annulled due to an incorrect application or interpretation of a body of law or a specific provision. In support of this, Hungary cites the recent decision of the *Duke Energy* annulment committee:⁹

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

28. Finally, Applicants qualify their stated standard by citing the first annulment decision in *Vivendi v. Argentina*, where it was found that a failure to exercise jurisdiction must be outcome-determinative. In other words, the manifest non-

⁸ A-A, ¶ 105, referring to *Enron Creditors Recovery Corporation (Formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, Decision on Annulment, 30 July 2010, ¶ 68 (“*Enron*”).

⁹ A-CM, ¶ 262, referring to *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, Decision on Annulment, 11 March 2011, ¶ 160 (“*Duke Energy*”).

exercise of jurisdiction must affect the outcome of the tribunal’s inquiry in order to justify annulment.¹⁰

29. Hungary, meanwhile, argues that an award cannot be annulled for having failed to decide such claims correctly. According to Hungary, a tribunal does not exceed its powers where its interpretation and conclusion are “tenable”, “adequately founded” or merely “the result of careful consideration”.¹¹

(b) The *ad hoc* Committee’s Analysis

30. The Committee shares the view put forward by Applicants in these proceedings, and noted by Professor Schreuer, that a tribunal may exceed its power by failing to exercise the jurisdiction which it possesses.¹² As also noted by Hungary and Professor Schreuer, however, this notion “relates to a deviation from the arbitration agreement and not to a quantitative concept of jurisdiction”.¹³ Whilst the precise boundaries of such a distinction may be difficult to discern, it is uncontroversial that such a non-exercise must be “manifest” in the sense of being somehow significant or consequential. Indeed, the Parties in the present case are in agreement that such a non-exercise must be “result-determinative”. This approach was confirmed, *inter alia*, by the *Soufraki* annulment committee in the passage cited by Applicants.¹⁴

¹⁰ A-A, ¶ 95, referring to *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, Decision on Annulment, 3 July 2002, ¶ 86 (“*Vivendi F*”).

¹¹ A-CM, ¶ 250, referring *inter alia* to: *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, Decision on Annulment, 3 May 1985, ¶ 52(b) (“*Klöckner I*”); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, Decision on Annulment, 23 December 2010, ¶ 112 (“*Fraport*”); *Duke Energy*, ¶ 99; *CMS Gas Transmission Company v. Argentine Republic*, Decision on Annulment, 25 September 2007, ¶ 85 (“*CMS*”); *Vivendi I*, ¶ 89.

¹² C.H. Schreuer, *The ICSID Convention: A Commentary*, (2nd Edition, 2009, Cambridge), p. 938 (“Schreuer”).

¹³ Schreuer, p. 947.

¹⁴ See ¶ 21.

31. Concerning the meaning of “manifest”, the Committee shares Professor Schreuer’s view that the term relates to the ease with which an excess of powers is perceived, rather than its gravity, and that such an excess must be able to “be discerned with little effort and without deeper analysis”.¹⁵ Such an approach is consistent with a manifest excess being one which is at once “textually obvious and substantively serious”.¹⁶
32. The Committee notes, however, that the practice of *ad hoc* committees is mixed as regards how to apply such a test. On the one hand, some committees have adopted a two-step approach: determining first whether there has been an excess of powers before going on to determine whether such excess was manifest. Others, on the other hand, have adopted a *prima facie* approach under which a summary examination is undertaken in order to ascertain if any alleged excess of powers was so egregious as to be manifest. To the extent these tests are not explicitly referred to, the Committee’s findings below should be understood in light of the application of both tests. As will be shown below, the Committee’s conclusions are in any case not dependent on such a distinction.
33. Further, the Committee notes that there is “widespread agreement that a failure to apply the proper law may amount to an excess of powers by the tribunal”,¹⁷ the underlying basis being that the issues put to a tribunal are circumscribed by the parties’ consent.¹⁸ The Committee takes note of the sparse yet well-known jurisprudence confirming this.¹⁹ However, the Committee again notes the importance of the distinction between *non-application* and mere *misapplication* of the applicable law. Whilst the precise boundaries of these concepts can be difficult

¹⁵ Schreuer, p. 938.

¹⁶ *Soufraki*, ¶ 40.

¹⁷ Schreuer, p. 955.

¹⁸ Schreuer, p. 958, referring to *Soufraki* ¶ 37.

¹⁹ For instance, *Maritime International Nominees Establishment v. Republic of Guinea*, Decision on Annulment, 14 December 1989 (“*MINE*”); *Klöckner I*.

to gauge, the Committee is mindful of the criticism that has been levelled against certain *ad hoc* committees for overstepping the line between annulment and appeal.²⁰ The prevailing, and correct, view in modern investment jurisprudence must be understood as setting a very high threshold. As put by the *Soufraki* annulment committee:²¹

Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law. Such gross and consequential misinterpretation or misapplication of the proper law which no reasonable person (“*bon père de famille*”) could accept needs to be distinguished from a simple error – or even a serious error – in the interpretation of the law which in many national jurisdictions may be the subject of ordinary appeal as distinguished from, e.g., an extraordinary writ of *certiorari*.

34. The Committee therefore notes that in order to annul the Award under Article 52(1)(b) for a manifest excess of the Tribunal’s powers consisting of a failure to apply the applicable law, at the very least something more than a “serious error” is required.
35. Finally, the Committee considers that annulment for non-application of the applicable law is only sustainable where there has been a failure to apply the proper law *in toto*. As Professor Schreuer notes, this is because a finding of partial non-application of the applicable law (*i.e.* relating to a specific provision) is indistinguishable from a finding of erroneous application, the latter constituting appellate review for which the Committee has no competence.²²

²⁰ Schreuer, p. 960.

²¹ *Soufraki*, ¶ 86.

²² Schreuer, p. 964.

B. Article 52(1)(e): Failure to State Reasons

(a) Summary of the Parties' Positions

36. Applicants submit that under Article 52(1)(e) of the ICSID Convention, a tribunal's failure to state reasons will justify annulment if its reasoning is "impossible to follow, essentially missing in a key respect, or if it contains *lacunae* which render the analysis unintelligible".²³

37. Applicants elaborate on the requisite standard of reasoning for annulment of ICSID awards with reference to various decisions of previous *ad hoc* committees. For instance, in *MINE*, the *ad hoc* committee stated that an award:²⁴

Must enable the reader to follow the reasoning of the Tribunal on points of fact and law...the requirement to state reasons is satisfied as long as the award enables one to follow how the Tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.

38. In this connection, in their written submissions Applicants rely on the decision in *MINE* in arguing that an award may be annulled if it contains "frivolous" reasoning even if it is not contradictory.

39. Applicants also cite *Vivendi I*, where the *ad hoc* committee stated that:²⁵

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

²³ A-A, ¶ 51.

²⁴ *MINE*, ¶ 5.09.

²⁵ *Vivendi I*, ¶¶ 64-65.

40. Applicants submit that sufficient *lacunae* in reasoning to warrant annulment may be found to exist where a tribunal has: (i) given genuinely contradictory reasons on a material point; or (ii) failed to deal with a necessary question and thus rendered its award unintelligible.²⁶
41. Hungary makes four main arguments regarding the applicable legal standards under Article 52(1)(e).
42. First, Hungary submits that an award may be annulled for a “complete absence of reasons”, although this is extremely unlikely since applicants face a very heavy burden of proof in this respect and *ad hoc* committees may not be drawn into reviewing the merits of a tribunal’s decision. Furthermore, a tribunal is not required to substantiate every legal principle relied upon in its award and its reasoning need not be explicit. It is sufficient that a careful reader can follow an award’s implicit reasoning.²⁷
43. Second, Hungary does not contest that the *ad hoc* committee in *Klöckner v. Cameroon* held that an award may be annulled if it gives genuinely contradictory reasons on a material point. However, it also notes that subsequent *ad hoc* committees have found the scope of this principle to be limited to where such contradictory reasons “cancel each other out”. Again, this ground requires a high threshold and must be carefully distinguished from review of the merits.²⁸
44. Third, Hungary argues that an award may be annulled where there is a failure to answer an outcome-determinative question which leads to a failure of intelligibility of a tribunal’s reasoning. In this context, Respondent distinguishes between “questions” and “arguments” – arguing that whilst the former requires an explicit or implicit response from a tribunal, the latter does not. According to Respondent,

²⁶ A-A, ¶ 54.

²⁷ A-CM, ¶ 228, referring to *Duke Energy*, ¶ 162.

²⁸ A-CM, ¶¶ 233-234, referring, *inter alia*, to the *ad hoc* committees’ decisions in *Vivendi I* and *Duke Energy*.

such “questions” must have been squarely presented to the tribunal during the underlying proceedings, and must be objectively understood as crucial or decisive issues, the acceptance of which would have altered the tribunal’s conclusions. Hungary submits that even if AES succeeds in presenting such a question, it still faces a heavy burden in proving that the Tribunal failed to deal with it since it may have been dealt with implicitly.

45. Finally, Hungary refutes AES’s submissions concerning “frivolous” reasons. Primarily, this is because to allow such grounds would constitute an impermissible assessment of the quality of the Tribunal’s reasoning.²⁹

(b) The *ad hoc* Committee’s Analysis

46. As a preliminary remark, the Committee notes that arbitral tribunals are under a fundamental obligation to provide a reasoned award. As stated by the *ad hoc* committee in *Wena*:³⁰

This requirement is based on the Tribunal’s duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision.

47. Of all the grounds of annulment listed in Article 52(1) of the ICSID Convention, it is the failure to state reasons that holds the greatest danger of overlapping with an inadmissible review of the merits. As Professor Schreuer notes:

It is difficult to determine with any degree of objectivity what standard of reasoning should be held sufficient by an *ad hoc* committee. Of all the grounds for annulment, an evaluation of the tribunal’s reasoning is most likely to blend into an examination of the award’s substantive correctness and hence to cross the border between annulment and appeal.³¹

²⁹ A-CM, ¶¶ 240 – 244.

³⁰ *Wena*, ¶ 79.

³¹ Schreuer, pp. 997-998.

48. In light of the above, the Committee recognises that application of this ground of annulment must be made within parameters which characterise a failure to state reasons as opposed to a failure to state convincing or good reasons. Indeed, as submitted by Hungary and explained by Professor Schreuer:³²

The duty to state reasons refers only to a minimum requirement. It does not call for tribunals to strain every sinew in an attempt to convince the losing party that the decision was the right one.

49. Nevertheless, there are certain circumstances in which annulment on these grounds will be permissible. The clearest example is where there is a total absence of reasons for the award. This, however, is “extremely unlikely”.³³ As put by the *Soufraki* annulment committee, “there will probably never be a case where there is a total absence of reasons for the award”.³⁴
50. In *Klöckner I*, the *ad hoc* committee found the tribunal’s reasoning to be sufficiently defective to warrant annulment of the award, stating that:³⁵

“... [t]he Award in no way allows the *ad hoc* Committee or for that matter the parties to reconstitute the arbitrators’ reasoning in reaching a conclusion that is perhaps ultimately perfectly justified and equitable (and the Committee has no opinion on this point) but is simply asserted or postulated instead of being reasoned.

The complaint must therefore be regarded as well founded, to the extent that it is based on Article 52(1)(e).”

51. The Committee is mindful that even in *Klöckner I*, the threshold for annulment was set very high since there had to be “no way” that the committee could reconstitute

³² Schreuer, p. 997; A-CM ¶ 225.

³³ Schreuer, p. 998.

³⁴ *Soufraki*, ¶ 122.

³⁵ *Klöckner I*, ¶ 144.

the tribunal's reasoning. Moreover, this decision has consistently come in for strong criticism. As Professor Schreuer notes:³⁶

Ad hoc committees have consistently confirmed that Art. 52(1)(e) does not permit any enquiry into the quality or persuasiveness of reasons. *Ad hoc* committees may be dissatisfied with the adequacy of reasons, but provided they meet the conditions set out in *MINE*, and confirmed in *Vivendi I*, there will not be grounds for annulment.

52. In view of the settled doctrine on this issue, the Committee again emphasises that it will not enter into an assessment of the merits of the dispute, either directly or indirectly.
53. However, as the Parties agree, annulment may be permitted in the exceptional circumstance that a tribunal's reasons are so contradictory that they effectively amount to no reasons at all. As stated by the *ad hoc* Committee in *Vivendi I*:³⁷

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

54. Finally, for the reasons discussed above, the Committee also takes the view that the giving of frivolous reasons will almost never amount to a failure to state reasons within the meaning of Article 52(1)(e), since this would impermissibly encroach into appellate territory. The better approach is to recognise that reasons which are sufficiently frivolous or absurd in nature would in effect amount to no reasons at all.³⁸

³⁶ Schreuer, p. 1011.

³⁷ *Vivendi I*, ¶ 64.

³⁸ Schreuer, p. 997.

IV. THE RELEVANCE OF AES'S PROFITABILITY

55. Applicants argue that the Award should be annulled under Articles 52(1)(b) and 52(1)(e) of the ICSID Convention since the Tribunal failed to address the question of whether AES's historic profits were sufficiently excessive to justify Hungary's reintroduction of regulated pricing. They argue that the Tribunal failed to exercise its jurisdiction, meriting annulment under Article 52(1)(b), and failed to state reasons in support of its conclusions, meriting annulment under Article 52(1)(e).
56. Concerning AES's fair and equitable treatment and non-impairment claims in the original arbitration, Applicants note the adoption by the Tribunal of the two-pronged test enunciated in *Saluka v. Czech Republic*.³⁹ The first prong of this test requires the identification of a rational policy goal aimed at addressing a matter of public interest. The second requires an assessment of the reasonableness of the measure adopted to implement the policy, including, as the Tribunal noted, the finding of a reasonable correlation between the policy objective and the impugned measure.

(a) Summary of the Parties' Positions

57. Applicants' primary argument under this heading relates to the Tribunal's application of the second prong of the *Saluka* test. They submit that having (incorrectly) found the regulation of luxury profits to be a rational policy, the Tribunal was obliged, yet failed, to make an assessment of AES's historic profitability and to determine whether or not it was in fact excessive.⁴⁰ In this connection, they also argue that the Tribunal failed to determine the appropriate methodology and threshold for determining whether AES's profits were in fact excessive.

³⁹ Award, ¶ 10.3.7.

⁴⁰ A-A, ¶¶ 56-57; A-Ry, ¶¶ 7-8.

58. AES also submits that the Tribunal was obliged to fulfil these steps since it found that Hungary's only rational policy goal was to address historically excessive profits, having previously considered and rejected various alternatives. They argue that the Tribunal therefore effectively rendered an award in the abstract without reference to the specific facts of the case, contrary to the requirements outlined by the tribunal in *Mondev*.⁴¹ They further argue that it is impossible to tell how the Tribunal arrived at its conclusion that the implementation of the Price Decrees was "reasonable, proportionate and consistent with the public policy" without examining whether and to what extent Applicants in fact earned "luxury profits", and whether and to what extent the Price Decrees regulated those profits in a reasonable manner.⁴² As such, they submit that the Tribunal did not try to find a reasonable correlation between Hungary's policy objective and the adopted measures.⁴³
59. Applicants further submit that the issue of historic profitability was placed squarely before the Tribunal since the Parties submitted substantial arguments and (expert) evidence on the matter.⁴⁴ They argue that the Tribunal nevertheless reached a summary conclusion without adequately assessing the evidence and behaved unreasonably in relying on the figures provided by Hungary which had been included in its draft pricing act.⁴⁵

⁴¹ Hearing on Annulment Transcripts ("Tr."), Tr. p. 83:16-19; Tr. p. 138:19-21, referring to *Mondev International Ltd. v. U.S.A.*, Award, 11 October 2002, ¶ 118 ("*Mondev*").

⁴² A-A, ¶¶ 56-62.

⁴³ Tr. p. 66:10-13, referring to Award, ¶ 10.3.9.

⁴⁴ A-Ry ¶¶ 10, 49-92, referring *inter alia* to the Parties' written submissions, Witness Statements of Mr. Horrocks (Applicants' Application for Annulment Exhibit AC-34 at ¶ 21) and Mr. Lithgow (Respondent's Counter-Memorial on Annulment Exhibit ARE-08 at ¶¶ 37, 55), Respondent's expert reports by Navigant Consulting (AC-25, AC-26), First Expert Report of LECG (AC-20, submitted by Applicants).

⁴⁵ Tr. p. 68:7-9, referring to Award ¶ 10.3.36; A-Ry, ¶¶ 47, 108-116.

60. Finally, Applicants submit that the Award must also be annulled under Article 52(1)(e) since the Tribunal’s reasoning is contradictory as regards its identification of a rational policy objective under the first prong of the *Saluka* test. They submit that at one stage the Award states that forcing the power purchase agreement’s (“PPA”) renegotiations with the perspective to reduce capacities was not a rational policy objective, yet the Award later states that Hungary exercised lawful government authority to specifically deprive AES of its contractual rights with respect to the pricing mechanism. Applicants argue that these are genuinely contradictory reasons which cancel each other out in accordance with the prevailing legal standards and the decision of the *ad hoc* Committee in *Klöckner I*.⁴⁶
61. Applicants also argue that the Tribunal gave “frivolous” reasons in respect of this issue by dismissing Applicants’ claims due to “the absence of a specific commitment to the Claimants that administrative pricing was never going to be reintroduced”.⁴⁷
62. Hungary refutes all of Applicants’ claims and submits that the Tribunal was not required to express an independent view as to Applicants’ actual historic profits in order to avoid an annulable error.⁴⁸
63. The relevant legal question before the Tribunal, it claims, was whether the government acted reasonably based on the information available to it at the time, or whether its actions were based on prejudice, abuse, or discrimination.⁴⁹ It argues

⁴⁶ A-A, ¶ 63; A-Ry, ¶¶ 47, 117-124, referring to Award, ¶¶ 10.3.12-10.3.14, 10.3.35.

⁴⁷ A-A, ¶ 64, referring to Award, ¶ 10.3.35.

⁴⁸ A-CM, ¶ 332-338; A-Rj, ¶¶ 26-29.

⁴⁹ A-CM, ¶ 331.

that the Tribunal adequately examined these requirements before finding that Hungary had met its obligations.⁵⁰

64. Indeed, Hungary submits that it was this aspect of reasonableness, rather than historic profitability, which was the focus of AES's arguments in the original proceedings. Hungary therefore submits that AES has mischaracterised the issues before the Tribunal since the issue of historic profitability was not placed squarely before it.
65. Further, Hungary submits that tribunals in international arbitration are not obliged to address every single point argued before them.⁵¹ As stated by the *Enron* annulment committee, the Tribunal was only obliged to state "its pertinent findings of fact, its pertinent findings as to the applicable legal principles and its conclusions in respect of the application of the law to the facts".⁵²
66. Alternatively, Hungary submits that the Tribunal made ample findings on profitability to resolve the dispute in sections 9 and 10 of the Award in respect of both the nature of the measures and their reasonableness. Its reasoning was relevant and could be easily followed "from Point A to Point B".⁵³
67. As regards both prongs of the *Saluka* test, Hungary argues that the Tribunal's reasoning was neither contradictory nor frivolous. It acted appropriately in referencing the stated purpose of the legislation as provided by Hungary.⁵⁴ The Tribunal's interpretation of these issues could not satisfy the extremely high threshold of being so untenable that it cannot possibly be supported by reasonable

⁵⁰ A-CM, ¶ 313.

⁵¹ A-Rj, ¶ 31; Tr. pp.149:24-150:3; Tr. p. 157:9-11.

⁵² *Enron*, ¶ 222.

⁵³ A-CM, ¶¶ 344-347, referring to Award, ¶¶ 9.3.42-9.3.73, 10.3.37-10.3.44.

⁵⁴ A-CM, ¶ 322.

arguments.⁵⁵ Hungary argues that AES uses the term “frivolous” as a synonym for “deficient” and thus is attempting to challenge the quality of the Tribunal’s reasoning and reargue the merits of the case.⁵⁶

(b) The *ad hoc* Committee’s Analysis

68. The Committee has reached the conclusion that Applicants’ claim is unfounded for the following reasons.
69. Concerning the first prong of the *Saluka* test, the Tribunal set forth the standard that “a rational policy is taken by a State following a logical (good sense) explanation and with the aim of addressing a public interest matter”.⁵⁷ Having considered the various arguments presented to it, the Tribunal identified Hungary’s aim in implementing regulated pricing as addressing the concern that “profits enjoyed by the PPAs, in the absence of either competition or regulation, exceeded reasonable rates of return for public utility sales”.⁵⁸ The Tribunal noted that Hungary “was motivated principally by widespread concerns relating to [...] excessive profits earned by generators and the burden on consumers”.⁵⁹ As such, the Tribunal concluded that “it was a perfectly valid and rational policy objective for a government to address luxury profits”.⁶⁰ The Committee is therefore unable to find, as argued by AES, that Hungary’s sole objective was to address *historic* luxury profits.

⁵⁵ A-CM, ¶ 362.

⁵⁶ A-CM, ¶ 355.

⁵⁷ Award, ¶ 10.3.8.

⁵⁸ Award, ¶ 10.3.20.

⁵⁹ Award, ¶ 10.3.31.

⁶⁰ Award, ¶ 10.3.34.

70. The Committee is unable to accept Applicants’ contention that the Tribunal employed contradictory or frivolous reasoning in coming to this conclusion.
71. Concerning the second prong of the *Saluka* test, in determining whether the impugned measures taken by Hungary were reasonable, the Tribunal enunciated that there needs to be an appropriate correlation between the State’s public policy objective and the measure adopted to achieve it, and that this had to do with the nature of the measure and the way it is implemented”.⁶¹
72. The following paragraphs outline the Tribunal’s approach in determining whether the measures taken by Hungary were reasonable, whereby it analysed the methodology followed by Hungary in adopting the price regulation measures.
73. The Tribunal first noted that the Hungarian Energy Office (“HEO”) determined that a 7.1% return on assets constituted the relevant reasonable profit benchmark for generators in the non-competitive “public utility” sector of the electricity market.⁶² The Award notes that in 2006 Hungary reviewed all electricity generators’ financial statements for the last available reporting period and set price caps in a manner that would cover each generator’s actual costs and still produce a 7.1% return on assets.⁶³ The Tribunal went on to note that having initially focused on profit capping, the Hungarian Ministry jettisoned a *post hoc* profit-sharing provision contained in the draft 2006 Price Decree, opting instead for a price-capping model.⁶⁴ In light of the foregoing, the Tribunal concluded that Hungary had not behaved in an arbitrary manner.⁶⁵

⁶¹ Award, ¶ 10.3.9.

⁶² Award, ¶ 9.3.47.

⁶³ Award, ¶ 9.3.48.

⁶⁴ Award, ¶¶ 9.3.53-9.3.55.

⁶⁵ Award, ¶ 9.3.70.

74. Further, the Tribunal noted that following introduction of the price-capping regime, generators were still able to attempt to achieve a return on assets higher than 7.1% during the course of the relevant cycle, until prices were realigned with costs at the beginning of the next cycle.⁶⁶
75. The Tribunal noted that only generators whose prior-year profits were already below a 7.1% return on assets were unaffected by the reintroduction of price regulation. As such, the pricing regime was not discriminatory since the effect on AES was the logical result of a uniform methodology that was applied equally to all generators, based on their differing assets and operating cost structures. AES had not received different treatment in comparison with other generators.⁶⁷ Further, the Tribunal concluded that whilst regulated prices unquestionably reduced generator prices, they still permitted generators (including AES) to receive a reasonable return.⁶⁸
76. The Committee considers that the methodology followed by the Tribunal on this question was within the bounds of its discretion. A determination as to the alleged excessiveness of AES's profits was not required. The reintroduction of regulated pricing was prospective and based on sector-wide concerns. It did not single out AES. It applied to all generators with a return on assets of higher than 7.1%.⁶⁹
77. Further, having been presented at the hearing with expert evidence confirming the HEO's conclusions, the Tribunal opted to rely on the HEO's calculations instead of attempting to evaluate their substantive accuracy *de novo*. This was fully within the limit of the Tribunal's discretionary power.

⁶⁶ Award, ¶ 9.3.57.

⁶⁷ Award, ¶ 10.3.50.

⁶⁸ Award, ¶¶ 10.3.4, 10.3.37, 10.3.44.

⁶⁹ Award, ¶ 9.3.48.

78. For the same reasons as listed above, the Committee is also unable to find that the Tribunal’s reasoning was either contradictory or frivolous. The Tribunal observed that it cannot be a reasonable measure for a state to force a private party to change or give up its contractual rights with respect to its production capacities. It found, however, that a state can exercise its legislative powers with respect to consumer protection against overly burdensome prices even if this has the consequence that private interests such as an investor’s contractual rights are affected, as long as that effect is the consequence of a measure based on public policy that was not aimed solely at affecting those contractual rights.⁷⁰ The Tribunal found that this was the case here. Hungary acted in furtherance of a distinct, legitimate objective.⁷¹ Indeed, the Tribunal explicitly stated that “the decision was not made with the intention of affecting Claimants’ contractual rights”.⁷² It is not the Committee’s task to appraise the quality of the Tribunal’s distinction and reasoning. It finds, however, that the distinction is understandable and thus neither contradictory nor frivolous.
79. For the above reasons, the *ad hoc* Committee finds that Applicants’ claims as to the alleged need for the Tribunal to make a finding as to AES’s profitability, as well as its claims that the Tribunal did not find a rational policy goal on Hungary’s part, must fail.

V. AES’S LEGITIMATE EXPECTATIONS

80. During proceedings before the Tribunal, in connection with the reintroduction of administrative pricing in 2006 and 2007, AES alleged a breach of the basic and legitimate expectations upon which they relied when making their investment, and consequently a violation of the fair and equitable treatment standards under the ECT. The Tribunal considered, however, that AES “cannot legitimately have been

⁷⁰ Award, ¶ 10.3.13.

⁷¹ Award, ¶¶ 10.3.20, 10.3.31.

⁷² Award, ¶ 10.3.30.

led by Hungary to expect that a regime of administrative pricing would not be reintroduced under any circumstances during the term of the 2001 Tisza II PPA”.⁷³

(a) Summary of the Parties’ Positions

81. AES claims annulable error under both Articles 52(1)(b) and 52(1)(e) of the ICSID Convention.

82. Applicants’ main argument is that the Award must be annulled since the Tribunal failed to apply the applicable law regarding legitimate expectations by applying a non-existent “absolute certainty” standard.⁷⁴ The impugned section of the Award states that:⁷⁵

In 2001, there was a great probability that there would be no administrative pricing after 2004, but this does not equate to absolute certainty giving rise to internationally protected legitimate expectations.

83. AES contrasts this alleged standard with the following test which, in its view, the Tribunal had earlier purported, yet ultimately failed, to apply:⁷⁶

The enquiry therefore turns to whether: (a) there were government representations and assurances made or given to Claimants at that time, and upon which they relied, of the sort alleged; and (b) Hungary acted in a manner contrary to such representations and assurances.

84. As well as constituting a failure to apply the law since the “absolute certainty” standard simply does not exist in international law, AES submits that employing this standard constituted such an egregious error of law as to warrant annulment for

⁷³ Award, ¶ 9.3.26.

⁷⁴ A-Ry, ¶ 135; Tr. p. 9:9-17.

⁷⁵ Award, ¶ 9.3.25.

⁷⁶ Award, ¶ 9.3.17; Tr. pp. 33:5-14, 118:2-18.

failure to apply the proper law, and is so inherently contradictory and frivolous as to constitute a failure to state reasons.⁷⁷

85. AES further argues that the Tribunal failed to state reasons since, *inter alia*, it incorrectly cited the 1996 Information Memorandum despite its irrelevance in the context of the existence of expectations in 2001, and erroneously interpreted a letter from the Ministry of Economic Affairs, dated 21 October 1999.⁷⁸
86. Further, according to AES, the Tribunal was presented with ample alternative authority which it could follow, or at least discuss, in its reasoning on legitimate expectations, yet failed to fulfil its obligation to give reasons for rejecting it. In particular, AES points to the general standards for legitimate expectations enunciated by the *Thunderbird Gaming* tribunal, and the three-stage test envisaged by the *Parkerings-Compagniet* tribunal.⁷⁹
87. Lastly, AES argues that the Award must be annulled since the Tribunal failed to state reasons for its finding that the absence of a “Stabilization Clause” and the presence of a “Change of Law” clause in the PPA and Settlement Agreement were legally significant.⁸⁰
88. Hungary refutes all of Applicants’ claims and argues that the Tribunal acted entirely within its discretion.

⁷⁷ Tr. p. 129:24-25.

⁷⁸ A-A, ¶ 81, referring to Award ¶¶ 9.3.19-9.3.20.

⁷⁹ A-Ry, ¶¶ 139-143; *International Thunderbird Gaming Corporation v. The United Mexican States*, Award, 26 January 2006 (“*Thunderbird*”); *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, 11 September 2007 (“*Parkerings-Compagniet*” or “*Parkerings*”).

⁸⁰ A-A, ¶¶ 81-82, A-Ry ¶¶ 171-177.

89. Hungary submits that the reference to “absolute certainty” in the Award was not intended to be a self-contained legal standard. It argues that it was:⁸¹

A non-essential sentence added after the Tribunal’s clear explanation of the relevant standard, representations and assurances, and after its clear factual finding that the standard had not been met.

90. Moreover, since the Tribunal’s reasoning would still stand even if the sentence on “absolute certainty” were stricken from the Award, it cannot constitute grounds for annulment. Nor is the reference to “absolute certainty” contradictory, since it was merely shorthand for the Tribunal’s conclusion that an investor’s subjective expectations do not give rise to legally-protected rights with regard to future government action.⁸²

91. Hungary further argues that Applicants’ arguments pertain not so much to the absence of (sufficient) reasons, but to the substantive merits of the Tribunal’s reasoning itself. In any case, argues Hungary, the Tribunal conducted a comprehensive analysis of the issue of legitimate expectations by examining whether any representations had been made in either 1996, 1999, or 2001.⁸³

92. Hungary submits that the Tribunal was not obliged to state reasons to substantiate every principle relied upon for its reasons. It notes that whilst the Tribunal was presented with multiple legal authorities on the relevant standards, it was not obliged to choose one over the other. The Tribunal was simply obliged to fulfil the test in *Enron*, as discussed above.⁸⁴

93. Finally, Hungary notes that the Committee in any case may not evaluate the substantive correctness of the Tribunal’s decision. Therefore, even if the Tribunal had articulated a novel “absolute certainty” standard, it is outside of the

⁸¹ Tr. pp. 224:22-225:2.

⁸² A-CM, ¶ 278.

⁸³ Tr. p. 217:13-19, referring to Award, ¶¶ 9.3.15, 9.3.20, 9.3.24-9.3.25, 9.3.31, 13.3.4.

⁸⁴ See ¶ 65.

Committee's jurisdiction to evaluate its correctness since this would constitute appellate review.

(b) The *ad hoc* Committee's Analysis

94. The Committee has determined that Applicants' arguments are unfounded for the following reasons.
95. Regarding the "absolute certainty" issue, the Committee is unable to find that the Tribunal has introduced a distinct legal standard which is invented, illogical or otherwise incorrect. As noted by Hungary, the reference only appears in the Award after the Tribunal found that, as a matter of law, in order to be legitimate and bind government conduct, an expectation has to be based on express governmental assurances and representations.⁸⁵ The Tribunal then found, as a matter of fact, that AES failed to produce evidence of those assurances or representations.⁸⁶
96. Contrary to AES's submissions, the relevant section of the Award does not enunciate a self-contained standard.⁸⁷ Its effect is to distinguish between probabilities which may be the basis for subjective expectations of an investor and binding obligations on a state under international law. Although AES may have subjectively believed that it was probable there would be no reintroduction of administrative pricing after 2004, absent any specific governmental assurance, there was no absolute legal certainty in this respect. The only assurance for the investor was that there would be a reasonable rate of return.⁸⁸
97. In any case, determination of the legal test for legitimate expectations was within the Tribunal's discretion. Having determined that the reference to "absolute certainty" was not the creation of a new legal standard, the Committee does not, in

⁸⁵ Award, ¶ 9.3.17.

⁸⁶ Award, ¶¶ 9.3.15, 9.3.20, 9.3.24-9.3.25.

⁸⁷ Award, ¶ 9.3.25.

⁸⁸ Award, ¶ 9.3.15.

principle, have to address AES's claim that the Tribunal did not apply the proper law. In this connection, the Committee notes the determination of the *Duke Energy* annulment committee that:

The obligation upon a tribunal ... to apply [the applicable law] is a reference to the whole of that law, such as the tribunal may determine to be relevant and applicable to the issue before it, and not to any portion of it. [A party] may well disagree with the view that the tribunal formed as to the correct solution of the issue before it under [the applicable body of law] but an *ad hoc* committee may not enter upon an assessment of whether a tribunal made a correct assessment of the content of the applicable law.

98. Whilst the Committee is mindful that in exceptional circumstances an error of law may be so egregious as to merit annulment, it does not consider this to be the case with respect to the Tribunal's reference to an "absolute certainty standard". The Committee does not therefore find it necessary to engage in an analysis of whether the Tribunal adopted the preferable legal test for legitimate expectations, be it under *Parkerings* or otherwise. This is all the more so, since the tribunal in *Parkerings* convincingly stated:⁸⁹

It is evident that not every hope amounts to an expectation under international law...contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law.

99. Moreover, the mere fact that a Tribunal does not follow the prevailing jurisprudence on a given issue is not an error of law *per se*. There is no system of binding precedent in ICSID jurisprudence. If one were to follow AES's theory, ICSID jurisprudence would be condemned to remain static and immutable, without the possibility of any evolution or innovative decisions.

⁸⁹ *Parkerings*, ¶ 344.

100. The Committee also finds that the Tribunal did not fail to state reasons. For the sake of completeness, the Committee now summarises the reasoning employed by the Tribunal.
101. In its application of the legal standards to the facts, the Tribunal determined that legitimate expectations can only be created at the moment of investment.⁹⁰
102. It then proceeded to consider whether AES had made investments in 1996 when AES Summit purchased the outstanding shares of Tisza, and in 2001 at the time AES Tisza actually began to invest in the Retrofit of the Tisza II Plant.⁹¹ It concluded that AES had made investments in both 1996 and 2001.⁹²
103. With respect to 1996, the Tribunal concluded that:⁹³

AES Summit can have had no legitimate expectation at that time regarding the conduct of Hungary about which it now complains (i.e., the fact of, motivation for and methodology relating to the reintroduction of administrative pricing in 2006/2007). Both the privatization materials and the relevant investment agreements (the original Tisza II PPA and the 1996 PSA [Purchase and Sale Agreement]) were explicit that Hungary would continue to set maximum administrative prices for electricity sales indefinitely into the future. This was subject only to the principle that such pricing would provide a “reasonable return” on investment, which would “target” returns in the general range of 8% on equity for the first regulatory period beginning in 1997.

104. The Tribunal reached the same conclusion with respect to 2001. Asking itself whether “there were government representations and assurances made or given to Claimants at that time,” it concluded that “Hungary made no representations/gave no assurances of a nature that go to the heart of Claimants’ complaint – i.e., that

⁹⁰ Award, ¶¶ 9.3.8-9.3.12.

⁹¹ Award, ¶ 9.3.13.

⁹² Award, ¶¶ 9.3.14, 9.3.16.

⁹³ Award, ¶ 9.3.15.

following the termination of price administration on 31 December 2003, regulated pricing would not again be introduced”.⁹⁴

105. Having considered this issue, the Tribunal ultimately did not accept Claimants’ reliance, in trying to establish the existence of legitimate expectations, on two statements found in the 1996 Industry Information Memorandum. The first statement concerned an 8% return on shareholder funds. The Tribunal found that this was simply a target rate of reasonable return for the first regulatory period. The second related to an alleged requirement for another overall price and costs review prior to the introduction of any new pricing mechanism. The Tribunal observed that this was made in the context of the HEO not expecting radical changes in Hungary’s administrative pricing system. It further found that the statements did not relate in a sufficiently material way to Claimants’ central complaint (the reintroduction of administrative pricing in 2006-2007). Therefore it could not find that Hungary’s conduct in 2006-2007 was contrary to representations and assurances said to have been made to AES Summit in 1996.⁹⁵
106. The Tribunal then considered Claimants’ reliance on Hungary’s letter of 21 October 1999 from Mr. Pal Ligati (Head of Department, Ministry of Economic Affairs) which, AES argued, constituted an express promise not to interfere with the PPA, as well as a promise that the contractual pricing formula set out in the PPA would not be altered by political considerations. The Tribunal found that:⁹⁶

[The letter] does not say what Claimants said it does. Moreover, it predated the 2001 Tisza II PPA by approximately two years and no evidence was led to suggest that such a new PPA was then contemplated. The letter was written immediately before Claimants commenced the PSA and treaty arbitrations in 2000. Accordingly, the Tribunal does not consider it plausible that Claimants can be said to

⁹⁴ Award, ¶¶ 9.3.17-9.3.18.

⁹⁵ Award, ¶ 9.3.19.

⁹⁶ Award, ¶ 9.3.20.

have relied on this assurance when, two years later, they entered into the 2001 Settlement Agreement and the 2001 Amendment Agreement.

107. The Tribunal further considered that “the language of the 2001 Settlement Agreement does not, as alleged, constitute a specific promise by Hungary not to frustrate the purpose and intent of the 2001 Settlement Agreement by the reintroduction of administrative pricing”,⁹⁷ and that “no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a “Stability Clause”) or that could legitimately have made the investor believe that no change in the law would occur”.⁹⁸
108. Further, the Tribunal found that “the 2001 Settlement Agreement introduced a ‘Change of Law’ provision ... into the Original Tisza II PPA” which allocated the risks among AES and MVM (Magyar Villamos Művek Zártkörűen Működő Részvénytársaság) of “a change in law ... during the now extended term of the PPA”.⁹⁹ Later in the Award, it noted that “neither the 2001 Settlement Agreement, nor the 2001 PPA, contemplated that pricing regulation could not be reintroduced. The PPA only stipulated that if the administrative pricing disappeared specific formulas would be applied”.¹⁰⁰
109. In light of these considerations, the Tribunal concluded that “Claimants cannot legitimately have been led by Hungary to expect that the regime of administrative pricing would not be reintroduced under any circumstances during the term of the 2001 Tisza II PPA”.¹⁰¹

⁹⁷ Award, ¶ 9.3.24.

⁹⁸ Award, ¶ 9.3.31.

⁹⁹ Award, ¶ 9.3.25.

¹⁰⁰ Award, ¶ 13.3.4.

¹⁰¹ Award, ¶ 9.3.26.

110. The Committee cannot accept Applicants’ argument that the Tribunal failed to state reasons either for rejecting AES’s preferred *Parkerings-Compagniet* test, or more generally, for finding an absence of legitimate expectations.
111. In accordance with several previous awards, the Tribunal decided that the correct test was whether there were government representations and assurances made or given to Claimants at the time of the investment and upon which they relied, of the sort alleged and whether Hungary acted in a manner contrary to such representations and assurances. There was no requirement that the Tribunal, in adopting this standard, should explain why it preferred such a test over any other. Moreover, the Tribunal’s reasoning can be easily followed “from Point A to Point B”, in accordance with the *MINE* standards.
112. The Committee also rejects Applicants’ argument that the Tribunal’s reference to the “Change of Law” clause in the 2001 Settlement Agreement was frivolous, in effect being treated as a waiver of AES’s rights to fair and equitable treatment under the ECT.¹⁰²
113. As explained above, an Award may only be annulled for giving “frivolous” reasons in the exceptional event that they amount to no reasons at all.¹⁰³
114. Since the Tribunal had already found that no legitimate expectations existed, there could not be any waiver. It was only after it had made this finding that the Tribunal pointed out that the “Change in Law” provision had been introduced into the original Tisza II PPA by the 2001 Settlement Agreement.¹⁰⁴
115. For the Tribunal, the “Change in Law” provision was further evidence that the Parties were aware that future legal changes could affect the PPA. This was already clear in the PPA which defined law as including “all acts of the Hungarian

¹⁰² A-Ry, ¶ 171.

¹⁰³ See ¶ 54.

¹⁰⁴ Award, ¶ 9.3.25.

parliament, as well as other governmental or ministerial decrees as might be issued *from time to time*".¹⁰⁵

116. The Committee therefore rejects AES's claim that the Tribunal failed to state reasons for finding the absence of a stabilization clause or the presence of a change of law clause to be legally significant.
117. In summary, therefore, the Committee finds that all of AES's arguments on legitimate expectations must fail.

VI. DUE PROCESS

118. In claiming unfair and inequitable treatment by Hungary before the Tribunal, AES relied both on the irrational and unreasonable character of Hungary's decision to reintroduce administrative pricing as well as the arbitrary and unfair manner in which it was implemented.¹⁰⁶ The Tribunal found that since it had concluded that there was nothing so irrational or unreasonable in Hungary's reintroduction of administrative prices as would constitute unfair and inequitable treatment, and AES's investment had not been impaired by unreasonable or discriminatory measures, it would limit its analysis of AES's due process claims to the manner and methodology by which the Price Decrees were brought into force. It would do so with a view to assessing whether "process" failures existed that constituted a failure to provide fair and equitable treatment.¹⁰⁷
119. The Tribunal referred to the decision of the *Tecmed* tribunal in enunciating the applicable legal standard:¹⁰⁸

¹⁰⁵ Award, ¶ 9.3.25 (emphasis added).

¹⁰⁶ Award, ¶ 9.3.36.

¹⁰⁷ Award, ¶¶ 9.3.37-9.3.38.

¹⁰⁸ Award, ¶ 9.3.40, referring to *Tecnicas Medioambientales Tecmed SA v. The United Mexican States*, Award, 29 May 2003, ¶ 154 ("*Tecmed*").

It is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a State's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable such as would shock, or at least surprise a sense of juridical propriety ... that the standard can be said to have been infringed.

120. The Tribunal ultimately concluded that it did not believe that the process of implementing the Price Decrees was so flawed as to amount to a breach of the fair and equitable standards of the ECT.¹⁰⁹

(a) Summary of the Parties' Positions

121. Applicants submit that in making the above determinations, the Tribunal failed to adequately assess Hungary's conduct in determining that the Price Decrees had been issued in accordance with due process and procedural propriety. AES submits that these are errors which warrant annulment of the Award under Article 52(1)(e) in their own right.
122. First, AES alleges that the Tribunal failed to provide reasons for its finding that Hungary's arbitrarily short timeframe for implementation of the Price Decrees did not constitute a due process violation.¹¹⁰ AES submits that a gap in the Tribunal's logic exists since it failed to step back from its analysis of the HEO's individual actions in implementing the Price Decrees and take account of the fact that the deadlines were imposed on the HEO by the Ministry of Economy.¹¹¹ The Tribunal therefore examined the conduct of the HEO to the exclusion of the Ministry of Economy or indeed Hungary as a whole.¹¹²

¹⁰⁹ Award, ¶ 9.3.41.

¹¹⁰ A-Ry, ¶¶ 181-185.

¹¹¹ A-Ry, ¶ 183.

¹¹² A-Ry, ¶ 182.

123. Second, AES alleges that “the Tribunal’s finding on Hungary’s failure to fully review AES’s costs and assets before establishing prices under the Price Decrees is contradictory and frivolous”.¹¹³ The alleged contradiction is based, according to AES, on the fact that:¹¹⁴

The Tribunal ... concedes that even though no costs and assets review took place in the third cycle, the HEO accepted AES’s costs as reflected in its own financial statements “*precisely as it had done for the second price cycle with which the Claimants have no complaint.*” AES had no complaint about the second price cycle because it included the *very feature* it complained was missing from the third: a full costs and assets review. Obviously, if the third cycle did not include a costs and assets review, as the Tribunal conceded, then it cannot be said that Hungary carries out the third cycle regulatory process “*precisely as it had done for the second cycle*”.

124. Regarding “frivolity”, AES submits, *inter alia*, that the Tribunal’s reasoning was frivolous because it accepted without any explanation that the non-performance of a costs review was justified by the short time frame that the Hungarian Ministry had in mind to enact the Price Decrees.
125. Hungary refutes Applicants’ claims.
126. It argues that the alleged shortcomings in the Tribunal’s reasoning only pertain to one facet of Hungary’s conduct in relation to the procedure for the enactment of the Price Decrees. In order to establish grounds for annulment, AES would need to prove that the Award is silent on the claim as a whole, rather than simply one given aspect of it.¹¹⁵ In its written submissions, Hungary cites the following passage from the decision of the *Helnan* annulment committee:¹¹⁶

¹¹³ A-Ry, ¶ 186.

¹¹⁴ A-Ry, ¶ 190, referring to Award, ¶ 9.3.72 (emphasis in original).

¹¹⁵ A-CM, ¶ 366; A-Rj, ¶ 99.

¹¹⁶ A-Rj, ¶ 99, referring to *Helnan International Hotels AS v. Arab Republic of Egypt*, Decision on Annulment, 14 June 2010, ¶ 36 (“*Helnan*”).

[Article 52(1)(e)] permits annulment on the ground “that the award has failed to state the reasons on which it is based. Thus, the object of this ground is the reasoning which leads to the Tribunal’s Award. It does not permit annulment simply because the tribunal has not determined it necessary to discuss every argument raised by one of the parties.

127. Alternatively, Hungary argues that, in order to merit annulment the issue in question would in any case need to have been an “essential question” that could have changed the outcome of the case.¹¹⁷ This, Hungary submits, was not the case.

(b) The *ad hoc* Committee’s Analysis

128. The Committee considers that Applicants’ claims are unfounded.
129. With respect to Applicants’ first claim, the Tribunal found that on 11 May 2006, the HEO sent each generator a draft text of the 2006 Price Decree, soliciting comments on its proposed approach by 18 May 2006.¹¹⁸ AES submitted its comments on this date in accordance with the HEO’s (admittedly short) deadline. AES then amended its comments, four days later, on 22 May 2006. The Tribunal found that these amended comments were substantive, detailed and led to changes to the draft 2006 Price Decree.¹¹⁹
130. The Tribunal went on to note that the HEO next met with AES on 31 May 2006 to discuss possible changes to the draft.¹²⁰ The HEO subsequently presented the draft to the Ministry on 2 June 2006, including a summary table of the principal comments that had been received from the generators (including AES).¹²¹

¹¹⁷ A-CM, ¶ 368.

¹¹⁸ Award, ¶ 9.3.49.

¹¹⁹ Award, ¶ 9.3.50.

¹²⁰ Award, ¶ 9.3.51.

¹²¹ Award, ¶ 9.3.52.

131. Several changes were thereafter made to the draft, including elimination of the original *post hoc* profit sharing provision as requested by a number of generators, including AES.¹²²
132. The Arbitral Tribunal concluded that although there were several procedural shortcomings in Hungary's implementation of the Price Decrees (the most obvious being the short deadline to submit comments) none was sufficient to constitute unfair and inequitable treatment.¹²³ The Tribunal considered that having been informed by the HEO no later than November 2005 that the HEO considered a 7.1% return on assets to be an appropriate rate of return, AES had been sufficiently forewarned to enable it to respond to the HEO's letter of 11 May 2006 within this timeframe. AES had not found it necessary to seek an extension. It further took the opportunity to supplement and amend its comments four days later. These late amendments were accepted as timely by the HEO, and were ultimately acted upon through Hungary's elimination of the proposed *post hoc* profit-sharing provision.¹²⁴
133. In light of the Tribunal's analysis, as described above, the Committee is unable to find that Applicants' claim that the Tribunal failed to specifically address the role of the Ministry of Economy in setting the time frame is well-founded. Moreover, the Committee does not see in what way such an omission would have been result-determinative.
134. Applicants' claim in the original proceedings was based on one single sentence in their post-hearing brief to the effect that "Hungary has never explained its self-imposed May deadline that appears arbitrary considering that the 2006 Price Decree was not issued until 24 November".¹²⁵

¹²² Award, ¶¶ 9.3.53-9.3.55.

¹²³ Award, ¶ 9.3.66.

¹²⁴ Award, ¶¶ 9.3.67-9.3.70.

¹²⁵ AES's Post-Hearing Submission, ¶ 78.

135. In the Committee’s view, this argument barely required a response by the Tribunal given the limited degree of prominence with which it was advanced by AES in the original proceedings.¹²⁶ Much less can it be regarded as “outcome-determinative”.
136. With respect to Applicants’ second complaint, AES submits that the Tribunal did not make any independent findings on the issue of Hungary’s alleged failure to perform a full costs and assets review during the implementation of pricing-regulation. Instead, AES argues, the Tribunal merely “recited Hungary’s unhelpful explanation that it was ‘impractical’ to perform a full costs review in the timeframe that the Ministry ‘had in mind’”.¹²⁷
137. In dealing with this question, the Tribunal was, by its own admission, greatly assisted by the testimony of Mr. Békés, head of the Electricity Office Preparation Department of the HEO at the time. The Tribunal found that his evidence described “a not culpably unreasonable implementation process in relation to the Price Decrees”.¹²⁸ Mr. Békés was not cross-examined. His testimony on the relevant process was contradicted neither by competing testimony, nor by contrary documentation.
138. Specifically, Mr. Békés testified that for a number of reasons, it was impractical for the HEO to perform a detailed bottom up cost review for the generators in early 2006.
139. There was therefore no reason for the Tribunal to make any other independent findings on the issue that Hungary had failed to perform a full costs and assets review during implementation of the pricing regulation.

¹²⁶ See *Continental Casualty Company v. Argentina*, Decision on Annulment, 16 September 2011, ¶ 129 (“*Continental Casualty*”).

¹²⁷ A-Ry, ¶ 186.

¹²⁸ Award, ¶ 9.3.42.

140. The Committee is also unable to find that the Tribunal’s reasoning is contradictory. As discussed above, such a contradiction must amount to the Tribunal having effectively given no reasons at all.¹²⁹ In light of the Tribunal’s reasoning described above, the Committee is unable to contemplate annulment of the Award on this basis. To do so would impermissibly cross the line into appellate review.
141. In any event, the Tribunal properly found that AES had not been denied due process with respect to a costs review, a determination of assets review, or a further opportunity for a price review.
142. Concerning the costs review, the Tribunal acknowledged that no such audit took place during the third pricing cycle. It concluded, however, that “HEO’s decision not to follow this practice at this time was not unfair to AES ... because HEO accepted AES’s costs as reflected in AES’s 2004 and 2005 own financial statements as supplied to HEO”.¹³⁰
143. With respect to the asset review, the Tribunal noted that the HEO’s return-on-assets calculations were based on the book value of assets as reported in AES’s financial statements. This methodology was identical to that employed in the second pricing cycle (with which Claimants had no complaint).¹³¹ The Tribunal also found that “because Claimants do not fault the first two cycles, it is relevant to their allegation of procedural failings that each and every of the three cycles were somewhat similar”.¹³²

¹²⁹ See ¶ 53.

¹³⁰ Award, ¶¶ 9.3.71-9.3.72.

¹³¹ Award, ¶ 9.3.72.

¹³² Award, ¶ 9.3.44.

144. If Claimants considered that costs were not included that should have been, they could have asked for a price review. However, they did not. The Tribunal stated as follows:¹³³

The March 2006 amendments to the 2001 Electricity Act (that provided for the reintroduction of administrative prices) did not affect its existing provisions which allow generators to petition for individual price review. Mr. Békés testified that AES Tisza did not submit a request for price review during the relevant review period applicable to the Price Decrees.

145. On the basis of the Tribunal’s reasoning as described above, under the prevailing legal standards the Committee considers it impossible to conclude that Claimants’ complaint that the Tribunal’s reasoning on due process was frivolous or contradictory is well founded.

VII. STABLE CONDITIONS

146. In the original proceedings, the Tribunal found that Hungary had not violated its obligation under Article 10(1) of the ECT to “encourage and create stable, equitable, favourable and transparent conditions for Investors”.

(a) Summary of the Parties’ Positions

147. AES requests annulment of the Award since, it alleges, the Tribunal failed to give positive content to the applicable legal standards under Article 10(1) of the ECT. It argues that “by characterizing the legal standard only by what it is not, the Tribunal gave frivolous reasons for its decision on this issue which requires annulment under Article 52(1)(e) of the Convention”.¹³⁴ It argues further that “this error constitutes a manifest excess of power under Article 52(1)(b) in that the Tribunal

¹³³ Award, ¶ 9.3.64.

¹³⁴ A-Ry, ¶ 195.

failed to exercise its jurisdiction by not making any findings on the abundant record on profitability”.¹³⁵

148. Applicants also argue that whilst the Tribunal purported to deal with the scope of this obligation by reference to the factual circumstances in the case, the Award is in fact concerned exclusively with Hungary’s sovereign right to change its law in the abstract, without specific consideration of the reintroduction of regulated prices in the relevant context.¹³⁶
149. Further, AES submits that since the Tribunal made no affirmative findings as to the legal test that it should apply to the facts of the case before it, it has disregarded the applicable law. This disregard of the applicable law, AES argues, is manifest insofar as it is both serious and obvious.
150. Hungary, for its part, submits that throughout the original proceedings, Applicants used the phrase “stable legal and business framework” as shorthand for all of Hungary’s obligations under Article 10(1) – that is, including the obligation to provide both stable conditions and fair and equitable treatment. Hungary submits that in the Award, the Tribunal responded to the question that had been presented to it, and found that the ECT’s “stable conditions” provision is not a stability clause preventing a sovereign entity from changing its laws. This approach, Hungary argues, is consistent with the findings of previous tribunals.¹³⁷
151. Hungary further submits that the Tribunal could not find a specific commitment by Hungary that could mandate obedience to a given framework. Rather, the Tribunal held that the business framework (the 2001 Electricity Act, 2001 Settlement Agreement and PPA Amendment) in itself contemplated changes. Moreover, Hungary submits that the Tribunal made specific findings about the extent and

¹³⁵ A-Ry, ¶ 131.

¹³⁶ A-A, ¶ 91.

¹³⁷ A-CM, ¶¶ 295-297, 304.

nature of the changes that occurred in this case, which were directly relevant to its finding that Hungary did not violate the ECT.¹³⁸

152. In any event, as discussed above with reference to the applicable legal standards,¹³⁹ it is Hungary's position that whilst the Tribunal's interpretation of the ECT's "stable conditions" provisions may not have been definitive or exhaustive, Article 52(1)(b) only requires that the Tribunal interpret the correct "body of law" and respond to the claims before it.¹⁴⁰

(b) The *ad hoc* Committee's Analysis

153. The Committee considers that Applicants' claims are unfounded.
154. In the Committee's view, the Tribunal did, in fact, give positive content to the standard. It stated that:¹⁴¹

To determine the scope of the stable conditions that a State has to encourage and create is a complex task given that it will always depend on the specific circumstances that surrounds [sic] the investor's decision to invest and the measures taken by the State in the public interest.

155. Furthermore, the Tribunal applied the law to the facts in stating that:¹⁴²

In this case however, the Tribunal observes that no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made investors believe that no change in the law would occur.

¹³⁸ A-CM, ¶¶ 298-302.

¹³⁹ See ¶ 29.

¹⁴⁰ A-CM, ¶ 312.

¹⁴¹ Award, ¶ 9.3.30.

¹⁴² Award, ¶ 9.3.31.

156. The Tribunal then went on to state that: “Specifically, the 2001 Settlement Agreement and the 2001 PPA did not [contemplate] that after 2004 no reintroduction of regulated pricing could take place”.¹⁴³ The Tribunal noted that “Moreover, it is clear from clause 3.7 of the 2001 PPA that the parties to the agreement were aware that a change in the law could occur that could make the obligations under the agreement become illegal, unenforceable or impossible to perform”.¹⁴⁴
157. The Tribunal also carefully examined the specific circumstances surrounding the measures taken by the State in the public interest and noted that a pricing regime in the third period did not significantly differ from those in the earlier cycles.¹⁴⁵ The fact that these findings are contained in various other sections of the Award is irrelevant. Under the prevailing legal standards recently enunciated by the *Continental Casualty* annulment committee:¹⁴⁶

In determining whether the reasons given for a conclusion on a particular question are sufficient, is it [sic] necessary not to look in isolation at the particular paragraphs of the award dealing specifically with that question. Those paragraphs must always be read together with the award as a whole.

158. It was therefore entirely rational for the Arbitral Tribunal to decide that in these circumstances, “absent a specific commitment from Hungary that it would not reintroduce administrative pricing during the term of the 2001 PPA, Claimants cannot properly rely on an alleged breach of Hungary’s Treaty obligations to provide a stable legal environment”.¹⁴⁷

¹⁴³ Award, note 39.

¹⁴⁴ Award, ¶ 9.3.32.

¹⁴⁵ Award, ¶¶ 9.3.44, 9.3.56, 9.3.72, 10.3.44.

¹⁴⁶ *Continental Casualty*, ¶ 261.

¹⁴⁷ Award, ¶ 9.3.34.

159. Applicants' contentions under this heading therefore fall short of proving a manifest excess of the Tribunal's powers, and must accordingly be rejected.

VIII. LEGALITY UNDER HUNGARIAN AND EU LAW

160. In its Award the Tribunal had summarized Claimants' position as to applicable law to the effect that "the parties to this arbitration made a clear choice as to the applicable law and that choice does not include Community competition law or Hungarian law".¹⁴⁸ It had concluded, based on Article 41(2) of the ICSID Convention and Article 26(6) of the ECT that, as agreed by the parties, "the applicable law to this proceeding is the ECT, together with the applicable rules and principles of international law".¹⁴⁹

(a) Summary of the Parties' Positions

161. Applicants claim annulment of the Award under both Articles 52(1)(b) and 52(1)(e) because, they submit, the Tribunal failed entirely to address its claim that Hungary's measures were in breach of both Hungarian law and EU law.
162. They argue that this presents a significant *lacuna* in the Tribunal's reasoning, constituting a failure to address an essential question and warranting annulment under Article 52(1)(e).¹⁵⁰ They stress the importance of such a determination since the evidential weight of such a determination was "crucial to a fulsome determination of whether [Hungary's] policy goal was rational".¹⁵¹ They submit that:¹⁵²

¹⁴⁸ Award, ¶ 7.3.1.

¹⁴⁹ Award, ¶ 7.6.4.

¹⁵⁰ A-Ry, ¶ 208.

¹⁵¹ A-Ry, ¶ 206; A-A, ¶¶ 75-77.

¹⁵² A-Ry, ¶ 206 (emphasis in original).

The policy's compliance with the law is a *factor* in determining its rationality. Were the Tribunal to have determined that Hungary's actions were illegal under one or both legal regimes, that determination would have had substantial weight in adjudicating the rationality of Hungary's proffered policy goal.

163. Applicants further contend that the Tribunal's finding that Hungary pursued a legitimate policy objective cannot amount to an implicit rejection of its claim concerning the illegality of the Price Decrees.¹⁵³
164. They submit that the question of legality under Hungarian and EU law was a significant issue in the original proceedings, having been raised at the hearing and having received substantial attention in their written submissions.¹⁵⁴ According to AES, the evidential weight that such a finding would have had renders the issue outcome-determinative.
165. Hungary argues that contrary to Applicants' submission that a rational or legitimate policy goal can only be found where a State's actions fully comply with national law and EC secondary legislation (in the case of EU Member States), neither of these issues was essential to the proper resolution of the claim before the Tribunal.¹⁵⁵ Respondent does not dispute that the Award does not discuss issues of Hungarian law or EC Liberalization Directives, which were "the only components of EC law Claimants alleged had been violated".¹⁵⁶ In any case, it submits that AES's argument mischaracterises the way in which the issue was presented to the Tribunal.¹⁵⁷

¹⁵³ A-A, ¶ 76.

¹⁵⁴ A-Ry, ¶ 202, referring to AES's Post-Hearing Brief, ¶ 33.

¹⁵⁵ A-CM, ¶ 375.

¹⁵⁶ A-CM, ¶ 377.

¹⁵⁷ A-CM, ¶ 379, referring to Tr. p. 76:22-77:9.

166. Hungary submits that AES’s argument must fail since: (i) the legal standard adopted by the Tribunal did not contain the “local law” legality element that Applicants argue was essential;¹⁵⁸ (ii) confirmation of the legality of a state’s actions under domestic law cannot be understood empirically as a prerequisite to finding that a state acted pursuant to a rational or legitimate policy goal under international law;¹⁵⁹ and (iii) Applicants’ complaint that the Tribunal failed to accord determinative weight to Applicants’ evidence on this issue does not provide a valid basis for annulment, since tribunals are free to address only those arguments which they regard as particularly pertinent.

(b) The *ad hoc* Committee’s Analysis

167. The Committee considers that Applicants’ claims are unfounded.

168. In its written submissions on the merits, AES itself argued that the only applicable law was the ECT and the applicable rules and principles of international law under Article 26(6) of the ECT.¹⁶⁰ Indeed, the Tribunal found that AES said that “Community law is irrelevant to the interpretation of the ECT, and that assertions to the contrary ignore the basic principles of treaty interpretation”.¹⁶¹

169. The Tribunal further found that:¹⁶²

This is ... said to be so given that Community law, including Community competition law, is considered the equivalent of internal or municipal law for the purposes of this proceeding. Community law is thus merely a fact to be considered by the Tribunal when determining the applicable law.

¹⁵⁸ A-CM, ¶ 389, referring to Award ¶¶ 9.3.40, 10.1.1, 10.3.8, 10.3.13, 10.3.23.

¹⁵⁹ A-CM, ¶¶ 393-395.

¹⁶⁰ Award, ¶ 7.3.1.

¹⁶¹ Award, ¶ 7.3.2.

¹⁶² Award, ¶ 7.3.4.

170. Having considered the Parties' arguments on this point, the Tribunal concluded, as already stated, that "the applicable law to this proceeding is the ECT, together with the applicable rules and principles of international law" (*i.e.* excluding domestic Hungarian law).¹⁶³
171. As mentioned above, the Tribunal adopted the standard that a "rational policy is taken by a State following a logical (good sense) explanation and with the aim of addressing a public interest matter".¹⁶⁴ The key point, as submitted by Hungary, is that a tribunal has a wide discretion to formulate and apply the relevant enquiry under the treaty standard.¹⁶⁵ Such a determination is not open to appeal.
172. The Committee notes that the majority of the Tribunal found that Hungary's decision to reintroduce administrative pricing was not motivated by pressure from the EC Commission. However, the majority found that "had Hungary been motivated to reintroduce price regulation with a view to addressing the EC's state aid concerns, there is no doubt that this would have constituted a rational public policy measure".¹⁶⁶
173. As discussed above, the Tribunal arrived at the conclusion that "it is a perfectly valid and rational policy objective for a government to address luxury profits".¹⁶⁷
174. The Tribunal therefore was not required to evaluate the legality of Hungary's reintroduction of regulated pricing under Hungarian or EU law, since this was not part of its adopted standard.

¹⁶³ Award, ¶ 7.6.4.

¹⁶⁴ See ¶ 69, referring to Award, ¶ 10.3.8.

¹⁶⁵ A-Rj, ¶ 128.

¹⁶⁶ Award, ¶ 10.3.16.

¹⁶⁷ Award, ¶ 10.3.34.

175. In any case, as discussed at length above, an error of law is not a valid basis for annulment. It is not open to AES or the *ad hoc* Committee to challenge the correctness of the standards applied by the Tribunal. Further, a tribunal is not required to address every argument invoked by a party if it considers that this argument is not essential in deciding the issue before it.
176. Applicants' claim for annulment of the Award on the above grounds must therefore also fail.

IX. COSTS

177. Under Article 61(2) of the ICSID Convention and Rule 47(1) of the ICSID Arbitration Rules, read in conjunction with Article 52(4) of the ICSID Convention and Rule 53 of the ICSID Arbitration Rules, the *ad hoc* Committee has discretion to determine how and by whom the costs and expenses of ICSID, the Committee and the Parties should be borne.
178. The Parties submitted their respective submissions on costs on 17 March 2012.
179. Applicants seek to recover their legal costs and expenses incurred in connection with this annulment proceeding, amounting to GBP 474,156.54. Hungary requests that the Committee issue an “appropriate” award of costs and fees in light of its decision. Hungary’s legal costs and expenses amount to USD 920,427.04. The Committee finds both parties’ cost submissions reasonable within the meaning of Rule 28(2) of the ICSID Arbitration Rules.
180. In accordance with Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations, Applicants have been “solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee”. This is without prejudice to the Committee’s final decision on cost allocation.
181. In its decision on the allocation of costs the Committee has been guided, as other committees and tribunals before it, that “costs follow the event” if no specific circumstances impose a different approach. Such circumstances do not exist here. Not only has Hungary prevailed in totality but the application for annulment was clearly without merit. Hungary was forced to go through the process and should not be burdened further by having to pay for its defence. This notwithstanding, the Committee recognises that both parties and their counsel have conducted the proceedings diligently and efficiently.

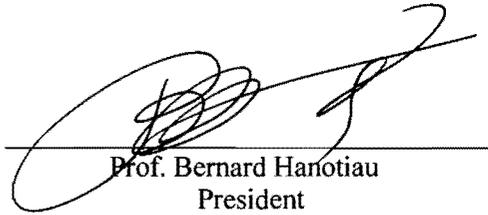
182. In weighing these criteria, the Committee concludes that the Applicants are to bear all ICSID costs, *i.e.* the fees and expenses of the members of the *ad hoc* Committee and of the ICSID Secretariat, amounting to USD 350,000.00¹⁶⁸ as well as Hungary's legal costs and expenses amounting to USD 920,427.04.

¹⁶⁸ The amount includes estimated charges (courier, printing, and copying) in respect of the dispatch of this Decision. The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all of the invoices are received and the account is final.

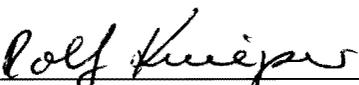
X. DECISIONS

1. For the foregoing reasons, the *ad hoc* Committee decides unanimously that:
- (1) Applicants' claims for annulment under Article 52(1)(b) and Article 52(1)(e) of the ICSID Convention are dismissed in their entirety;
 - (2) Applicants shall bear the full costs and expenses incurred by ICSID in these annulment proceedings, including fees and expenses of the arbitrators.
 - (3) Applicants shall bear Hungary's legal expenses and costs.

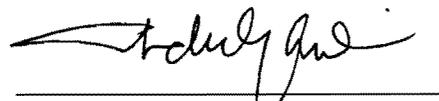
THE *AD HOC* COMMITTEE:



Prof. Bernard Hanotiau
President
Date: 5. 6. 2012



Prof. Dr. Rolf Knieper
Co-Member
Date: 11. 6. 2012



Judge Abdulqawi Ahmed Yusuf
Co-Member
Date: 5. 6. 2012