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

In the annulment proceeding between

**BOLIVARIAN REPUBLIC OF VENEZUELA**

(Applicant)

and

**TENARIS S.A. & TALTA – TRADING E MARKETING SOCIEDADE UNIPESSOAL LDA.**

(Respondents)

**ICSID Case No. ARB/12/23**

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# DECISION ON ANNULMENT

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**Members of the *ad hoc* Committee**
Prof. Dr. Rolf Knieper, President of the *ad hoc* Committee
Mr. José Antonio Moreno Rodríguez, Member of the *ad hoc* Committee
Mr. N. Fernando Piérola Castro, Member of the *ad hoc* Committee

**Secretary of the *ad hoc* Committee**
Mr. Marco Tulio Montañés-Rumayor

*Date of Dispatch to the Parties:* 28 December 2018

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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| Application for Annulment | Venezuela's application for annulment of the Award, dated 11 April 2017 |
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings |
| Award | Award rendered by the Arbitral Tribunal, dated 12 December 2016 |
| Background Paper | ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, dated 5 May 2016 |
| Claimants | Claimants in the original proceeding: Tenaris S.A. & Talta – Trading E Marketing Sociedade Unipessoal LDA |
| Committee | *Ad hoc* Committee |
| Counter-Memorial | Tenaris's Counter-Memorial on Annulment, dated 20 March 2018 |
| Decision on Stay | Committee's Decision on Venezuela's Stay Request, dated 23 February 2018 |
| Hearing | Hearing on Annulment held from 27 to 28 August 2018. |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of Other States |
| ICSID or Centre | International Centre for Settlement of Investment Disputes |
| ICJ | International Court of Justice |
| Luxembourg BIT or Luxembourg Treaty | Agreement between the Belgium-Luxembourg Economic Union and the Government of the Republic of Venezuela for the Reciprocal Promotion and Protection of Investments, signed on 17 March 1988, and in force as of 28 April 2004 |
| Memorial | Venezuela's Memorial on Annulment, dated 23 January 2018. |
| Portugal BIT or Portugal Treaty | Agreement between the Government of the Portuguese Republic and the Government of the Republic of Venezuela for the Reciprocal Promotion and Protection of Investments, signed on 17 June 1994, and in force as of 11 May 1995 |
| Rejoinder | Tenaris's Rejoinder on Annulment, dated 29 May 2018 |

| | |
|---|---|
| Reply | Venezuela's Reply on Annulment, dated 17 April 2018 |
| Stay Hearing | Hearing on the Stay of Enforcement of the Award held on 1 February 2018 |
| Stay Request | Venezuela's request for a continued stay of enforcement of the Award contained in its Application for Annulment, dated 11 April 2017 |
| *Tenaris I v. Venezuela* Decision | The Decision on the Application for Annulment issued in *Tenaris SA and Talta - Trading E Marketing Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), dated 8 August 2018 |
| Tenaris/Respondents | Tenaris S.A. & Talta – Trading E Marketing Sociedade Unipessoal LDA |
| Tenaris' Costs | Tenaris' Statement of Costs, dated 9 October 2018 |
| Tenaris' PHB | Tenaris' Post-Hearing Brief, dated 25 September 2018 |
| Treaties | Collectively the Portugal and the Luxembourg treaties |
| Stay Tr. p. # | Transcript of the Hearing on the Stay of Enforcement of the Award of 1 February 2018 |
| Tr. p. # | Transcript of the Hearing on Annulment held from 27 to 28 August 2018 |
| VCLT | Vienna Convention on the Law of Treaties. |
| Venezuela/Applicant | Bolivarian Republic of Venezuela |
| Venezuela Costs | Venezuela's Statement of Costs, dated 9 October 2018 |
| Venezuela's PHB | Venezuela's Post-Hearing Brief, dated 25 September 2018 |

# I. INTRODUCTION

1. This decision concerns the application for annulment ("**Application for Annulment"**) submitted by the Bolivarian Republic of Venezuela (the "**Applicant**" or "**Venezuela**") of the award rendered on 12 December 2016 (the "**Award**") in ICSID Case No. ARB/12/23, initiated by Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA (the "**Respondents**" in the annulment or "**Tenaris**").

2. The Applicant and the Respondents are hereinafter collectively referred to as the **"Parties**", and individually referred to as a "**Party**." The Parties' legal representatives are listed above on page (ii).

# II. PROCEDURAL HISTORY

## A. Registration and Provisional Stay of Enforcement of the Award

3. On 11 April 2017, the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") received an Application for Annulment from Venezuela.

4. The Application for Annulment was filed 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**") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"). In its Application for Annulment, Venezuela requested that enforcement of the Award be stayed provisionally pursuant to Article 52(5) of the ICSID Convention.[1]

5. On 18 April 2017, the Secretary-General registered the Application for Annulment. She also informed the Parties that, pursuant to Article 52(3) of the ICSID Convention, the Chairman of the Administrative Council of ICSID would proceed with the appointment of an *ad hoc* Committee. Finally, the Secretary-General confirmed the provisional stay of enforcement of the Award pursuant to Arbitration Rule 54(2).

[1] Application for Annulment, ¶ 63.

### B. Constitution of the Committee

6. On 17 October 2017, the Secretary-General notified the Parties that the three members of the *ad hoc* Committee (the "**Committee**") had accepted their appointments. Accordingly, the Committee was deemed to have been constituted and the annulment proceeding to have begun as of that date pursuant to Arbitration Rules 6 and 53.

7. The Committee was composed of Prof. Dr. Rolf Knieper, a national of Germany, President of the Committee; Ms. Dyalá Jiménez Figueres, a national of Costa Rica; and Mr. José Antonio Moreno Rodríguez, a national of Paraguay. Mr. Marco Tulio Montañés-Rumayor, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.

### C. First Session and Procedural Order No. 1

8. On 5 December 2017, the Committee held the First Session by telephone conference. An audio recording of the session was distributed to the Members of the Committee as well as to the Parties. Participating in the session were:

Members of the Committee:
Prof. Dr. Rolf Knieper, President of the Committee
Ms. Dyalá Jiménez Figueres, Member of the Committee
Mr. José Antonio Moreno Rodríguez, Member of the Committee

ICSID Secretariat:
Mr. Marco Tulio Montañés-Rumayor, Secretary of the Committee

Attending on behalf of Venezuela:
Mr. Henry Rodríguez Facchinetti, Attorney-General's Office
Mr. Diego Gosis, GST LLP
Mr. Guillermo Moro, GST LLP
Mr. Kenneth Figueroa, Foley Hoag LLP
Ms. Analía González, Foley Hoag LLP

Attending on behalf of Tenaris:
Mr. Elliot Friedman, Freshfields Bruckhaus Deringer US LLP
Mr. Ben Love, Freshfields Bruckhaus Deringer US LLP

9. During the First Session, the Committee and the Parties considered (i) the draft agenda and the draft procedural order circulated by the Secretary of the Committee on 3 November 2017 and (ii) the Parties' agreements and positions on the draft agenda and the draft procedural order submitted on 28 November 2017.

10. Among other items on the agenda, the Parties confirmed the proper constitution of the Committee and a timetable for the proceeding, with the exception of hearing dates for the Stay Request and the Application for Annulment.

11. On 6 December 2017, the Committee issued Procedural Order No. 1 governing the procedural matters of the annulment proceeding, including the further schedule of written and oral pleadings.

**D. Procedure regarding the Stay of Enforcement of the Award**

12. In its Application for Annulment, Venezuela requested that the stay of enforcement of the Award be maintained until the Committee rendered a decision on the Application for Annulment ("**Stay Request**").[2]

13. On 19 October 2017, Tenaris opposed Venezuela's Stay Request, asking that (i) Venezuela post financial security as a condition to continuing the stay or, alternatively, that (ii) the stay be lifted ("**Tenaris' First Submission**"). Tenaris' First Submission was accompanied by Exhibits A/C-1 to A/C-30, and Legal Authorities A/CLA-1 to A/CLA-37.

14. By letter dated 20 October 2017, the Committee informed the Parties that, as contemplated by Arbitration Rule 54(2), "it ha[d] decided to extend the provisional stay of enforcement of the [A]ward until it rule[d] on such request after receiving the parties' submissions to that effect."[3]

15. On the same letter of 20 October 2017, the Committee fixed a timetable for the exchange of written and oral submissions on the Stay Request.

[2] *Id.*, ¶ 64.
[3] Letter from the Committee to the Parties dated 20 October 2017.

16. On 8 November 2017, Venezuela filed its reply to Tenaris' First Submission ("**Venezuela's First Submission**") in Spanish. Venezuela's First Submission was accompanied by Exhibits A/R-1 to A/R-13, and Legal Authorities A/RLA-1 to A/RLA-26.

17. On 27 November 2017, Tenaris filed a reply to Venezuela's First Submission of 8 November 2017 ("**Tenaris' Second Submission**") in English. Tenaris' Second Submission was accompanied by Exhibits A/C-31 to A/C-47, and Legal Authorities A/CLA-38 to A/CLA-44.

18. On 14 December 2017, Venezuela filed its reply to Tenaris' Second Submission ("**Venezuela's Second Submission**") in Spanish. Venezuela's Second Submission was accompanied by Exhibits A/R-14 to A/R-19, and Legal Authorities A/RLA-27 to A/RLA-32.

19. A hearing on the Stay Request ("**Stay Hearing**") was held on 1 February 2018 at the seat of the Centre in Washington, D.C. The following were present at the Stay Hearing:

| **COMMITTEE** | |
|---|---|
| Prof. Dr. Rolf Knieper | President |
| Ms. Dyalá Jiménez Figueres | Member |
| Mr. José Antonio Moreno Rodríguez | Member |
| **ICSID SECRETARIAT** | |
| Mr. Marco Tulio Montañés-Rumayor | Secretary of the Committee |
| **APPLICANT (Venezuela)** | |
| ***Counsel:*** | ***Affiliation*** |
| Mr. Ignacio Torterola | GST LLP |
| Mr. Diego Gosis | GST LLP |
| Ms. Marianna Lozza | GST LLP |
| Mr. Guillermo Moro | GST LLP |
| Mr. Gary Shaw | GST LLP |

| **RESPONDENTS (Tenaris and Talta)** | |
|---|---|
| ***Counsel:*** | ***Affiliation*** |
| Mr. Nigel Blackaby | Freshfields Bruckhaus Deringer |
| Mr. Elliot Friedman | Freshfields Bruckhaus Deringer |
| Mr. Ben Love | Freshfields Bruckhaus Deringer |
| Ms. Paige von Mehren | Freshfields Bruckhaus Deringer |
| Ms. Jessica Moscoso | Freshfields Bruckhaus Deringer |
| Ms. Yesica Crespo | Freshfields Bruckhaus Deringer |
| **COURT REPORTERS** | |
| Ms. Dawn K. Larson | Worldwide Reporting, LLP |
| Ms. Elizabeth Cicoria | DR Esteno |
| Mr. Rodolfo Rinaldi | DR Esteno |
| **INTERPRETERS** | |
| Ms. Silvia Colla | English-Spanish interpreter |
| Mr. Daniel Giglio | English-Spanish interpreter |
| Mr. Claudio Debenedetti | English-Spanish interpreter |

20. During the Stay Hearing, and as agreed by the Parties, the Committee admitted onto the record two new exhibits:[4] (i) *Tidewater v. Bolivarian Republic of Venezuela*, No 15-cv-01960 (ALC), Petitioner's Response to Respondent's Renewed Motion to Vacate the Judgement (S.D.N.Y. Nov. 28, 2017), A/C-48; and (ii) *Tidewater v. Bolivarian Republic of Venezuela*, No 15-cv-01960 (ALC), Order (S.D.N.Y. Jan. 22, 2018), A/C-49.

21. On 20 February 2018, Venezuela informed ICSID to send all future case correspondence exclusively to the Procuraduría and to counsel from GST LLP.

[4] Stay Tr., p. 150:9-18.

22. On 23 February 2018, the Committee issued a decision on Venezuela's Stay Request ("**Decision on Stay**"). In it, the Committee decided to:

> "Lift the stay of enforcement of the Award;
>
> Reserve its decision on the allocation of costs until the final decision on annulment…;"[5]

**E. Reconstitution of the Committee**

23. On 25 April 2018, following the resignation of Committee member Ms. Dyalá Jiménez Figueres, the Secretary-General notified the Parties of the vacancy on the Committee and of the suspension of the proceeding pursuant to ICSID Arbitration Rules 53 and 10(2).

24. On 7 May 2018, the Centre notified the Parties that the Committee had been reconstituted following the acceptance of Mr. N. Fernando Piérola Castro, a Peruvian and Swiss national, of his appointment as a member of the Committee.

25. The proceeding was resumed on the above date pursuant to ICSID Arbitration Rules 12 and 53.

**F. Written Submissions regarding the Application for Annulment**

26. On 23 January 2018, Venezuela filed a memorial on annulment accompanied by Exhibits A/R-20 to A/R-57, and Legal Authorities A/RLA-33 to A/RLA-103 ("**Memorial**").

27. On 20 March 2018, Tenaris filed a counter-memorial on annulment accompanied by Exhibits A/C-48 to A/C-59, and Legal Authorities A/CLA-45 to A/CLA-66 ("**Counter-Memorial**").

[5] Decision on Stay, ¶ 159.

28. On 17 April 2018, Venezuela filed a reply on annulment accompanied by Exhibits A/R-58 to A/R-59, and Legal Authorities A/RLA-104 to A/RLA-109 ("**Reply**").

29. On 29 May 2018, Tenaris filed a rejoinder on annulment accompanied by Exhibits A/C-60 to A/C-65, and Legal Authorities A/CLA-67 to A/CLA-85 ("**Rejoinder**").

30. On 20 August 2018, and further to their agreement, the Parties requested the Committee's leave to introduce into the record the decision on the application for annulment of the Bolivarian Republic of Venezuela issued in *Tenaris SA and Talta - Trading E Marketing Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26) dated 8 August 2018 ("***Tenaris I v. Venezuela* Decision**").

31. On 22 August 2018, the Committee granted the Parties leave to introduce into the record the *Tenaris I v. Venezuela* Decision.

32. On August 27, 2018, the Parties introduced the *Tenaris I v. Venezuela* Decision as A/CLA-86.

### G. Hearing on Annulment

33. On 27 to 28 August 2018, a hearing on annulment ("**Hearing**") was held at the seat of the Centre in Washington, D.C. The following persons were present at the Hearing:

| **COMMITTEE** | |
|---|---|
| Prof. Dr. Rolf Knieper | President |
| Mr. José Antonio Moreno Rodríguez | Member |
| Mr. N. Fernando Piérola Castro | Member |
| **ICSID SECRETARIAT** | |
| Mr. Marco Tulio Montañés-Rumayor | Secretary of the Committee |

| **APPLICANT (Venezuela)** | |
|---|---|
| ***Counsel:*** | **Affiliation** |
| Mr. Ignacio Torterola | GST LLP |
| Mr. Diego B. Gosis | GST LLP |
| Mr. Quinn Smith | GST LLP |
| Ms. Katherine Sanoja | GST LLP |
| Ms. Adrianne Silva | GST LLP |
| ***Parties:*** | |
| Dr. Reinaldo Muñoz Pedroza | Procuraduría General de la República |
| Sr. Henry Rodríguez Facchinetti | Gerente General de Litigio, Procuraduría General de la República |
| **RESPONDENTS (Tenaris and Talta)** | |
| ***Counsel:*** | **Affiliation** |
| Mr. Nigel Blackaby | Freshfields Bruckhaus Deringer US LLP |
| Ms. Caroline Richard | Freshfields Bruckhaus Deringer US LLP |
| Ms. Jessica Moscoso | Freshfields Bruckhaus Deringer US LLP |
| Ms. Paige von Mehren | Freshfields Bruckhaus Deringer US LLP |
| Mr. Pieter-Bas Munnik | Freshfields Bruckhaus Deringer US LLP |
| Mr. Reynaldo Pastor | Freshfields Bruckhaus Deringer US LLP |
| Mr. Jowkuell Arias-Tapia | Freshfields Bruckhaus Deringer US LLP |
| Ms. Sandra Diaz | Freshfields Bruckhaus Deringer US LLP |

### H. Post-Hearing Phase

34. On 11 September 2018, the Parties jointly submitted the agreed-upon revisions to the Hearing transcripts.

35. On 25 September 2018, the Parties filed their post-hearing briefs ("**PHBs**").

36. On 9 October 2018, the Parties submitted their statements of costs.

37. On 17 October 2018, the Committee declared the proceeding closed.

## III. THE PARTIES' REQUESTS FOR RELIEF

### A. The Applicant's Request for Relief

38. In its Memorial, as well as in its Reply and PHB, Venezuela requests that:

> "(a) The Award rendered in this case be annulled pursuant to Article 52 and Arbitration 50 of the ICSID Convention;
>
> (b) Tenaris and Talta be ordered to pay all costs and legal expenses arising out of these proceedings."[6]

### B. The Respondents' Request for Relief

39. In its Counter-Memorial, Rejoinder and PHB, Tenaris requests that the Committee:

> "(a) Reject Venezuela's request for annulment in its entirety; and
>
> (b) Order that Venezuela bear all costs and expenses incurred by the Claimants in connection with the present annulment proceedings, including the fees of the Centre, the costs and fees of the ad hoc Committee, and the Claimants' legal fees and expenses."[7]

## IV. THE PARTIES' POSITIONS AND THE COMMITTEE'S ANALYSIS

40. In this Section, the Committee will first determine the relevant standards governing an annulment proceeding (A), and then apply those standards to the facts of this proceeding (B).

### A. The Relevant Standards

41. The grounds upon which an application for annulment may be based are enumerated in Convention Article 52(1). In the present case, the Applicant invokes three of these grounds, namely:

(1) that the Tribunal has manifestly exceeded its powers (Art. 52(1)(b));

[6] Memorial, ¶ 291; Reply, ¶ 274; PHB, p. 15.
[7] Counter-Memorial, ¶ 195; Rejoinder, ¶ 184; Tenaris' PHB, ¶ 35.

(2) that there has been a serious departure from a fundamental rule of procedure (Art. 52(1)(d)); and

(3) that the Award has failed to state the reasons on which it is based (Art. 52(1)(e)).

42. The Committee has to interpret these terms "in good faith in accordance with the ordinary meaning to be given to the terms … in their context and in the light of its objective and purpose," as provided for in Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**") of 1969.

43. As stated in the ICSID Secretariat's Background Paper on Annulment ("**Background Paper**"), the Convention's drafting history demonstrates that "assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system." [8] Therefore, the "limited and exceptional nature" of annulment has to be taken into account as well as its "narrowly circumscribed"[9] criteria. Its objective is "to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice."[10] An annulment committee should not qualify a tribunal's reasoning as superficial, substandard, deficient, wrong or otherwise faulty. All this would reassess the reasoning of the tribunal which is only appropriate for an appeal. This does not imply that the narrowly circumscribed criteria have to be interpreted restrictively. This Committee agrees with the annulment committee in *Mitchell v. Congo*, which stated that the grounds for annulment "must be examined in a neutral and reasonable manner, that is, neither narrowly nor extensively."[11]

44. ICSID Convention Article 53 provides that an award is not "subject to any appeal." The Parties agree that "annulment is not a remedy against a merely incorrect decision; annulment is not an appeal."[12] Therefore, the Committee has no competence to

[8] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶¶ 71, 73 and 74 ("Background Paper").
[9] Background Paper, ¶ 74.
[10] Background Paper, ¶ 7.
[11] *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (1 November 2006), ¶ 19.
[12] Reply, ¶ 6; Counter-Memorial, ¶ 1.

substitute its own judgments on the jurisdiction of the Tribunal or on the merits for the judgments of the Tribunal.

45. With these objectives in mind, the Committee will summarize the Parties' submissions for each of the three annulment grounds invoked by Venezuela. These summaries are not meant to be recitals but orientations without intending completeness.

**(1) Manifest Excess of Powers (Article 52(1)(b))**

***a. Summary of the Parties' Positions***

46. It is generally accepted and undisputed between the Parties that both the usurpation of competence by a tribunal as well as its failure to apply the proper law to the merits of the case represent core manifestations of excess of power. Both Parties have adduced a good number of decisions confirming these principles. It is further uncontroversial, and simply a reflection of the ICSID Convention, that in both instances described above, the excess of powers must be "manifest."

47. Rather, the dispute between the Parties concerns the Committee's competence to re-examine the Tribunal's reasoning and determination and qualify them with respect to their conformity to its mandate as established and circumscribed by the Parties' consent.

48. The Applicant is of the view that the Committee has the "power to conduct the necessary analysis of the jurisdiction that the Tribunal assumed when it did not have the power to do so,"[13] and to "verify the excess of powers by analyzing the facts of the case together with the sources of jurisdiction invoked"[14], including "the duty to make an interpretation of those sources."[15] The Applicant summarizes this point as follows:

[13] Reply, ¶ 17.
[14] Memorial, ¶ 37. See also *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 September 2009) (hereinafter *Azurix v. Argentina*), ¶ 82 (A/RLA-49).
[15] Memorial, ¶¶ 37 and 18.

> "If the Committee were to choose not to conduct a complete analysis of the jurisdiction mistakenly assumed by the Tribunal from the very beginning, it would simply be impossible to prove the existence of the ground invoked and, therefore, Article 52(1)(b) would be demoted to an unenforceable right, which would contradict the rules governing the interpretation of the ICSID Convention."[16]

49. Venezuela relies in particular on the *ad hoc* committee's decision in *Occidental v. Ecuador*, which found:

> "Jurisdictional excess of powers requires a finding that the tribunal has misconstrued the applicable law (e.g. the law regulating ownership of a protected investment) or has wrongly established the relevant facts (e.g. whether an investor actually controls an investment). Article 52(1)(b) of the Convention requires that the excess of jurisdiction resulting from such misconstruction or from such wrongful determination be "manifest"; if that requirement is fulfilled, the tribunal's award deserves annulment."[17]

50. The Respondents refute this argument. They contend that Venezuela's position, as well as the holding by the *Occidental v. Ecuador* committee, would lead to a "*de novo* review of the Tribunal's jurisdictional findings,"[18] to which the Committee is not entitled as it would go "beyond the scope of annulment review."[19] They argue "that where an issue can reasonably be resolved one way or another, and a tribunal adopts one of those reasonable alternatives, there can be no manifest excess of powers."[20]

51. The Respondents rely in particular on the *ad hoc* committee's decision in *Azurix v. Argentina*, which found:

> "If … reasonable minds might differ as to whether or not the tribunal has jurisdiction, that issue falls to be resolved definitively by the tribunal in exercise of its power under Article 41 before the award is given, rather than by an ad hoc committee under Article 52(1)(b) after the award has been given.
>
> In these circumstances, even if it is subsequently seen to be arguable whether or not the tribunal's decision under Article 41 was correct, it cannot

[16] Memorial, ¶ 38.
[17] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision of the *ad hoc* Committee on the Application for Annulment (2 November 2015) (hereinafter *Occidental v. Ecuador*), ¶ 50 (A/RLA-42).
[18] Counter-Memorial, ¶ 82.
[19] Rejoinder, ¶ 61.
[20] Rejoinder, ¶ 69.

> be said that the tribunal manifestly lacked jurisdiction, and there is no basis for an ad hoc committee in purported exercise of its power under Article 52(1)(b) to substitute its own decision for that of the tribunal. As the tribunal's decision under Article 41 must be treated as conclusive, in such a case there is also no occasion for an ad hoc committee to express its own view on whether or not the tribunal had jurisdiction."[21]

52. The Applicant also raises a related issue on jurisdiction and contends that in theory a tribunal will exceed its powers if it does not exercise its competence.[22] The Committee will not venture into this issue as neither Party asserts such conduct by the present Tribunal. The issue is purely academic under the circumstances of the case.

53. To allow the award to be annulled, Convention Article 52(1)(b) provides that the tribunal must have "manifestly" exceeded its powers when ascertaining its competence. The Applicant agrees with Respondents on the fact that "manifest" means "obvious" or "self-evident."[23] However, the Parties differ greatly on the interpretation of these generic terms.

54. The Applicant contends that *ad hoc* committees have the power and the duty to review thoroughly the tribunal's reasoning leading to the acceptance of its competence. It quotes – along with other decisions – *Caratube v. Kazakhstan*. In that case the committee held that:

> "the power of any arbitral tribunal derives from the authority vested upon it through the consent of the parties; if arbitrators address disputes not included in the powers granted, or decide issues not subject to their jurisdiction or not capable of being solved by arbitration, their decision cannot stand and must be set aside."[24]

55. According to the Applicant, the Committee has to examine itself, with the "necessary degree of argumentation and analysis,"[25] whether the Tribunal was competent to

[21] *Azurix Corp v. Argentine Republic*, ¶ ¶ 68-69.
[22] Memorial, ¶ 30.
[23] Memorial, ¶ 27; Counter-Memorial, ¶ 76.
[24] *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision of the *ad hoc* Committee on the Application for Annulment (21 February 2014) (hereinafter *Caratube v. Kazakhstan*), ¶ 74 (A/RLA-41); similarly *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision of the *ad hoc* Committee on the Application for Annulment (12 February 2015), ¶ 76 (A/RLA-50).
[25] Reply, ¶ 15.

decide the dispute. If not, the Committee has to annul the award which the Tribunal had rendered appropriating a competence that it did not have.[26] The Applicant further argues that "manifest" does not necessarily imply substantial seriousness and does not exclude that "an extensive argumentation and analysis may be required to prove that the misuse of powers has in fact occurred," as stated by the *ad hoc* committee in *Occidental v. Ecuador*.[27] In fact, according to the Applicant, "the manifest excess does not need to be prima facie apparent."[28]

56. The Respondents refute the Applicant's argumentation. They contend that such argumentation would lead away from the concept of annulment as being an extraordinary remedy introduced "to safeguard the procedural integrity of arbitral proceedings,"[29] and instead install "a full-blown appellate mechanism."[30] In their view, "[t]he 'manifest' requirement was included in the ICSID Convention to safeguard the finality of awards, and is an intentional limit on the review function exercised by an annulment committee."[31]

57. They note that the "excess of powers cannot be 'manifest' if the alleged excess is discernible only through elaborate interpretation of a tribunal's reasoning (such an exercise would, moreover, cross the line from annulment into appeal)."[32] Instead, the Respondents sustain that an excess of powers is only 'manifest' if it can be discerned without great effort or extensive analysis.[33]

58. They also state that for systemic reasons, *ad hoc* committees are not authorized to review the quality of the tribunal's interpretation of the law nor its assessment of evidence and "whenever the underlying issue is subject to more than one reasonable

[26] *Ibid*.
[27] *Occidental v. Ecuador*, ¶ 59; See also: *Caratube v. Kazakhstan*, ¶¶ 77-78.
[28] Memorial, ¶ 26.
[29] Counter-Memorial, ¶ 31.
[30] Counter-Memorial, ¶¶ 31 and 76.
[31] Counter-Memorial, ¶ 75.
[32] Counter-Memorial, ¶ 77.
[33] Counter-Memorial, ¶ 76.

interpretation or is otherwise open to debate, there can by definition be no excess of powers, and a tribunal's decision is final and its award must be upheld."[34]

59. The Respondents rely on *Impregilo v. Argentina* when they note that the excess of powers must be "substantially serious"[35] to warrant annulment of the award. They assert that even if a committee might decide not to take the gravity of the tribunal's error into consideration, it has "to conclude that an annullable error actually had (or could have had, according to Venezuela) a material impact on the outcome of a case."[36]

60. The failure to apply the proper law represents the alternative limb for a possible manifest excess of powers. Again, the Parties do not disagree in principle but only in the determination of the borderline.

61. The Applicant submits that "the parties agree, as they must, that annulment committees have the power to annul an award when a tribunal did not apply the proper law and that a mere misapplication of the law does not warrant an annulment of the award."[37]

62. However, it notes that a misconstruction of the applicable law, an "error of law that is effectively equivalent to a failure to apply the applicable law," [38] or the wrong establishment of facts, constitute a manifest excess of powers. The Applicant refers to this effect – among others – to *Occidental v. Ecuador* and *TECO v. Guatemala.*[39] Furthermore, it considers that a committee should not limit its analysis to whether the tribunal formally listed certain applicable rules, but instead, whether the tribunal,

[34] Counter-Memorial, ¶¶ 79 and 80; Rejoinder, ¶ 68. The Respondents rely on *Daimler Financial Services AG v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment (7 January 2015) (hereinafter *Daimler v. Argentina*), ¶ 187 (A/RLA-39), and *Impregilo SpA v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment (24 January 2014) (hereinafter *Impregilo v. Argentina*), ¶¶ 137-141 (A/RLA-44).
[35] Counter-Memorial, ¶ 76.
[36] Rejoinder, ¶ 63.
[37] Reply, ¶ 18.
[38] Memorial, ¶ 44.
[39] Reply, ¶¶18 and 20; Memorial, ¶¶ 39-46; *Occidental v. Ecuador*, ¶¶ 50 and 51; *TECO Guatemala Holdings LLC v. Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 April 2016) (hereinafter *TECO v. Guatemala*), ¶311 (A/RLA-67).

under the specific circumstances of the case in question, has in fact effectively applied them.

63. The Respondents disagree with the Applicant. They submit that an "erroneous application of the law is not a manifest excess of powers."[40] Neither is it an alleged partial non-application of the law: "a tribunal's decision not to address or apply a particular provision that it considers irrelevant does not constitute a failure to apply the applicable law."[41]

***b. The Committee's Analysis***

64. The Committee emphasizes that it is not a court of appeal and that it does not have the authority to substitute its judgment on jurisdictional requirements, the interpretation of law, and/or the assessment of facts, for that of the Tribunal.

65. It agrees with the Parties that a tribunal may exceed its powers when it exercises jurisdiction that it does not have, and when it fails to apply the proper law.

66. "Consent of the parties is the cornerstone of the jurisdiction of the Centre"[42] and thus, of the competence of an ICSID tribunal. Consent establishes and limits both the jurisdiction of the Centre and the competence of tribunals. Tribunals have to assess the applicability of the ICSID Convention to the dispute between the parties at hand, and, once so ascertained, they have to apply it as well as the Arbitration Rules.

67. Consent extends to the applicable law. As Prof. Schreuer has stated, "the provisions on applicable law are essential elements of the parties' agreement to arbitrate and constitute part of the parameters for the tribunal's activity."[43] A tribunal that fails to

[40] Counter-Memorial, ¶ 85; relying on *Impregilo v. Argentina*, ¶ 131.
[41] Counter-Memorial, ¶ 88, relying on *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (16 September 2011) (hereinafter *Continental v. Argentina*), ¶ 91 (A/RLA-51), and C. Schreuer, *The ICSID Convention, A Commentary* (2d edition 2009), Art. 52, ¶ 226 (hereinafter *Schreuer*).
[42] Report of the Executive Directors of the International Bank of Reconstruction and Development on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 23.
[43] *Schreuer*, Art. 52, ¶ 192.

apply the applicable law transgresses the boundaries of its mandate as expressed in the parties' consent as much so as when it usurps jurisdiction.

68. These alternative expressions of excess of power are not simply juxtaposed but are substantively interconnected. According to Convention Article 41, the tribunal is the judge of its own competence. It has to exercise its judgment in applying and interpreting Convention Article 25 and any other agreements between the disputing parties (i.e. the provisions of a BIT, contract, investment law, etc.). Thus, an excess of powers made effective through the usurpation of competence is the result of the non-application of the applicable law.

69. In line with the *jurisprudence constante*, the Committee finds that the erroneous application of the applicable law must be distinguished from its non-application and does not lead to an excess of power. The Parties have no query in this respect and agree – as said – that "a mere misapplication of the law does not warrant an annulment of the award."[44]

70. The Parties have engaged in a short exchange on the question of whether an erroneous application of the law may be so egregious that it equals to a non-application of it. The Applicant quotes *TECO v. Guatemala* where the *ad hoc* committee found that a manifest excess of powers may exist when the tribunal "committed an error so egregious that its interpretation can be deemed untenable."[45] The issue is without practical importance in the present case as "the Republic is not arguing that the Tribunal erroneously applied the proper law."[46] Rather, it asserts that the Tribunal did not "effectively apply" the proper law.[47]

71. *Ad hoc* committees may only annul an award that was rendered by a tribunal in excess of powers when the excess was "manifest." This qualification must have a meaning and cannot be ignored.

[44] Reply, ¶ 18.
[45] *TECO v. Guatemala*, ¶ 311.
[46] Reply, ¶ 20.
[47] Memorial, ¶ 44.

72. Different methods may be used to provide specific meaning to the term "manifest" beyond general notions. One consists in establishing a *prima facie* test on the evidence of the excess; another one is based on assessing the excess first and subsequently determining whether this excess is "manifest." The Committee believes that the method must not prevail over the substance. Ultimately, both methods must examine the facts and interpret the legal terms in accordance with VCLT Article 31.

73. In the Committee's mind, the term "manifest" underlines the limited and exceptional character of an annulment as opposed to an appeal. The finality of an award must not be disturbed if the excess of power is not manifest. This objective must be taken into account when establishing the standard.

74. Therefore, the Committee agrees with the Parties and a well-established jurisprudence that the term "manifest" means "obvious" and "self-evident." It further shares the *ad hoc* committee's view in *Soufraki v. UAE,* which held that:

> "a strict opposition of 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."[48]

75. This does not imply that whenever a tribunal reached a decision on jurisdiction after an extensive argumentation and analysis, there can be no manifest excess of power just because it may take the committee an equally extensive argumentation and analysis to understand the tribunal.

76. Two levels of reflection have to be distinguished. The first level concerns the ease with which the tribunal's analysis can be understood. Once understood, the second level concerns the ease with which the excess of powers can be detected. Only if the tribunal's extensive argumentation and analysis represent an 'obvious', 'clear', 'evident', 'serious', or in other words, a 'manifest' non-application of the proper law (and therefore a usurpation of jurisdiction), will it be justified to annul the award. A

[48] *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki (5 June 2007), ¶ 40 (A/RLA-46) (hereinafter *Soufraki v. UAE).*

tribunal's argumentation and analysis can be complex, extensive, deep and at the same time obviously, clearly and seriously outside the scope of application of the proper law.

77. The Committee finds support for this position in the *ad hoc* committee's decision in *Pey Casado v. Chile,* introduced by the Applicant, which held that "an extensive argumentation and analysis do not exclude the possibility of concluding that there is a manifest excess of power, as long as it is sufficiently clear and serious."[49]

78. The Committee distinguishes these two levels.

79. It notes that even though a tribunal's argumentation and analysis may be extensive and complex, a committee may nevertheless find a manifest excess of power. However, to allow annulment, the tribunal's excess of power still needs to be clear and serious in such a manner that it is "manifest."

80. The Committee does not share the point of view of the *ad hoc* committees in *Caratube v. Kazakhstan* and *Occidental v. Ecuador*, according to which a committee may require extensive argumentation and analysis to demonstrate that such excess of power has in fact occurred. In the Committee's view, such an interpretation may be regarded as neglecting the ordinary meaning of the term "manifest" in the light of the object and purpose of the Convention, and blurring the line between annulment and appeal. Furthermore, a committee should not need to resort to complex argumentation and analysis to find the existence of an excess of power by a tribunal, if such excess of power was sufficiently clear and obvious to fulfill the "manifest" requirement.

**(2) Serious Departure from a Fundamental Rule of Procedure (Article 52(1)(d))**

***a. Summary of the Parties' Positions***

81. The Parties agree that a tribunal departs from a fundamental rule of procedure when it disregards "the minimal standards of procedure to be respected in international law

[49] *Pey Casado v. Chile,* ¶ 70.

proceedings."[50] Venezuela relies (as well as Tenaris) on a series of uncontroversial decisions of *ad hoc* committees, such as *Wena v. Egypt* holding that:

> "[Article 52(1)(d)] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other."[51]

82. Venezuela identifies the fundamental rules of procedure as including, "due process, the right of defense, the right of both parties to be heard and to submit their claim, the right of each party to properly respond to the arguments and evidence presented by the other party, equal treatment between the parties, the treatment of evidence and the burden of proof."[52] Venezuela states that "the principle ***onus probandi actori incumbit*** constitutes a fundamental rule of procedure,"[53] as well as "a fundamental principle of law, an essential component of the due process rights of a party."[54] It quotes *Caratube v. Kazakhstan* and *Klöckner v. Cameroon* to this effect. In both cases, the *ad hoc* committees held that "a reversal of the burden of proof could well lead to a violation of a fundamental rule of procedure. It all depends on the importance, for the decision of the Tribunal, of the subject regarding which the burden has been reversed."[55]

83. The Respondents agree to the list mentioned in paragraph 82 above except for the criteria of "treatment of evidence and the burden of proof." They contend that neither the treatment of evidence nor the burden of proof is a fundamental rule of procedure. They assert that "none of the cases and authorities cited by Venezuela support the proposition that the burden of proof is a fundamental rule of procedure. […] Indeed,

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[50] Memorial, ¶ 49; Rejoinder, ¶¶ 12 and 13.
[51] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated 8 December 2000 (5 February 2002) (hereinafter *Wena Hotels v. Egypt*), ¶¶ 56 and 57 (A/RLA-64).
[52] Reply, ¶ 22.
[53] Venezuela's PHB, p. 2 (emphasis in the original).
[54] Venezuela's PHB, p. 3.
[55] *Caratube v. Kazakhstan*, ¶ 97, quoting *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment (3 May 1985) (hereinafter *Klöckner v. Cameroon*) (A/CLA-53).

no *ad hoc* committee has ever annulled an award based on an alleged misallocation of the burden of proof."[56] They argue that debates about evidence are regularly focused on its weight and probity, and are therefore more of a substantive rather than a procedural nature.[57] Since Arbitration Rule 34(1) bestows a high degree of discretion on the tribunal to judge the probative value of evidence, and since international law does not provide for formal evidentiary rules, it is impossible – or at the very least highly unlikely – that the evidentiary standards applied in ICSID arbitration could ever be classified as "fundamental" rules for purposes of Article 52(1)(d)."[58] The Respondents rely on *Continental Casualty v. Argentina* where the *ad hoc* committee found:

> "that the ICSID Convention and the Arbitration Rules contain no provisions with respect to the burden of proof or standard of proof. Accordingly, there cannot be any requirement that a tribunal expressly apply a particular burden of proof or standard of proof in determining the dispute before it. Indeed, the tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms, as opposed simply to making findings of fact on the basis of the evidence before it."[59]

84. With respect to the cumulative requirement of Article 52(1)(d), according to which the departure from a fundamental rule must be "serious", the Applicant asserts that the Committee has to ascertain the existence of the requirement under the specific circumstances of the case and not "aprioristically or automatically."[60] It further contends that it does not have to prove that the departure from the fundamental rule was result-determinative or that it would have won the case if the departure had not taken place. Rather, it has to demonstrate that "the departure had the potential to have an effect on the award."[61] The Applicant relies on a series of decisions by *ad hoc* committees, such as *Pey Casado v. Chile*, stating that:

> "The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected.

[56] Tenaris PHB, ¶ 24.
[57] Rejoinder, ¶¶ 14 and 15; Tr. D1, p. 189.
[58] Rejoinder, ¶ 16.
[59] *Continental v. Argentina*, ¶ 135.
[60] Memorial, ¶ 50.
[61] Memorial, ¶¶ 50, 55; Reply, ¶ 23.

> The committee notes in fact that, in Wena, the committee stated that the applicant must demonstrate "the impact that the issue may have had on the award." The Committee agrees that this is precisely how the seriousness of the departure must be analyzed."[62]

85. The Respondents contend that "the departure from that fundamental procedural rule must have been so serious as to deprive Venezuela of the intended benefit of that rule; and the claimed violation must have affected the outcome of the arbitration (or, according to Venezuela, at least had the potential to affect the outcome of the arbitration)."[63]

86. For both criteria, the Respondents rely on decisions of *ad hoc* committees. For instance, in *MINE v. Guinea*, the committee ruled that "the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide."[64] Also, in *Azurix v. Argentina*, the committee held that "the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed."[65]

***b. The Committee's Analysis***

87. In line with the Parties, the Committee subscribes to the definitional criteria set out in *Wena v. Egypt*. If minimal standards of procedure are not respected, committees have the authority to annul the award.

88. The Parties disagree on whether "the treatment of evidence and the burden of proof" are fundamental rules of procedure. The Committee reiterates that the right of each party to produce evidence in support of its case and the right to have an adequate opportunity to respond to the evidence produced by the other party form part of such fundamental rules. However, both do not concern the submission of evidence as such, but are rather expressions of the rights to be heard and to be treated equally and

[62] *Pey Casado v. Chile*, ¶ 78.
[63] Counter-Memorial, ¶ 41.
[64] *Maritime International Nominees Establishment v. The Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award (22 December 1989) (hereinafter *Maritime v. Guinea*), ¶ 5.05; identical in *Wena Hotels v. Egypt*, ¶ 58.
[65] *Azurix v. Argentina*, ¶ 234.

impartially. In that sense, the *ad hoc* committee in *Tenaris I* distinguishes correctly both issues and "finds that the Tribunal neither shifted the burden of proof **nor** breached any fundamental rule of procedure."[66]

89. To the extent that the Applicant invokes an additional element affecting the evidence, namely its "treatment,"[67] the Committee does not see a possible fundamental rule of procedure that may be violated by the Tribunal's treatment of evidence. Arbitration Rule 34 grants wide discretion to tribunals to order the production of evidence and to judge its admissibility and probative value. The Parties have not adduced any further substantive procedural rules of evidence that might be relevant to the present case, and the Committee is unaware of any.

90. In addition, the Committee recalls that the different grounds for annulment in Convention Article 52(1) pursue different rationales and must not be amalgamated. An alleged non-application of the proper law and rules may represent a manifest excess of powers and must be examined under the heading of Article 52(1)(b). Its rationale is the respect of the parties' consent, which limits the mandate of the tribunal. Only if this non-application seriously departs from fundamental rules of procedure can Article 52(1)(d) be invoked. Its rationale is the preservation of the integrity and propriety of the procedure and not the application of the proper law.

91. Chapter IV of the Arbitration Rules contains the evidentiary rules of ICSID proceedings. It confirms the standards of impartiality, equality of the parties and due process. In addition, it confers discretion on tribunals to determine how to conduct proceedings diligently and in the respect of procedural economy. While the standards are part of the fundamental rules of procedure, the technical provisions on the written and oral procedures, the production of documents, and the examination of witnesses and experts, are not. They do not touch upon the fundamental requirement of

[66] *Tenaris S.A. and Talta v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela (8 August 2018), ¶ 228 (emphasis added by Committee) (hereinafter *Tenaris I v. Venezuela* Decision) (A/CLA-86)
[67] Reply, ¶ 22.

procedural justice and fairness. Their non-application may imply an excess of power but not a departure from a fundamental procedural rule.

92. As to the burden of proof, the Committee has no doubt that the principle of "*actori incumbit probatio*" represents a generally accepted rule. It is applied in many national jurisdictions, either codified or as a matter of court practice, and also in international law. The Applicant quotes a recent judgment of the International Court of Justice ("ICJ") where it recalls that "it is for the party alleging a fact to demonstrate its existence."[68] It further relies on abundant tribunal practice confirming that claimants bear the burden of proof for their claims, including and especially when jurisdictional matters, such as the nationality of a party, are at stake. These matters must be proven and not only assumed.[69] The Applicant relies on Prof. Bin Cheng's commentary affirming that "there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings."[70]

93. That said, the Committee is unable to identify the principle as an unshakeable and invariable minimum standard of procedure, as compared, for instance, to the right to be heard and rebut evidence, due process, neutrality and impartiality of tribunals and the equality of parties. In the words of the ICJ with respect to the burden of proof, "[t]his principle is not an absolute one."[71] The Committee agrees with the *Caratube* committee that "a reversal of the burden of proof could well lead to a violation of a fundamental rule of procedure", if for instance the tribunal did not treat the parties equally or did not grant an opportunity to be heard on the issue. However, these are consequences of other principles that have an impact in the treatment of the burden of proof but they are not principles themselves. The Applicant relies on a dissenting opinion in *Soufraki v. UAE*, where the arbitrator held, without further arguments or reference to court practice, that "an erroneous reversal of the burden of proof […] is

[68] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter *Croatia v. Serbia*), Judgment (3 February 2015), ¶ 172 (A/RLA-81).
[69] Memorial, ¶¶ 93-101.
[70] Venezuela's PHB, p. 2, quoting Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals. Cambridge, 1953-2006, pp. 326, 327 cited in *Soufraki v. UAE*.
[71] *Croatia v. Serbia*, ¶ 172.

a serious departure from the fundamental rule of procedure."[72] This statement in itself does not convince the Committee.

94. Firstly, the principle is less a rule of procedure than a rule to determine the requirements of substantive law. Although mostly relevant in court and arbitral proceedings, it does not necessarily guide the process before the court or tribunal and does not define the parties' fundamental rights and duties. Rather, it provides an instrument to judges and arbitrators that allows them to ascertain or reject a claim in situations of *non liquet*. It is thus understandable that in certain national and regional jurisdictions the principle is codified and/or considered as a substantive and not procedural law and rule.

95. Secondly, to the extent that the principle is considered a procedural rule, it cannot be considered a basic, invariable, and 'absolute' element of the corpus of due process and minimal standards of procedure. For a variety of circumstances and purposes of substantive law, such as consumer protection, product liability, tort claims, and others, jurisprudence and legislators have adapted and even reversed the principle when requirements of social justice and fairness seemed to require so.

96. Such changes and adjustments show that the burden of proof is not part of the minimal standards and the fundamental rules of procedure. It seems that the appropriate place to determine whether the principle or a law on the burden of proof has been applied or not comes therefore under the realm of excess of powers and not of a serious departure from a fundamental rule of procedure.

97. When qualifying the departure from a fundamental rule of procedure in Article 52(1)(d) as "serious," the Convention reconfirms the high value of finality of awards. It recalls the limited and exceptional character and purpose of annulment. As the Applicant notes, the term underlines the "stringent standard of annulment."[73] A departure without any effect on the proceeding and without depriving a party of the protection of procedural fairness, which is at the heart of procedural rules, cannot be

[72] *Soufraki v. UAE*, Separate Opinion and Statement of Dissent of Omar Nabulsi (27 May 2007), ¶ 49.
[73] Memorial, ¶ 68.

qualified as serious. Therefore, the Committee agrees with the decisions in *MINE*, *Wena*, and others, that emphasize that the departure must be "substantial" to be serious.

98. Does this mean that applicants have to prove that the departure has caused the tribunal to render an award substantially different from what it would have awarded had such a rule been observed?

99. The Committee finds that the asserting party must demonstrate that, indeed, the departure of a fundamental procedural rule caused the tribunal to reason in a way that decreased the level of procedural fairness and protection in its disfavor.

100. However, an applicant must not and cannot be asked to prove in addition that such a substantively untenable result caused by a specific departure from the rules of procedure caused the tribunal to render a different award. The decision-making process in arbitral deliberations is a complex matter and influenced by a variety of considerations and compromise. It is not excluded, but by no means certain or even probable, that the debate on one specific procedural rule may alter the totality of the construct of determination resulting from complex deliberations.

**(3) Failure to State Reasons (Article 52(1)(e))**

***a. Summary of the Parties' Positions***

101. The Parties agree that Convention Article 52(1)(e) requires "the failure to state any reasons with respect to all or part of an award, a tribunal's reasoning which is genuinely contradictory, or a reasoning that is so lacking in coherence that a reader cannot follow it."[74] However, at a lower level of abstraction, they present a different reading.

102. The Applicant contends generally that the duty of a tribunal to provide coherent and adequate reasoning is one of the essential requirements for the validity of an award, as clearly established by Convention Article 52(1)(e) in conjunction with

[74] Reply, ¶ 24; Counter-Memorial, ¶ 111.

Article 48(3).[75] Venezuela refers to Convention Article 48(3) since "it requires that the reasons be stated."[76] Relying on the annulment decision in *Tidewater v. Venezuela*, and the expert opinions of Professors Alvarez and Reisman, it points to:

> "the crucial importance of the duty to state the reasons for the decisions rendered in arbitrations involving the analysis of public decisions made by sovereign States, taking into account the fact that those interested in such decisions include not only the parties to the dispute, but also the people of the State concerned, which increases the duty of intelligibility and transparency of the decision."[77]

103. It further notes that the clear language of the Convention, which does not use terms such as 'manifest' or 'serious', does not allow a restrictive interpretation. At the same time, the wording 'failure to state reasons' must not be understood to mean a complete failure to state reasons. There is general agreement that the ground for annulment cannot be restricted to the "highly unlikely, if not virtually unimaginable" and unconceivable situation of a complete absence of reasons and must extend to situations of "lack, unintelligibility, inconsistency and frivolity of reasons", as well as "contradictory and/or insufficient reasons", whereby "contradictory reasons are those that are mutually inconsistent and thus cancel each other out."[78] Venezuela also sustains that inadequate and insufficient reasons amount to a failure to state reasons, whereby "inadequate or insufficient reasons are those that do not logically lead to the conclusion posited."[79]

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[75] Memorial, ¶ 61; Venezuela quotes *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment (10 July 2014), ¶ 64.
[76] Reply, ¶ 28.
[77] Memorial, ¶ 65; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment (27 December 2016), ¶¶ 163-165; Guillermo Aguilar Alvarez and Michael Reisman, *The Reasons Requirement in International Investment Arbitration*, 2008
[78] Memorial, ¶¶ 67-73; Reply, ¶ 24; Venezuela relies on and quotes – among others – *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment (10 July 2014), ¶ 202; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment (26 February 2016), ¶ 157; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision of the *ad hoc* Committee on the Application for Annulment (21 February 2014), ¶¶ 102; *Maritime v. Guinea*, ¶ 5.09; *Pey Casado v. Chile*, ¶ 86; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment (27 December 2016) (hereinafter *Tidewater v. Venezuela*), ¶ 195 (A/RLA-71); *TECO v. Guatemala*, ¶ 250.
[79] Memorial, ¶ 75.

104. The Applicant insists that the lack of reasons may not be replaced by mere reference to elements, documents or decisions outside the award and must not be replaced by the committee's own reasoning, as clearly held in *Rumeli v. Kazakhstan*. In that case, the committee stated that "an ad hoc committee should not construct reasons in order to justify the decision of the tribunal."[80] In the same vein, it contends that *ad hoc* committees do not have the authority to "speculate about what the tribunal allegedly intended to express but did not state" but has to annul the award if the intentions are not explicit.[81] As found in *Klöckner v. Cameroon*, it "is not for the Committee to imagine what might or should have been the arbitrators' reasons."[82]

105. The Respondents assert that Convention Article 52(1)(e) does not "authorize committees to review the quality or the persuasiveness of a tribunal's reasoning,"[83]and that they may not annul an award "because it disagrees with the reasons provided by a tribunal."[84] They rely on a broad range of decisions by *ad hoc* committees that have "consistently confirmed there is no basis for annulment so long as it is possible to follow a tribunal's reasoning through to its conclusion – even if the award contains an error of law or fact."[85] However, the "reasons need not be correct, or even convincing, for an award to survive annulment."[86]

106. In order to avoid "hair-trigger annulment" in cases where the tribunal's argumentation is perfectly coherent, committees are bound to make an effort to also understand the implicit reasoning.[87]

107. The Respondents refute the Applicant's assertion that the failure to state reasons should be interpreted broadly. They further contend that tribunals are not obliged to deal with every question and argument that have been put before them to avoid

[80] Memorial, ¶¶ 84-86; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee (25 March 2010), ¶ 83.
[81] Reply, ¶¶ 28 and 29.
[82] *Klöckner v. Cameroon*, ¶ 151.
[83] Counter-Memorial, ¶ 110
[84] *Ibid*.
[85] Counter-Memorial, ¶ 112.
[86] Counter-Memorial, ¶ 113.
[87] Counter-Memorial, ¶ 114; Rejoinder, ¶ 112; Respondents rely among others on *Wena v. Egypt*, ¶ 81.

annulment. Instead, the Respondents sustain that the failure to state reasons must relate to a point that is "essential to a tribunal' decision."[88] The appropriate remedies for a challenge as to the substance of reasons as well as for the failure to address a particular question are embedded in Convention Article 49(2).[89]

108. Finally, the Respondents emphasize a distinction between genuinely contradictory reasons, which may give rise to annulment "if they do not enable the reader to understand the tribunal's motives,"[90] and the "tribunal's appropriate weighing of conflicting considerations."[91] In their view, tribunals must enjoy a certain amount of freedom on how to organize their reasoning. The scrutiny for hidden contradictions by *ad hoc* committees would necessarily transform the procedure into an illicit appellate mechanism.

***b. The Committee's Analysis***

109. The Committee agrees with the Applicant's position that the statement of reasons is a primordial duty of arbitral tribunals in general, and investment arbitral tribunals, in particular. Indeed, the "legitimacy of the process depends on its intelligibility and transparency."[92]

110. At the same time, the Committee agrees with the Parties that only a total absence of reasons or a tribunal's reasoning which is genuinely contradictory, or a reasoning that is so lacking in coherence that a reader cannot follow it, warrants annulment. As repeatedly stated, the Committee is not a court of appeal. It is not authorized to qualify a tribunal's reasoning as superficial, substandard, deficient, wrong or otherwise faulty, and thus, substitute its judgment for that of the tribunal.

111. The Committee is mindful of the delicate task to determine properly the borderline between an appeal and an annulment in the context of Convention Article 52(1)(e).

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[88] Counter-Memorial, ¶ 115.
[89] Conter-Memorial, ¶¶ 116 and 117; Tenaris' Rejoinder, ¶¶ 113-116; Respondents rely among others on *Wena v. Egypt*, ¶ 80, and on *Michael Reisman*, "The Breakdown of the Control Mechanism in ICSID Arbitration" (1989) 4 Duke Law Journal 740, p. 763.
[90] Rejoinder, ¶ 117.
[91] Counter-Memorial, ¶ 121.
[92] *Tidewater v. Venezuela,* Decision, ¶ 163.

As Prof. Schreuer stated, "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."[93]

112. It is true that, differently from Convention Article 52(1)(b) and (d), Article 52(1)(e) does not add qualifications such as "manifest" or "serious." That does not, however, imply that the interpretation has to be broad and extensive. Rather, the omission is intrinsic to the formulation of the ground: taken literally, a failure to state reasons (in the French version: 'défaut de motifs') means an absence of reasons. This is in itself so restrictive that no further adjective would add severity to it. At the same time, a total absence of reasons is so improbable that an appropriate interpretation, taking into consideration the mandate of VCLT Article 31, must extend the meaning of 'failure' to practically relevant insufficiencies such as total incoherence or genuine contradiction in order to give an *effet utile* to the term and to satisfy the purpose of the provision, i.e. the intelligibility of the award for the parties and the public.

113. This generally accepted interpretation is in itself a broad reading of the term 'failure', which has a narrow meaning, without further restrictive adjectives. This extensive reading must be exercised with prudence and measure. Efforts to move the exercise further by labelling reasons as 'frivolous' or 'inadequate' will inevitably cross the border to the scrutiny of the quality of the award and thereby to an appeal award.

114. Therefore, the Committee will proceed to assess the quality of the Tribunal's reasoning but will limit its examination to the question of whether the reasons are so incoherent and/or contradictory that they cannot be understood and followed. This threshold concerns the totality of the reasons in the Award, encompassing those presented for the Tribunal's competence and jurisdiction, for the merits of the claim, the quantum of compensation, and the allocation of the costs.

115. The Applicant requests the annulment of the Award for the failure to state reasons and bases its request on Convention Article 52(1)(e). It refers explicitly to Convention

[93] *Schreuer*, Art. 52, ¶ 344.

Article 48(3), which provides that the tribunal has to state the reasons upon which the award is based.[94] It has chosen not to seek a supplementary decision of the Award by the Tribunal in accordance with Convention Article 49(2).

116. Both remedies follow different rationales and objectives. Convention Article 49(2) "enables the tribunal to correct mistakes that may have occurred in the award's drafting in a non-bureaucratic and expeditious manner,"[95] while Article 52(1) is concerned with the integrity of the proceedings and "would safeguard against violation of the fundamental principles of law."[96]

117. The remedies do not exclude each other. Applicants are free to pursue one or the other as long as the specific requirements for each of them are met. Venezuela is not obliged to apply first to the initial tribunal in accordance with Convention Article 49(2) and request a decision on an alleged failure to state reasons. Therefore, Article 49(2) does not stand in the way of a request for annulment.

### B. The Application of the Standards to the Facts

118. The Applicant asserts 16 different violations or issues which in its view give rise to the annulment of the Award.

119. The Committee will address the alleged violations one by one. For reasons of transparency and readability, it has regrouped the different issues under the three separate grounds for annulment asserted by Venezuela. Although the three grounds are each based on different requirements, on several occasions the alleged violations are based on identical facts, leading inevitably to a certain degree of repetition.

120. The Committee has studied the written and oral submissions of both Parties carefully and considered them during its deliberations. The purpose of the following summaries of the Parties' positions is not to rehearse them exhaustively, but to present the salient features and in particular the points of divergence between the Parties.

[94] Reply, ¶ 28.
[95] *Schreuer,* Art. 49, ¶ 28.
[96] Background Paper, ¶ 71.

**(1) Manifest Excess of Powers**

***a. The Issue of Jurisdiction Ratione Personae***

***i. Summary of the Parties' Positions***

***1. The Applicant***

121. As a preliminary matter, the Applicant asserts that the Committee has the power to conduct a "broad-scope analysis"[97] of the Tribunal's reasoning and that "a review of the evidence on the record and even the submission of new evidence are not contrary to the requirement that the excess of powers by the Tribunal be manifest."[98] To that effect, it relies on the decision of the *ad hoc* committee in *MHS v. Malaysia*. That committee found that the tribunal failed to apply the BIT and reassessed the tribunal's interpretation of the term "investment" of Convention Article 25 in a thorough legal analysis, including going back to the *travaux préparatoires* of the ICSID Convention. The committee came to the conclusion that the tribunal had omitted one of the criteria normally used to define "investment", i.e. the contribution to the local economy, and that it had "reached conclusions not consonant with the *travaux* in key respects."[99] The Applicant argues that the committee had rightly interpreted the applicable rules differently from the tribunal, and had in fact conducted "a proper *de novo* analysis."[100]

122. In the same vein, the *ad hoc* committee in *Sempra v. Argentina* equally "made an interpretation of the applicable norms that differed greatly from that of the tribunal."[101] The committee concluded that the tribunal had failed to apply Article XI of the BIT. After a thorough legal analysis of both BIT Article XI and Article 25 of the ILC Draft, the committee concluded that both texts differed in substance and that BIT Article XI should have been applied. In the committee's words:

> "Thus, the Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law. The

[97] Reply, ¶ 66.
[98] Reply, ¶ 65.
[99] *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Decision of the *ad hoc* Committee on the Application for Annulment (16 April 2009), ¶ 62 (A/RLA-52).
[100] Reply, ¶ 71.
[101] Reply, ¶ 72.

> Committee is therefore driven to the conclusion that the Tribunal has failed to conduct its review on the basis that the applicable legal norm is to be found in Article XI of the BIT, and that this failure constitutes an excess of powers within the meaning of the ICSID Convention."[102]

123. The Applicant maintains that the *ad hoc* committee in *Enron v. Argentina* had also "made an enquiry into the underlying tribunal's analysis" to find that the tribunal had not applied the proper law but the results of an expert opinion. Not only had the committee criticized the tribunal's approach but had corrected the tribunal by stating how the tribunal should have reasoned. In fact, the committee had found:

> "The Tribunal's process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence before it […]. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(b) to the facts as found […]. Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had "contributed to the situation of necessity" within the meaning of Article 25(2)(b)."[103]

124. The Applicant concludes from these decisions that an in-depth analysis and *de novo* review of the Award are appropriate and necessary in order to determine that the Tribunal's own findings on the legal requirements for the definition of *siège social* or, respectively, the seat of the Respondents are not backed-up by the evidence.[104] It alleges that it "is manifest that the Tribunal failed to decide the case based on the evidentiary materials put before it by the Claimants."[105]

125. The Applicant recalls, relying on *ICS v. Argentina*, that "a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not." Since Venezuela did not consent to arbitrate with claimants that were not investors from Luxembourg and Portugal, respectively, and since Tenaris and Talta were not

[102] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision of the *ad hoc* Committee on the Application for Annulment (29 June 2010) (hereinafter *Sempra v. Argentina*), ¶¶ 208 and 209 (A/RLA-36).
[103] *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision of the ad hoc Committee on the Application for Annulment (30 July 2003), ¶ 393 (A/RLA-60).
[104] Memorial, ¶¶ 128 ss.; Reply, ¶¶ 88 ss.
[105] Memorial, ¶143.

investors from either country, its consent is lacking and thereby the jurisdiction of the Tribunal.[106]

126. Finally, the Applicant states that the Tribunal had held that international law should apply to establish the proper meaning of *siège social*, including the rules on interpretation, and since that law does not provide for a definition of the 'effective seat', the Tribunal proposed to look into "rules generally accepted by different municipal legal system."[107] Instead of applying these rules, it had "invoked only a rebuttable presumption on the seat present in Portuguese law."[108] "By applying Portuguese law, as it did, the Tribunal manifestly exceeded its powers."[109] The "Tribunal said that it was applying principles of international law and ended up applying Portuguese and Luxembourg law."[110]

127. In developing its case, the Applicant does not contest that the Tribunal refers to and interprets Convention Article 25, Article 1.b) of the Luxembourg-Venezuela BIT and Article I.1.b) of the Portugal-Venezuela BIT. Likewise, it does not contest the result of such interpretation according to which the terms nationality/*siège social*/seat mean the effective seat and not a statutory seat.

128. Further, it agrees in principle with the Tribunal's analysis that according to the unanimous and undisputed expert opinions for both legal systems:

> "the factors conditioning a company's Effective Seat are three:
>
> - The place in which the shareholders' meetings and the board of directors' meetings are conducted; the place where they are held is relevant;
>
> - The place in which the management tasks take place, the place from which a company reaches out to customers, where it signs its main contracts and where financial activities are carried out;

[106] Venezuela's PHB, p. 10; Venezuela relies on *ICS Inspection and Control Services Ltd. v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012), ¶ 280 (A/RLA-86).
[107] Award, ¶ 192.
[108] Memorial, ¶ 155.
[109] Venezuela's PHB, p. 8
[110] Tr. D2, p. 344.

- The place where the company's books are deposited and kept."[111]

129. The Applicant confirms that "[a]ll these elements had to be present for the Tribunal to affirm its jurisdiction. They are cumulative requirements."[112] However, it observes that according to the expert on Luxembourgian law "the minutes of the board of directors appear as the most relevant evidence to assess whether the decision-making nerve centre of Tenaris S.A. is located in Luxembourg." It criticizes the Tribunal for not having applied this hierarchy of criteria.[113]

130. During the Hearing, the Applicant presented the minutes of meetings of the board of directors to prove that they were authentic but "heavily redacted" and void of content.[114] It alleges that they were not only submitted untimely[115] but that they do not prove the effective seats to be located in Luxembourg and Portugal. The Applicant asserts that Tenaris' meetings were mostly held by telephone conference at times convenient for South American time zones, that members of the board dialed in from places that were incorrectly identified by the Tribunal and overwhelmingly from outside Luxembourg, that most of the minutes concern meetings held after the date of notice of arbitration and are of no value as to the establishment of the effective seat at that crucial moment.[116] The Applicant does not comment on the Tribunal's finding that "Talta's board of directors always met in Portugal."[117]

131. With respect to the Tribunal's holding that Luxembourgian law allows board meetings held by telematics means and that such law "establishes the presumption that the meetings held by telematics channels are deemed conducted in the statutory seat,"[118] the Applicant alleges that the central administration of a company and its

[111] Award, ¶ 193.
[112] Reply, ¶ 85; Memorial, ¶¶ 131 and 132.
[113] Memorial, ¶ 133, quoting the expert on Luxembourg law.
[114] Tr. D2, p. 28.
[115] This issue will be dealt with in the context of a departure from procedural rules.
[116] Memorial, ¶¶ 133 ss.; Reply, ¶¶ 88 ss.
[117] Award, ¶ 210.
[118] Award, ¶ 212.

statutory seat "are not necessarily the same" and that the "mere assumption" of coinciding is not backed by the minutes.[119]

132. With respect to the other criteria that the Tribunal used to define the effective seat, i.e. the meetings of shareholders and the place where the companies are audited and the books are kept, the Applicant asserts that they are irrelevant. Both are "mere consequences of compliance with the legal requirements of the place of incorporation and, as such, they are irrelevant for purposes of determining the effective seat of a company": both Luxembourgian and Portuguese law require that accounts are audited, and books are kept, and shareholder meetings are conducted at the statutory seat.[120]

133. As to the criteria for the *siège social* under Luxembourgian law and their application in a concrete situation, the Applicant relies on the recent award in *CFH v. Cameroon,*[121] which "is deferential to the Tenaris awards only in relation to the interpretation of the concept of seat."[122] That tribunal had to apply almost identical provisions of the Belgo-Luxembourg Economic Union (BLEU) BIT; it "sided with the Tribunal [sic] in the determination of the elements that would indicate where the effective seat of a company is located."[123] Despite an identical application and interpretation of the law, in direct reference to the present case, "that tribunal reached a very different conclusion," [124] based on the evidence.

134. The *CFH v. Cameroon* tribunal found that:

> Shareholder meetings took place in Luxembourg, although irregularly;

[119] Memorial, ¶ 145; Reply, ¶ 94.
[120] Reply, ¶¶ 95 and 101; The Applicant discusses further facts referring to the issue of the Claimants' nationality, such as the office space and the nature of the Portuguese company. It is not always evident to the Committee whether issues are addressed to document an excess of power or a failure to state reasons. For these particular items, however, the Applicant clearly states that they concern the failure to state reasons only (cf. Venezuela's Memorial, ¶¶ 147, 154; Venezuela's Reply, ¶ 97). They will be addressed in that section.
[121] *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017) (hereinafter *CFH v. Cameroon*) (A/RLA-107).
[122] Venezuela's PHB, p. 11.
[123] Reply, ¶ 103.
[124] *Ibid.*

> Board meetings were deemed to be formally held in Luxembourg, "but many directors voted by circular letters";
>
> The company kept records in Luxembourg, "albeit incomplete."[125]

135. Despite these findings, according to the Applicant similar to the present case, "the tribunal still concluded that it did not have *ratione personae* jurisdiction."[126]

### *2. The Respondents*

136. The Respondents recall the "elementary principles" for both substantive and jurisdictional enquiries "that annulment committees are not fact finders, and that annulment committees are without the power to substitute their assessment of the facts for that of a tribunal."[127] They rely on the *ad hoc* committee in *Tulip v. Turkey*, which held that: "[*a*]*d hoc* committees cannot review an award's findings for errors of fact or law."[128]

137. They explain that the Tribunal had applied the Convention and the Treaties and found –following the reasoning of Venezuela and its expert – that they all required that the effective and not only the statutory seat was decisive to establish the nationality of the investors. The Tribunal then determined the cumulative criteria that constitutes such effective seat, again in agreement with Venezuela, with the exception of its opinion on the hierarchy of the criterion of the meetings of the board of directors, where the Tribunal had considered and rejected the expert's legal argument.[129] "In other words, Venezuela claims that the Tribunal identified the correct legal test but then reached the wrong result based on the evidence."[130]

138. The Respondents contend that in light of these uncontroversial findings on law, the Applicant is only able to argue that the Tribunal erred in the appreciation of the facts and that "an annulment committee has the power and duty to review the evidence in

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[125] Reply, ¶¶ 104 and 106; *CFH v. Cameroon*, ¶ 315.
[126] Reply, ¶ 107.
[127] Rejoinder, ¶ 74.
[128] *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (30 December 2015), ¶ 44 (A/RLA-68).
[129] Counter-Memorial, ¶¶ 90-93 and 129-131; Rejoinder, ¶ 81.
[130] Counter-Memorial, ¶ 94.

full to find that claimed error."[131] Yet, it is widely accepted that *ad hoc* committees do not have such power. The Committee is not authorized to reassess the evidence and scrutinize whether the Tribunal erred in its assessment. As stated in *Rumeli v. Kazakhstan*, "it would not be proper for an ad hoc committee to overturn a tribunal's treatment of the evidence to which it was referred."[132]

139. Even the cases on which Venezuela relies to justify a committee's *de novo* analysis of the tribunal's findings (and which have been criticized as going too far into the direction of appeal), do not accept that committees might undertake a *de novo* analysis of the factual findings of a tribunal.[133]

140. The Respondents rely on the *ad hoc* committee in *Dogan v. Turkmenistan* that found:

> "The Committee shall not review the probative value attributed by the Tribunal to the evidence on which it has relied to reach its Decision on Jurisdiction. This is a matter of appreciation and evaluation of evidence. It is repetitious to observe that it is beyond the mandate of this Committee to revisit the conclusions reached by the Tribunal in such matters, considering that it is not acting as an appellate body."[134]

141. Finally, the Respondents submit that the Applicant has failed to address the "manifest" requirement, which obliges it to prove that the alleged error was – in the words of the *Impregilo v. Argentina* committee – "obvious, self-evident, clear, flagrant and substantially serious."[135] The Applicant has ignored that another tribunal, which was confronted with the same jurisdictional issue with respect to the same Claimants and Respondent, had correctly found that *Tenaris* and *Talta* had their effective seats in Luxembourg and Portugal, respectively.[136] The correctness of the

[131] Rejoinder, ¶ 73.
[132] *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee (25 March 2010) (hereinafter Rumeli v. Kazakhstan), ¶ 96 (A/RLA-78).
[133] Rejoinder, ¶¶ 73-78.
[134] *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment (15 January 2016), ¶ 214 (A/RLA-105).
[135] *Impregilo v. Argentina*, ¶ 128.
[136] *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, (29 January 2016) (hereinafter *Tenaris I v. Venezuela* Award), ¶ 226 (A/CLA-45).

tribunal's decision has been confirmed by an *ad hoc* committee that rejected Venezuela's request for annulment in this regard.[137] The Respondents submit that:

> "the Tribunal's jurisdictional decision in Tenaris II cannot be an obvious and self-evident excess of powers given that another tribunal has reached the same conclusion. In that circumstance, any alleged jurisdictional error, by definition, cannot be manifest."[138]

142. Instead, as the Respondents submit, the Applicant relies on a separate case – *CFH v. Cameroon* – involving a different claimant and respondent, and different facts. The tribunal in that case found that the claimant had abused its rights by "wakening" a dormant company for the sole purpose of availing itself of treaty protection and that the evidence was insufficient. The Respondents assert that:

> "it is in any event misplaced to compare the evidence submitted in CFH to the evidence supporting the Tribunal's assumption of jurisdiction in this case. Moreover, even if the facts of the two cases were exactly the same, the different results reached by the two tribunals would not give rise to annulment of one award or the other. At most, in such circumstances one of the tribunals could be accused of making a factual or legal error. But that is not a basis for annulment."[139]

### *ii. The Committee's Analysis and Determination*

143. The Committee does not have the authority to scrutinize the Award for errors of law and/or fact. The Committee will proceed to examine the Applicant's *ratione personae* issue within the limits of its mandate.

144. The Committee finds that the Tribunal has identified the relevant provisions of the ICSID Convention and the applicable Treaties in paragraphs 165-174 of the Award to determine its jurisdiction *ratione personae.* The Tribunal's further research of rules of international law has led it to conclude that "[i]nternational law lacks a concept of "seat" […] of its own", and that it "was developed within the different systems of Municipal Law. […] Hence to give substance to the term, it is necessary to resort to

[137] *Tenaris I v. Venezuela* Decision, ¶¶ 204-216.
[138] Counter-Memorial, ¶ 95; Rejoinder, ¶¶ 86-87.
[139] Rejoinder, ¶ 85 (footnotes omitted).

the rules generally accepted by different municipal legal systems."[140] It has then turned to the interpretation of the Treaties in light of VCLT Article 31.[141]

145. By relying on literature, jurisprudence and expert opinions presented by both Parties, the Tribunal developed its analysis in paragraphs 175-189 of the Award as to the requirement of an effective seat to determine the nationality of the Respondents. It reached its conclusion in application of detailed "hermeneutic principles, and in the light of the rules of international law."[142] In paragraphs 191-194 of the Award, it identified the factors that determine such seat. The reasoning is exhaustive. It corresponds to the reasoning in *Tenaris I* and has been largely quoted with approval in *CFH v. Cameroon*, where the tribunal held that the legal argumentation in both *Tenaris I* and the Tribunal in the present case are similar and appropriate.[143]

146. When considering the development of the Tribunal's reasoning, the Committee does not find a regressive argumentation based exclusively on Portuguese and Luxembourgian law.

147. The Tribunal has identified a number of factors to determine the effective seat, in close consideration of the Parties' experts. The disagreement between the Tribunal and the Applicant's expert on the hierarchy to be given to the different factors is not more than that: a disagreement on the interpretation of legal terms and by no means a non-application of the law. It is not the Committee's role to take sides in such a debate on the interpretation of a legal norm.

148. Conversely to the circumstances in the annulments of *MHS v. Malaysia* and *Sempra v. Argentina*, which have been presented above and which have both found that those tribunals failed to apply crucial provisions of the respective BITs, no such situation exists in the present case.

[140] Award, ¶ 181.
[141] Award, ¶¶ 183-188.
[142] Award, ¶ 189.
[143] *CFH v. Cameroon*, ¶¶ 226 ss. for *Tenaris I* and ¶¶ 262 and 263 for *Tenaris II*.

149. Given these circumstances, the Committee is not surprised to find that the Parties' argumentation does not differ widely as to the legal analysis of the Tribunal. Rather, the Applicant bases its case on the assertion that it "is manifest that the Tribunal failed to decide the case based on the evidentiary materials put before it by the Claimants."[144]

150. Having found that both Treaties demand an effective seat to determine the nationality of the Respondents, and having identified the factors that condition a party's effective seat, the Tribunal applied these legal determinations to the facts provided by the Parties. In paragraphs 195-203 of the Award, it presented the Respondents' evidence that is meant to prove that they had their seats in Luxembourg and Portugal, respectively; in paragraphs 204-206 of the Award, it presented Venezuela's evidence that is meant to prove that the Respondents' seat was Argentina and not Luxembourg and Portugal; and in paragraphs 207-230 of the Award, the Tribunal assessed the evidence.

151. In a preliminary remark, the Tribunal has indicated that after having studied the experts' opinions and the accompanying evidence "it tends to think that in Portuguese Law there actually exists a presumption that the Effective Seat coincides with the Statutory Seat."[145] Notwithstanding this remark, the Tribunal has "thoroughly analyzed and assessed the evidence."[146] Evidently, the Tribunal has not based its determination on a mere presumption.

152. The Tribunal has found that:

- The shareholders' meetings of both Tenaris and Talta were always held in Luxembourg and Portugal respectively;
- Tenaris' board of directors met 8 times in person in Luxembourg, twice in Mexico, and once in Argentina, once in the USA and 22 times by telephone

[144] Memorial, ¶ 143.
[145] Award, ¶ 207.
[146] Award, ¶¶ 207 and 208.

conference, which is allowed by Luxembourgian Law and deemed held at the statutory seat;

- Talta's board of directors always met in Portugal;
- Offices, even if small, are operated in both Luxembourg and Portugal;
- The issue of the number of employees is irrelevant for the purpose of determining the effective seat;
- The lack of operations with third parties does not imply the absence of business activities as holding companies;
- Luxembourgian and Portuguese auditing companies audit both Tenaris and Talta, respectively, and books are kept and stored in Luxembourg and Portugal, respectively.

153. The Tribunal has concluded that "there is no evidence that Tenaris and Talta's Effective seat are located in Argentina. On the contrary, the evidence points to the fact that Effective Seat is located in Luxembourg and Portugal, respectively."[147]

154. The Committee finds that the assessment of the evidence and the conclusions are developed with care. It has neither the right nor the duty to scrutinize them with the aim to find errors and/or incorrect appreciations as long as they do not amount to a suppression or manipulation of the evidence leading to a usurpation of jurisdiction.

155. The Applicant submits that the geographical location from which directors dialed into telephone conferences was often not revealed, that the Tribunal did not correctly identify the names of the participating directors, and that the time zone of the conferences was appropriate for Argentina and Mexico but not for Luxembourg.[148] The Applicant has presented the minutes of meetings to prove its assertion, confirming that the documents were authentic.

156. These allegations try to prove that the Tribunal erred in its appreciation. The Committee is not authorized to reassess this evidence and substitute its appreciation

[147] Award, ¶ 230; the foregoing is a summary of ¶¶ 198 and 207-229 of the Award.
[148] Memorial, ¶¶ 135-143.

for that of the Tribunal, as long as it does not believe that the Tribunal mishandled the evidence in order to establish its competence to hear the merits. The Committee does not find any indication in this sense. The Committee agrees with the *ad hoc* committee in *Tenaris I* which held that "it is for the Tribunal, not for the Committee, to weigh the evidence adduced."[149] In the Tribunal's appreciation of the evidence, the Respondents were Portuguese and Luxembourgian investors, respectively. As said, the Committee is not authorized to reassess that evidence. Therefore, Venezuela's assertion that it did not consent to arbitrate disputes with investors from different countries has no merit.

157. Further, the Applicant asks the Committee to be alerted by the fact that in *CFH v. Cameroon,* the tribunal shared the legal analysis of the Tribunal in the present case but reached completely different conclusions in evaluating the evidence.

158. The Committee has studied the award in *CFH v. Cameroon* and finds that those facts are very different from the ones of the present case. In that case, the tribunal found that for four years no shareholder meeting had taken place, no director had been nominated, and the books had not been audited. The company had been "en sommeil" for all those years only to have woken up ("réveillé") for the purposes of the dispute.[150]

159. Therefore, the issue was not one of effective seat but of the effective existence of the claimant. The tribunal denied jurisdiction for this reason and for the abusive conduct of the claimant. The difference of appreciation by the two tribunals is based on the difference of the factual circumstances. It is not indicative of a mishandling of evidence by the Tribunal in the present case.

160. The Committee finds it more appropriate to refer to the *Tenaris I* award, where the tribunal assessed the evidence similarly to the Tribunal in the present case.[151] The parallel indicates, indeed, that the Tribunal has not manipulated or suppressed the

[149] *Tenaris I v. Venezuela* Decision, ¶ 207.
[150] *CFH v. Cameroon*, ¶¶ 363-365.
[151] *Tenaris I v. Venezuela* Award, ¶ 226, as upheld in an annulment proceeding: *Tenaris I v. Venezuela* Decision, ¶ 127.

evidence and that it has not unlawfully arrogated the competence to decide the merits of the case.

161. For all these reasons, the Committee determines that the Tribunal has not exceeded its powers in its decision regarding the *siège social* and will not have to examine the term "manifest." Therefore, it rejects the Applicant's request to annul the Award based on this ground.

### *b. The Issue of Jurisdiction Ratione Temporis*

#### *i. Summary of the Parties' Position*

##### *1. The Applicant*

162. The Applicant contends that the Tribunal exceeded its powers "when it granted jurisdiction without the parties' consent under the terms of the Treaties. Since the Tribunal fabricated jurisdiction where there was none, it exceeded its powers in a manifest manner."[152]

163. Venezuela recalls the fundamental importance of consent as expressed in paragraph 23 of the Report of the Executive Directors of the World Bank on the ICSID Convention: "Consent of the parties is the cornerstone of the jurisdiction of the Centre", and reiterated in abundant jurisprudence and doctrine. The Applicant states that *ad hoc* committees have the power "to review a tribunal's findings for errors of facts or law" since "through the application mutatis mutandis of Article 41 by the Committee, the Committee has to decide whether jurisdiction existed under the ICSID Convention."[153]

164. Without explicitly referring to Convention Article 72, it bases its argument on the requirement that the consent to jurisdiction must be received before the notice of denunciation of the Convention. Venezuela denounced the Convention on 24 January 2012. Only an acceptance of Venezuela's offer by Tenaris and Talta to have disputes with investors heard and decided by an arbitral tribunal under the ICSID Convention

[152] Reply, ¶ 137; Memorial, ¶¶ 186 and 187.
[153] Tr. D1, pp. 67-72.

that preceded the date of notice of denunciation would have perfected the consent. However, that acceptance was only declared valid after such date.

165. The Applicant submits that the substance and the limits of its offer were clearly circumscribed in the Treaties, and that Article 9 of the Luxembourg BIT unequivocally provided that the offer was contingent on a previous notice of dispute initiating amicable settlement negotiations.

166. It submits that the Respondents' letters and notices, as well as negotiations between different parties preceding the date of denunciation, cannot be considered valid manifestations of acceptance.

167. As to Tenaris-TAVSA, it states that "Tenaris' Notice of Dispute regarding TAVSA was flawed because it failed to accept the Republic's offer of consent given in the Treaty with Luxembourg,"[154] thus constituting "an amendment to the Republic's consent offer."[155] The Applicant contends that the Luxembourg BIT conditions the offer to arbitrate to a six-month consultation period. An acceptance that rejects that condition cannot be considered valid and thus cannot perfect the consent to arbitrate.[156] It relies on its expert report, as well as on case law and on the analysis of international law and the ICSID system. It argues that the reservation of the right to start arbitration before a six-month settlement negotiation period "clearly contravenes the design of the dispute settlement offer contained in the Belgium-Luxembourg/Venezuela BIT"[157] and has to be qualified as "lack of a corresponding acceptance."[158]

168. As to Tenaris-COMSIGUA, it states that "Claimants [sic] consent was not validly given before the Republic's Denunciation since it departed significantly from the terms of the offer contained in the Treaty invoked."[159]

[154] Reply, ¶ 120.
[155] Reply, ¶¶ 120-122.
[156] Tr. D2, pp. 413-414.
[157] Memorial, ¶ 170.
[158] Memorial, ¶ 169.
[159] Memorial, ¶174.

169. As to Talta-COMSIGUA, it states that – like with Tenaris-COMSIGUA – "it is not possible to conclude that negotiations under the Treaties started before the COMSIGUA Notification of December 2011."[160] As a general rule, as correctly analyzed by the Republic's expert before the Tribunal, the consent to (ICSID) arbitration cannot be expressed before the expiry of the six-month amicable settlement period.[161]

170. The Applicant asserts that by not taking these circumstances into consideration and by thus "wrongly establishing the relevant facts, the Tribunal made a decision that is beyond the scope of its jurisdiction."[162]

#### *2. The Respondents*

171. The Respondents refute the Applicant's argumentation and the assertion that the Tribunal has established the facts wrongly. They argue that:

> "[t]he following two facts are relevant for present purposes: the Claimants accepted Venezuela's offer to arbitrate, and thus perfected consent, by notices submitted to Venezuela between 2009 and 2011; and Venezuela denounced the ICSID Convention on 24 January 2012. Thus, an agreement to arbitrate between the Claimants and Venezuela existed before the denunciation."[163]

172. The Respondents contend that these facts are established and not contested, and that "Venezuela only disputes the *legal consequences* flowing from those facts."[164] Such appraisal does not constitute an excess of power, as little so as the assessment of the facts by the Tribunal. The Committee has no authority to reassess the Tribunal's findings on facts. Finally, "Venezuela does not even try to establish that the Tribunal's jurisdictional decision, even if wrong (which it is not), constitutes an excess of powers that is *manifest.*"[165]

### *ii. The Committee's Analysis and Determination*

[160] Memorial, ¶ 177.
[161] Reply, ¶ 123.
[162] Reply, ¶¶ 140 and 141; Venezuela relies on *Occidental v. Ecuador*, ¶ 50.
[163] Counter-Memorial, ¶ 97 (footnotes omitted).
[164] Rejoinder, ¶ 90.
[165] Reply, ¶¶ 90 and 91.

173. The Committee has carefully studied the Award. It has not detected a non-application of the applicable law nor a mishandling of the evidence that the Parties had presented when establishing its competence, and thereby the jurisdiction of the Centre.

174. The Tribunal started its analysis and determination by quoting Convention Article 72 according to which the consent must be given or rather perfected before the denunciation of the Convention since in investment arbitration "consent to arbitrate is expressed consecutively."[166]

175. It then identified, quoted and applied the relevant provisions in both the Luxembourg and the Portugal BITs. Given the difference in their texts, and the factual circumstances for each of the Claimants and their investments, the Tribunal structured its analysis by distinguishing the different scenarios.

176. As to Tenaris-TAVSA, the Tribunal presented Venezuela's position in paragraphs 66-71 and Tenaris' position in paragraphs 72-76 of the Award. In paragraphs 77-91 of the Award, it presented its analysis and determination.

177. The Tribunal listed a string of uncontested communications and negotiations between the Parties that took place between May 2009 and November 2011 in order to reach an amicable settlement. It also referred to a Notice of Dispute dated 20 November 2009 which reads in the relevant part:

> "The Luxembourg Treaty contains Venezuela's consent to solve any dispute through international arbitration, in particular before the International Centre for the [sic] Settlement of Investment Disputes (ICSID). Tenaris and Tavsa LLC hereby also give their consent to resort to arbitration in the unfortunate event the dispute could not be settled amicably."[167]

178. The Tribunal took this Notice to mean that Tenaris perfected the consent to arbitrate before ICSID. In the Committee's mind, the text of the Notice is unambiguous and the interpretation given by the Tribunal is understandable.

[166] Award, ¶¶ 59 and 63.
[167] Quote reproduced from the Award, ¶ 85 (underlined in the original).

179. The Tribunal noted that Venezuela "seems to have abandoned the argument," in the Tenaris-TAVSA context, that "acceptance should have been submitted only after negotiating in good faith for six months."[168] It therefore focused the debate on this issue to the circumstances of Tenaris-COMSIGUA. The Committee is not in a position to verify the Tribunal's assumption.

180. The Committee notes, however, that the Applicant did not raise this specific issue in the annulment proceeding. Rather, Venezuela contends that Tenaris' acceptance was flawed since it contained a reservation. The reservation was inconsistent with Venezuela's offer and could therefore not perfect the consent.[169]

181. With respect to the latter query, the Tribunal quoted the reservation in the Award which states:

> "In this context, Tenaris and Tavsa LLC hereby reserve their right to file for arbitration upon expiration of the six-month term […] or even before insofar as the Government's behaviour shows the expiration of such term is a mere formality deprived of all usefulness."[170]

182. The Tribunal found, firstly, that Tenaris had never made use of the reservation, and secondly, that it did not substantially modify the offer, "as by doing so Tenaris merely subscribed to a principle accepted in investment arbitration and reflected in the Luxembourg Treaty itself."[171]

183. The Committee does not have to determine whether the Tribunal applied the Luxembourg Treaty erroneously, although it finds that the reservation is not substantively inconsistent with Venezuela's standing offer to accept arbitration: Article 9.1 provides that the parties shall endeavor as far as possible to settle the dispute amicably. Tenaris' declaration expresses the acceptance of the offer unequivocally and states that it will conduct proceedings as legally prescribed. In any

[168] Award, ¶ 78.
[169] Tr. D1, p.53
[170] Quote reproduced from Award, ¶ 87.
[171] Award, ¶¶ 89 and 90.

event and for this reason, the Tribunal's determination does not amount to a non-application of the applicable law.

184. As to Talta-COMSIGUA, the Tribunal found that negotiations started in June 2010 and a Notice of Dispute was sent on 2 December 2011, i.e. before the date of denunciation, when Talta-COMSIGUA expressed its consent to submit the dispute to ICSID arbitration. It held that the consent was validly expressed and that the six-month negotiation period had been completed since, according to Article VIII.2 of the Portugal Treaty, it had started to run "from the beginning of these consultations."[172]

185. The Tribunal decided to postpone its final ruling until it had also determined whether Tenaris, being a joint claimant in COMSIGUA, had equally given its consent.

186. The Tribunal determined that the situation for Tenaris-COMSIGUA was "more complex" given the difference in wording between the Luxembourg and Portuguese Treaties.[173]

187. The Tribunal displayed the Applicant's and its expert's positions in paragraphs 103 and 106-114, and the Respondents' and their expert's positions in paragraphs 104 and 115-121 of the Award.

188. It developed its analysis in paragraphs 122-151 of the Award in a delicate appreciation of the experts' opinions on the proper reading of Article 9 of the Luxembourg Treaty. In reference to VCLT Article 31 and by weighing the text of the Luxembourg Treaty, its context, purpose and object, as well as the overriding requirement of good faith, the Tribunal concluded that "Article 9 of Luxembourg Treaty (when correctly interpreted) allows the investor expressing its consent in advance and, at the same time, declaring its choice for ICSID arbitration."[174]

[172] Award, ¶¶ 95-97.
[173] Award, ¶ 100.
[174] Award, ¶ 143.

189. Therefore, the Tribunal held that Talta's and Tenaris' Notice of Dispute dated 2 December 2011, and hence before Venezuela's denunciation of the ICSID Convention, which had chosen the ICSID procedure, completed the consent.

190. In an addendum, the Tribunal analyzed a number of cases that had been submitted by Venezuela to evidence that the consent can only be completed after the negotiation period and found these cases inconclusive.[175]

191. The Committee cannot but state that the Tribunal applied the relevant treaty and came to reasonable conclusions for all constellations, i.e. for Tenaris-TAVSA, Talta-COMSIGUA and Tenaris-COMSIGUA.

192. Therefore, the Committee determines that the Tribunal has not exceeded its powers in its decision regarding the consent to arbitrate and will not have to examine the term "manifest." Accordingly, it rejects the Applicant's request to annul the Award based on this ground.

### *c. The Issue of Expropriation*

#### *i. Summary of the Parties' Position*

##### *1. The Applicant*

193. The Applicant contends that the Tribunal "manifestly exceeded its power by failing to apply the applicable law, *i.e.* the Portugal BIT and customary rules of international law."[176]

194. It submits that the Tribunal initially confirmed that both the Luxembourg and the Portugal Treaties had to be applied and that it analyzed them both "when addressing many of the parties' arguments on expropriation" but that it failed to do so when considering the issue of compensation. Thereby, it overlooked Venezuela's argument that the Portugal BIT required only a suitable mechanism to ensure payment of

[175] Award, ¶¶ 145-151.
[176] Memorial, ¶ 188.

compensation, "and that lack of payment did not make a legal expropriation illegal."[177]

195. Venezuela had put the question before the Tribunal whether it had violated Article IV of the Portugal BIT. That question was not addressed, amounting to "a failure to apply the proper law in a manifest excess of powers."[178]

196. The Applicant admits that the Tribunal refers to the Portugal BIT when it presents both BITs in its section on "The Lack of Payment" and states that:

> "Prima facie the Arbitral Tribunal sits with Claimants: a delay of more than seven years in the payment of compensation does not constitute "immediate" payment, following the wording of art. IV of the Portugal Treaty."[179]

However, that was "merely a prima facie expression that had to be addressed and elaborated on by the Tribunal." By failing to make a "conclusive determination" to that effect, the Tribunal exceeded its power.[180]

197. Instead of applying the Portugal BIT to the events concerning TALTA, the Tribunal applied the Luxembourg BIT, which is not the applicable law with respect to an allegedly Portuguese Claimant, and "any use of the Luxembourg Treaty as to Talta is frivolous."[181]

198. The Applicant extends its complaint to the non-application of customary international law. It asserts:

> "The Republic's argument based on customary international law relied on the fact that the BITs are the ones that provide for the application of such rules as part of the applicable law. Therefore, applying customary international law amounts to applying the proper law, i.e. the BITs. Consequently, not applying customary international law means not applying the proper law."[182]

[177] Memorial, ¶¶ 192 to 198; Reply, ¶¶ 148 and 149.
[178] Tr. D1, pp. 85 and 86.
[179] Award, ¶ 357.
[180] Reply, ¶¶ 150 and 151; Tr. D2, pp. 421-424.
[181] Tr. D1, p. 94.
[182] Reply, ¶ 153; Memorial ¶ 194.

> It insists that the Tribunal's manifest excess of power is particularly blatant since it did apply customary international law selectively, for instance in connection with quantum.[183]

199. The Applicant relies on *Sempra v. Argentina*, where the *ad hoc* committee found that the tribunal had exceeded its powers by applying – through Article 25 of the Draft Articles on State Responsibility – customary international law, "rather than Article XI of the BIT."[184] It argues:

> "In the present case, the Tribunal did the opposite; i.e. it adopted the BIT (not the Venezuela-Portugal Treaty) as the primary law to be applied, and failed to apply the rules on customary international law on expropriation, which indeed is part of the applicable law pursuant to the terms of the BITs."[185]

### *2. The Respondents*

200. The Respondents refute the Applicant's argumentation. They contend that the Tribunal did apply the Portugal BIT when finding that the non-payment for more than seven years did not constitute immediate payment, following the wording of its Article IV requirement. No extended analysis was needed and appropriate to come to this conclusion. The succinctness of the reasoning does not amount to a non-application of the norm but at best to a failure to state reasons.

201. The expression "*prima facie*" in paragraph 357 of the Award might be a "rather strange coda" and the issue could "have been more felicitously expressed" but that does not hinder the identification of the clear conclusion by the Tribunal that Venezuela violated Article IV.1 of the Portugal BIT.[186]

202. Further, the Tribunal elaborated on the Luxembourg BIT because of its "more permissive language." In any event, the Applicant's arguments do not relate to

[183] Reply, ¶ 153.
[184] *Sempra v. Argentina*, ¶ 207.
[185] Reply, ¶ 157.
[186] Tr. D1, pp. 251-252.

COMSIGUA, since the TAVSA investment was covered by the Luxembourg BIT, whose non-application is not alleged.[187]

203. With respect to the alleged non-application of customary international law, the Respondents rely on the *Vivendi I v. Argentina* committee, which found that:

> "[n]o doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with."[188]

They explain that the Tribunal had established under the Treaties that Tenaris and Talta had been unlawfully expropriated and that there was no need to go any further in its analysis. The Treaties were *leges speciales* that cannot be overridden by customary law. By not taking it into consideration, the Tribunal expressed implicitly that it gave primacy to the BITs. It did not have to reject the application of customary law explicitly. In any event and where appropriate, the Tribunal did apply customary international law.[189]

204. Finally, the Respondents assert that the non-application of the applicable law can only be considered an excess of power when it is not applied *in toto*, which is not the case here. Any other interpretation would amount to the unauthorized scrutiny of the correct application of the law.[190]

### *ii. The Committee's Analysis and Determination*

205. The Applicant alleges the non-application of two sets of legal norms: (i) the Portugal BIT and (ii) provisions of customary international law. The Committee will address both allegations separately.

206. With respect to the Portugal BIT, the Committee notes at the outset that the Applicant's allegation relates only to Talta-COMSIGUA's expropriation. The

[187] Counter-Memorial, ¶¶ 103-106; Rejoinder, ¶ 93.
[188] *Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) (hereinafter *Aguas v. Argentina*), ¶ 87 (A/RLA-45).
[189] Rejoinder, ¶¶ 104, 105, 108.
[190] Rejoinder, ¶ 107.

Applicant does not assert that the Tribunal did not apply the Luxembourg BIT, and the issues connected to Tenaris' investments in both TAVSA and COMSIGUA are covered by the Luxembourg Treaty. Having argued that the Tribunal "only referred to the Venezuela-Luxembourg Treaty,"[191] the Applicant states without any elaboration that "the Tribunal […] failed to apply both."[192] The Committee is unable to follow the Applicant's reasoning.

207. In addition, in the Committee's view, the Tribunal has done more than just presenting a "*prima facie* conclusion," as alleged by the Applicant.[193]

208. It has opened its analysis on the issue of expropriation by quoting both Treaties in their relevant parts. It concluded that "the Treaties" allow expropriations when they meet certain requirements one of which is that they are "accompanied by provisions that contemplate the payment of compensation […] and payment thereof shall be made without undue delay."[194] That is an interpretation of both BITs. It is not for this Committee to delve into its correctness.

209. The Tribunal has reiterated the text of both Treaties when discussing the lack of payment. It has concluded that the wording of Article IV of the Portugal BIT, which requires that the "immediate, adequate and effective" payment of compensation must be guaranteed (differently from the wording of Article 4 of the Luxembourg BIT), has been violated. From there it has drawn the further conclusion that "a delay of more than seven years in the payment of compensation does not constitute "immediate" payment, following the wording of art. IV of the Portugal Treaty."[195]

210. This is a reasoned conclusion in application of the Portugal BIT. The Applicant denies this fact by arguing that the Tribunal itself had stated that it is only *prima facie*, which should have been followed up by a more "conclusive determination."[196]

[191] Memorial, ¶¶ 189-198; Reply, ¶¶ 147-150.
[192] Reply, ¶ 151.
[193] Reply, ¶ 151.
[194] Award, ¶¶ 314-321.
[195] Award, ¶ 357.
[196] Reply, ¶ 151.

211. The Committee does not have to entertain an analysis of the term "*prima facie,*" nor whether the structure of paragraph 357 of the Award is linguistically appropriate. However, it notes that "*prima facie*" precedes the Tribunal's statement that it sides with the Respondents. It refers to paragraph 356 of the Award where the Respondents assert that Venezuela has breached Articles 4 and IV of both Treaties by not compensating for the expropriation in the course of more than seven years.[197] It is not evident that the definitional effects of the term may somehow be conditioned by the following part of paragraph 357, which presents a succinct conclusion in application of the Portugal BIT and introduces a debate of the Luxembourg BIT.

212. Be that as it may, the "conclusive determination" by the Tribunal is clear to the Committee. The Tribunal has applied and interpreted Article IV of the Portugal BIT in the preceding paragraphs of the Award and states the result of such interpretation in paragraph 357. The fact that it continues its inquiry into the Luxembourg BIT because of the different wording with respect to the lack of payment of Tenaris cannot obscure the conclusions drawn from the application of the Portugal BIT with respect to Talta.

213. In any event, the Committee has not found an indication that the Tribunal has made use of the Luxembourg Treaty to determine the (un-)lawfulness of Talta's expropriation.

214. With respect to the alleged non-application of customary international law, the Tribunal noted Venezuela's position in this regard. However, it decided to base its determination as to the unlawfulness of the expropriation due to the lack of compensation in the Treaties.[198]

215. The Committee notes that both the Portugal and the Luxembourg Treaties provide in Articles VII and 9, respectively, that tribunals have to apply the Treaties and principles of international law. Does that mean that the Tribunal has to explicitly

[197] Award, ¶ 356.
[198] Award, ¶¶ 292, 396 and ss.

quote each time both Treaties in their decision? The Committee does not believe so for the following reason.

216. BITs and other treaties are *leges speciales* in relation to principles of international law and, for that matter, customary international law (the distinction is of no relevance in the present case). As such, they are able to derogate from the *leges generales* contained in customary law to the extent that they are not of an imperative character, as clearly expressed in VCLT Article 53. The rules on compensation are not of such imperative character.

217. It would be unnecessary for a tribunal that has determined a legal issue based on a treaty to address it through the prism of *leges generales*. To the extent that a determination based on customary international law yielded a contradicting result, the application of the treaty would take precedence and the examination of the customary law would prove irrelevant and even incorrect. In this sense, principles of customary international law are only relevant in circumstances where the treaty is obscure or leaves gaps.

218. By mentioning Venezuela's position in the Award but basing its decision on the Treaties, the Tribunal has conformed itself to the structure of international law and the provisions of Articles 9 and VII of the Luxembourg and Portugal Treaties, respectively. Precisely, it has not failed to apply the provisions of customary international law, since in light of both Treaties, those provisions are not applicable to determine the lawfulness of the expropriation.

219. The Applicant relies in its argument on *Sempra v. Argentina.* However, the decision supports the Committee's findings. The *ad hoc* committee found that the tribunal had applied customary international law where the BIT had provided otherwise, and had made a fundamental error in determining that customary law "trumps" the BIT.[199] That is perfectly in line with, and supports this Committee's finding. When "[i]n the present case the Tribunal did the opposite; i.e. it adopted the BIT (not the Venezuela-

[199] *Sempra v. Argentina*, ¶ 207.

Portugal Treaty) as the primary law to be applied, and failed to apply the rules on customary international law on expropriation,"[200] as submitted by the Applicant, the Tribunal accepted the correct hierarchy.

220. For these reasons, the Committee rejects the request for annulment regarding the issue of expropriation based on the ground of manifest excess of powers.

**(2) Serious Departure from a Fundamental Rule of Procedure**

***a. The Issue of Burden of Proof and Evidence***

***i. Summary of the Parties' Position***

***1. The Applicant***

221. The Applicant bases its request for annulment due to a serious departure from a fundamental rule of procedure on two assertions. Firstly, the Tribunal inverted the burden of proof regarding the effective seat of Tenaris and Talta with the objective to establish jurisdiction.[201] Secondly, the Tribunal "allowed the Claimants to introduce evidence after the 'closure of the files to the Parties' which the Republic could not examine during the Hearing."[202]

222. With regard to the burden of proof, the Applicant asserts that the Tribunal had concluded that Tenaris' and Talta's effective seat was Luxembourg and Portugal, respectively, but not because the Respondents had discharged their burden of proof to this effect. Rather, the Tribunal had "compared the evidence produced by Claimants […] with the evidence presented by the Republic in order to support the Republic's argument that Tenaris and Talta's seat was Argentina […]. In doing so, the Tribunal disregarded the Claimants' burden of proof and reversed it onto the Republic."[203] When assessing the evidence with respect to the relevant criteria for the determination of the seat, i.e. the number of employees, the business operations and the factual management, "the Tribunal considered not what had been effectively

[200] Reply, ¶ 157.
[201] Memorial, ¶¶ 91-108; Reply, ¶¶ 31-43.
[202] Memorial, ¶¶ 109-125; Memorial, ¶¶ 45-64.
[203] Memorial, ¶ 104.

demonstrated by Tenaris and Talta, but instead a balance of the scant evidence provided by Claimants with the evidence produced by Venezuela to demonstrate that the **seat** was in Argentina."[204]

223. In that vein, it argues that the Tribunal had concluded that:

- the effective seat was in Luxembourg and Portugal respectively because Venezuela had not sufficiently supported its argument by evidence (which was not its duty) that the seat was in Argentina,
- the effective seat corresponded to the statutory seat because Venezuela had failed to prove (which was not its duty) that business contacts were made from Argentina,
- Talta was a holding company because Venezuela had failed to prove (which was not its duty) that Talta carried out commercial activities of its own outside of its statutory seat.[205]

224. With regard to the Tribunal's allegedly untimely and procedurally inappropriate permission for the Respondents to introduce new evidence at the "eleventh-hour,"[206] the Applicant submits that the Tribunal exercised "a highly irregular procedural misconduct that severely limited its right to defence and eroded its right to be heard"[207] when it allowed Tenaris and Talta to submit documents evidencing the location of the effective seat. It has thus re-opened the proceeding,[208] which it had closed with respect to the submission of new evidence.[209]

225. The Applicant refers to Arbitration Rule 38 and refutes its applicability at the time when the Tribunal granted the Respondents the possibility to introduce new documents. It states, "Arbitration Rule 38 refers to a situation in which the proceedings have been already closed, which is not the situation here."[210]

[204] Venezuela's PHB, p. 4 (emphasis in the original).
[205] Memorial, ¶¶ 104-106; Reply, ¶¶ 40-43.
[206] Memorial, ¶ 140.
[207] Memorial, ¶ 119.
[208] Memorial, ¶¶ 117-119.
[209] Tr. D1, pp. 28-30.
[210] Memorial, ¶ 115.

226. At the same time, the Applicant alleges that the Tribunal had communicated to the Parties that the files were closed after the hearings with respect to evidentiary materials. That said, the Tribunal invited Tenaris and Talta more than a year later to complete the evidence with respect to the effective seat by submitting redacted documents which had been in the Respondents' custody throughout the proceeding. It had done so when it had realized that Venezuela's argument as to the paucity of evidence was pertinent.[211]

227. The Applicant affirms that it never had an opportunity to rebut this belated evidence and to do so properly during a hearing. Equally, cross-examinations during the hearing had relied on the evidence in the record and could not be extended to the new, untimely documents. "Even though the Tribunal granted Venezuela the opportunity to present its observations on Tenaris and Talta's late submission, in accordance with a calendar of pleadings agreed upon by the parties, the Republic's rights had already been damaged beyond repair."[212]

228. In particular, the Tribunal did not grant the Republic "an opportunity to complete the record or to add arguments or documents or to question those documents at a hearing."[213]

229. The Applicant relies on the decision in *Fraport v. Philippines*, where the *ad hoc* committee had found that the tribunal's reliance on evidence, which had been produced after the hearing had taken place and thus could not be considered by the experts, had violated a fundamental principle of procedure.[214]

### *2. The Respondents*

230. With regard to the burden of proof, the Respondents assert that (i) the treatment of evidence and the burden of proof do not amount to a fundamental rule of procedure,[215]

[211] Memorial, ¶ 112; Reply, ¶¶ 53-58.
[212] Memorial, ¶ 119.
[213] Reply, ¶ 63; Memorial, ¶ 123.
[214] Reply, ¶¶ 61-62; Venezuela relies on *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (23 December 2010) (hereinafter *Fraport v. Philippines*), ¶¶ 178-247 (A/RLA-61).
[215] Rejoinder, ¶ 14.

and (ii) the Applicant has failed to demonstrate that the Tribunal had reversed the burden at any occasion.

231. On the contrary, be it on the establishment of the effective seat, the quality of Talta as a holding company, and on the coincidence of the statutory and effective seat, the Tribunal has each time "analyzed the evidence presented by the Claimants and found it to be probative and persuasive. The Tribunal then analyzed the Respondent's evidence and found it wanting."[216]

232. The Respondents argue that, "[t]hat approach is entirely faithful to the principle that it is for the party alleging a fact to demonstrate its existence."[217]

233. They state that the Applicant's arguments "are nothing more than a disagreement with the Tribunal's evidentiary determinations", which are entirely in its discretion, and that a corresponding reassessment of the evidence by the Committee is not covered by its authority. Venezuela constantly confuses the burden of proof and the standard of proof, which cannot be alleged to be a rule of procedure.[218]

234. The Respondents have mustered the case law quoted by the Applicant and agree with their "uncontroversial propositions that: (*i*) matters that are decisive for purposes of establishing jurisdiction must be proven and cannot simply be assumed; and (*ii*) the claimant bears the burden of proof on its jurisdictional allegations." They contend, however, that the Tribunal in the present case did hold Tenaris and Talta to their burden of proof, did rely on evidence and not on assumptions and did find the Respondents' evidence persuasive.[219]

235. With regard to the alleged untimeliness of the submission of documents on shareholder and board meetings as requested by the Tribunal, the Respondents

[216] Rejoinder, ¶¶ 29 and 24-28.
[217] *Croatia v. Serbia*, ¶ 172.
[218] Rejoinder, ¶¶ 26 and 23; Counter-Memorial, ¶¶ 42-43.
[219] Counter-Memorial, ¶¶ 45 and 46; Rejoinder, ¶ 22.

contend that the Tribunal acted within the scope of its competence because of the following reasons.

236. Firstly, Convention Article 43 authorizes the Tribunal to request the production of documents "at any stage of the proceedings" *sua sponte*. Moreover, Arbitration Rule 41 allows the Tribunal at any stage of the proceedings to decide whether the dispute is within its competence and whether procedures related to jurisdictional objections shall be oral or not. The Parties have the inalienable right to be heard but they do not have the right to a hearing.[220]

237. Contrary to Venezuela's allegations, the Respondents argue that the documents only complemented the substantial evidence that they had submitted before the hearing, and the Tribunal relied on both.

238. Secondly, the Respondents assure that Venezuela had sufficient opportunity to comment on the new documents and to submit documents of their own. It is uncontested that the Parties had agreed on a schedule and page-limit for submissions, that both Parties have submitted briefs in two rounds, and that Venezuela simply chose not to add new evidence, together with the briefs. "What this history shows is that all Parties received extensive due process in response to the Tribunal's request."[221]

239. The Respondents refute the Applicant's reliance on *Fraport v. Philippines* because of incomparability of the facts. In *Fraport* the tribunal accepted more than 1900 pages of new evidence after the closing of the proceeding and relied on it without having given the parties an opportunity to make submissions with respect to it.[222] That is the contrary of what happened in the present case as described above.

[220] Counter-Memorial, ¶¶ 56-57.
[221] Counter-Memorial, ¶¶ 54-55; Rejoinder, ¶¶ 35-38.
[222] *Fraport v. Philippines*, ¶¶ 219, 227, 230, 236, 244.

### *ii. The Committee's Analysis and Determination*

240. The Committee has carefully read Chapter V.2 of the Award. It disagrees with the Applicant's reading on the burden of proof because the Tribunal did not state what the Applicant alleges. The Committee notes that the Tribunal first presented the evidence submitted by the Respondents in detail, in paragraph 195 to 203 of the Award, and did the same with Venezuela's evidence, in paragraph 204 to 206. It then proceeded to weigh this evidence. The Tribunal found the evidence adduced by Tenaris probative and convincing, contrarily to the Applicant that found it "scant."[223] It is not for the Committee to question the Tribunal's evaluation.

241. The Tribunal did not state a causal link between Venezuela's insufficient evidence as to Argentina being the effective seat but relied on Tenaris' and Talta's as well as on Venezuela's evidence. It concluded, after an extensive assessment in paragraphs 207-230 of the Award, that "there is no evidence that Tenaris and Talta's Effective Seat are located in Argentina. On the contrary, the evidence points to the fact that the Effective Seat is located in Luxembourg and Portugal, respectively."[224] To the Committee's mind, the Tribunal's operation of balancing the factual allegations and related evidence produced by all Parties, neither constitutes a reversal of the burden of proof nor a departure from a fundamental rule of procedure.

242. As to the presumption of a coincidence between the statutory and the effective seat in Portuguese law, the Tribunal repeated the experts' opinions to that effect, but did not rely on the presumption because Venezuela had failed to prove that Talta's business was conducted from Argentina. Rather, the Tribunal continued, after having stated the experts' opinion, that "[t]he above having been said, the Tribunal has thoroughly analyzed and assessed the evidence provided by the Parties, and it concludes that it is not persuaded that Tenaris and Talta have their Effective Seat in

[223] Venezuela's PHB, p. 4.
[224] Award, ¶ 230.

Argentina, and it understands that their Effective Seats coincide with the Statutory Seats."[225]

243. Again, the Committee does not find a reversal of the burden of proof.

244. As to the qualification of Talta as a holding or commercial company, the Tribunal did not reach its conclusions because Venezuela had not submitted sufficient evidence that it conducted commercial activities outside its statutory seat. Rather, it firstly appraised the evidence presented by both Parties and found that this evidence pointed to a qualification as a holding company, in disagreement with Venezuela's expert's legal analysis of Portuguese law. Secondly, it did not pursue the legal analysis in detail because it found that real activities as a holding company, and not the formal legal qualification, to be decisive. As to the activities, it assessed the evidence produced by Talta and found it probative. It is not the Committee's role to reassess the evidence.

245. Again, the Committee does not find a reversal of the burden of proof.

246. In any event, the Committee recalls that the question of whether the principle of burden of proof is a "fundamental rule of procedure" is still subject to debate. This is even more so based on the fact that the reversal of the burden through the operation of *prima facie* presumptions should also be part of such rule of procedure. As developed in Section IV.A.2 of this Decision, the rules on the burden of proof provide judges and arbitrators with a mechanism to solve situations of *non liquet*. To the Committee's mind, they are not concerned with fundamental procedural propriety and justice.

247. For these reasons, the Tribunal did not violate a fundamental rule of procedure when it assessed the evidence on the effective seats of Tenaris and Talta.

248. With respect to the Tribunal's decision to allow new documents on shareholder and board meeting into the record more than a year after the hearing but before the closure

[225] Award, ¶ 208.

of the proceeding in accordance with Arbitration Rule 38, the Committee believes that the Tribunal did not breach due process.

249. In fact, wide experience shows that in the course of deliberations, additional issues of fact and law arise that a conscientious tribunal will try to elucidate by reverting to the parties. This precious option would be curtailed if a tribunal would have to re-open the oral phase of the proceeding each time when asking for additional evidence. The option to ask for additional evidence and give the parties an opportunity to comment on it in writing fits the Convention's and Arbitration Rules' objective to grant wide discretion to tribunals to conduct the proceeding, and to allow them in particular to call upon parties to produce documents at any of its stages.

250. Therefore, the Tribunal had the authority to request the production of documents after the hearings without conducting new oral hearings, as clearly established in Arbitration Rule 41(4).

251. It is a different issue whether a tribunal violates a fundamental procedural rule and due process if it does not afford the parties the opportunity to comment on the request and on the new evidence. The Committee does not have to decide the question as a matter of principle since the Tribunal had not only granted the Parties the opportunity to comment but had sought and received the agreement of the Parties to this effect, including a limitation of pages in two rounds of submissions. The Applicant was not hindered to submit new evidence together with its briefs.

252. The circumstances are thus different from *Fraport*, where no such opportunity had been granted.

253. The Committee does not have to decide the question of whether the Tribunal might have bound itself to the extent that it "expressly declared the file closed as it pertains to evidentiary materials."[226]

[226] Memorial, ¶ 109.

254. The Applicant refers to the Tribunal's Procedural Order No. 3, dated 22 July 2015, which reads in its paragraph 8, "the Tribunal will not accept any new documents […] without prior application and the Tribunal's express permission." Unambiguously, the provision limits the rights of the Parties but not the exercise of procedural discretion by the Tribunal.

255. In addition, the Committee notes that the Tribunal closed the proceeding only on 15 November 2016.[227]

256. Therefore, the Tribunal did not violate a fundamental rule of procedure when it called upon Tenaris and Talta to supplement its evidence on the shareholder and board meetings in the course of its deliberations more than a year after the hearing.

***b. The Issue of the Valuation Date of Damages***

257. In its Memorial, the Applicant asserts that the Tribunal "seriously departed from a fundamental rule of procedure in its decision on damages, particularly as it pertains to the valuation date adopted for the calculation of the amount of compensation."[228]

258. During the Hearing, the Applicant affirmed that it was not pursuing a request to annul the Award because the Tribunal departed from a rule of procedure when determining the date for the valuation of damages.[229] In its Post Hearing Brief, the Applicant reiterates in one heading that the "tribunal seriously departed from a fundamental rule of procedure and failed to state grounds for its findings on damages and costs," but argues exclusively on the lack of reasons for the determination of the valuation date, without mentioning the ground of Convention Art. 52(1)(d).[230]

259. In light of the Applicant's affirmation during the hearing and the complete lack of argument on a departure from a procedural rule, the Committee will not entertain the initial request.

[227] Award, ¶ 46.
[228] Memorial, ¶ 206; Reply, headline before ¶ 167.
[229] Tr. D2, pp. 447-448.
[230] Venezuela's PHB, p. 12.

### *c. The Issue of an Increase of Compensation Awarded to COMSIGUA*

#### *i. Summary of the Parties' Position*

##### *1. The Applicant*

260. The Tribunal calculated the amount of compensation for COMSIGUA's expropriation by using the DCF method first and then up-grading it after an analysis of alternative approaches such as the 'market multiples approach' and the 'comparable transactions approach'. The alternative approaches had been introduced by the Parties' experts.[231]

261. The Applicant criticizes the method and the result of the calculation and asserts an annullable misconduct of the Tribunal it failed to state reasons for this decision to increase the amount of compensation. It has based its argument predominantly on an alleged lack of reasons.[232] This issue will be addressed at a later stage and in the appropriate context.

262. However, at the end of respective chapters in its submissions, the Applicant contends that:

> "[i]n addition to failing to provide reasons for this holding, the Tribunal seriously departed from fundamental rules of arbitral procedure. This is so because the Tribunal's subjective, unwarranted, unjustified increase of value was never even presented as a possibility by or to the Parties as part of their respective exchanges with the Tribunal."[233]

263. The Applicant devotes paragraphs 259-262 of its Memorial and paragraph 230 of its Reply to the issue. It argues that the Parties or their experts had never requested the blending of several methods of calculations and that the experts were never given the chance to address them. The Applicant was thus deprived of its right to be heard and the Tribunal acted "*extra petita*."

[231] Award, ¶¶ 684-754.
[232] Memorial, ¶¶ 244-258; Reply, ¶¶ 207-232.
[233] Memorial, ¶ 259.

### *2. The Respondents*

264. The Respondents contend that the Applicant misrepresents the proceeding. The different valuation methods were introduced and widely discussed by the Parties and their experts. The Parties had invited the Tribunal to base its calculation "on a number of different methods presented by the Parties."[234] Thereby, the Parties had set the legal framework, the Tribunal being free to reach its own conclusions, as it is well established in case law.[235]

265. They submit that it is equally well established since the *Chorzów Factory* case that a tribunal may estimate the value of the damage by several methods, including, if necessary, by way – in the words of the Court – "of completing the results of the one by those of the others."[236]

266. The Respondents summarize their argument by stating:

> "It cannot seriously be suggested that the Tribunal denied Venezuela the right to be heard when the Tribunal adopted valuation methodologies that had been presented and debated at length by the Parties and their quantum experts. It was well within the Tribunal's power to decide not to pick one approach or the other, but instead to adopt a hybrid approach based on the arguments and evidence presented by the parties."[237]

### *ii. The Committee's Analysis and Determination*

267. Before arriving at its own analysis and determination of the amount of compensation, the Tribunal presented the Respondents' proposed methods of calculation of COMSIGUA's value. They are various, although preferably based on the DCF method.[238] Thereafter, the Tribunal presented the Applicant's methods of calculation. They are equally various, with the expert not opposing the DCF method but preferring

[234] Rejoinder, ¶ 45.
[235] Counter-Memorial, ¶ 62; Respondents rely on *Klöckner v. Cameroon* and *Caratube v. Kazakhstan*.
[236] *Case Concerning the Factory at Chorzów* (Merits) [1928] PCIJ Series A, No 17, p. 53 (A/CLA-75).
[237] Counter-Memorial, ¶ 61.
[238] Award, ¶¶ 631-661.

a compared transaction approach.[239] None of the Parties insist that one or the other method is exclusive and the Applicant does not allege so.

268. The Award presents the parameters and numbers in detail. The Tribunal based its conclusions on these parameters and numbers. None of them were unknown to the Parties.

269. The Tribunal stated that it "finds no reason to depart from the traditional DCF method" but that nothing prevents it "from contrasting the value obtained with other approaches."[240]

270. The Applicant does not contradict the Tribunal's statement. It does not allege that international law obliges a tribunal to use a specific methodology. However, it seems to assert that the Tribunal was hindered to combine methods to arrive at a fair market value if the Parties had not made a petition in that sense. If that were the assertion, the Committee rejects it. The choice of methodology to determine the fair market value is the prerogative of the tribunal. It does not depend on a "petition" by either party in that sense.

271. Tribunals read and hear the Parties' and experts' opinions. They appraise the material in deliberation and come to conclusions based on this material, which is at the same time the frame of reference. They have discretion to arrange and systematize it, as long as they do not rely on new material, which has not been before the Parties. That is not a "fiat" of a tribunal[241] but the result of a reasoned process. No procedural rule exists that obliges tribunals or courts to present (interim) deliberation findings to the parties and allow them to provide "input from the Parties or their experts."[242]

[239] Award, ¶¶ 662-683.
[240] Award, ¶¶ 685, 686, and 705.
[241] Reply, ¶ 233.
[242] Reply, ¶ 233.

272. Therefore, the Committee cannot conclude that the Tribunal has departed from a rule of procedure when it contrasted the DCF method with other methods to calculate the fair market value of COMSIGUA.

### *d. The Issue of Tax Indemnity*

#### *i. Summary of the Parties' Position*

##### *1. The Applicant*

273. On 5 August 2016, i.e. almost a year after the Parties' written pleadings, the Tribunal sent a letter to the Parties informing them that during its deliberations it had discussed the potential relevance of Article 5 of the Luxembourg BIT for the issue of taxation of possible compensation, and that the Parties had not referred to this Article in their pleadings. It invited the Parties to comment on the norm, which both Parties did in post-hearing submissions.[243]

274. The Applicant submits that this conduct of the Tribunal violated a fundamental rule of procedure "not because they were not heard about the point, but rather from the fact that the Tribunal added a new item of claim – including the normative source in the articles of the Venezuela-Luxembourg BIT to those that were the subject of the Parties written and oral submissions."[244] In other words, "it incorporated into its decision a line of argument that was absent from the Parties' pleadings"[245], thus venturing "*extra petita*."[246]

275. The Applicant opines that the Tribunal was "constrained by the way by which the Parties had decided to unfold the debate,"[247] although it admits that the Tribunal is "not restricted to mere repetition to allegations of the Parties."[248]

[243] This is undisputed between the Parties: Memorial, ¶¶ 263-268; Counter-Memorial, ¶ 63.
[244] Memorial, ¶ 264.
[245] Reply, ¶ 236.
[246] Reply, ¶ 240.
[247] Reply, ¶ 241.
[248] Memorial, ¶ 269.

276. By giving "Claimants the line of normative argument that they had not developed before"[249] and by allowing them to supplement their legal argument, the Tribunal affected the "equality of arms as a fundamental rule of procedure", because on other occasions it had not allowed Venezuela to add to its argument when it was allegedly insufficient.[250] Tenaris and Talta "had the burden of proof to establish the jurisdiction of the Tribunal and to support its assertion, both legally and factually."[251]

277. A reference to Article 43 of the Convention and Arbitration Rule 34 is of no avail, since "the text of these rules cited refer to evidentiary material […] and does not refer to legal sources and argument." The provisions do not "allow for any kind of supplementary legal arguments to be introduced by the Tribunal at any stage in the proceedings."[252]

### *2. The Respondents*

278. The Respondents argue that the Applicant's assertions are deficient for a number of reasons.

279. Firstly, they submit that the Tribunal had based its decision on the tax issue on Article 4(2) of the Luxembourg BIT and V(1)(c) of the Portugal BIT, i.e. on the proper definition of compensation for expropriation, and that Article 5 "was ultimately irrelevant to the Tribunal's conclusion." Therefore, "Venezuela's argument cannot satisfy Article 52(1)(d)."[253]

280. Secondly, it is uncontested that Venezuela made extensive submissions on the issue and was thus sufficiently heard. There is "no substance to the claimed denial of due process."[254] Furthermore, the Respondents clarify that the tax indemnity pretense was

[249] Memorial, ¶ 271.
[250] Memorial, ¶ 271, Reply, ¶¶ 243, 244.
[251] Reply, ¶¶ 242, 243.
[252] Reply, ¶ 247.
[253] Counter-Memorial, ¶¶ 65 and 66; Rejoinder, ¶ 51.
[254] Counter-Memorial, ¶ 67; Rejoinder, ¶ 54.

not introduced after the Tribunal's request for comments on Article 5 of the Luxembourg BIT, but had instead been part of the arbitration from the beginning.[255]

281. Thirdly, nothing hinders a tribunal to ask parties to argue a point that it finds to be potentially relevant during deliberations and "to address the relevance or irrelevance of a provision of a legal instrument, where that instrument has already formed the basis for the Parties' arguments."[256]

### *ii. The Committee's Analysis and Determination*

282. The Committee recalls that the totality of the Venezuela-Luxembourg BIT was introduced into the record. It is part of the applicable law by agreement of the Parties. By discussing a specific article of the BIT, the Tribunal did not introduce a new normative source.

283. The Committee does not have to decide whether the parties to a dispute are free to agree that one specific provision of a generally applicable international treaty such as a BIT may be declared inapplicable. Even if so, it would be a very unusual situation and would have to be declared explicitly by the parties. The Committee disagrees with the Applicant's opinion that "the way in which the Parties decided to unfold the debate" can be considered an agreement on implied terms constraining the Tribunal in its right and duty to apply the applicable law, i.e. the BIT, in its totality.[257] This is all the more so under the present circumstances, where Tenaris made its disagreement to the non-applicability explicitly known through its post-hearing submission on Article 5, even if that submission came a year after other submissions.

284. The Committee agrees with the Applicant that the issue of interpretation of Article 5 of the BIT is not one of "evidentiary material" but one of "legal arguments."[258] It follows from there that the absence or presence of arguments in this respect are not issues of evidence and (burden of) proof, as alleged by the Applicant.[259] Such issues

[255] Counter Memorial, ¶ 67.
[256] Counter-Memorial, ¶ 68; Rejoinder, ¶¶ 56, 57; Tenaris relies on *Klöckner v. Cameroon*, ¶ 91.
[257] Reply, ¶ 241.
[258] Reply, ¶ 247.
[259] Reply, ¶¶ 242-243.

necessarily relate to facts and not to the interpretation of law. Certainly, parties to a dispute have the duty to substantiate their case and to present legal argument. At the end, however, *iura novit curia*: it is the tribunal that knows the law, and it has the authority and duty to apply it irrespective of the parties' positions.

285. The Applicant alleges that the Tribunal privileged Tenaris and Talta and disfavoured Venezuela because repeatedly "faulting the Republic for not having fostered sufficient support for its position and, thus, deciding in favour of the Claimants."[260]

286. The Committee has carefully read the Award, in particular paragraphs 80, 205, 208, 211, 213, 215, 220, 225, 228, 230, 361, 365, 546, and 872 where the Tribunal, according to the Applicant, demonstrates such a violation of the procedural principle of equality of arms. It has found that in all the paragraphs quoted, the Tribunal finds on the evidence of facts. The Committee has not found any indication where the Tribunal has dismissed any of Venezuela's defenses by determining that its legal argument was absent or poorly developed.

287. Tenaris' *petitum* was a compensation for damages for expropriation free of Venezuelan taxes and not for the correct application of the BIT. Therefore, the Tribunal's decision to ascertain Tenaris' claim for compensation based on Articles 4 and 5 of the BIT cannot be described as "*extra petita*" as proposed by the Applicant.[261]

288. The arbitral tribunal is under no fundamental procedural duty to search for the parties' opinion on one or the other legal issue that emerges only during deliberations, after the hearings and parties' submissions, as long as it remains within the frame of the applicable law. It may be considered part of its *nobile officium* to do so. However, under the present circumstances the Committee does not have to venture into this problem since, in fact, the Tribunal did invite the Parties to comment on Article 5 of the BIT. It is evident that it was only able to put the question before the Parties when it had come up during deliberations. Any other conclusion would limit the

[260] Memorial, ¶ 271.
[261] Memorial, ¶ 267.

competence of the Tribunal inappropriately and hinder it to accomplish its duty to solve the dispute in application of the applicable law.

289. Therefore, the Applicant's request to annul the Award for an alleged violation of a fundamental rule of procedure because the Tribunal had invited the Parties to make submissions on Article 5 of the Venezuela-Luxembourg BIT after the hearings and other submissions is rejected.

### *e. The Issue of the Tribunal's Decision on Costs*

#### *i. Summary of the Parties' Position*

##### *1. The Applicant*

290. As to the Tribunal´s decision on costs, in its Memorial, the Applicant devotes paragraphs 285 and 286 to the issue of a violation of a fundamental rule of proceeding. In its Reply, the Applicant repeats the headline of the respective section but chooses not to elaborate its thoughts in the text. During the Hearing, the Applicant confirmed its reasoning of the Memorial.[262]

291. The Applicant contends that the Tribunal:

> "also committed a serious departure from fundamental rules of arbitral procedure. This is so because the Republic never got the chance during the proceeding to address the standard eventually applied by the Tribunal, even though the Parties were requested to file separate simultaneous submissions dealing only with the costs of the proceedings.
>
> Hence, the Tribunal failed to provide the Republic with an opportunity to be heard on this issue and defend itself, irrespective of whether the Tribunal would end up upholding or not the Republic's arguments on the matter. The Tribunal had the duty to abide by the Republic's fundamental due process rights, not taking a decision based on criteria that were not the object of debate between the Parties during the proceedings and, thus, without granting the Republic the opportunity to be heard on the matter."[263]

292. The Applicant relies on a general statement in *Tidewater v. Venezuela*, where the *ad hoc* committee held that "[t]he right to be heard and to present one's case is one of

[262] Tr. D1, p. 150.
[263] Memorial, ¶¶ 285-286 (footnotes omitted).

the fundamental principles of due process. Its violation is a serious departure from a fundamental rule of procedure."[264]

### *2. The Respondents*

293. The Respondents assert that the Tribunal had invited the Parties to develop their views on the allocation of costs in post-hearing briefs. Both Parties did so. "There is therefore no basis to Venezuela's complaint that it did not have the opportunity to make submissions on the allocation of costs."[265]

294. Moreover, Article 61.2 Convention confers broad discretion on tribunals to apportion costs. They "are under no obligation to submit to the parties an advance draft of their costs submissions […] for comment."[266]

295. In any event, the Applicant has chosen not to rebut to the Respondents' arguments in its Reply. Its request "may therefore be taken as abandoned."[267]

### *ii. The Committee's Analysis and Determination*

296. The Committee notes that it is uncontested between the Parties that the Tribunal afforded them the opportunity to submit their views on the allocation of costs in post hearing briefs and that they made use of this opportunity.

297. The Tribunal has presented the Parties' positions on that issue in paragraphs 832-836 of the Award. In paragraphs 837-856 the Tribunal has developed its determination, not without referring again to the Parties' positions.

298. In light of these steps and considerations undertaken by the Tribunal and of its uncontestable discretion to allocate costs, the Committee does not see an indication that may be interpreted as a departure from a fundamental rule of procedure.

[264] *Tidewater v. Venezuela*, ¶ 149.
[265] Counter-Memorial, ¶ 71.
[266] Counter-Memorial, ¶ 72.
[267] Rejoinder, ¶ 58.

299. Therefore, the Committee rejects the Applicant's request to annul the Award because of an alleged violation of a procedural rule.

**(3) Failure to State Reasons**

***a. The Issue of the Claimants' Seats***

***i. Summary of the Parties' Positions***

***1. The Applicant***

300. The Applicant asserts that the Tribunal failed to state the reasons for its assumption that Tenaris and Talta had their seat in Luxembourg and Portugal respectively and that its conclusions were contradictory. The Applicant has put forward most of the arguments together with its contentions on an erroneous application of law and an excess of power. Under the present Section, the Committee only summarizes the arguments to the extent that they have not been presented in Sections IV.A 1 and 2.

301. Firstly, the Tribunal "dismissed the Republic's contention that Tenaris was run from Argentina and Italy and that most of its employees were also there"[268] by holding that:

> "[t]he argument is devoid of force since the (large number) of Argentine workers are hired by Siderca, an Argentine subsidiary of Tenaris, and not by Tenaris itself. The fact that a subsidiary with legal status of its own, located in Argentina, has a large number of employees, is irrelevant for the purposes of determining where the Effective Seat of its headquarters is located."[269]

However, when the Tribunal had to determine the scope of the nationalization decree, it argued in "direct contradiction" with the foregoing that it:

> "has no doubt that Comsigua was an affiliate of Sidor because, as put by Respondent itself, "affiliates" are companies that have the same parent, and, in this case, Comsigua was an affiliate of Sidor, as it belongs to Tenaris and Sidor to Ternium, and both Tenaris and Ternium are a part of the Techint group – their final and common owner."[270]

[268] Memorial, ¶ 158; Reply, ¶ 111-114.
[269] Award, ¶ 219.
[270] Award, ¶ 415 (footnotes omitted).

302. The Applicant argues that the Tribunal treated the issue of ultimate ownership differently where it "should have applied the same criteria to both matters, but instead, it took the opposite direction resulting in a manifest, critical contradiction."[271]

303. Secondly, the Tribunal has taken the view that Tenaris' and Talta's accounts are audited by Luxembourgian and Portuguese auditing companies, and that this fact indicates that their effective seats were in Luxembourg and Portugal, respectively. In reality, the Applicant contends, these uncontested facts are but a "mere consequence of compliance with the legal requirement of the place of incorporation and, as such, they are irrelevant for purposes of determining the effective seat of a company. The Tribunal blatantly failed to state reasons as to why simply meeting a requirement of Luxembourgish law was relevant to the determination of Tenaris' *siège social*."[272]

304. The Applicant advances a similar argument with respect to the shareholder meetings: the fact that "they were held in Luxembourg is just a manifestation of Tenaris being incorporated there. It merely supports the fact that Tenaris' statutory seat is located in Luxembourg"[273] but not the effective seat.

305. Thirdly, the Applicant presents as "an egregious example of inconsistent reasoning"[274] the Tribunal's way of determining the status of Talta : although it had conceded that Talta might not meet the legal requirements to be considered a holding company instead of a commercial company, it based its appreciation of the facts indicating the effective seat such as office space and business contacts with third parties on criteria that are only appropriate for holdings.[275] This is "a clear-cut failure to state reasons."[276]

[271] Reply, ¶¶ 113.
[272] Reply, ¶ 95; Memorial, ¶ 148.
[273] Reply, ¶ 101.
[274] Memorial, ¶ 154.
[275] Memorial, ¶¶ 150-155; Reply, ¶¶ 95-97.
[276] Memorial, ¶ 154.

### *2. The Respondents*

306. The Respondents submit that the Tribunal has given extensive reasons for its conclusion that the effective seats of Tenaris and Talta were Luxembourg and Portugal, respectively, and that these reasons were free of contradictions.

307. They argue that "Venezuela's claim is not that the Tribunal failed to state reasons, or stated contradictory or inadequate reasons, but that the Tribunal adopted the *wrong* reasons. That is not a basis for annulment."[277] Specifically, according to the Respondents, "[i]n reality, Venezuela's argument is not that the Tribunal failed to state reasons. Rather, Venezuela takes issue with the Tribunal's assessment of the evidence."[278]

308. They submit that the Tribunal had found that the effective seat was decisive for the determination of the companies' nationality, and that it had developed, after extensively hearing both Parties' experts on the issue, the criteria to define the effective seat. On this basis, it had appraised the evidence presented by the Parties and had come to reasoned and consistent conclusions. Venezuela now complains that the Tribunal had found Tenaris' and Talta's evidence more convincing than Venezuela's. However, it is not for an *ad hoc* committee to reassess the evidence.[279]

309. With respect to the ultimate ownership of the Respondents by the Techint Group, the Respondents assert that:

> "[t]here is no contradiction in recognizing that (i) for the purposes of expropriation, a nationalization decree can (and in this case did) cover an entire group such as the Techint Group, and (ii) for the purposes of jurisdiction, neither the Techint Group nor its Argentine subsidiary Siderca were claimants in the arbitration, so the location of their employees and legal seats were irrelevant in determining the effective seats of the Claimants."[280]

[277] Counter-Memorial, ¶ 122.
[278] Counter-Memorial, ¶ 132.
[279] Counter-Memorial, ¶¶ 126-134; Rejoinder, ¶¶ 120-121.
[280] Rejoinder, ¶ 124.

### *ii. The Committee's Analysis and Determination*

310. In Section IV.B.1.a, the Committee has already determined that the Tribunal had not exceeded its powers by finding that Tenaris and Talta had their effective seats in Luxembourg and Portugal, respectively, and that it had jurisdiction *ratione personae.*

311. It has come to this conclusion after having examined the reasons presented by the Tribunal.

312. The Tribunal presented the following line of reasoning. In a first step – point A, it identified the legal provisions in the ICSID Convention and in the BITs that determine the issue of nationality and seat of a juridical person. It concluded that all provisions required an effective seat rather than the statutory seat to be present, thus following Venezuela's arguments.

313. It then – point B – determined the criteria for such effective seat after an appraisal of the "experts in Luxembourgian and Portuguese Law introduced by both Parties" as (i) the place of the shareholders' and the board of directors' meetings, "the venue being of relevance", (ii) the place of management and (iii) the place where the company's books are maintained and kept.[281]

314. In a further step – point C –, the Tribunal applied the evidence to the criteria, which was a logical consequence, in paragraphs 195-230 of the Award.

315. With respect to the specific contentions formulated by the Applicant, the Tribunal held and concluded in this exercise – point D –:

- That "for the purposes of determining where the effective seat of its headquarters is located", the number of employees in a subsidiary is irrelevant. The Tribunal has formed an opinion to that specific issue. For a different issue, i.e. the question of whether the Nationalization Decree extended to all members of the Techint Group, including to its subsidiaries, the Tribunal has come to a different conclusion. The Committee is convinced that it is not contradictory when a

[281] Award, ¶¶ 192-195.

Tribunal reasons differently for different issues. It disagrees with the Applicant when it opines that the same criteria must be applied for different matters.[282] The reason for establishing the effective seat and the reason determining the scope of an expropriation decree do not wipe each other out but co-exist.

- That Talta was a holding and not a commercial company. It has come to this conclusion by rejecting, with reasons and based on evidence, the Applicant's expert's different opinion, and by reasoning that the formal characterization of Talta in the registry was of less relevance for the determination of the effective seat than its substantive activity, where the evidence shows "that Talta's activity is limited to the holding of interests in other companies."[283] The reasoning is detailed and the Committee will not venture into a reassessment of the evidence, which would be beyond its authority.
- That both Respondents' books were audited and kept in Luxembourg and Portugal, respectively. The Applicant's argument that the Tribunal should have explained why it chose that criterion to determine the effective seat is inappropriate, as much so as the other one according to which it must be explained why the venue of shareholder meetings may be taken into consideration. As noted by the Committee, the Tribunal has explained, after an appraisal of the experts' opinion, that a number of cumulative criteria were relevant to determine the effective seat, one of which is the place of the shareholders' meetings and the place of auditing. It has evaluated these criteria collectively and stated that they all converged to allow the conclusion that the effective seat of Tenaris was Luxembourg and that the effective seat of Talta was Portugal. The Committee cannot but state that the Tribunal has developed these thoughts and conclusions in a reasoned manner.

316. In sum, the Committee sees no problem to follow the Tribunal's reasoning from point A – the identification of the problem – to point D – the conclusion – and finds it not

[282] Reply, ¶ 113.
[283] Award, ¶¶ 224-225.

contradictory in and of itself. Therefore, it rejects the Applicant's request to annul the Award for a failure to state reasons.

### *b. The Issue of the Consent to Arbitrate*

#### *i. Summary of the Parties' Positions*

##### *1. The Applicant*

317. The Applicant contends that the Tribunal, in addition to exceeding its powers when assuming that the consent to arbitrate was perfected before Venezuela's denunciation of the ICSID Convention (as discussed in Section IV.B.1.a), also failed to state the reasons for its decision.

318. With respect to the dispute over Tenaris' expropriation of its investment in TAVSA, the Applicant submits that its expert had presented a profound opinion on Article 9 of the Luxembourg BIT, backed by solid case law, according to which TAVSA's Notice of Dispute, dated 20 November 2009, was defective.[284]

319. Instead of accepting Venezuela's standing offer contained in the BIT, the Notice amended the offer by a reservation of rights to initiate ICSID arbitration proceedings at any time. The Tribunal, the Applicant submits, ignored "the abundance of legal arguments and supporting legal authorities." It expressed its decision "in just one paragraph," without referring or analyzing Venezuela's arguments or explaining "the logical steps followed to reach its conclusion." It did not address the issue of futility of consultations and the notion why they must only be conducted to the extent possible. The Applicant finds even "more troublesome for the validity of the Award that the Tribunal did not explained [sic] why a reservation of the right to provide consent to arbitration was, in fact, an exercise of that right. Even more, the Tribunal expressly recognized that such reservation was never used."[285]

320. Although the Applicant agrees that "tribunals do not have an obligation to address in detail every single assertion in support of an argument presented by the parties, if they

[284] Memorial, ¶¶ 168-170.
[285] Memorial, ¶¶ 171 and 172; Reply, ¶¶ 123-128; Tr. D1, pp. 53 ss.

do not address one question that is relevant for understanding its reasoning, they have the obligation to give reasons for not doing so."[286] The Applicant relies on *Libananco v. Turkey*, where the *ad hoc* committee stated:

> "lack of consideration of a question submitted to a tribunal could amount to a failure to state reasons if no reasons are given by the tribunal for not addressing the question and such question would be determinant for understanding the reasoning of the award."[287]

321. With respect to the claims concerning COMSIGUA, the Applicant asserts that again the Respondents did not accept Venezuela's standing offer to arbitrate before the denunciation of the BIT since it departed significantly from that standing offer, and because it could not accept the offer before the period of consultation had elapsed, i.e. before 2 June 2012. Although Venezuela has presented abundant arguments for this opinion, the Tribunal failed to address them.[288]

322. The Applicant further alleges that the Tribunal contradicted itself when it confirmed on the one hand that in accordance with the Luxembourg BIT six months have to elapse between the notice of a dispute and its submission, and held on the other hand that "it was preferable to interpret the Luxembourg Treaty as allowing an investor to give at the same time its notice of dispute as well as its consent to arbitration."[289]

### *2. The Respondents*

323. The Respondents submit that the Tribunal has devoted "18 pages and over 100 paragraphs"[290] of reasons to the issue of whether the consent was perfected and that "those reasons may easily be followed from point A to point B."[291] In light of the Tribunal's approach, Venezuela cannot demonstrate that it failed to state reasons or that it argued in a contradictory manner. In reality, Venezuela tries to re-argue the

[286] Reply, ¶ 126.
[287] *Libananco Holdings Co. Limited v. Republic of Turkey*, (ICSID Case No. ARB/06/8), Decision on Annulment (22 May 2013), ¶ 192 (A/RLA-73).
[288] Memorial, ¶¶ 174 and 175; Reply, ¶¶ 130-135.
[289] Memorial, ¶ 180.
[290] Counter-Memorial, ¶ 139.
[291] Counter-Memorial, ¶ 154.

case and have its expert's opinion prevail, although the Tribunal had rejected his argumentations in a well-reasoned way.[292]

324. The Respondents argue that the Tribunal did not have to follow a "minimum word requirement"[293] to present its conclusions, but that it has to provide reasons that can be followed, and that it did not have to address every argument submitted by Venezuela explicitly, but had to consider and treat them implicitly. That is what the Tribunal did.[294]

325. In particular, the Respondents assert that the Tribunal has carefully taken the different wording of the Venezuela-Luxembourg and the Venezuela-Portugal BIT into account and has interpreted them in thoroughly appraising the expert opinions presented by both Parties.

326. Specifically, with respect to TALTA's consent to arbitration regarding COMSIGUA, the Respondents sustain that the Tribunal incurred in no contradiction when it applied a different treatment to Talta-Comsigua and Tenaris-Comsigua to determine the date of beginning of negotiations. Precisely, the difference responded to the different language of each applicable BIT. [295]

327. After a careful reasoning, it has rejected the opinion of the Applicant's expert and agreed to the opinion of the Respondents' expert. It submits that with respect to TAVSA, "the Tribunal explained and supported its decision that Tenaris could perfect consent with its notice of arbitration before the negotiation period in the Luxembourg Treaty had elapsed; and the Tribunal similarly explained why the reservation of rights to resort to arbitration prior to the exhaustion of that period did not change the Tribunal's conclusion."[296]

[292] Counter-Memorial, ¶¶ 139 and 154 and *passim*; Rejoinder, ¶¶ 125-128; Tr. D1, pp. 217-234.
[293] Counter-Memorial, ¶ 141.
[294] Counter-Memorial, ¶¶ 141 and 142. Tenaris relies on *Aguas v. Argentina*, ¶ 64, and on *Rumeli v. Kazakhstan*, ¶ 84.
[295] Counter Memorial, ¶¶144-148.
[296] Counter-Memorial, ¶ 130.

328. The Respondents further submit that the Tribunal has distinguished in a reasoned way between the consent and the initiation of arbitration and has explained that the consent could precede the initiation.[297] The clear and consistent reasoning led the Tribunal to decide that consent can be perfected before (the end of) consultations, while the submission of the dispute to arbitration is only admissible after the period of consultations has elapsed.[298]

### *ii. Committee's Analysis and Determination*

329. In Section IV.B.1.b, the Committee has already determined that the Tribunal did not exceed its powers by finding that the consent to arbitrate was perfected before Venezuela's denunciation of the ICSID Convention, and that it had jurisdiction *ratione temporis.*

330. It has come to this conclusion after having examined the reasons presented by the Tribunal. The Tribunal developed its reasoning and conclusions in paragraphs 59-151 of the Award.

331. Given Venezuela's denunciation of the ICSID Convention, the Tribunal started by stating in paragraphs 59-64 of the Award that according to Convention Article 72, the consent must have been given before such denunciation, i.e. before 24 January 2012. In light of the circumstantial differences and the different wording in the applicable BITs, the Tribunal stated in paragraph 65 of the Award that "[e]ach Claimant's case and its investment shall be discussed separately."[299]

332. Consistently with the introductory remarks, the Tribunal continued to analyze Tenaris-TAVSA's, Talta-COMSIGUA's and Tenaris-COMSIGUA's conduct, communications, and expression of consent to ICSID arbitration, and subsumed them under the two applicable BITs.

[297] Rejoinder, ¶ 133.
[298] Rejoinder, ¶¶ 134-136.
[299] Award, ¶ 65.

333. As to Tenaris-TAVSA, after having exposed the Parties' positions and scrutinized numerous letters, minutes of meetings, and the Notice of Dispute, all dated between May 2009 and November 2011, the Tribunal concluded that "the settlement period of six months from the Tenaris and Tavsa Notice of 20 November 2009 had long ago elapsed" when Venezuela denounced the Convention.[300]

334. As already explained in Section IV.B.1.b of this Decision, the Tribunal found that the Notice, by which they "give their consent to resort to arbitration" under the ICSID Convention" shows a "perfect consistency between the terms of the offer to arbitrate and the terms of Tenaris' acceptance."[301]

335. The Committee does not find a failure to state reasons in this sequence of arguments.

336. Once the consent was established, the Tribunal addressed the issue of reservation of rights contained "in the final part of the phrase following Tenaris' consent,"[302] which according to the Applicant modifies the offer and thereby disqualifies the Notice as a valid acceptance. Firstly, the Tribunal stated that Tenaris did observe the six-month consultation period and thus, did not make use of the reserved right. Nevertheless, it then found that "the inclusion of this reservation would not have substantially modified the offer."[303]

337. The Committee has no difficulty to follow the Tribunal's reasoning: it found that the consent was expressed unequivocally and that the reservation of rights was not meant to alter its content.

338. In light of the particular evidence in Tenaris-TAVSA, the Tribunal did not consider the need to address Venezuela's expert opinion. That cannot be interpreted as a general unwillingness of the Tribunal to take the expert opinion into consideration. The contrary is convincingly documented by the fact that in the different factual

[300] Award, ¶ 81.
[301] Award, ¶ 86.
[302] Award, ¶ 87.
[303] Award, ¶ 90.

circumstances of Tenaris-COMSIGUA, it presented and analyzed this opinion in detail.[304]

339. Therefore, the Committee is unable to find a lack of reasoning when the Tribunal addressed the Applicant's arguments in the context where they were crucial.

340. As to Talta-COMSIGUA, the Tribunal based its reasoning on the text of Article VIII of the Portugal BIT, which does not require a notice of dispute.[305]

341. The Tribunal reconstructed the "chronology of events," starting from a first request to negotiate dated 28 June 2010, including a Notice of Dispute of 2 December 2011 that contains an expression of consent to submit the dispute to ICSID arbitration, and ending with the request for arbitration, dated 20 July 2012, i.e. four days before Venezuela's denunciation became effective on 24 July 2012.[306] In light of these unambiguous statements and reference to uncontested dates, the Committee rejects the Applicant's allegation that the Tribunal did not take the beginning of negotiations into account.[307]

342. The Committee has no difficulty to follow the Tribunal's reasoning to its "point B", where it stated that "[t]he facts are clear: when Talta sent the Comsigua Notice, it had already complied with its obligation to negotiate for six months (and, by then, Venezuela had not yet denounced the Convention). Therefore, Talta validly perfected its consent to arbitrate when it sent the Comsigua Notice on 2 December 2011, prior to the Denunciation."[308]

343. As to Tenaris-COMSIGUA, the Tribunal found the situation "more complex" because the Luxembourg BIT differs from the one with Portugal: point A.[309] Therefore – and the Committee has no reason to criticize the approach – it devotes some fifty paragraphs to the specific factual and legal circumstances in order to

[304] Award, ¶¶ 106-130.
[305] Award, ¶ 95.
[306] Award, ¶ 96.
[307] As alleged in Venezuela's Memorial, ¶ 176.
[308] Award, ¶ 97.
[309] Award, ¶ 100.

establish whether Tenaris had perfected the consent to arbitrate before the denunciation date.[310]

344. Both Parties have presented reports by prominent experts on this issue, reaching contradictory conclusions. The Tribunal presented and analyzed these reports in detail. It re-quoted the relevant provision of the Luxembourg BIT, referred to VCLT Article 31 and presented its own interpretation in accordance with the ordinary meaning of Article 9 of the BIT as well as its context, object and purpose, each time referring back to the experts' opinions. In conclusion, the Tribunal determined that "Article 9 of the Luxembourg Treaty (when correctly interpreted) allows the investor expressing its consent in advance and, at the same time, declaring its choice for ICSID arbitration."[311] In an appendix to this conclusion, the Tribunal discussed a number of decisions which had been cited by the experts and found after an analysis that they were "actually irrelevant as they do not deal with what is actually fundamental" with the case at hand.[312]

345. The Committee finds the Tribunal's reasoning clear, detailed, and consistent, and followed it easily from point A to point B.

346. It has not found a contradiction in paragraph 136 of the Award, as alleged by the Applicant. Paragraph 136 reads in its relevant part:

> "Article 9.2 of the Treaty provides that, after the mandatory notification of a dispute, the investor shall have six months to submit the dispute to any forum of its choice […]. However, the Treaty does not include any prohibition that prevents an investor, at the time of notification of dispute, from expressing its consent and choose arbitration. There is also no indication whatsoever that negotiations should be deemed a condition precedent for the effectiveness of consent."

347. The Committee agrees with the Respondents: the paragraph differentiates between the submission of the dispute to arbitration, which is only admissible after the lapse

[310] Award, ¶¶ 100-151.
[311] Award, ¶ 143.
[312] Award, ¶¶ 145-151.

of the consultation period, and the perfection of the consent, which – in the reasoned opinion of the Tribunal – the claimant investor can express before.

348. In conclusion, the Committee holds that the Tribunal did not fail to state reasons when accepting that the consent to arbitrate was perfected before the denunciation of the ICSID Convention, thereby establishing its competence and the jurisdiction of the Centre.

### *c. The Issue of Expropriation*

#### *i. Summary of the Parties' Positions*

##### *1. The Applicant*

349. The Applicant contends that in addition to not applying the Portugal BIT and customary international law (and thus exceeding its powers when discussing the element of payment),[313] the Tribunal also failed to state the reasons why it did not apply the proper law. It develops its case in paragraphs 201-205 of its Memorial and in paragraphs 158-206 of its Reply.[314]

350. In the initial proceeding, Venezuela had based its argument regarding the legality of the expropriation on both Treaties and on customary international law. The Tribunal reached its final conclusions by quoting both Treaties in the dispositive part of the Award and in a summary, but based its reasons on the Luxembourg BIT only. As such, the Applicant argues that:

> "As a consequence, it is not possible to follow the Tribunal's reasoning or to understand what are the bases for concluding that Article IV of the Venezuela-Portugal Treaty was breached and for not addressing the Republic's defence based on that Treaty as well as on customary rules of international law."[315]

351. The Applicant believes that the Tribunal's decision may have been different had it addressed the Portugal BIT and the rules of customary law.[316]

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[313] See Section IV.A.1.a, *supra.*
[314] Cf. also Tr. D1, pp. 84 ss., and D2, pp. 421 ss.
[315] Memorial, ¶ 203; Reply, ¶¶ 160 and 161.
[316] Memorial, ¶ 205.

352. Further, the Applicant notes that the Tribunal did apply customary international law when determining the quantum of compensation but failed to do the same when determining the lawfulness of the expropriation. It argues that such approach is "openly contradictory."[317]

353. Finally, the Applicant asserts – relying on *CMS v. Argentina* – that these lacunae cannot be filled and cured by the Parties or the Committee.[318]

### *2. The Respondents*

354. The Respondents refute Venezuela's argumentation in paragraphs 155-157 of its Counter-Memorial and paragraphs 138-147 of its Rejoinder.[319]

355. They assert that the Tribunal had no reason to reconsider the Portugal BIT in its section on the unlawfulness of the expropriation for lack of payment because it had already found such unlawfulness in previous sections. Having found that the Portugal BIT required a guarantee of cumulatively immediate, adequate and effective payment, there was no need to address Venezuela's allegation that it was enough to provide a suitable mechanism since the obligations were "very clearly breached."[320] It was only the Luxembourg BIT that did not require immediate payment. Therefore, the Tribunal correctly concentrated its reasoning on this BIT's provision.[321]

356. Further, the Respondents submit that the Tribunal was under no obligation to examine the rules of customary international law since such approach only reflects:

> "the fact that customary international law applies in cases where treaty text is silent (such as in determining the consequences of a violation of the Treaties), but does not apply where treaty text explicitly deals with an issue (such as the applicable criteria for determining the lawfulness of an expropriation). Different bodies of law rightly apply in different situations."[322]

[317] Reply, ¶¶ 162 and 163.
[318] Reply, ¶ 165; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007), ¶ 97 (A/RLA-57).
[319] Cf. also Tr. D1, pp. 246 ss., and Tr. D2, pp. 524 ss.
[320] Counter Memorial, ¶ 156.
[321] Counter-Memorial, ¶¶ 156 and 157; Rejoinder, ¶¶ 139 and 140.
[322] Rejoinder, ¶ 145.

357. The Respondents argue that there is no contradiction between this approach and the discussion of rules of customary law in the context of quantum since the Tribunal had applied these rules along with the BITs and found that they would both lead to the same result.[323]

358. In any event, the Respondents assert, the Tribunal was under no obligation to address every single argument presented by the Parties as long as it addressed the questions put before it. And that is what the Tribunal did.[324]

### *ii. The Committee's Analysis and Determination*

359. The Committee has already found that the Tribunal did not fail to apply the applicable law when it based itself on the Luxembourg BIT in Section VI.4.3.C of the Award.

360. The Committee has come to this conclusion after examining carefully the totality of Section VI of the Award, and not only its last subsection.

361. The Tribunal presented the relevant provisions of both BITs and marked the difference. It then presented the difference between the processes of expropriation of the investments in TAVSA and COMSIGUA. In paragraph 357 of the Award, the Tribunal stated that "a delay of more than seven years in the payment of compensation does not constitute "immediate" payment, following the wording of art. IV of the Portugal Treaty." It has gone on to develop specific arguments for the Luxembourg BIT also in reference to Venezuela's alternative argument that "the lack of payment does not make the expropriation unlawful."[325]

362. The Tribunal referred to paragraphs 298-304 of Venezuela's Counter-Memorial in the original proceeding, dated 24 October 2014, where Venezuela starts by quoting the texts of both BITs, but bases its argument on Article 4 of the Luxembourg BIT

[323] Rejoinder, ¶ 144; Award, ¶ 397.
[324] Rejoinder, ¶ 141.
[325] Award, ¶ 357.

when referring to the provisions underlying the *Amoco* case, which are completely different from the Portugal BIT.[326]

363. After having pondered the specificities of the Luxembourg BIT in the context of the COMSIGUA expropriation, the Tribunal summarizes the result of Section VI of the Award by determining that the "expropriation of the property belonging to Tavsa and Comsigua occurred in breach of arts. IV and 4 of the Treaties."[327]

364. The Committee had no difficulty to follow the totality of the Tribunal's argumentation resulting in this conclusion.

365. Further, it does not consider that the Tribunal reasoned contradictorily when it did not base its decision on customary international law, even if it did mention customary law in a different context. As explained in Section IV.B.2.d, the Treaties are the applicable law. Where they foresee a provision with respect to a specific issue, there is no need to examine customary law as well.

366. For these reasons, the Committee finds that the Tribunal did not fail to state the reasons for its decision to find the expropriation unlawful.

### *d. The Issue of the Valuation Date for the Determination of Damages*

#### *i. Summary of the Parties' Positions*

##### *1. The Applicant*

367. The Applicant asserts that the Tribunal contradicted itself clearly when it characterized the expropriation of both TAVSA and COMSIGUA on the one hand, and fixed the valuation date of the expropriation, on the other hand. In the Applicant's view "[t]his contradiction amounts to a failure to state reasons and warrants the annulment of the Award."[328]

[326] Award, ¶¶ 383-385.
[327] Award, ¶ 386.
[328] Memorial, ¶ 225.

368. It submits[329] that the Tribunal had firstly defined "expropriation" under the BITs in paragraph 317 of the Award as taking place "when the State adopts a measure, in the exercise of any of its sovereign powers, which dispossesses the investor of its investment."[330]

369. The Applicant documents that on many different occasions the Tribunal had confirmed that the dispossession had taken place after the adoption of Decree-Law No. 6,058, or "Nationalization Decree", dated 30 April 2008, and after President Chavez' announcement of 21 May 2009 on the nationalization of TAVSA and COMSIGUA.[331] With respect to TAVSA, it had found that the "takeover was formalized via the so-called "Record of Transfer" dated 16 November 2009", while "[i]n the case of Comsigua, the transfer of control over the Expropriated Assets was carried out two years later, on 17 June 2011."[332] Likewise, the Tribunal acknowledged that negotiations and meetings on compensation took place in 2009 and 2011, respectively.[333]

370. In irreconcilable contradiction to its own reasoning, the Tribunal used "another, artificial date of expropriation" for the purposes of its valuation date by relying on the date of the Nationalization Decree, i.e. 30 April 2008. This decision increased the amount of compensation tremendously, although, as previously held by the Tribunal, "no expropriation measure existed yet."[334] The Applicant insists that:

> "[t]here is no place in the Award where a careful and informed reader can find an explanation as to why the expropriation should be deemed to have been configured before the date in which the questioned measure actually had the effect of an expropriation."[335]

371. In fact, the Applicant alleges, the Nationalization Decree had no effect on the investment and initiated only – in the Tribunal's own appreciation – "a series of

[329] Memorial, ¶¶ 209 and 210; Reply, ¶ 177.
[330] Award, ¶ 317.
[331] Memorial, ¶¶ 213-216; Reply, ¶¶ 178-186.
[332] Award, ¶ 331. The Award mentions the date of 17 June 2011 on several other occasions: cf. ¶¶ 332, 333, 344, and 347.
[333] Reply, ¶¶ 184 and 185.
[334] Memorial, ¶ 225; Reply, ¶ 197.
[335] Reply, ¶ 171.

posterior acts of the State [that] gave rise to an expropriation."[336] The Tribunal assumed contradictorily an indirect expropriation for purposes of establishing liability and a direct expropriation for the purposes of establishing the amount of compensation.[337]

372. The Applicant argues that "if the Tribunal considered—as it did—that an indirect expropriation had taken place through the taking of control of the "Expropriated Assets" by Venezuela, and that that taking of control had occurred in 2009 for Tavsa and in 2011 for Comsigua, then it simply could not have found that the valuation date should be April 30, 2008. Conversely, if the Tribunal considered that the expropriation had occurred on April 30, 2008, then it could not have found that the expropriation had consisted in the taking of control, especially when it found that those takings occurred in 2009 (for Tavsa) and 2011 (for Comsigua). Those findings are mutually exclusive, and amount to a complete failure to state grounds on the critical issue of what expropriation, if any, took place, when it occurred, what it consisted in, and what compensation, if any, should be awarded to Claimants."[338]

373. Finally, the Applicant alleges that the Tribunal "lied" when it justified the valuation date for the expropriation of TAVSA by referring to the Applicant's approval of such date. The Applicant quotes its submission in the Counter-Memorial of 21 October 2014 and summarizes that it argued quite the contrary of an acceptance. Rather, it had stated that "the Nationalization Decree could not have any expropriatory effects," which was first acknowledged by the Tribunal, only to be rejected without justification for the fixing of the valuation date.[339]

### *2. The Respondents*

374. The Respondents submit that the "review of the Award […] shows that the Tribunal did give reasons for choosing a valuation date of 30 April 2008 and rejecting

[336] Reply, ¶ 175.
[337] Reply, ¶¶ 187-189; Tr. D1, pp. 124-126.
[338] Venezuela's PHB, pp. 13-14
[339] Reply, ¶¶ 191-197; Venezuela has clarified its position during the Hearing: Tr. D1, pp. 128 ss.

Venezuela's position on that issue, and that those reasons are not in any way contradictory."[340]

375. They assert that the Tribunal based its analysis on Article 4 of the Luxembourg BIT, and Article IV of the Portugal BIT, which both require appraising the value of the investment concerned immediately prior to the adoption or publication of the expropriatory measure.

376. They submit that the expropriation was a process which started with the Nationalization Decree of 30 April 2008, continued by President Chavez' public announcement of 21 May 2009 confirming the nationalization of TAVSA and COMSIGUA, was confirmed by Executory Decree No. 6,796 of 14 July 2009, and finalized by the takeover of TAVSA in 2009 and COMSIGUA in 2011. The Parties and their experts had proposed different dates to mark the first step in this process and thereby the crucial moment for the valuation. Tenaris and Talta had found that the date of the Nationalization Decree was appropriate, while Venezuela had argued in favour of the President's public announcement. The Tribunal weighed the Parties arguments in paragraphs 405-417 of the Award and came to the reasoned conclusion that Tenaris' and Talta's proposal corresponded better to the purpose of the Treaties.[341] With respect to an alleged contradiction, the Respondents submit that both parties agreed that "in view of the Treaties the valuation date should be immediately before *the first relevant State measure*". While the Tribunal found that the last relevant measure adopted by Venezuela was the formal taking of control of TAVSA and COMSIGUA in 2009 and 2011 respectively, it found that the first relevant State measure was the Nationalization Decree. There is no contradiction in that reasoning.[342]

377. In sum, the Respondents argue that the Tribunal's reasoning is straightforward, consistent, and not contradictory. They summarize that:

[340] Counter-Memorial, ¶ 158.
[341] Counter-Memorial, ¶¶ 159-162; Rejoinder, ¶¶ 149-153.
[342] Rejoinder, ¶153.

> "[o]ne may agree or disagree with the Tribunal's conclusion on this point, but there is no legitimate basis for arguing that these findings are so contradictory that reasons are effectively absent."[343]

378. Finally, the Respondents address "one remaining, unfortunate matter", namely Venezuela's allegation that the Tribunal lied when stating that Venezuela had accepted TAVSA's expropriation had occurred under the Nationalization Decree. To this effect, the Respondents quote from Venezuela's Counter-Memorial of 21 October 2014 and its Post-Hearing Brief of 2 October 2015, where Venezuela states, indeed, that the occupation of TAVSA's facilities "was authorized by Decree 6,058." Therefore, the "Tribunal accurately observed" and reproduced exactly Venezuela's statement.[344]

### *ii. The Committee's Analysis and Determination*

379. In order to understand fully the Tribunal's reasoning, the Committee has to analyze the totality of the Award, including the "factual background" as presented in its Section VI.1. The relevant part starts with paragraph 253, where the Tribunal described the Claimants' account of "two takeovers within the framework of the process aimed at the nationalization of the entire iron and steel sector of the Guyana Province formalized through two Decrees: 6,058 (a.) and 6,796 (b.)."[345] After presenting the Decrees of 2008 and 2009 respectively, the Tribunal goes on to specify the modalities of the takeover that has taken place in 2009 for TAVSA and 2011 for COMSIGUA, "[i]n compliance with the Nationalization Decree and the Executory Decree."[346]

380. In the Committee's mind, there is no doubt that the Tribunal understood the expropriation not as a single act but as a process, as a series of events and measures which started with the Nationalization Decree. That understanding is clearly expressed in paragraph 320 of the Award, where the Tribunal defined the "measures" of expropriation and nationalization, as stated in paragraphs 317 and 318, as

[343] Rejoinder, ¶ 153.
[344] Rejoinder, ¶¶ 154-156; Slide 49 of Respondents' Presentation during Hearing, Day 2.
[345] Award, ¶ 253.
[346] Award, ¶ 270 et seq.

"legislative, judicial, or administrative acts adopted by a State, that significantly interfere in the use and enjoyment of the investment, ending up in the annulment of the value thereof, although without depriving the investor of its ownership and control." When paragraph 317 is read in the light of paragraph 320, it is clear that the Tribunal did not contradict itself when finding that the Nationalization Decree was the first administrative act that 'ended up' in the loss of value.

381. In the context of this issue, the Tribunal did not distinguish between a direct and an indirect expropriation. The Committee does not find this approach erroneous.

382. Further, the Committee has the impression that Venezuela's position is not without ambiguity in this respect. It is true that in its Reply Memorial on Annulment and during the Hearing, the Applicant argued that Decree 6,058 "could not have any expropriatory effect."[347] However, this allegation does not correspond to Venezuela's assertions made during the original proceeding before the Tribunal and which the Tribunal quoted in paragraph 405 of its Award, namely paragraphs "284 *et seq.*" of Venezuela's Counter-Memorial, dated 21 October 2014. There, Venezuela confirms that:

- "Decree-Law No. 6,058 establishes that the transformation or transit of the iron and steel industry from a private business concern to state production will take place in various phases" (paragraph 286);
- "Executive Decree No. 6796 is precisely the law that contains such supplementary provisions that will serve to specify the application of provisions in the nationalization procedure applicable to the SIDOR affiliates, among them TAVSA, which it expressly referenced. This Decree reproduces for TAVSA the procedure outlined by Decree-Law No. 6,058" (paragraph 287);
- "in the case of *CEMEX*, in 2008 the Republic nationalized the cement industry under Decree-Law No. 6091, which has a structure and content similar to Decree-Law No. 6,058" (paragraph 295).

[347] Reply, ¶ 197; Tr. D1, pp. 128 ss.

383. The Committee cannot but understand these statements as affirming that Venezuela considered the nationalization as a process and that the first measure in this process was Decree-Law No. 6,058, similar to Decree-Law No. 6091, under which the cement industry was nationalized. These assertions do not exclude that additional steps had to follow to implement the process. Further, when reading the statements, the Committee does not understand Venezuela's allegation that the Tribunal lied when stating that Venezuela accepted that TAVSA's expropriation occurred under or by virtue of Decree-Law No. 6,058.

384. The Committee is reinforced in its appreciation of Venezuela's statements by the fact that the Applicant did not opt for a valuation date corresponding to the date of the takeovers but for the date of the day preceding President Chavez' announcement of 21 May 2009, which was followed by Executive Decree No. 6,796, dated 14 July 2009. This Decree was certainly "a consequence of President Chavez' statement of 21 May 2009"[348], but it was at the same time 'supplementary' to Decree No. 6,058.

385. In light of these events and their appreciation by the Tribunal, the Committee does not find any contradiction in its reasoning. It holds that the expropriation is a process, consisting of a "measure", which "shall be construed in the widest way possible" as confirmed by the Treaties that add "the generic plural "measures."[349] This measure "dispossess the investor of its investment", whereby the dispossession is not reducible to a single act.[350] It is true that the Tribunal "distinguishes between the instances of this first Decree and the implementation of the decision by the Republic" [351], but holds at the same time that for purposes of establishing the date when the amount of compensation is to be determined, the first measure influencing on the value of the investment is determinative. The Tribunal found that already the Nationalization Decree had "expropriatory effects"[352] and not only the Executory Decree as asserted by Venezuela. The Tribunal fixed the valuation date accordingly. This line of

[348] Memorial, ¶ 214.
[349] Award, ¶ 315.
[350] Award, ¶¶ 317-320.
[351] Reply, ¶ 183.
[352] Award, ¶ 409.

reasoning is detailed in paragraphs 403-417 of the Award, which in turn built on the reasons given in its Section VI.

386. The Committee has no difficulty to follow the Tribunal's reasoning and finds it consistent and not contradictory. Therefore, it cannot annul the Award for lack of reasons with respect to the valuation date.

387. At the same time, the Committee confirms that its findings on the Tribunal's reasoning with respect to the valuation date exclude the appropriateness of the assertion that the Tribunal's consequential calculations of damages and interests are contradictory, as presented in the Applicant's post hearing brief.[353]

### *e. The Issue of Price Projections in the Determination of Quantum*

#### *i. Summary of the Parties' Positions*

##### *1. The Applicant*

388. The Applicant asserts that the Tribunal contradicted itself when it decided on the source for future price projections in its calculation of damages using the Discounted Cash Flow ("DCF") methodology.[354]

389. It submits that the Parties' experts had proposed different approaches and formulas to calculate price development probabilities. Venezuela's expert had initially proposed to choose as starting point historical prices adjusted by inflation. The Tribunal had rejected the reference to historical prices in favor of a formula that TAVSA and PDVSA had used in their negotiations on the amount of compensation after the expropriation.[355] One of the elements of this formula is the publicly available *Pipe Logix* index. The Tribunal disregarded this index without giving reasons for this deviation, thus changing 70% of the calculation formula, although it was part of exactly this formula that it had endorsed previously.[356] This failure "is severe here

[353] Venezuela's PHB, pp. 14-15.
[354] Memorial, ¶ 226; Reply, ¶ 199.
[355] Memorial, ¶¶ 227-230; Reply, ¶ 200.
[356] Tr. D1, pp. 133-134; D2, pp. 448-450.

given that the Republic's expert on quantum had expressly argued against disregarding *Pipe Logix*."[357]

390. In a further step, the Tribunal executed its decision to disregard the *Pipe Logix* index by replacing it by an index published in *Metal Bulletin Research*, as proposed by theRespondents, against the Applicant's proposal to use the prices published by *Canaccord*.[358] Contrary to its initial decision to disregard historical prices, the Tribunal chose Metal Bulletin Research because it "allegedly reflected better the historical commercial trajectory of TAVSA regarding prices."[359]

391. The Applicant concludes that:

> "it is impossible for any reader of the Award to appreciate how the Tribunal estimated future prices based on historical data, departing from the notion that such future prices were not to be calculated from historical prices. As explained above, the contradictions in the Tribunal's reasoning amount to having provided no reasoning at all, giving rise to the ground of annulment of the Award contemplated in Article 52(1)(e) of the ICSID Convention."[360]

### *2. The Respondents*

392. The Respondents refute the Applicant's request and assert that "[t]here is no merit at all to this argument. It is based on a mischaracterization of the Tribunal's reasoning."[361]

393. They insist that:

> "the Tribunal never declared that historical prices were irrelevant; just that historical prices were not as reliable a projection of future prices as the price formula that the parties had been negotiating. Venezuela's 'contradiction' argument therefore fails at the threshold."[362]

394. Further, the Respondents submit that contrary to the Applicant's allegation, the Tribunal did give reasons to disregard the *Pipe Logix* index. The Tribunal considered

[357] Reply, ¶ 203; Memorial, ¶¶ 231-235.
[358] Memorial, ¶¶ 236-241.
[359] Reply, ¶ 204; Memorial, ¶ 242.
[360] Memorial, ¶ 243.
[361] Counter-Memorial, ¶ 163; Tr. D1, pp. 281-286.
[362] Counter-Memorial, ¶ 166.

the index and found that it "makes price forecasts within a year, which is why it is not valid for making price forecasts into the future."[363] The Respondents argue that it is irrelevant for the request for annulment that the Applicant disagrees with the Tribunal's reasons. The only point that matters is whether it gave reasons, and that is what it did.[364]

395. Finally, the Respondents contend that the Tribunal gave consistent reasons why it preferred the *Metal Bulletin* over the *Canaccord* index. This had nothing "to do with its relationship to historical prices, but because the Parties agreed, through their conduct and the agreements they signed, that it was the preferable index to use when projecting future prices."[365]

### *ii. The Committee's Analysis and Determination*

396. The Committee notes at the outset that it has neither the means nor the authority to reassess the different expert opinions nor the appropriateness of one or the other index for the estimation of future prices. Its role is limited to an examination of the Award with respect to a possible failure to state reasons.

397. That said, the Committee has scrutinized paragraphs 536-555 of the Award and found that the Tribunal provided detailed and non-contradictory reasons in its determination of the estimation of prices of pipes, each time considering the different Parties' expert opinions.

398. The Tribunal confronted the experts' proposals as to the manner on how to estimate the prices. It preferred to rely on the approach that TAVSA and PDVSA had used when negotiating the compensation in the real world. In paragraphs 538-540, the Award explains why it considers this approach to be "the best indication of future prices." It is evident that it was not the preferred method because it rejects reliance on historical prices, as the Applicant alleges, but because it was discussed in the negotiations that have taken place between TAVSA and a partner with "wide

[363] Award, ¶ 542.
[364] Rejoinder, ¶ 160.
[365] Counter-Memorial, ¶ 168; Rejoinder, ¶ 163.

bargaining power" and because of a plausible assumption that the partners would stick to the formula as agreed upon. There is no question of correct or incorrect expert opinions but of a more or less appropriate method to arrive at plausible estimates.

399. Further, the Tribunal adapted the formula thus established by replacing one index against another, *Pipe Logic* against *Metal Bulletin Research*. The Committee does not venture into the relative qualities of the indices. Rather, it finds that the Tribunal stated its reasons when formulating that "it is necessary to replace the international reference to Pipe Logix with another index."[366] The Tribunal argued that "Pipe Logix, an index that samples global sales of seamless pipes, only makes price forecasts within a year, which is why it is not valid for making price forecasts further into the future."[367] These are reasons. The fact that they contradict Venezuela's expert's proposal do not make them inconsistent.

400. Finally, the Tribunal made a choice between the *Metal Bulletin Research* and *Canaccord* indices and opted for the *Metal Bulletin Research*. The Tribunal gave reasons for this choice in paragraphs 544-555 of the Award. It referred to TAVSA's management forecasts and on commercial agreements, both of which relied on *Metal Bulletin* and not on *Canaccord*, and concluded that "both the forecasts made by Tavsa's management and historical commercial agreements confirm the reliability of the price estimates published by Metal Bulletin Research."[368]

401. In addition, the Tribunal discussed Venezuela's expert's counter-argument in favor of *Canaccord* and opined that:

> "the answer shall be in favor of Metal Bulletin Research, as the foregoing paragraphs have already shown that it is a reference publication in the sector, while Cannacord Adams is an investment bank that publishes prices of the iron and steel industry, as well as other industries […]. Expert Hart has failed to persuade the Arbitral Tribunal that, regardless of its predictive reliability, Canaccord Adams was a price reference publication to hypothetical buyers."[369]

[366] Award, ¶ 543.
[367] Award, ¶ 542 (footnotes omitted).
[368] Award, ¶ 551.
[369] Award, ¶ 555.

402. The different quotations demonstrate that the Tribunal has not failed to give reasons for its determination of the price projections. Therefore, the Committee rejects the Applicant's request to annul the Award for this reason.

### *f. The Issue of COMSIGUA's Compensation*

#### *i. Summary of the Parties' Positions*

##### *1. The Applicant*

403. The Applicant contends that the Tribunal had "fully endorsed DCF as the applicable methodology for the Valuation of COMSIGUA" "in its sufficiency" and as an "exclusive DCF approach", after having considered different other valuation methods and having found them "not consistently reliable."[370] After having calculated the amount of compensation based on its chosen methodology, the Tribunal contrasted the result with the other methods of valuation that it had rejected before and found that the amount arrived at through the DCF method was too low and that therefore, it should be augmented.

404. The Applicant alleges that "the Tribunal states no reason for its decision to increase the amount of compensation once the DCF calculation was completed" and that it has made it "impossible for any impartial and informed reader to understand this move from a DCF calculation to a factoring of other previously dismissed methods."[371]

405. It argues that the comparison of the amount arrived at by the DCF method "with results yielded by other methodologies is in itself problematic, since there is no apparent reason to check an allegedly reliable methodology against other unreliable or less reliable methodologies."[372]

406. Further, it alleges that "shockingly" the Tribunal in weighting the different calculation methods found the compensation paid to Japanese investors an indicator

[370] Reply, ¶¶ 208, 209, 215; Memorial, ¶ 251.
[371] Reply, ¶¶ 230, 222; Memorial, ¶¶ 253, 254.
[372] Reply, ¶ 221.

more reliable than other comparators despite the fact that such compensation was lower than the value arrived at through the DFC method.[373]

407. Further, the Applicant points to an even more "fantastic contradiction" resulting from the irreconcilable difference in valuation of TAVSA and COMSIGUA. It submits that for both investments the Tribunal has applied the DCF methods first, has contrasted the amounts yielded to other methods because they were "on the low end for both companies", and has finally decided to leave the TAVSA amount untouched while increasing the one for COMSIGUA. The Tribunal has failed completely to state the reasons why it treated identical situations differently.[374]

408. Finally, the Applicant suggests that the erroneous determination of the valuation date has immediate repercussions on the reasoning in the context of the appraisal of damages since the "Award does not allow a reader to calculate the damages to be awarded if the valuation date was not April 30, 2008."[375]

The Respondents

409. The Respondents submit that the Applicant mischaracterizes the Tribunal's reasoning.

410. They insist that that the Tribunal did not choose the DCF method to the exclusion of other methods.[376] They refer to the beginning of the Section on the determination of the appropriate method in the Award, where the Tribunal holds:

> "The Arbitral Tribunal finds no reason to depart from the traditional DCF method (1.), which has become a standard in company valuation: in the instant case, the company had a past history and there was a predictability of future cash flows that can be estimated with reasonable accuracy.
>
> This being said, nothing prevents the Arbitral Tribunal from contrasting the value obtained with other approaches (2.)."[377]

[373] Reply, ¶¶ 231 and 232.
[374] Tr. D1, pp. 144-147.
[375] Venezuela's PHB, p. 14
[376] Counter-Memorial, ¶¶ 171 and 172; Rejoinder, ¶¶ 165 and 166.
[377] Award, ¶¶ 685 and 686.

411. Thus, the Tribunal did not only endorse the DCF method exclusively from the outset but announced that it would possibly correct the results in contrasting them to other methods. The Tribunal gave consistent reasons for its approach.

412. Further, it is not true, the Respondents assert, that the Tribunal did not give reasons why it found the other methodologies worth considering. In fact, it gave a detailed analysis in paragraphs 705-749.[378]

413. Equally and contrary to the Applicant's allegations, the Tribunal stated the reasons in paragraph 752 of the Award on why and how it weighted the different comparators.[379]

414. Finally, the Respondents argue that "the evaluation of damages is not an exact science, and tribunals are given wide scope to exercise their own judgment in determining the damages owed."[380] They refer to jurisprudence going back as far as the *Chorzów Factory* judgment, where the Permanent Court of International Justice held that courts and tribunals have the power:

> "to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others."[381]

In that context, the Respondents recall that the Venezuelan government had recommended a price of 24 million USD for the purchase of Talta's shares in COMSIGUA, which is not far from the 24.7 million USD ascertained by the Tribunal.[382]

415. The Respondents summarize their argument by stating:

> "One may disagree with the conclusion that the valuation produced by the DCF method resulted in a value that was in the "low range." One may disagree with the Tribunal's decision to use multiple valuation methods in addition to the DCF method. One may disagree with the Tribunal's implementation and weighting of those alternative valuation methods. And one may disagree with the Tribunal's use of the word "contrast" to describe

[378] Counter-Memorial, ¶ 177; Rejoinder, ¶ 167.
[379] Counter-Memorial, ¶ 178.
[380] Rejoinder, ¶ 169.
[381] *Case Concerning the Factory at Chorzów* (Merits) [1928] PCIJ Series A, No 17, p. 53 (A/CLA-75).
[382] Rejoinder, ¶ 169.

> what it was doing when it applied these other valuation methods. But that is all irrelevant at the annulment stage: whether the Tribunal erred is not a basis for annulment. The only relevant question is whether the Tribunal stated its reasons – whether the reader can follow the Tribunal's reasoning from A to B. It cannot seriously be suggested that the Tribunal's Award fails that basic test."[383]

### *ii. The Committee's Analysis and Determination*

416. In Section IV.B.2.c, the Committee has presented its reasons and determined why it believes that the Tribunal did not depart from a fundamental rule of procedure when it increased the amount of compensation for the expropriation of COMSIGUA after a comparison between the value resulting from calculations performed under the DCF method and other approaches and methods. These "other approaches" (to use a term introduced by the Tribunal as a headline of subsection VII.3.2) were not of the Tribunal's making but introduced by the two Parties and analyzed extensively by the Tribunal.[384]

417. The Committee has come to its conclusion by following the Tribunal's reasoning. The reasons are unfolded in Section VII of the Award, in paragraphs 387 to 402 and 630 to 755.

418. In a first step, the Tribunal referred to Articles 4 of the Luxembourg Treaty and IV of the Portugal Treaty and defined its duty as to determine the "market value" or "real value" of the expropriated property, calculated on the day preceding the valuation date. It stated that the Parties agree that both expressions of value are equivalent.[385]

419. In a second step, the Tribunal determined the market value for TAVSA and for COMSIGUA in Subsections VII.2 and VII.3, respectively. Each time, the Tribunal started by presenting the Parties' positions. They do not object to the DCF method but offer at the same time alternative methods of valuation.

420. For TAVSA, the Tribunal's DCF analysis leads to an amount of the "market value" of 112,345,530 USD, as summarized in paragraphs 603-604 of the Award. In

[383] Rejoinder, ¶ 168 (footnotes omitted).
[384] Award, ¶¶ 705-755.
[385] Award, ¶¶ 393 and 394.

paragraphs 605 to 628, the Tribunal contrasted this result to three other approaches, the return on investment, the market multiples and comparable transactions, each time relying on the figures presented by one or the other expert. If found that the comparison led to a result according to which the estimated market value arrived at through the application of the DCF method is "reasonable."[386] Therefore, it confirmed the result.[387]

421. The Applicant does not assert that the Award lacks reasons with respect to TAVSA's valuation, contrarily to the valuation of COMSIGUA.

422. Like for TAVSA, the Tribunal displayed the Parties' methods of valuation of COMSIGUA. It started by pointing out Claimants' experts' opinion in paragraphs 632-663 who "have calculated Comsigua's value based on the discounted cash flow (**1.**); but they have also determined it based on market multiples (**2.**). And, finally, they have given their opinion regarding Comsigua's value implied in other transactions (**3.**)." [388]

423. In paragraphs 664-683 of the Award, the Tribunal presented Venezuela's expert opinion who "does not oppose to the use of the DCF (**1.**) or the market ratios (**2.**) as methods for the calculation of Comsigua's value, but he does question certain hypotheses or parameters used by the counterpart's experts. And, even then, he prefers other forms to calculate the value (**3.**); specifically, the expert analyzes the transaction with the Japanese Shareholders and the purchase price recommendation made by Comsigua's management, but he has also found other measures of Comsigua's value."[389]

424. The Committee quotes these initial summaries of the Parties' experts, which are followed by a detailed analysis of each of their proposed methods and calculations.

[386] Award, ¶¶ 611, 622, 626.
[387] Award, ¶ 629.
[388] Award, ¶ 631.
[389] Award, ¶ 664.

The quotes demonstrate that the experts did not advocate the use of one method to the exclusion of another.

425. The Tribunal accepted this approach in the reasoned belief that it facilitates a calculation that gets as close as possible to the determination of the real market value. The Committee has examined carefully the Award and has not found any indication that the Tribunal considered the results provided by the DCF method determinative or conclusive, to the exclusion of the other methods, which in any event were suggested by the Parties' experts.

426. On the contrary: the Tribunal started the subsection on its determination of COMSIGUA's value by announcing that it would choose "as its preliminary decision the value method determination." It then opted for the DCF method which none of the experts were opposed to, and which has become the traditional method of valuing enterprises. However, the Tribunal continued to emphasize its discretion to use elements of other methods. The Tribunal reiterated its approach and reasoning in paragraph 705 of the Award as follows:

> "[the Tribunal] has decided to determine Comsigua's value by applying the DCF methodology. But this does not mean that other approaches should not be used to contrast the value obtained. The Tribunal shall analyze these approaches *infra*." [390]

427. After having explained what it intended to do, it unfolded in a third step its own appreciation of the 'other approaches' in paragraphs 706-749. Consistent with its stated duty to establish the "market value"[391], the Tribunal tested the result arrived at through the DFC method with "market¨ multiples. With the use of these market multiples, the Tribunal found in paragraphs 712-713:

> "… that Comsigua is the last in the line, although close to the benchmark companies. The Arbitral Tribunal would have expected its value to be more centered, as it would have been the case with a multiplier of 1.25x of the BVA and of 2x of the BVE.

[390] Award, ¶¶ 705.
[391] See above, ¶ 416.

> Applying a multiplier of 1.25x of the BVA and of 2x of the BVE, it results in a value of Talta's stake in Comsigua of USD 24.06 million and USD 26.08 million."

428. Thus, the Tribunal expressed some misgiving with respect to the value of COMSIGUA resulting from the DFC method in the light of other market benchmarks.

429. The Tribunal then proceeded to evaluate some "Comparable Transactions" in paragraphs 714-.749. As a result, it came to the conclusion that it had identified "different indicative calculations of Comsigua's value, with greater or lesser degree of reliability."[392] It compared the result of these calculations and found firstly that the DCF methods yielded a result that "is in the low range, and therefore, it should be raised", and secondly that the different calculations with their different degree of reliability should be weighted. In assigning the respective weights, the Tribunal noted that it had "accept[ed] the criticism that [the compensation paid to the Japanese shareholders] is no indication of a fair market value, but a forced sale price.."[393]

430. In paragraph 752 of the Award, the Tribunal concluded that the market value of the Respondents' shareholding in COMSIGUA amounted to USD 24,672,357.

431. The Committee finds that the Tribunal stated reasons why it had some doubts that the value arrived at through the DCF method reflected the "market" or "real" value of COMSIGUA. From the findings in the Award, the Committee understands the fact that the Tribunal considered it appropriate to rely also on other valuation means.

432. The Committee has neither the information nor the authority to reassess the weighting exercise nor the experts' figures and parameters and the Tribunal's calculations. However, it is able to state with certainty that the Tribunal stated the reasons why it exercises its uncontestable discretion to evaluate the damage and to calculate the compensation, and that these reasons are not contradictory.

433. The Committee further recognizes that the Tribunal has applied identical methods in assessing TAVSA's and COMSIGUA's values. Based on the experts' figures, it has

[392] Award, ¶ 750.
[393] Award, ¶ 752(i).

come to different results. In TAVSA's case, it found that the amount arrived at through the application of the DCF method was reliable to represent the market value. In COMSIGUA's case, the Tribunal found that the results arrived at through the DCF method were not reasonable when contrasted to the results in the comparative methods. These are different results for different circumstances and figures. The Committee does not see any contradiction, whereby the arguments used in the TAVSA context neutralize the ones used in the COMSIGUA context.

434. Therefore, the request to annul the Award for lack of reasons in the context of the determination of COMSIGUA's damage valuation must fail.

### *g. The Issue of the Tax Indemnity*

#### *i. Summary of the Parties' Positions*

##### *1. The Applicant*

435. The Applicant asserts that the Tribunal based its decision on the tax exemption for the compensation on Article 5 of the Venezuela-Luxembourg BIT. The provision was its "normative support."[394]

436. However, the Tribunal did not give reasons for its application and interpreted it in a way that is "logically flawed."[395] The Applicant argues and requests:

> "The absence of reasons (or, equally, providing arbitrary or inconsistent reasons, which amount to no reasons at all) does not allow an informed reader to understand how the Tribunal moved from the premises to its conclusion regarding tax indemnities. Therefore, this portion of the Award is also annullable by virtue of Article 52(1)(e) of the ICSID Convention."[396]

437. The Applicant alleges that the Tribunal did not state reasons why it restricted the imposition of taxes to the deliverance of "authorizations" instead of interpreting the norm in a "literal, harmonious" way referring to indemnification.[397]

[394] Reply, ¶¶ 250-254.
[395] Memorial, ¶ 275.
[396] Memorial, ¶ 277.
[397] Memorial, ¶ 274.

438. The Tribunal's interpretation of Article 5 of the Luxembourg BIT via reference to its preamble, which specifies as its purpose the attraction of investments and the creation of favorable economic conditions, and its effort to justify its erroneous interpretation by a reference to VCLT Article 31, contains a *non sequitur* fallacy. The Tribunal "jumps from a very general assertion contained in the Preamble of the BIT concerning the creation of favorable conditions for investment to the legal conclusion that those general assertions support the interpretation that taxes—otherwise explicitly safeguarded in Article 5 of the BIT—cannot be applied to the amounts of compensation awarded to an alleged foreign investor."[398]

439. Further, the Applicant criticizes the Tribunal for quoting Article 4(c) of the Luxembourg BIT and Article IV(c) of the Portugal BIT first and to "jump immediately thereafter to a conclusion regarding the imposition of taxes on compensation that is not linked in any way to the articles of the Treaty that it cites."[399] "In this way, the Tribunal contradicts itself by establishing as a premise of its reasoning a pair of legal rules but extracting a conclusion that is not derived from those premises but from some different, unrevealed source."[400]

### *2. The Respondents*

440. The Respondents contend firstly that Convention Article 52(1)(e) is not applicable because the Tribunal did not base its decision on the tax indemnity on Article 5 of the Luxembourg Treaty but on Articles 4 of the Luxembourg and Portugal Treaties, and stated the reasons for a compensation free of taxes in Section IX.2 of the Award. The issue of Article 5 is therefore not result-determinative and cannot justify the annulment.[401]

441. Secondly, the Respondents assert that in and of itself the Tribunal's discussion of Article 5 of the Luxembourg BIT is clear, comprehensive and can be followed. In light of the contradictory French, Spanish and Dutch texts of the BIT, the Tribunal

[398] Reply, ¶ 258; Memorial, ¶¶ 275 and 276.
[399] Reply, ¶ 256.
[400] Reply, ¶ 257.
[401] Counter-Memorial, ¶¶ 181 and 182; Rejoinder, ¶ 171.

applied the French version. It interpreted the text as providing that such fees do not refer to the free transfer of compensation but to the issuance of authorizations, an interpretation that is supported by the use of the French term *'taxes'*, which the Tribunal rightly considered to be a levy of services provided by the State.[402]

442. Moreover, the Respondents assert that the Applicant mischaracterizes the Tribunal's reasoning when referring to the preamble of the BIT. When doing so, the Tribunal does not rely on an 'unrevealed source' but on VCLT Article 31, as explicitly quoted in paragraph 818 of the Award.[403] Further, the Tribunal referred to the preamble to support its literal interpretation of the term "fees" in Article 5 of the Luxembourg BIT.

443. Finally, the Applicant's argument reveals that it complains about the sufficiency and the content of reasons and not about their absence. Such type of complaint is misplaced in annulment proceedings.[404]

### *ii. The Committee's Analysis and Determination*

444. The Committee notes that the Tribunal declared at the beginning of the section on taxation (Section IX) that it "shall explain the position of the parties (**1.**) and make a decision (**2.**), thereafter, it shall analyze a specific question: the possible impact of art. 5 of the Luxembourg Treaty (**3.**)."[405]

445. This declaration is straightforward: The Tribunal will decide the taxation issue, and once it has done so, it will examine whether Article 5 of the Luxembourg BIT supports this decision or whether it warrants a correction.

446. In paragraphs 782-792 of the Award, the Tribunal reasons and concludes, after having presented the Parties' arguments in paragraphs 777-781, that "the compensation ordered by the Award shall be net of Venezuelan taxes."[406]

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[402] Counter-Memorial, ¶¶ 183 and 184; Rejoinder, ¶ 173.
[403] Rejoinder, ¶ 173.
[404] Rejoinder, ¶¶ 174 and 175.
[405] Award, ¶ 776 (emphasis in the original).
[406] Award, ¶ 792.

447. The Committee finds the Tribunal's reasoning and conclusions to be detailed and consistent. It does not share the Applicant's allegation that they are "self-serving, layman general notions."[407]

448. In Subsection IX.3 of the Award, the Tribunal checked its decision on the tax exemption against Article 5 of the Luxembourg BIT.

449. It started by presenting the controversial position of the Parties and then weighed possible contradictory interpretations of Article 5.3.[408] The Tribunal noted a difference in the French, Dutch and Spanish texts. It reasoned that preference should be given to the French text, since Article 12 of the Treaty provides that "while the Spanish, French and Dutch texts are equally authentic, in the event of disagreement, the fact that the negotiations were carried out in French shall be taken into account."[409]

450. As a next step, the Tribunal interpreted the French text in light of VCLT Article 31.[410] The Committee does not understand the Applicant's allegation that the Tribunal relied on "a pair of rules" and – unrelatedly – on "some different unrevealed source."[411]

451. In accordance with VCLT Article 31, the Tribunal determined the ordinary meaning of Article 5.3 of the Luxembourg BIT in paragraphs 819-824 of the Award and concluded that:

> "The literal interpretation of the terms used supports the interpretation advanced by Claimants: "Esto" ("ce") ["this", omitted in the English translation] may only refer to the obligation assumed by the State under Article 5.3, that is, to issue the authorization, but not to the transfers."[412]
>
> "This literal interpretation is reinforced by the use of the term "tasas" ("taxes"). There are different types of tax burdens, such as fees.[413] A fee is

[407] Reply, ¶ 257.
[408] Award, ¶¶ 800-810.
[409] Award, ¶ 815.
[410] Award, ¶ 818.
[411] Reply, ¶ 257.
[412] Award, ¶ 822.
[413] The Venezuelan law makes a difference between fees and other fiscal charges, such as taxes. *See* Articles 31 and 136 of the 1961 Venezuelan Constitution and Article 13 of the 1994 Venezuelan Organic Tax Code, as effective upon negotiation of the Treaty.

> a charge that the taxpayer pays for a service provided by the State. This is the usual meaning of the term 'fee'. The fees mentioned under Article 5.3 may only apply to one taxable fact: the issuance by the Authorities of all necessary administrative authorizations to transfer an investment or the returns thereof abroad. The issuance of an authorization is a public utility, whereas the existence of a transfer could not be taxed, as a transfer is not per se a public utility provided by the State."[414]

452. Further, the Tribunal determined that the literal interpretation was supported by the 'context, object and purpose' found in the preamble of both Treaties. It held that an interpretation that does not impose tax burdens upon the transfer of compensation is more in line with the purpose of the Treaties.[415]

453. Finally, the Tribunal added an argument to its interpretation that it distills from the Venezuelan Nationalization Decree as it was applied to the Japanese investors. Article 10 of the Decree exempts the compensation from taxes. The Tribunal held that "the tax exemption expressly recognized under the Nationalization Decree and granted to the Japanese Shareholders is relevant, because it evidences a State behavior consistent with the Arbitral Tribunal's interpretation of Article 5.3 of the Treaty, provided herein."[416]

454. As a general result, the Tribunal found that Article 5.3 of the Luxembourg BIT did not impact its decision arrived at by applying Article 4 and IV of the BITs, namely that the compensation must be paid net of taxes.

455. The Committee finds the summary of the Tribunal's reasoning to be comprehensive, mutually reinforcing and free of contradiction. Therefore, the Committee rejects the Applicant's request for a partial annulment of the Award for lack of reasons for the Tribunal's decision to ascertain the compensation net of taxes.

[414] Award, ¶¶ 823.
[415] Award, ¶¶824-826.
[416] Award, ¶ 829.

### *h. The Issue of the Apportionment of Costs*

#### *i. Summary of the Parties' Positions*

##### *1. The Applicant*

456. The Applicant asserts that the Tribunal's allocation of costs "contains a number of serious defects that warrant annulment of the Award."[417]

457. It argues that firstly, the Tribunal's approach is "completely subjective" and devoid of any citation of "jurisprudence or principles."[418] Secondly, even if tribunals have a certain discretion to apportion costs, they are held to state the reasons for their decision and "should not be allowed to get away with a serious argumentative defect."[419]

458. The Applicant submits that the Tribunal had decided to adopt the 'cost follow the event' approach. Accordingly, the Tribunal stated that it would take the "degree of success" into account. However, when it had to apply its own standard, the Tribunal failed to take into account that Venezuela had prevailed in the dispute with respect to the appropriate interest rate. The Tribunal had accepted a one-year LIBOR plus 4% rate, in line with Venezuela's expert opinion, instead of the WACC as proposed by Tenaris and Talta. This decision significantly reduced the amount of damages to be paid.

459. Thus, the Tribunal contradicted the approach it had previously adopted. It did not consider Venezuela's relative success in regards to the interest rate into its overall degree of success, thereby artificially decreasing its rate and increasing its costs. "This contradiction resulted in a meaningful amount of the compensation awarded to Tenaris and Talta which was awarded under terms that warrant annulment of the Award."[420]

[417] Memorial, ¶ 280.
[418] Memorial, ¶ 281.
[419] Reply, ¶¶ 264 and 265.
[420] Reply, ¶ 263; Memorial, ¶¶ 282 and 283.

### *2. The Respondents*

460. The Respondents submit that "Venezuela's argument amounts to nothing more than a disagreement with the Tribunal's application of the "costs follow the event" principle."[421]

461. They argue that the Tribunal stated the reasons why it adopted the "costs follow the event" principle and then stated the reasons how it apportioned the costs according to this principle with respect to the relative success of each Party for the issues of jurisdiction, liability and quantum. When Venezuela criticizes the Tribunal for not taking a sub-issue into account for the apportionment of costs, it does not explain why the latter was obliged to do so. In addition, Venezuela fails to explain why the Tribunal's approach "prevents the reader from following the Tribunal's reasoning from A to B." [422]

462. Finally, Venezuela has failed to explain that the alleged contradiction in the Tribunal's reasoning was "so severe that the two conflicting reasons "cancel each other out so as to amount to no reasons at all."[423]

### *ii. The Committee's Analysis and Determination*

463. The Committee notes that the Tribunal correctly concluded, based on Convention Article 61(2), that "it has discretion to award costs."[424] The Tribunal then explained how it exercised its discretion and why it did so, each time after having presented the Parties' positions and claims.[425]

464. The reasons are detailed. They state why the Tribunal rejected Venezuela's assertion that the Claimants acted in bad faith which should be reflected in the apportionment of the costs (paragraphs 840-842), why the Tribunal accepted the Claimants' proposal to apply the widely used principle "costs follow the event" (paragraphs 843-844), and

[421] Rejoinder, ¶ 177; Counter-Memorial, ¶ 187.
[422] Rejoinder, ¶ 177.
[423] Rejoinder, ¶ 177; Respondents quote *Daimler v. Argentina*, ¶ 77.
[424] Award, ¶ 838.
[425] Award, ¶¶ 839-856.

how this principle is applied to the facts and the results of the case (paragraphs 845-846). This is far from being "completely subjective."

465. The Tribunal determined, in application of the "costs follow the event" principle, that "Claimants are the successful party, as they have seen how the jurisdictional objections were rejected and their principal claim accepted by the Arbitral Tribunal. However, Respondent has also succeeded to some extent, as it has persuaded the Arbitral Tribunal that the applicable compensation was lesser than that claimed."[426]

466. Having found so, the Tribunal did not apply the principle exclusively and as a mathematical exercise, but took other elements into account, some of which favor the Claimants and some the Respondent. That approach is covered by the Tribunal's wide discretion. Thus, it is not subject to a correction by the Committee.

467. From this perspective, the Tribunal started by ordering Venezuela to pay the totality of the costs of proceedings irrespective of the "cost follow the event" principle. The reasons are not linked to the relative success of either Party but to Venezuela's decision not to participate in advancing its part of these costs and to the Tribunal's rejection of Venezuela's objections to jurisdiction.[427]

468. As a next step, the Tribunal decided to reduce the amount of defense expenses claimed by Tenaris and Talta from 6 million USD to 2.8 million USD, again not by applying the "cost follow the event" principle but by holding that 2.8 million USD are reasonable.

469. When weighing the reasonable defense expenses, the Tribunal considered the complexity of each issue (jurisdiction, liability and quantum), the "assistance provided by counsel," and the level of success in each issue.[428]

470. The Tribunal applied these criteria to allocate the reasonable defense expenses. It "[took] into consideration the complexity of each of the great issues under discussion

[426] Award, ¶ 844.
[427] Award, ¶¶ 846 and 847.
[428] Award, ¶¶ 848-855.

and Claimants' level of success."[429] In its determination of the level of success with respect to quantum, the Tribunal exercised its discretion and took only the principal amounts of compensation into account, as requested by the Claimants and partly ascertained by Venezuela.

471. The Tribunal did not take the ancillary claims into account, such as the final allocation of costs nor the decision on the interest rate. As to the allocation of costs, it ascertained the Claimants' claim for full cost recovery only partly. As to interest, the Tribunal applied a one-year LIBOR plus 4% rate. The Tribunal came to this decision by hearing the Parties' experts on this point and then exercising its discretion. The decision was more in line with Venezuela's expert's opinion although not entirely, since he had proposed a six-month LIBOR plus 2% rate.[430]

472. The Applicant opines that this is "a serious argumentative defect" and an "internal contradiction," and not, as alleged by the Respondents, at best an error in the Tribunal's reasoning, which would not give rise to annulment. It argues that any contradiction "can be re-described as an error, since contradiction is indeed a form of error." Allowing such "artificial re-description" would lead to the result that "contradiction would cease to be an instance of no statement of reasons under Article 52(1)(e) of the ICSID Convention, a notion that runs afoul with a unanimous line of persuasive decisions to the contrary."[431]

473. The Committee disagrees with the Applicant's reasoning. Convention Article 52(1)(e) does not use the term 'contradiction' but allows the annulment of an award if it fails to state the reasons on which it is based. Instances may exist when two reasons in an award neutralize each other with the practical effect of an absence of reasons. The issue is not one of the lexical meaning of the term 'contradiction' and its vicinity to the term 'error'. Rather, the issue is one of an absence of reasons caused by the mutual annihilation of irreconcilable reasons.

[429] Award, ¶ 890.
[430] Award, ¶¶ 769-775.
[431] Reply, ¶ 264.

474. The Committee finds that the Tribunal explained in detail the criteria that led it to exercise its discretion the way it did. While the 'costs follow the event' principle was the *leitmotif*, it differentiated and used additional considerations, without contenting itself to a strictly mathematical exercise. When weighing the relative success of both Parties with respect to quantum, the Tribunal exercised its discretion to take only the principal claim for compensation into account and not the ancillary claims for the payment of interest and of costs as well. In addition, the Tribunal used its discretion to establish the interest rate and had not followed the Parties' experts fully. In both cases, the Tribunal exercised its discretion. It is not for the Committee to correct this.

475. In any event, even assuming that the Tribunal inadvertently omitted to take into consideration the saving due to the application of an interest rate lower than the one requested by the Claimants, such omission would not have annihilated another reason. At best, it would be an error that does not amount to a failure to state reasons.

476. For these reasons, the Committee has not found that the Tribunal failed to state the reasons on which it has based its decision on the apportionment of costs to warrant annulment.

## V. DECISION ON COSTS

477. The Parties submitted their respective statements for costs on 9 October 2018.

### A. The Applicant's Statement of Costs

478. The Applicant seeks to recover "all costs and expenses arising out of these proceedings," including the advanced costs of proceeding, in application of the "principle that costs follow the event" and under the assumption that the Committee will annul the Award. [432]

479. Venezuela contends that its Application for Annulment was submitted "in good faith and based on facially evident annullable errors."[433] It further argues that "[e]ven in

[432] Reply, ¶¶ 274(b) and 273; Tr. D2, p. 465, Venezuela's Costs, ¶ 2.
[433] Venezuela's PHB, ¶; Venezuela's Costs, ¶ 5.

the case that this Committee exercises its discretion not to annul the award, Venezuela should not be punished by an imposition of costs as a result of it exercising a right granted under the Convention."[434]

480. The Applicant's legal costs and expenses are as follows:[435]

| | | |
|---|---|---|
| Legal Costs[436] | USD | 1,505,569.00 |
| Expenses[437] | USD | 21,099.78 |
| Advance Payments | USD | 546,565.45 |
| Lodging Fee | USD | 25,000.00 |
| **Total**: | **USD** | **2,098,234.23** |

### B. The Respondents' Statement of Costs

481. The Respondents request that "Venezuela bear all costs and expenses incurred by the Claimants in connection with the present annulment proceedings, including the fees of the Centre, the costs and fees of the *ad hoc* Committee, and the Claimants' legal fees and expenses", again in application of the "costs follow the event approach" and under the assumption that the Committee will reject Venezuela's annulment application.[438]

482. The Respondents' legal costs and expenses are as follows:[439]

| | | |
|---|---|---|
| Legal Costs | USD | 1,204,176.60 |
| Expenses | USD | 46,776.38 |
| **Total**: | **USD** | **1,250,952.98** |

[434] Venezuela's Costs, ¶ 5.
[435] Venezuela's Costs, ¶ 4.
[436] This amount was calculated by adding USD 1,129,155.00 for the legal fees of GST LLP to USD 376, 414 for the legal fees of Foley Hoag LLP.
[437] This amount was calculated by adding USD17,742.78 for the expenses of GST LLP to USD 3,357 for the expenses of Foley Hoag LLP.
[438] Tr. D1, pp. 326-327; Rejoinder, ¶ 184(b).
[439] Tenaris' Costs, Annex A.

### C. The Costs of the Proceeding

483. The costs of the annulment proceeding, including the Committee's fees and expenses, ICSID's administrative fees and direct expenses, are as follows:

| | |
|---|---|
| Committee Members' fees and expenses | USD 388,064.04 |
| ICSID's administrative fees | USD 74,000.00 |
| Direct expenses[440] | USD 82,111.01 |
| **Total**: | **USD 544,175.05** |

[440] This amount includes meeting-related expenses, court reporting and translation services, and charges relating to the dispatch of this Decision on Annulment (courier, printing and copying).

### D. The Committee's Analysis and Decision

484. According to Convention Article 61(2) and Arbitration Rule 47(1)(j), which are applicable *mutatis mutandis* to annulment proceedings (see Article 52(4) Convention)), the Committee has discretion to determine "how and by whom" the costs and expenses of ICSID, the Committee and the Parties are borne.

485. In accordance with ICSID Administrative and Financial Regulation 14(3)(e), the Applicant was "solely responsible for making the advance payments […] without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid." The Applicant has paid the advances as requested, amounting to USD 546,565.45.

486. The Committee finds it appropriate to follow *mutatis mutandis* the same approach as the Tribunal. It takes into account the principle that costs should normally follow the event, as well as other circumstances specific to annulment proceedings.

487. With respect to the costs of the proceeding, the Committee is conscious of the fact that in annulment proceedings, conversely to original arbitration proceedings, the applicant has to pay the necessary advances. In case of the rejection of its application, the 'cost follow the event' principle leads to a result that corresponds to another principle of cost allocation according to which 'costs should lie where they fall.' Both principles have their merits and reinforce each other with respect to the costs of the proceeding due to ICSID Administrative and Financial Regulation 14(3)(e). In application of both standards, the Committee decides that the Applicant shall bear the cost of the proceeding given that its Application was rejected.

488. With respect to the Parties' legal fees and expenses, the matter is more complicated, also because the two principles lead to different results.

489. The Committee believes that the remedy of annulment is important to guarantee the legitimacy and acceptability of the ICSID system. There is an objective interest to

assure that awards do not suffer from fundamental defects. In the present case, the Committee has found that the Award was free of such flaws.

490. Both Parties have greatly assisted the Committee to reach its conclusions through their diligent and efficient written and oral submissions and presentations. For this reason, the Committee agrees with the *ad hoc* committee in *Tenaris I*. It has found in similar circumstances that "the underlying fundamental questions posed by them [the grounds for annulment] justify that each Party shall bear all expenses incurred in connection with its own defence."[441] In line with this argument, the Committee finds it reasonable to extend the application of the principle that costs should lie where they fall to all costs of the present case, and decides that each Party shall bear its own legal costs and expenses.

## VI. DECISION

491. For the foregoing reasons, the Committee decides unanimously:

(1) The Application for Annulment of the Award is rejected;

(2) Each Party shall bear its own costs and fees; and

(3) The Applicant shall bear the costs of the annulment proceeding, including the fees and expenses of the Committee and the costs of the Centre.

[441] *Tenaris I v. Venezuela* Decision, ¶ 281.

Mr. N. Fernando Piérola Castro
Member of the *ad hoc* Committee
December 21, 2018

Mr. José Antonio Moreno Rodríguez
Member of the *ad hoc* Committee
December 17, 2018

Prof. Dr. Rolf Knieper
President of the *ad hoc* Committee
December 12, 2018