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

In the annulment proceeding between

TENARIS S.A. AND TALTA - TRADING E MARKETING SOCIEDADE UNIPESSOAL LDA

(Respondents)

and

BOLIVARIAN REPUBLIC OF VENEZUELA

(Applicant)

ICSID Case No. ARB/11/26

DECISION ON THE APPLICATION FOR ANNULMENT OF THE BOLIVARIAN REPUBLIC OF VENEZUELA

Members of the *ad hoc* Committee

Dr. Andrés Rigo Sureda, President
Professor Fernando Cantuarias Salaverry
Professor Diego P. Fernández Arroyo

Secretary of the *ad hoc* Committee

Mrs. Ana Constanza Conover Blancas

Date of dispatch to the Parties: 8 August 2018

REPRESENTATION OF THE PARTIES

Representing the Bolivarian Republic of Venezuela:

Dr. Reinaldo Enrique Muñoz Pedroza
Dr. Henry Rodríguez Facchinetti
Procuraduría General de la República
Av. Los Ilustres, c/c calle Francisco Lazo Martí
Urb. Santa Mónica
Caracas
Venezuela

and

Mr. Ignacio Torterola
Mr. Diego Gosis
Mr. Quinn Smith
Ms. Verónica Lavista
Mr. Guillermo Moro
GST LLP
1875 I Street NW, 5th Floor
Washington, D.C. 20006
United States of America

Representing Tenaris S.A. and Talta - Trading E Marketing Sociedade Unipessoal Lda:

Mr. Nigel Blackaby
Ms. Caroline Richard
Freshfields Bruckhaus Deringer US LLP
700 13th Street NW, 10th Floor
Washington, D.C. 20005
United States of America

and

Mr. Elliot Friedman
Mr. Ben Love
Ms. Paige von Mehren
Ms. Jessica Moscoso
Freshfields Bruckhaus Deringer US LLP
601 Lexington Avenue, 31st Floor
New York, NY 10022
United States of America

TABLE OF CONTENTS

LIST OF DEFINED TERMS

Applicant or Venezuela	Bolivarian Republic of Venezuela.
Application for Annulment	Application for Annulment of the Bolivarian Republic of Venezuela, filed on 21 September 2016.
Arbitration Rules	Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes in force as of 10 April 2006.
Award	Award dated 29 January 2016, rendered in the arbitration proceeding captioned *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26.
Background Paper	Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016.
Committee or *ad hoc* Committee	*Ad hoc* committee in the annulment proceeding captioned *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26.
Counter-Memorial	Respondents' Counter-Memorial on Annulment, filed on 3 July 2017.
DCF	Discounted Cash Flow.
Decision on Rectification	Decision on Rectification of the Award dated 24 June 2016, issued in the arbitration proceeding captioned *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26.
Hearing on Annulment or Hearing	Hearing on annulment held on 22 and 23 March 2018 in Washington, D.C.
ICSID Convention or 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.
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.

Matesi	Materiales Siderúrgicos S.A.
Memorial	Memorial on Annulment of the Award of the Bolivarian Republic of Venezuela, filed on 19 April 2017.
Parties	Tenaris S.A., Talta - Trading e Marketing Sociedade Unipessoal Lda., and the Bolivarian Republic of Venezuela.
Portuguese 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	Respondents' Rejoinder on Annulment, filed on 2 October 2017.
Reply	Reply on Annulment of the Award of the Bolivarian Republic of Venezuela, filed on 17 August 2017.
Respondents on Annulment or Respondents	Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda.
Talta	Talta - Trading e Marketing Sociedade Unipessoal Lda.
Tenaris	Tenaris S.A.
Tr. Day # [page:line]	Transcript of the hearing on annulment held on 22 and 23 March 2018, followed by date, page and line number.
Treaties	Luxembourg Treaty and Portuguese Treaty.
Tribunal	Arbitral tribunal composed of Messrs. John Beechey (President), Judd L. Kessler and Toby T. Landau, constituted on 26 April 2012 in the arbitration proceeding captioned *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26.
USD	United States Dollars.
Vienna Convention	Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27 (1969).

I. INTRODUCTION AND PARTIES

1. This decision is issued within the framework of the annulment proceeding of the award rendered on 29 January 2016 —including the Decision on Rectification of the Award issued on 24 June 2016 (together, the "**Award**"), under ICSID Case No. ARB/11/26.

2. The applicant in this annulment proceeding, respondent in the original arbitration proceeding, is the Bolivarian Republic of Venezuela ("**Venezuela**" or the "**Applicant**"). Respondents on annulment, claimants in the original arbitration proceeding, are Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. ("**Tenaris**" and "**Talta**", or the "**Respondents**").

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

II. PROCEDURAL HISTORY

A. APPLICATION, REGISTRATION, PROVISIONAL STAY OF ENFORCEMENT AND CONSTITUTION OF THE COMMITTEE

4. On 21 September 2016, Venezuela filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") an application for annulment of the Award (the "**Application for Annulment**"), in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"). The Application for Annulment was filed within the term established in Article 52(2) of the ICSID Convention.

5. Venezuela bases its Application for Annulment on the following grounds set forth in the ICSID Convention: *(a)* manifest excess of powers (Article 52(1)(b)); *(b)* serious departure from fundamental rules of procedure (Article 52(1)(d)); and *(c)* failure to state reasons (Article 52(1)(e)).

6. The Application for Annulment contained a request for a stay of enforcement of the Award under Article 52(5) of the ICSID Convention and Arbitration Rule 54.

7. On 29 September 2016, the Acting Secretary-General registered the Application for Annulment and informed the Parties of the provisional stay of enforcement of the Award in accordance with Arbitration Rule 54(2).

8. On 27 December 2016, the Acting Secretary-General notified the Parties of the constitution of the *ad hoc* Committee (the "**Committee**"), in accordance with Arbitration Rule 52(2). The Committee was composed of Dr. Andrés Rigo Sureda (President), a Spanish national; Professor Piero Bernardini, an Italian national; and Professor Diego P. Fernández Arroyo, an Argentine and Spanish national.

9. On the same date, the Parties were informed that the annulment proceeding was deemed to have begun, pursuant to Arbitration Rules 6 and 53. Likewise, the Parties were notified that Mrs. Ana Constanza Conover Blancas, ICSID Legal Counsel, would serve as Secretary of the Committee.

B. FIRST SESSION AND PROCEDURAL ORDER NO. 1

10. On 3 February 2017, the Committee held a first session with the Parties by telephone conference.

11. On 16 February 2017, the Committee issued Procedural Order No. 1 fixing the procedural calendar and the rules of procedure applicable to the annulment proceeding.

C. PROCEDURE CONCERNING THE STAY OF ENFORCEMENT OF THE AWARD

12. By communications dated 9 and 10 January 2017, the Parties informed the Committee of their agreement to file three rounds of simultaneous written submissions on the issue of stay of enforcement of the Award. Moreover, the Parties informed the Committee that they had agreed to hold a hearing on the stay of enforcement of the Award in March 2017.

13. By letter dated 12 January 2017, the Committee took note of the schedule of simultaneous written submissions agreed upon by the Parties and extended the provisional stay of enforcement of the Award until the Committee ruled on this issue.

14. In accordance with the procedural calendar agreed by the Parties, Venezuela filed its respective submissions in support of the continuance of the provisional stay of enforcement of the Award on 27 January, 17 February, and 28 February 2017. On the same dates, the Respondents filed their respective submissions in opposition to the continuance of the provisional stay of enforcement of the Award.

15. On 15 February 2017, the Parties and the Committee held a pre-hearing organizational meeting, via telephone conference, in order to resolve any outstanding procedural, administrative or logistical matters concerning the hearing on stay.

16. On 1 March 2017, the hearing on stay was cancelled on account of the lack of payment of the first advance requested to Venezuela by letter dated 8 December 2016.

17. On 10 March 2017, the Committee informed the Parties that it would issue its decision on the stay of enforcement of the Award given its priority pursuant to Arbitration Rule 54(1), no hearing being held on the issue. No comments were received from the Parties in this regard.

18. On 24 March 2017, the Committee issued its Decision on the Request to Maintain the Stay of Enforcement of the Award. In said decision, the Committee dismissed Venezuela's request to maintain the stay of enforcement of the Award and lifted the provisional stay of enforcement of the Award.

D. PROCEDURE CONCERNING THE APPLICATION FOR ANNULMENT

19. In accordance with the procedural calendar agreed-upon for written submissions in Procedural Order No. 1:

    a) on 19 April 2017, Venezuela filed its Memorial on Annulment of the Award ("**Memorial**");

    b) on 3 July 2017, the Respondents filed their Counter-Memorial on Annulment ("**Counter-Memorial**");

    c) on 17 August 2017, Venezuela filed its Reply on Annulment of the Award ("**Reply**"); and

    d) on 2 October 2017, the Respondents filed their Rejoinder on Annulment ("**Rejoinder**").

20. On 6 October 2017, after the resignation of Professor Piero Bernardini, the Secretary-General notified the Parties of a vacancy on the Committee and that the proceeding was suspended pursuant to Arbitration Rules 10(2) and 53.

E. RECONSTITUTION OF THE COMMITTEE AND HEARING ON ANNULMENT

21. On 10 November 2017, the Centre notified the Parties that the Committee had been reconstituted following the acceptance of Professor Fernando Cantuarias Salaverry, a

Peruvian national, of his appointment as member of the Committee. In accordance with Arbitration Rules 12 and 53 of the, the proceeding was resumed as of such date.

22. On 20 March 2018, Messrs. Paul S. Richler and Kenneth J. Figueroa of the firm Foley Hoag LLP (Washington D.C. office) informed the Committee that, as of such date, Foley Hoag LLP would no longer represent Venezuela in the annulment proceeding.

23. On 22 and 23 March 2018, the Committee held an oral hearing with the Parties on the Application for Annulment at the World Bank facilities in Washington, D.C., the seat of ICSID (the "**Hearing on Annulment**" or "**Hearing**"). The following persons were present at the Hearing:

Members of the Committee:

Dr. Andrés Rigo Sureda, President
Professor Fernando Cantuarias Salaverry
Professor Diego P. Fernández Arroyo

ICSID Secretariat:

Mrs. Ana Constanza Conover Blancas

For the Applicant:

Mr. Ignacio Torterola, GST LLP
Mr. Diego Gosis, GST LLP
Mr. Quinn Smith, GST LLP P
Ms. Mariana Lozza, GST LLP
Mr. Alejandro Vulejser, GST LLP
Mr. Joaquín Coronel, GST LLP

For the Respondents:

Mr. Nigel Blackaby, Freshfields Bruckhaus Deringer
Mr. Elliot Friedman, Freshfields Bruckhaus Deringer
Mr. Ben Love, Freshfields Bruckhaus Deringer
Ms. Jessica Moscoso, Freshfields Bruckhaus Deringer
Ms. Paige von Mehren, Freshfields Bruckhaus Deringer
Mr. Bas Munnik, Freshfields Bruckhaus Deringer

Interpreters:

Ms. Silvia Colla
Mr. Charles Roberts
Mr. Claudio Debenedetti

Court reporters:

Mr. David Kasdan, Worldwide Reporting, LLP
Mr. Dante Rinaldi, D-R Esteno
Mr. Dionisio Rinaldi, D-R Esteno

F. POST-HEARING PHASE

24. On 2 and 4 May 2018, the Parties submitted their respective statements of costs.

25. The proceeding was closed on 4 June 2018.

III. THE AWARD AND THE DECISION ON RECTIFICATION

A. THE ORIGINAL ARBITRATION PROCEEDING

26. The arbitration proceeding to which the Application for Annulment refers was instituted before the Centre on the basis of the ICSID Convention, the 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 (the "**Luxembourg Treaty**"), and the 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 (the "**Portuguese Treaty**" and, together with the Luxembourg Treaty, the "**Treaties**").

27. The dispute in the original proceeding arose within the framework of Tenaris' and Talta's investment in Matesi Materiales Siderúrgicos S.A. ("**Matesi**"), a Venezuelan company engaged in the production of hot briquetted iron, a component used in the production of steel. In the context of the arbitration, Tenaris and Talta argued that their use and enjoyment of

their investment had been lost as a result of the indirect expropriation of, and pre-nationalisation interference with, their investments in Matesi.[1]

B. THE AWARD

28. The Award was rendered on 29 January 2016 by an arbitral tribunal presided over by Mr. John Beechey (a national of the United Kingdom) and also composed of Messrs. Judd L. Kessler (a national of the United States of America) and Toby T. Landau QC (a national of the United Kingdom) (the "**Tribunal**").

29. In the Award, the Tribunal declared that it had jurisdiction to hear and determine all of Tenaris' and Talta's claims, save in respect of certain off-take agreement, which the Tribunal concluded that was not an investment.[2] As to the merits, the Tribunal found that Venezuela expropriated Tenaris' and Talta's investment in Venezuela failing to observe the requirements laid down in the Treaties.[3] The Tribunal determined that Tenaris and Talta were entitled to compensation for such expropriation and ordered Venezuela to pay USD 87,300,000.00 (eighty-seven million, three hundred thousand US Dollars), plus interest, for its breaches of the Treaties.[4]

C. THE DECISION ON RECTIFICATION

30. On 14 March 2016, Venezuela filed with the Tribunal a request for rectification of the Award, seeking a correction of the Tribunal's calculation of the amount of damages awarded to Tenaris and Talta, "such that the Award would be: '*…rectified in order to avoid inappropriate double compensation*'".[5]

31. On 24 June 2016, the Tribunal issued its Decision on Rectification, denying Venezuela's request for rectification. In addition, the Tribunal required Venezuela to pay Tenaris and Talta their costs incurred in connection with the request for rectification.[6]

---

[1] *See* Award, paras. 5-6.
[2] *Id.*, paras. 293, 313, 625(1) and 625(2).
[3] *Id.*, paras. 494 to 497, and 625(5).
[4] *Id.*, paras. 570 and 625.
[5] Decision on Rectification, para. 2. Italics in the original.
[6] *Id.*, para. 114.

32. In the present proceeding, Venezuela seeks annulment of the Award, including the Decision on Rectification of the Award.[7]

IV. THE PARTIES' ARGUMENTS

A. THE APPLICANT'S ARGUMENTS

33. The Applicant considers that the Tribunal's decisions on jurisdiction and expropriation, as well as the damage assessment methodology used by the Tribunal, and the award of costs in the Decision on Rectification, are subject to annulment pursuant to the grounds set forth in Article 52(1)(b), (d) and (e) of the ICSID Convention (manifest excess of powers, serious departure from fundamental[8] rules of procedure, and failure to state reasons, respectively).

34. The following is a brief summary of the Applicant's arguments in connection with the applicable standard and the reasons to annul the Award, with respect to each of the grounds for annulment relied upon.

1. APPLICABLE STANDARD

35. The Applicant does not dispute, as a matter of principle, that the annulment regime set forth in the ICSID Convention is extraordinary in nature. Moreover, the Applicant agrees with the Respondents that annulment is not a remedy against an incorrect decision, but against the defects provided for in Article 52 of the Convention.[9] The Applicant notes that the grounds for annulment set forth in the Convention should be neutrally examined; that is, adopting a position that is neither expansive nor restrictive in general of the annulment regime.[10]

36. In addition, contrary to the Respondents' arguments, the Applicant submits that, in case of finding that an award has annullable defects, annulment committees must necessarily order that it be annulled, without exercising any discretion. Furthermore, it indicates that

---

[7] Application for Annulment, para. 1.

[8] The Spanish version of the Convention (Article 52(1)(d)) does not include the description of the rule as "fundamental" contained in the English and French versions. On the other hand, Arbitration Rule 50(1)(c)(iii) requires that the rule departed from be fundamental. This has not been a matter of discussion between the Parties, who, like the Committee, understand in their arguments that the rule must be fundamental. The further note of the Committee in footnote 8 of the Spanish version of this Decision on the differences between Article 52 (1)(d) and Rule 50(1)(c)(iii) is unnecessary here because the English versions of both texts are consistent.

[9] *See* Reply, paras. 18, 25.

[10] *See id.*, paras. 26-27.

annulment committees may consider and analyse the arbitration's underlying arguments so as to determine whether an award should be annulled or not.[11]

i. Manifest Excess of Powers

37. Pursuant to Article 52(1)(b) of the ICSID Convention, an award may be annulled in the event that the Tribunal has manifestly exceeded its powers. The Applicant considers that, in order to verify that this ground is present, a "two-step" approach should be adopted, whereby the Committee must annul the award if satisfied that *i)* there was an excess of powers, and, if so, that *ii)* such excess was manifest.[12]

38. Contrary to the Respondents' position, the Applicant highlights that the term "manifest" does not entail a restrictive interpretation. The manifest excess does not require the defect in the award to arise *prima facie*, and the need for a certain degree of analysis and study (including the revision of the evidentiary record of the arbitration) does not deprive the excess of its "manifest" nature.[13] Furthermore, the Applicant admits that, to be manifest, the excess of powers must be serious to some extent.[14]

39. The Applicant points out that a tribunal exceeds its powers "insofar as it has made a decision outside its jurisdiction or has failed to exercise its jurisdiction in full." [Committee's translation][15] This includes a tribunal assuming powers it has not been granted or exceeding the arbitration agreement, or failure to meet the jurisdictional requirements agreed by the States party to the applicable treaty.[16]

40. Moreover, the Applicant contends that a tribunal may incur an excess of powers if it ignores the proper law, or if the award is based on a law other than the proper law. Consequently, the Committee should analyse whether the tribunal identified the proper law correctly and whether it actually applied it.[17]

---

[11] Reply, paras. 21, 28-30.
[12] Memorial, para. 23; Reply, para. 34.
[13] Memorial, para. 24; Reply, paras. 38-39, 42.
[14] Reply, para. 46.
[15] Memorial, para. 26. *See also* Reply, paras. 48 and 129.
[16] Memorial, para. 27.
[17] Memorial, paras. 29, 31; Reply, paras. 55, 129, 162 and 202.

41. In conclusion, the Applicant considers that the Award should be annulled in full in accordance with Article 52(1)(b) of the ICSID Convention if the Tribunal ignored the proper law or the award was based on a law other than the proper law.

ii. Failure to State the Reasons on which the Award is Based

42. Article 52(1)(e) of the ICSID Convention sets forth as grounds for annulment the failure to state the reasons on which the award is based. The Applicant observes that such provision is subject to no condition whatsoever (*e.g.*, to that failure being "manifest" or "serious").[18] In addition, the Applicant notes that the requirement of stating the reasons leading to the tribunal's decision aims at the intelligibility of awards and is one of its essential validity requirements.[19]

43. The Applicant submits that the purpose of this ground is to ensure that the parties to an arbitration under the ICSID Convention can understand tribunals' decisions and the reasons why such decisions were adopted.[20] Pursuant to this ground, the Committee should evaluate whether the reasons furnished by the Tribunal are inadequate in the sense that they hinder the understanding of its reasoning at the time of making decisions.[21]

44. Furthermore, the Applicant asserts that stating contradictory, inadequate or insufficient reasons also entails a failure to state reasons. Venezuela defines contradictory reasons as those in contrast to each other and, thus, cancelling each other out, and inadequate or insufficient reasons as those not logically leading to the conclusion reached.[22]

45. In conclusion, the Applicant considers that the Award should be annulled in accordance with Article 52(1)(e) of the ICSID Convention in the event of a failure to state reasons therein, whether a complete lack of reasons, or the statement of contradictory, insufficient and/or inadequate reasons.

---

[18] Reply, para. 70.
[19] Memorial, paras. 36-37; Reply, para. 69.
[20] Memorial, para. 38; Reply, para. 69.
[21] Reply, paras. 82-83.
[22] Memorial, paras. 40-41; Reply, para. 93.

iii. Serious Departure from a Fundamental Rule of Procedure

46. Pursuant to Article 52(1)(d) of the ICSID Convention, an award may be annulled in the event of a serious departure from a fundamental rule of procedure. The Applicant points out that the term "fundamental rule of procedure" should be broadly understood. According to the Applicant, this arises from the *travaux prèparatoires* of the ICSID Convention and has been endorsed by different annulment committees.[23]

47. Moreover, the Applicant contends that the "serious" nature of the departure should be determined on a case-by-case basis. Accordingly, and contrary to the Respondents' position, determining seriousness does not mean that the applicant must prove that the result would have been different had such rule not been departed from, but that the departure from the rule could have made an impact on the award.[24]

48. In conclusion, the Applicant considers that the Award should be annulled in accordance with Article 52(1)(d) of the ICSID Convention if there were departures from fundamental rules of procedure and such departures were serious.

2. GROUNDS RELATED TO THE DECISION ON JURISDICTION

i. Manifest Excess of Powers

49. The Applicant considers that the Tribunal manifestly exceeded its powers by establishing that it had jurisdiction to settle this dispute where it did not, and, also, by failing to apply the proper law. In both cases, the Applicant refers to the Tribunal's analysis of the terms "*seat*" and "*siège social*" contained in the Treaties in order to determine whether Tenaris and Talta qualify as investors.

50. In both Treaties, the definition of "investor" includes companies constituted and having their "*seat*" (or "*siège social*") in the territory of one of the Contracting States.[25] The Tribunal found that, to determine the nationality of the investor, two elements had to be proved: the requirement of having been constituted (*i.e.*, having a statutory seat) and the requirement of

[23] Memorial, para. 33.
[24] Memorial, para. 34, and Reply, para. 62; *see also* Reply, paras. 63 to 66.
[25] Memorial, paras. 58-59 (citing the Luxembourg Treaty, Article 1(b) (C-1); and the Portuguese Treaty, Article 1(b) (C-3)).

having a *seat* or *siège social* in the territory of a Contracting State (which the Tribunal deemed equal to a place of actual or effective management).[26]

51. The Applicant argues that the evidentiary record could, at most, satisfy the requirement of statutory seat. However, it considers that in no way was it shown that Tenaris and Talta had their place of actual or effective management in Luxembourg and Portugal, respectively.[27] By not having proved a requirement deemed essential by the Tribunal itself to regard the Respondents as "investors" under the Treaties, the Tribunal assumed jurisdiction to entertain the dispute when it had none, which is why it manifestly exceeded its powers.[28]

52. Venezuela clarifies that, contrary to the Respondents' statements, it is not requesting that evidence be re-examined. On the contrary, it contends that the elements that the Tribunal itself claimed that it had to demonstrate were not demonstrated, and that the requirements of constitution and seat not having been met, the Tribunal lacked jurisdiction.[29] In addition, it considers that these excesses of powers by the Tribunal are manifest, as they may be readily perceived by any reasonably informed third party, no investigation being necessary.[30]

53. Furthermore, the Applicant considers that the Tribunal failed to apply the proper law. In this regard, it refers to the Tribunal's indication in the Award that, even though the interpretation of the terms "*seat*" and "*siège social*" was a matter of international law, it would consider the municipal law of Luxembourg and Portugal by way of background to its interpretation. Venezuela points out that such *renvoi* to municipal law does not stem from the Treaties' dispute resolution clauses, and that, since the text of the Treaties allowed for no such distinction, the Tribunal had no basis to make it.[31]

54. In conclusion, the Applicant states that the Tribunal departed from the proper law and its own prior findings by asserting jurisdiction to settle this dispute where it lacked such prerogative, which entailed a manifest excess of powers, in the terms of Article 52(1)(b) of the ICSID Convention.

---

[26] *See*, for example, *id.*, paras. 44, 62 (referring to para. 153 of the Award), 63 and 103; Reply, paras. 102-103, 106-107 and 132.
[27] Reply, paras. 136, 150-152, 157; Memorial, paras. 95-101.
[28] *See*, for example, Memorial, para. 44.
[29] Reply, para. 159.
[30] *Id.*, para. 160.
[31] *Id.*, paras. 162-165.

ii. Failure to State the Reasons on which the Award is Based

55. The Applicant considers that the Tribunal failed to state reasons by determining that it had jurisdiction to decide this dispute.

56. Venezuela indicates that the Tribunal started from the premise that, for the terms "*seat*" and "*siège social*" contained in the Treaties to have *effet utile*, they had to mean something other than statutory seat and, thus, it concluded that both terms meant that Tenaris and Talta were to have their effective management in the territory of a contracting party. Nevertheless, Venezuela contends that the Tribunal limited its analysis of these terms to considerations regarding the statutory seat, the Respondents' place of effective management not having been proved.[32]

57. Hence, by building on premises that do not support the conclusion reached, the Tribunal failed to state reasons in the terms of Article 52(1)(e) of the ICSID Convention, given the contradictory nature of the reasons stated thereby.[33]

58. The Applicant also submits that the Award contains other contradictions regarding jurisdiction that make it annullable pursuant to Article 52(1)(e) of the ICSID Convention. Among other examples, Venezuela states that the Tribunal relied upon Tenaris' articles of association as applicable but it did not reach the conclusion to which those rules should lead but their opposite, and that the Tribunal used a witness statement to substantiate some conclusions but ignored it in other respects.[34]

59. Furthermore, Venezuela considers that the Tribunal failed to state the reasons why it had made certain decisions regarding the evidence produced, arbitrarily deciding its admission.[35]

iii. Serious Departure from a Fundamental Rule of Procedure

60. The Applicant states that the Tribunal incurred in a serious departure from fundamental rules of procedure by determining that it had jurisdiction to decide the dispute between the Parties, in two respects. First, by making an arbitrary assessment of the evidence produced and not produced on record (in violation of Venezuela's right of defence and the principle of equality

[32] Memorial, paras. 60-62; Reply, paras. 168, 172.
[33] Memorial, para. 71; Reply, paras. 171, 173.
[34] Memorial, paras. 76, 86. *See also id.*, paras. 76, 82 and 92.
[35] *Id.*, paras. 44-45.

of arms between the parties). Second, by unduly shifting the burden of proof to Venezuela (in violation of the principle of equality of arms and due process).

61. First, Venezuela contends that the Tribunal deemed as proven facts that were not substantiated and admitted as conclusive elements lacking evidentiary value pursuant to the proper law.[36]

62. Venezuela refers to the Tribunal's determination that the notion of *seat* and *siège social* meant the place where Tenaris and Talta exercised their daily acts of management (including the place where the board of directors met among the elements indicative of the existence of an effective seat), and objects that the Tribunal had later departed from this determination by founding its conclusions on elements that merely showed Tenaris' and Talta's registrations in their statutory seats.[37]

63. The Applicant mentions other examples in the Award where it considers that the Tribunal reached certain conclusions by means of factual speculations and assumptions in favor of Tenaris and Talta.[38]

64. Therefore, the Applicant concludes that, by making an "ostensibly arbitrary" assessment of the evidence produced and not produced on record, the Tribunal undermined Venezuela's exercise of its right of defence, and the equality of arms between the Parties.[39]

65. Second, the Applicant contends that the Tribunal shifted the burden of proof to Venezuela, where it fell upon the Respondents, by stating that Venezuela was "unable to identify and demonstrate any other corporate seat for Tenaris, outside of Luxembourg".[40] As a result, the Tribunal ignored its essential duty to verify the objective requirements necessary to exercise its jurisdiction. According to the Applicant, if the claimant fails to satisfy the jurisdictional burden of proof, the Tribunal must necessarily declare that it lacks jurisdiction.[41]

66. In the Applicant's opinion, this shift of the burden of proof violates fundamental rules of evidence, such as equality of arms between the parties and due process. Therefore, it constitutes a serious departure from fundamental rules of procedure in the terms of Article 52(1)(d) of the ICSID Convention.[42]

---

[36] *Id.*, para. 45.
[37] *Id.*, paras. 95-104.
[38] *See id.*, paras. 78-81, 90-91; Reply, paras. 123-124.
[39] Memorial, para. 71.
[40] *Id.*, para. 84, and Reply, para. 117 (internal quotations omitted, citing para. 216 of the Award).
[41] Memorial, paras. 84-85; Reply, para. 116.
[42] Memorial, para. 85; Reply, paras. 109, 120-121 and 125.

3. GROUNDS RELATED TO THE DECISION ON EXPROPRIATION

i. Manifest Excess of Powers

67. Venezuela contends that the Tribunal manifestly exceeded its powers with regard to its decision on expropriation, in two respects. First, by finding that there was an illegal expropriation under domestic law, while failing to apply the relevant Treaty provisions. Second, by simply mentioning in the Award that the requirement of payment of compensation was breached after analysing certain provisions of Venezuelan law, offering no explanation whatsoever based on applicable Treaty provisions.[43]

68. First, Venezuela submits that the Tribunal failed to explain the reasons why the alleged breach of domestic law requirements constitutes an unlawful expropriation in view of each of the requirements listed in the Treaties. In the absence of such an analysis, the Applicant concludes that the Tribunal did not decide on the basis of the proper law which was the Treaties themselves.[44]

69. Second, the Applicant considers that the Tribunal limited itself to analyse the facts only in the light of certain provisions of Venezuelan law relevant to the payment of compensation, without explaining the reasons why the failure to pay compensation entailed a violation of Treaty provisions.[45] The Applicant notes that it is not enough for the Tribunal to have mentioned in the Award that Venezuela violated the Treaties by conducting an expropriation in disregard of provisions on payment of compensation; the Tribunal should have at least tried to apply the proper law, in this case, under a factual and legal analysis of the compensation requirement in accordance with applicable Treaty provisions.[46]

70. In the Applicant's opinion, the foregoing entails a failure to apply the law chosen by the Contracting States in Article 8(3) of the Portuguese Treaty and Article 9(5) of the Luxembourg Treaty for dispute resolution purposes, as well as a manifest excess of powers by the Tribunal, in the terms of Article 52(1)(b) of the ICSID Convention.[47]

---

[43] Memorial, paras. 46-49, 137-141; Reply, para. 205.
[44] Memorial, paras. 46, 138-139.
[45] *Id.*, paras. 47-48; Reply, para. 211.
[46] Memorial, paras. 48, 140.
[47] *Id.*, paras. 136-139, 141-142; Reply, paras. 212-214.

ii. Failure to State the Reasons on which the Award is Based

71. Venezuela submits that the Tribunal failed to state the reasons for its ruling on expropriation, in two respects.

(a) Failure to State Reasons where Finding that Venezuela Violated Article 4(a) of the Portuguese Treaty and Article 4(1)(b) of the Luxembourg Treaty

72. The Applicant states that the Tribunal failed to state reasons, since it limited itself to transcribing the expropriation provisions of the Treaties in the Award and analysing the facts in the light of Venezuelan law, having conducted no analysis whatsoever under applicable international law, even though Venezuela raised arguments on expropriation based on international law and customary international law during the written phase.[48]

73. Moreover, the Applicant contends that the Tribunal failed to explain the reasons why Venezuela's proposition whereby any violation of a municipal law provision does not entail an international wrongful act is erroneous or invalid. Such lack of explanation constitutes a defect leading to annulment of the Award.[49]

74. In addition, the Applicant criticises the Tribunal's lack of explanation to conclude that non-compliance with the phrases "in accordance with the legislation in force" (included in the Portuguese Treaty) and "in accordance with legal procedures" (included in the Luxembourg Treaty), as references to municipal law, entailed a violation of the Treaty or international law.[50] Likewise, the Applicant objects to the Respondents' argument that the Treaties made a *renvoi* to Venezuelan law, since, even assuming that it was correct, such an argument was not raised by the Tribunal, and the Committee has no power to create reasons where there were none in the Award.[51]

75. Likewise, the Applicant criticises the Tribunal for failing to explain the bases for comparing certain aspects of the *Generation Ukraine* decision with the facts of the present case.[52] In addition, Venezuela criticises the Tribunal's partial citation of *ADC v. Hungary* in

---

[48] Memorial, paras. 46, 114-116; Reply, para. 184.
[49] Memorial, para. 119. *See also* Reply, para. 186.
[50] Memorial, para. 124; Reply, para. 186.
[51] Reply, para. 186.
[52] *Id.*, para. 191 (referring to *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003 ("***Generation Ukraine***")).

paragraph 496 of the Award, and contends that it failed to state reasons by failing to explain the similarities between that case and the case at issue.[53]

76. The Applicant concludes that the Tribunal failed to state reasons when determining that Venezuela violated Article 4(a) of the Portuguese Treaty and Article 4(1)(b) of the Luxembourg Treaty, as a consequence of which the Award should be annulled.

(b) Failure to State Reasons where Finding that Venezuela Violated Article 4(c) of the Portuguese Treaty and Article 4(1)(d) of the Luxembourg Treaty

77. The Applicant makes reference to the Tribunal's determination that "the simple failure on the part of Venezuela to pay compensation is sufficient to render the expropriation unlawful as a matter of Venezuelan law".[54] According to the Applicant, the Tribunal's finding that Venezuela violated both Treaties by conducting an expropriation without provisions for payment of compensation lacks reasons from the perspective of both international law and Venezuelan law.[55]

78. On the one hand, the Applicant submits that the Tribunal analysed the facts only in the light of certain provisions of Venezuelan law, despite Venezuela's argument in the arbitration that failure to pay compensation does not render an expropriation illegal *per se.* Given this lack of analysis under international law, the Tribunal failed to state the reasons why the failure to pay compensation entailed a violation of the expropriation provisions of the Treaties.[56]

79. On the other hand, Venezuela argues that, even under Venezuelan law, the Tribunal failed to analyse whether Tenaris and Talta would have been able to receive compensation had they resorted to the domestic procedural remedies available.[57]

80. Therefore, on the basis of Article 52(1)(e) of the ICSID Convention, Venezuela requests that the Award be annulled regarding the Tribunal's determination that there was a violation of the expropriation clauses of the Treaties.

---

[53] Memorial, para. 124; Reply, paras. 192, 194 (referring to *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 October 2006 ("***ADC v. Hungary***")).
[54] Memorial, para. 47 (internal quotations omitted, citing para. 481 of the Award).
[55] *Id.*, paras. 126-129.
[56] *Id.*, paras. 47-48, 113-115, 127; Reply, para. 198.
[57] Memorial, para. 129.

4. GROUNDS RELATED TO THE DAMAGE ASSESSMENT METHODOLOGY

i. Manifest Excess of Powers

81. The Applicant contends that the Tribunal manifestly exceeded its powers with regard to the damage assessment methodology, in two respects. First, by using a methodology for which the Parties never advocated. Second, by awarding a double counting of damages.[58]

82. First, Venezuela argues that the Award should be annulled as the Tribunal adopted a new methodology in order to calculate the fair market value of Tenaris' and Talta's interest in Matesi, which was neither advocated for nor analysed by the Parties.[59]

83. In support of its argument, the Applicant cites the decision of the annulment committee in *Wena Hotels* which highlights, as a classic example of manifest excess of powers, the situation in which a tribunal chooses 'a third line' between two possible boundary lines submitted by the parties. In this case, the Applicant contends that the Tribunal's choice of a third methodology never argued by the Parties constitutes a manifest excess of powers, and, thus, the Award should be annulled.[60]

84. Second, the Applicant considers that the damage assessment methodology adopted by the Tribunal resulted in a double counting of damages of USD 25.75 million. That is tantamount to an unjust enrichment in favor of Tenaris and Talta, as well as a manifest excess of powers by the Tribunal.[61]

85. Therefore, by using a damage methodology other than that proposed by the Parties and double counting damages, the Tribunal manifestly exceeded its powers, in the terms of Article 52(1)(b) of the ICSID Convention.[62]

ii. Failure to State the Reasons on which the Award is Based

86. The Applicant submits that the Tribunal failed to state reasons in its analysis by using a damage assessment methodology, other than that proposed by the Parties, on three main

---

[58] *Id.*, paras. 50-52, 167-169.
[59] *Id.*, paras. 50 and 143; Reply, paras. 233, 245.
[60] Memorial, paras. 167-168 (referring to *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment dated 5 February 2002 (RLA-169) ("***Wena Hotels***")); Reply, para. 233.
[61] Memorial, paras. 52, 154 and 169.
[62] *Id.*, paras. 52 and 169.

accounts: *(a)* the Tribunal failed to identify precisely the valuation approach or the methodology used in its damage assessment; *(b)* the tribunal ignored key steps in the calculation of damages without providing an explanation or analysis; and *(c)* the damage analysis conducted by the Tribunal contains contradictions.[63]

87. First, the Applicant asserts that the Tribunal simply made reference in the Award to Matesi's asset acquisition transaction. However, it failed to explain in detail both, the approach and the damage methodology used. Consequently, it is not possible to determine whether the Tribunal compensated the Respondents' initial investment or Matesi's business value on the basis of an asset transaction. In other words, the Tribunal's failure to define the methodology adopted in order to assess damages makes it impossible to know or infer the premises on which such assessment was made.[64] In the absence of an explanation by the Tribunal of the elements of its methodology, Venezuela submits that it is not possible to understand the conclusions at which the Tribunal arrives or determine whether or not they are within the competence of the Tribunal.[65]

88. Second, the Applicant contends that the Tribunal failed to explain the reasons why it ignored key steps in the calculation of damages, which led to a double counting of damages. In Venezuela's opinion, such omissions included the following: failing to explain the reasons why it did not consider Matesi's debt as of the valuation date and the reasons why the total amount of certain long-term loan ("**Talta Loan**") was to be recognized as further damages.[66]

89. Lastly, the Applicant argues that there are contradictions in the damage analysis conducted by the Tribunal, as it rejects the damage methodologies proposed by the Parties, while expressing uncertainties not dispelled in the Award as to the very damage methodology it decided to adopt.[67] The Applicant refers to paragraph 567 of the Award in which the Tribunal admitted having accepted with some reluctance the value of the Respondents' initial investment at Matesi's fair market value. Among other criticisms, the Applicant indicates that the Tribunal failed to state the reasons why such reluctance was to be tolerated, or that would help to understand why the Tribunal adopted a mechanism that the Tribunal itself deemed unfair and unreliable.[68]

---

[63] *Id.*, paras. 53 and 170-177; Reply, paras. 246 to 257.
[64] Memorial, paras. 53, 144-149, 171; Reply, para. 246.
[65] Reply, para. 247.
[66] Memorial, paras. 53 and 172-174. *See also*, for example, Reply, paras. 248-250.
[67] Memorial, paras. 53, 175-177; Reply, paras. 252, 254.
[68] Memorial, para. 175.

90. Therefore, the Applicant concludes that the rejection of the methodologies proposed by the Parties on account of their uncertainties and the choice of a methodology that was not reliable according to the Tribunal itself, entail a fundamental contradiction, and, thus, a failure to state reasons pursuant to Article 52(1)(e) of the ICSID Convention.[69]

iii. Serious Departure from a Fundamental Rule of Procedure

91. The Applicant contends that the Tribunal incurred a serious departure from several rules of procedure by choosing a methodology that was neither advocated for nor analysed by the Parties.

92. In particular, the Applicant states that the Tribunal violated *(a)* Venezuela's right of due process, as well as fundamental principles of burden of proof, by proceeding to assess damages after completely rejecting the methodologies proposed by Tenaris and Talta in order to prove their damages; *(b)* the Parties' right to be heard, by using a damage assessment methodology other than that presented and discussed by the Parties, affording them no opportunity to make observations; and *(c)* the principle of equal treatment of the Parties, by incurring a double counting of damages leading to unjust enrichment in favor of the Respondents.[70]

93. First, the Applicant submits that the Tribunal violated fundamental principles of burden of proof with respect to the damages alleged. Venezuela indicates that the Tribunal completely rejected the Respondents' submission on damages by considering that the Discounted Cash Flow ("**DCF**") methodology proposed suffered from various uncertainties. Moreover, the Tribunal completely rejected the supplementary valuation submitted by Tenaris and Talta in accordance with the "market multiples" methodology.[71]

94. Since these methodologies rejected by the Tribunal were the only ones presented by Tenaris and Talta to prove their damages, in Venezuela's opinion, the Tribunal decided that Tenaris and Talta failed to discharge their burden of proof. Consequently, the Tribunal should have dismissed their claim for damages entirely. Nevertheless, the Tribunal proceeded to adopt a new methodology that was never discussed by the Parties and ordered that damages

[69] *Id.*, paras. 176-178; Reply, paras. 251, 257.
[70] Memorial, paras. 51, 155 and 166; Reply, para. 217.
[71] Memorial, para. 157 (referring to paras. 526-527 and 532 of the Award).

be paid.[72] Thus, the Tribunal violated Venezuela's right of due process and incurred a serious departure from a fundamental rule of procedure.[73]

95. Second, the Applicant submits that the fact that it was not possible to discuss the new damage assessment methodology adopted by the Tribunal violated the Parties' right to be heard.[74] In this regard, Venezuela contends that the right to be heard is a fundamental rule of procedure, and affirms that arbitral tribunals and national courts have recognized that adopting a damage methodology other than that presented and discussed by the parties, without the parties having the opportunity to make observations (as was the case here), constitutes a serious violation of a rule of procedure.[75]

96. In the Applicant's view, it is not enough for a methodology to be generally acknowledged or based on objective data submitted by the parties. In any case, a tribunal should give the parties an opportunity to make observations. In addition, the Applicant asserts that the opportunity to express views and argue about the damage methodology to be adopted by the tribunal is of paramount importance, since using a methodology other than that presented by the parties is a substantial defect that changes the outcome of the case.[76]

97. Accordingly, and contrary to the Respondents' argument whereby the outcome of the case was allegedly not affected, the Applicant states that the damage amount determined by the Tribunal may not be claimed to reflect the position of an expert of Venezuela –and that any comparison between the alternative valuation made by such expert and the Tribunal's calculation is inadequate.[77]

98. Lastly, the Applicant submits that the Tribunal violated the equality of the Parties by favoring the unjust enrichment of Tenaris and Talta. Venezuela contends that the Tribunal, by assessing damages in accordance with its new methodology, double counted damages in the amount of USD 25.75 million, the outstanding balance of the Talta Loan, which was not an additional investment and would have already been recovered under the valuation methodology adopted by the Tribunal. The Applicant argues that this is tantamount to unjust

[72] *Id.*, paras. 157-158; Reply, para. 227.
[73] Memorial, paras. 156, 159; Reply, paras. 227-228.
[74] Memorial, para. 163.
[75] *Id.*, para. 160; Reply, para. 218.
[76] Memorial, paras. 161-162.
[77] Reply, paras. 224-226.

enrichment in favor of the Respondents, and that, by awarding such amount, the Tribunal violated basic principles of due process, such as equal treatment of the parties.[78]

5. GROUNDS RELATED TO THE COSTS AWARD REGARDING THE REQUEST FOR RECTIFICATION

i. Failure to State the Reasons on which the Decision on Rectification is Based

99. The Applicant contends that the Tribunal failed to state the reasons to order Venezuela to pay the costs incurred by the Respondents in the course of the rectification proceeding.[79]

100. According to Venezuela, such decision is inconsistent with the Tribunal's indication in the Award that the award of costs against one of the parties is subject to a high threshold, which requires the presence of special circumstances.[80] Furthermore, the Applicant states that "the Tribunal's finding whereby, in its opinion, Venezuela's request failed to comply with the interpretation of the terms of Article 49(2) of the Convention says nothing about the reasons for awarding costs" [Committee's translation].[81] The Applicant highlights that the Tribunal identified none of the special circumstances that would warrant sanctioning Venezuela in costs, such as an abusive procedural conduct.[82]

101. Furthermore, Venezuela criticises the explanations offered by the Respondents of the possible reasoning employed by the Tribunal to have awarded costs differently in the Award and in the Decision on Rectification. The Applicant points out that the reasons argued by the Respondents are not included in the Award, and the Committee may not create reasons where the Tribunal itself failed to provide them.[83] Moreover, it objects to the Respondents' reference to the Tribunal's indication that there were plenty of authorities to award costs in favor of the successful party since it is an incomplete citation, made out of context in an *obiter* paragraph.[84]

---

[78] Memorial, paras. 164-165; Reply, paras. 231-232.
[79] Memorial, paras. 54 and 179.
[80] *Id.*, para. 185 (referring to para. 618 of the Award); Reply, para. 259.
[81] Reply, para. 263.
[82] Memorial, para. 186; Reply, para. 263.
[83] Reply, para. 263.
[84] *Id.*, para. 260.

102. The Applicant concludes that the Tribunal's failure to state the reasons to justify that Venezuela had to bear the costs incurred by Tenaris and Talta for exercising a right set forth in the ICSID Convention, and by ignoring the reasons why the Tribunal adopted a decision contrary to criteria it had previously applied, are grounds for annulment pursuant to Article 52(1)(e) of the ICSID Convention.[85]

ii. Serious Departure from a Fundamental Rule of Procedure

103. The Applicant contends that the Tribunal incurred a serious departure from a fundamental rule of procedure, since it violated the principle of equal treatment of the parties by ordering Venezuela to pay the costs incurred by Tenaris and Talta in the course of the rectification proceeding.[86]

104. The Applicant notes that, in its Decision on Rectification, the Tribunal expressly acknowledged Venezuela's decision to request the rectification of the Award as a right and an integral element of the ICSID investment arbitration system.[87] However, the Tribunal ordered Venezuela to pay all the costs of the rectification proceeding, including the attorneys' fees of the Respondents.

105. The Applicant cites several decisions in support of the claim whereby a large number of arbitral tribunals have distributed the costs of the proceeding equally between the disputing parties.[88] Venezuela points out that the criteria for equal distribution of costs include that the parties' arguments have been raised in good faith and have not been frivolous, and that the parties' conduct has been justified. In addition, Venezuela stresses that the Tribunal itself indicated in the Award that it is standard practice for each party to bear its own costs, and that departing from such rule required an egregious, illegal or frivolous conduct.[89]

106. Accordingly, the Applicant states that, even though the Tribunal dismissed the Request for Rectification, no part of the decision pointed to the existence of special circumstances that warranted sanctioning Venezuela. Therefore, this unjustified award of costs constitutes a serious violation of procedure.[90]

---

[85] Memorial, paras. 179 and 187; Reply, para. 264.
[86] Memorial, paras. 54, 180-184; Reply, paras. 265-268.
[87] Memorial, para. 54, footnote 75 (referring to para. 73 of the Decision on Rectification).
[88] *Id.*, para. 181 and footnote 235.
[89] *Id.*, para. 182.
[90] *Id.*, para. 183; Reply, paras. 266-267.

B. THE RESPONDENTS ON ANNULMENT'S ARGUMENTS

107. The Respondents submit that Venezuela has not met the high standard that warrants the annulment of the Award; on the contrary, they consider that Venezuela's claims are based on disagreements with the Tribunal's findings. The Respondents assert that Venezuela seeks a substantive review of the Award as if it were an appeal, which is impermissible under the ICSID Convention.[91]

108. In particular, Tenaris and Talta claim that the Tribunal did not manifestly exceed its powers, and that there was no serious departure from a fundamental rule of procedure or failure to state the reasons on which the Award is based. The applicable standards and the arguments concerning each of these grounds are discussed *infra*.

1. APPLICABLE STANDARD

109. By way of introduction, the Respondents note that annulment is an extraordinary remedy in the ICSID system, not a mechanism for appeal.[92] The role of an *ad hoc* committee in deciding an application for annulment is accordingly limited. Said mandate is restricted to determining whether any of the grounds enumerated in Article 52(1) of the Convention has been established, which permit no form of substantive review of the merits of a tribunal's award. Thus, even when a tribunal has committed evident errors of fact or law, annulment is not a remedy against an incorrect decision.[93]

110. Moreover, the Respondents object to Venezuela's suggestion that all annullable errors justify annulment. The Respondents argue that Article 52(3) of the ICSID Convention empowers an *ad hoc* committee to annul the award if a ground under Article 52(1) is established,[94] though such article does not require a committee to do so.

i. Manifest Excess of Powers

111. As regards the applicable standard for annulment under Article 52(1)(b) of the ICSID Convention, the Respondents aver that *(a)* an excess of powers must be manifest;

---

[91] *See*, for example, Counter-Memorial, paras. 1, 3-4, and 42-43; Rejoinder, paras. 4, 7-8.
[92] Counter-Memorial, para. 39; Rejoinder, paras. 5, 12.
[93] Counter-Memorial, para. 40; Rejoinder, para. 8.
[94] Counter-Memorial, para. 41 and footnote 79; Rejoinder, para. 10.

(b) Article 52(1)(b) does not permit a *de novo* assessment of the Tribunal's jurisdiction; and *(c)* the erroneous application of the law is not an excess of powers.

112. First, the Respondents point to the fact that Article 52(1)(b) of the Convention permits annulment only where a tribunal has exceeded its powers and where that excess is manifest.[95] The term "manifest" means that the excess has to be "obvious, self-evident, clear, flagrant and substantially serious", and that it can be discerned without great effort or extensive analysis.[96] Also, they consider that whenever the underlying issue is subject to more than one reasonable interpretation or is otherwise open to debate, there can by definition be no excess of power.[97]

113. The Respondents further allege that any excess of powers must also be evident from reading the award, without having to review the evidence before the tribunal. In this regard, under the ICSID Arbitration Rule 34, only the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.[98]

114. Second, the Respondents state that Article 52(1)(b) does not permit a *de novo* assessment of the Tribunal's jurisdiction. The Respondents object to Venezuela's argument that any excess of powers as to jurisdiction constitutes a manifest excess of powers. Instead, they argue that the Convention does not distinguish between allegations of excesses of power that relate to jurisdiction, and those that relate to the merits (neither of which allows a *de novo* review). [99]

115. Third, the Respondents claim that the erroneous application of the law is not an excess of powers. The Respondents state, *inter alia*, that only a failure to apply the law *in toto* may amount to a manifest excess of powers for failure to apply the applicable law.[100] Moreover, a tribunal's decision not to address a particular provision that it considers irrelevant does not constitute a failure to apply the applicable law.[101]

---

[95] Counter-Memorial, para. 46.
[96] *Id.*, para. 47 (internal quotation marks omitted, citing *Impregilo SpA v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment dated 24 January 2014 (RLA-224**)**, para. 128); Rejoinder, para. 13.
[97] Counter-Memorial, para. 48; Rejoinder, para. 13.
[98] Counter-Memorial, para. 49. *See also* Rejoinder, para. 24.
[99] Counter-Memorial, paras. 52 and 54; Rejoinder, paras. 13, 17 and 24.
[100] Counter-Memorial, para. 57; Rejoinder, para. 13.
[101] Counter-Memorial, para. 58.

116. In sum, the Respondents state that an excess of powers must be manifest in the award at first sight; evidentiary inquiries and a *de novo* review of the award are beyond the scope of an annulment committee's mandate; and an error of law is insufficient to annul an award.

ii. Failure to State the Reasons on which the Award is Based

117. The Respondents indicate that, in very limited circumstances, a violation of the duty to state reasons may warrant annulment under Article 52(1)(e) of the ICSID Convention.[102] Said provision does not authorize committees to review the quality or persuasiveness of a tribunal's reasoning. Therefore, an *ad hoc* committee may not annul an award because it disagrees with the reasons provided by a tribunal.[103]

118. The Respondents refer to different decisions from annulment committees in support of the fact that 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. In other words, reasons need not be correct, or even convincing; the key issue is whether there are reasons and these are understandable.[104]

119. To justify annulment of an award, a failure to state reasons must relate to a point that is essential to a tribunal's decision.[105] Contrary to Venezuela's assertion, a tribunal need not address each and every argument raised under every claim put before it, nor is it required to address those arguments that are not relevant to its final decision.[106] Further, the Respondents submit that the committees must consider whether the tribunal's reasons are implicit in the considerations and conclusions of the award.[107]

120. The Respondents claim that contradictory reasons may constitute a failure to state reasons, but only when they prevent the reader from understanding the tribunal's motives.[108] Likewise, the Respondents assert that annulment committees have also stressed the importance of distinguishing genuine contradictions in a tribunal's reasoning from a tribunal's appropriate weighing of conflicting considerations.[109]

---

[102] *Id.*, para. 86; Rejoinder, para. 50.
[103] Counter-Memorial, para. 87.
[104] *Id.*, paras. 89-90; Rejoinder, para. 54.
[105] Counter-Memorial, para. 92.
[106] *Id.*, para. 93.
[107] *Id.*, para. 91.
[108] *See id.*, para. 94.
[109] *Id.*, para. 95.

iii. Serious Departure from a Fundamental Rule of Procedure

121. The Respondents state that the ground for annulment under Article 52(1)(d) is intended to ensure that minimum standards are observed in arbitral proceedings. Similarly, they indicate that the Applicant bears the burden of proving both that the Tribunal committed a serious departure from a rule of procedure, and that the rule was fundamental.[110]

122. To be fundamental, the Respondents point out, the rule violated must relate to an element of due process, such as the equal treatment of parties, the right to be heard, or the right to an independent and impartial tribunal.

123. Likewise, to satisfy the ground for annulment under Article 52(1)(d), it must be established that there was a "serious" departure from a fundamental rule of procedure. The procedural irregularity must have been serious to the effect that it must have caused the Tribunal to reach a result substantially different from what it would have achieved had the rule been observed.[111]

2. GROUNDS RELATED TO THE DECISION ON JURISDICTION

i. Manifest Excess of Powers

124. The Respondents state that the Tribunal did not manifestly exceed its powers when upholding jurisdiction over the dispute.

125. As a preliminary consideration, the Respondents criticize Venezuela's alleged failure to assess the governing legal standard that an excess of powers should be "manifest", as well as its request to the Committee to undertake a *de novo* review of the Tribunal's jurisdictional findings.[112] The Respondents recall that the assessment of evidence is beyond the scope of review of an *ad hoc* committee, and that even if the Tribunal had made a mistake in its assessment of the evidence (which they claim is not the case), that too would not be a basis for annulment.[113]

---

[110] *Id.*, para. 154.
[111] *Id.*, para. 155. *See also* Rejoinder, para. 92.
[112] Counter-Memorial, paras. 50 and 61; Rejoinder, paras. 23-24.
[113] Counter-Memorial, paras. 50 and 61; Rejoinder, para. 22.

126. The Respondents submit that Venezuela's arguments on an alleged excess of powers simply criticize the Tribunal's reasoning and the evidence on which it relied, as if a *de novo* review of the facts was allowed, but provides no explanation of why Venezuela's failure to persuade the Tribunal on these points amounts to an excess of powers. In addition, the Respondents submit that Venezuela's treatment of the evidence is incomplete and inaccurate.[114]

127. In any event, the Respondents recall that the correctness of the Tribunal's legal and factual findings leading to its decision that it had jurisdiction *ratione personae* is not a ground for annulment.[115]

128. Similarly, Venezuela's arguments that the Tribunal adopted certain domestic law elements as necessary for establishing the location of the corporate seat of Tenaris and Talta (such as the place where directors' meetings would be held) are deemed irrelevant by the Respondents. The Respondents note that, although the Tribunal considered them relevant by way of background, the Tribunal confirmed that the interpretation of the terms "*siège social*" and "*sede*" remained a matter of international law alone.[116]

ii. Failure to State the Reasons on which the Award is Based

129. The Respondents assert that the Tribunal stated reasons for its decision on jurisdiction, and criticize Venezuela's allegation in this regard as based on a mischaracterization of the legal standard applied by the Tribunal.

130. The Respondents summarize the Tribunal's reasoning on jurisdiction and conclude that the reasons provided by the Tribunal for its decision are clear, straightforward, and may be followed from point A to point B.[117]

131. For example, after reviewing the Parties' positions on the meaning of the terms "*siège social*" and "*sede*", the Tribunal concluded that these meant something more than the purely formal matter of the address of a registered office or statutory seat. That led the Tribunal to assign to both terms a meaning of effective management or some sort of actual or genuine corporate activity.[118]

---

[114] Rejoinder, para. 29.
[115] Counter-Memorial, paras. 63 and 64.
[116] Rejoinder, para. 27.
[117] Counter-Memorial, paras. 97-107; Rejoinder, para. 59.
[118] Counter-Memorial, para. 98 (referring to paras. 150 and 154 of the Award).

132. Then, the Tribunal explained that, although the interpretation of these terms was a matter of international law alone, as the Treaties did not include an express *renvoi* to domestic law for neither of these terms, it was at least appropriate to consider the domestic law of Luxembourg and Portugal as background to their interpretation.[119] Among other arguments in support of its conclusions on jurisdiction, the Tribunal made certain observations about Tenaris' and Talta's corporate structure.[120]

133. The Respondents allege that Venezuela's argument amounts to an impermissible criticism of the evidentiary findings of the Tribunal. In their view, Venezuela is not actually claiming that the Tribunal has failed to state reasons, or that its reasons are contradictory, but rather that the Tribunal adopted the wrong reasons or findings based on the evidence before it. That is no basis for annulment.[121]

134. Similarly, the Respondents criticize two fundamental aspects of Venezuela's argument that the Tribunal failed to state reasons because no board meeting minutes were produced (and that, therefore, Tenaris and Talta could not have shown effective management in Luxembourg and Portugal).

135. First, this argument is based on the Tribunal's allegedly erroneous weighing of the evidence, which is no basis for annulment.[122] Second, the Respondents criticize that Venezuela focuses on only one of many factors underlying the Tribunal's conclusions, as the Tribunal never suggested that the location of a board meeting was unequivocal evidence of "effective management" or that the inability to prove the location of board meetings would result in a failure to prove Tenaris' "*siège social*".[123]

136. Similarly, the Respondents submit that the Tribunal consistently and clearly communicated the reasons for its jurisdictional decision as regards Talta, based on many factors that allow proceeding from point A to point B, and that in no event give rise to annullable error.[124]

---

[119] *Id.*, para. 99 (referring to para. 169 of the Award).
[120] *Id.*, paras. 102-106.
[121] Counter-Memorial, paras. 96 and 114; Rejoinder, para. 64.
[122] Counter-Memorial, paras. 109-110; Rejoinder, para. 62.
[123] Counter-Memorial, paras. 111-112.
[124] *Id.*, para. 113.

iii. Serious Departure from a Fundamental Rule of Procedure

137. The Respondents allege that the Applicant has not established how, in its jurisdictional decision, the Tribunal seriously departed from a fundamental rule of procedure. In their view, Venezuela does not identify precisely how its right of defence and the principle of equality of arms were undermined.[125]

138. The Respondents state that Venezuela attempts to reargue the merits of the dispute. For instance, Venezuela's argument that the Tribunal's assessment of the evidence produced and not produced in the record was patently arbitrary, is nothing more than a disagreement with the evaluation and weighing of the evidence. However, that does not establish the departure from a fundamental rule of procedure.[126]

139. As to the allegation that the Tribunal seriously departed from a fundamental rule of procedure because it shifted the burden of proof (allegedly requiring Venezuela to disprove the existence of the Tribunal's jurisdiction), the Respondents point out that upon reading the Award it follows that the Tribunal placed the burden of proof on Tenaris and Talta, and found that they satisfied that burden. In addition, the Respondents highlight the difference between the burden of the proof and the standard of proof that a party must satisfy.[127]

3. GROUNDS RELATED TO THE DECISION ON EXPROPRIATION

i. Manifest Excess of Powers

140. The Respondents argue that the Tribunal did not exceed its powers —by allegedly failing to apply the proper law— when determining that Venezuela expropriated the investment of Tenaris and Talta in violation of the Treaties. In the Respondents' view, Venezuela's arguments are based on a mischaracterization of the Tribunal's decision.[128]

141. The Respondents assert that the Tribunal's decision that the expropriation of the investment of Tenaris and Talta was "unlawful as a matter of Venezuelan law" was based on the text of the Treaties, which established a *renvoi* to domestic law.[129] In other words, the Tribunal

[125] *Id.*, para. 158.
[126] Counter-Memorial, paras. 158-159.
[127] Rejoinder, paras. 93-95. *See also id.*, paras. 98-99.
[128] Counter-Memorial, paras. 67-68; Rejoinder, para. 36.
[129] Counter-Memorial, para. 68 (internal quotation marks omitted, citing para. 481 of the Award); Rejoinder, para. 39.

carried out a detailed analysis of the facts and the applicable Venezuelan law, and found that, when expropriating the Respondents' investment in violation of its own law, Venezuela breached its international law obligations as regards expropriation.[130]

142. Hence, the Respondents consider that Venezuela's argument that the Tribunal based its decision on an analysis exclusively conducted under Venezuelan law is untenable, since that was what the Treaties themselves required. In any case, the Tribunal decided in accordance with the principles of international law, which principles directed the Tribunal to apply the *lex specialis* requirements in the Treaties over general rules of customary international law.[131]

143. Moreover, the Respondents consider that Venezuela's argument that the Tribunal did not analyse the failure to pay compensation as an independent basis for the expropriation's unlawfulness under the Treaties, is merely a critique of the adequacy of the Tribunal's reasoning.[132]

144. The Respondents point out that the legality requirements under the Treaties were cumulative and, once the Tribunal found that Venezuela failed to meet the requirements under Articles 4(a) and 4(c) of the Portuguese Treaty, and 4(1)(b) and 4(1)(d) of the Luxembourg Treaty, it needed not to analyse further the requirements related to expropriation under the Treaties.[133]

145. As a consequence, the Respondents assert that the Tribunal's findings that Venezuela's expropriation was unlawful under the Treaties on account of failure to comply with its own law and to pay compensation are based on the proper law.[134]

ii. Failure to State the Reasons on which the Award is Based

146. The Respondents assert that the Tribunal stated the reasons to conclude that *(a)* Venezuela failed to follow applicable legal procedures when expropriating the Respondents' investment; and *(b)* it also breached the Treaties by failing to pay compensation for the expropriation.

---

[130] Counter-Memorial, paras. 68-69.
[131] Rejoinder, para. 39.
[132] *Id.*, para. 41.
[133] *Id.*, para. 37.
[134] Counter-Memorial, para. 72.

(a) The Tribunal Stated Reasons for Concluding that Venezuela Violated Article 4(a) of the Portuguese Treaty and Article 4(1)(b) of the Luxembourg Treaty

147. The Respondents state that the Tribunal provided detailed reasons how Venezuela, by failing to follow its own legal procedures and legislation, breached the international law requirements for lawful expropriation in accordance with the Treaties.[135] They point out that the Tribunal devoted a section of the Award entitled "Failure to comply with the Treaties" and provide a summary of the reasons stated by the Tribunal therein.[136] Respondents indicate that such reasons are numerous, and are supported by findings of fact.[137]

148. Additionally, the Respondents object to the arguments raised by Venezuela in relation to the Tribunal's finding on the unlawfulness of the expropriation. They criticize, *inter alia*, Venezuela's allegation that the Tribunal merely analysed considerations related to Venezuelan law, and explain that the Treaties so provided in their *renvoi* clauses.[138]

149. In the Respondents' view, once a Treaty establishes a *renvoi* to domestic law, compliance with that domestic law is, by definition, internationalized. Similarly, the Respondents allege that the Tribunal clearly stated that the Treaties contained a *renvoi* to Venezuelan law in paragraphs 494 and 495 of the Award.[139]

150. The Respondents further object to Venezuela's argument that the Tribunal did not reference all of its arguments about compliance with international law. The Respondents state that the Tribunal was not required to address each and every argument presented by the Parties. Since the conditions for the legality of an expropriation were cumulative, failure to fulfil any of those conditions would suffice.[140]

151. Tenaris and Talta also dispute Venezuela's argument that, in order to complain of a breach of international law, the Respondents should have resorted to Venezuelan legal procedures. The Respondents indicate that the Tribunal itself rejected this argument in the Award and clearly motivated its decision.[141]

---

[135] *Id.*, para. 116.
[136] *Id.*, para. 117 (referring to paras. 481-492 of the Award).
[137] *Id.*, para. 118; Rejoinder, para. 65.
[138] Counter-Memorial, para. 119; Rejoinder, para. 65.
[139] Rejoinder, paras. 67, 69.
[140] Counter-Memorial, para. 121.
[141] *Id.*, paras. 122 and 125 (referring to paras. 489-492 of the Award); Rejoinder, para. 70.

152. Finally, as regards Venezuela's complaint about the Tribunal's partial quote of *ADC v. Hungary*, alleging that it failed to state reasons by not explaining the similarities between such case and the instant case, the Respondents submit that tribunals are not required to explain the differences and similarities between every case cited and the proceeding at issue. In any event, the Tribunal's reasoning in relation to such partial quote may be found in the preceding paragraphs of the Award.[142]

153. In sum, the Respondents claim that Venezuela's arguments about the Tribunal's findings on noncompliance with legal procedures applicable to expropriation amount to arguments about whether the Tribunal's reasons are correct, and they are no basis for annulment.[143]

(b) The Tribunal Stated Reasons for Concluding that Venezuela Violated Article 4(c) of the Portuguese Treaty and Article 4(1)(d) of the Luxembourg Treaty

154. According to the Respondents, the Tribunal stated reasons for its finding that Venezuela, by failing to pay compensation for the expropriation of the investment of Tenaris and Talta, also failed to meet the requirements for a lawful expropriation under the Treaties.

155. In the Respondents' view, the Tribunal made its Venezuelan law findings in the course of its inquiry into whether Venezuela complied with the requirements to observe Venezuelan law under Article 4(a) of the Portuguese Treaty and Article 4(1)(b) of the Luxembourg Treaty, but not as a necessary premise for its conclusion that the same failure to pay compensation also breached Article 4(1)(d) of the Luxembourg Treaty and Article 4(c) of the Portuguese Treaty.[144]

156. The Respondents also consider that Venezuela's allegation that the Tribunal did not consider its arguments that the failure to pay compensation does not render an expropriation *per se* unlawful under international law is unacceptable. In this regard, they state that the Tribunal's decision was governed by the Treaties as *lex specialis*, rather than general international law.[145]

---

[142] Counter-Memorial, para. 126; Rejoinder, para. 71.
[143] Counter-Memorial, para. 127.
[144] *Id.*, para. 129.
[145] *Id.*, para. 130; Rejoinder, para. 76.

157. Furthermore, the Respondents also object to Venezuela's arguments that the Tribunal should have determined whether Tenaris and Talta could have resorted to local procedural remedies, or that the provision of adequate procedures to obtain compensation was enough in order to fulfil the requirement to pay compensation. In this regard, the Respondents highlight the Tribunal's finding that the mere availability of additional domestic law remedies did not excuse Venezuela's failure to pay compensation.[146]

158. In sum, the Respondents claim that the reasons set out by the Tribunal on why the failure to pay compensation renders the expropriation unlawful are clear and straightforward to follow.[147]

4. GROUNDS RELATED TO THE DAMAGE ASSESSMENT METHODOLOGY

i. Manifest Excess of Powers

159. The Respondents assert that the Tribunal did not manifestly exceed its powers in the assessment of damages.

160. As a preliminary remark, the Respondents state that Venezuela does not dispute that the Tribunal had the power to award and calculate damages, and submit that, in the exercise of that function, tribunals have a broad margin of appreciation.[148] In the Respondents' view, Venezuela's real complaint is not that the Tribunal exceeded its powers, but that the Tribunal committed errors when determining damages, which is no basis for annulment.[149]

161. The Respondents argue that there cannot be an excess of powers, manifest or otherwise, when the Tribunal acts within the scope of its jurisdiction and the applicable legal framework.[150] In this regard, the Respondents assert that the key issue is not whether the Tribunal adopted a position that was or was not advanced by either Party, but whether it assessed damages within the applicable legal framework. The Respondents claim that Venezuela cannot deny that the Tribunal applied the legal framework agreed between the Parties when awarding damages (that is, the international law that required the Tribunal to

[146] Counter-Memorial, paras. 131-132.
[147] *Id.*, para. 132.
[148] *Id.*, para. 73.
[149] *Id.*, para. 75.
[150] Rejoinder, para. 43.

assess the fair market value of the expropriated investment), even though the Tribunal ultimately applied that legal framework according to its own appreciation of the evidence.[151]

162. The Respondents state that the Tribunal established a legal test based on a standard of compensation endorsed by the Parties, which was the fair market value. Once such legal test was established, the Tribunal exercised its discretion in the review of the evidence submitted by the Parties to determine what that fair market value was.[152] According to the Respondents, international tribunals frequently reach damages assessments that differ from those advanced by the parties based on the evidence on the record. In any case, the Respondents highlight that the Tribunal assessed damages within the legal framework advanced by the Parties.[153]

163. The Respondents further state that for an excess of powers to be annullable, it must have a material impact on the outcome of the Award.[154] Insofar as the valuation adopted by the Tribunal was nearly identical to the figure put forward by an expert for Venezuela, any impact resulting from the adoption of that methodology would be either immaterial or in Venezuela's favour.[155]

164. On the other hand, the Respondents criticize Venezuela's argument that the Tribunal exceeded its powers by allegedly awarding duplicative damages. The Respondents submit that, with that allegation, Venezuela asks the Committee to review the Tribunal's findings of fact, which is beyond the role of an annulment committee and amounts to an impermissible attempt to appeal. In any event, the Respondents point out that there was no double counting of damages.[156]

ii. Failure to State the Reasons on which the Award is Based

165. The Respondents state that the Tribunal *(a)* explained its damages methodology; *(b)* did not omit any key steps in assessing damages; and *(c)* did not contradict itself when it determined damages.

166. First, the Respondents allege that the Tribunal explained in detail the damages methodology it used. After summarizing such explanations, the Respondents conclude that the Tribunal's

---

[151] *Id.*, paras. 44-45.
[152] Counter-Memorial, paras. 77-78.
[153] *Id.*, paras. 79-82; Rejoinder, para. 47.
[154] *See, e.g.*, Rejoinder, para. 15.
[155] Counter-Memorial, para. 83. *See also* Rejoinder, para. 49.
[156] Counter-Memorial, para. 84.

reasons for determining the value of the 2004 acquisition of Matesi's assets, relevant to an assessment of Matesi's fair market value, can be followed without difficulty.[157]

167. In addition, contrary to Venezuela's argument, the Tribunal was not required to state whether the methodology was an appraisal based on a 2004 transaction or a valuation based on the initial investment's cost, in order to satisfy the requirement to state reasons. In any event, throughout its analysis, the Tribunal mentioned that it assessed Matesi's fair market value based on an actual transaction relating to Matesi, which it considered as a proxy for fair market value of Respondents' interest in Matesi.[158]

168. Second, Respondents object to Venezuela's argument that the Tribunal failed to consider Matesi's debt as of the valuation date. The Respondents contend that the Tribunal clearly described its methodology for valuing Tenaris' and Talta's losses, and addressed Venezuela's double counting arguments in its Award, and again in the Decision on Rectification.[159] The Respondents allege that Venezuela's argument amounts to an impermissible allegation that the Tribunal incorrectly assessed fair market value, not a ground for annulment.[160]

169. The Respondents also criticize Venezuela's argument that the Tribunal failed to explain why the total amount of the Talta Loan should be recognized as additional damages (which Venezuela believes led to double counting of damages). The Respondents state that the Tribunal decided in the Award that said loan constituted an investment in its own right, as well as an additional investment of Talta that had been expropriated and for which Talta should be compensated. Therefore, the Respondents submit that the Tribunal's reasons for granting additional compensation are straightforward and that Venezuela's disagreement with the Tribunal's findings of fact in that regard does not amount to a failure to state reasons.[161]

170. Finally, the Respondents assert that Venezuela mischaracterizes the Tribunal's decision on damages by arguing that the Tribunal adopted a transaction-based methodology that suffered from uncertainties and, at the same time, rejected the damages methodologies discussed by the Parties due to their uncertainties. The Respondents point to the reasons provided by the

---

[157] *Id.*, paras. 133-134.
[158] *Id.*, para. 135.
[159] *Id.*, para. 137 (referring to paras. 566-570 of the Award, and paras. 101-105 of the Decision on Rectification). *See also* Rejoinder, para. 81.
[160] Counter-Memorial, para. 138.
[161] *Id.*, paras. 140-143.

Tribunal in paragraphs 525 to 532 of the Award in support of its decision to reject the DCF and market multiples method.[162]

171. In any case, the Respondents highlight the Tribunal's remark that, to the extent that certain factors rendered its valuation inaccurate, they would do so in favor of Venezuela. Moreover, the Respondents state that the Tribunal considered that its methodology established damages with reasonable certainty, while the methodologies advanced by the Parties did not.[163]

172. In sum, the Respondents submit that there was no contradiction and the Tribunal's reasoning on damages can be easily followed.[164]

iii. Serious Departure from a Fundamental Rule of Procedure

173. The Respondents state that the Tribunal's decision on damages in the Award did not violate any fundamental principle relating to the allocation of the burden of proof, the right to be heard, or the right to equal treatment.[165]

174. As regards the burden of proof, the Respondents indicate that the two key pieces of evidence on which the Tribunal based its valuation of Matesi were on the record and undisputed by Venezuela: the definition of fair market value applied by the Tribunal, and the value of the transaction on which the Tribunal based its valuation.[166]

175. The Respondents allege that Tenaris and Talta had to prove they had suffered a loss and submitted evidence that the Tribunal deemed sufficient to establish what the value of its investment would have been but-for Venezuela's measures. The Tribunal found that the Respondents adduced such evidence (in the form of the sale price for Matesi in 2004) and therefore the Respondents carried their burden of proof.[167]

176. Furthermore, the Respondents allege that the Tribunal did not violate the right to be heard or the right to equal treatment. The Respondents state that the power of a tribunal to reach a decision that differs from the positions taken by the parties is well-recognized. The exercise

[162] *Id.*, paras. 144-146 and footnotes 283 and 284.
[163] Rejoinder, para. 84.
[164] Counter-Memorial, para. 149.
[165] *Id.*, paras. 160-174.
[166] *Id.*, para. 162.
[167] Rejoinder, para. 114.

of that power cannot, without additional factors, constitute a departure from the right to be heard.[168]

177. In this regard, the Respondents refer to the decision on annulment in the case *Klöckner* and state that the committee considered that the tribunal had the discretion to adopt a position that was different from that advanced by the parties. The operative question, according to the committee, was whether the tribunal, in adopting its own position, went outside the legal framework established by the parties.[169]

178. In this case, the Respondents maintain that the Parties had a full, fair and equal opportunity to make submissions on the valuation of Matesi. Hence, it was within the discretion of the Tribunal to adopt the Parties' positions on that issue or a third position based on the evidence before it. According to the Respondents, the Tribunal acted within the legal framework agreed upon by the Parties (by basing the damages on an assessment of the fair market value in light of the evidence on the record) and did not deny the Parties the right to be heard on how that framework should be applied.[170]

179. Moreover, the Respondents stress that the Tribunal's decision to calculate the amount of damages using an alternative methodology, rather than the methodology adopted by the Parties, did not affect Venezuela because the figure produced was no higher than that endorsed by an expert for Venezuela.[171]

5. GROUNDS RELATED TO THE COSTS AWARD REGARDING THE REQUEST FOR RECTIFICATION

i. Failure to State the Reasons on which the Decision on Rectification is Based

180. Tenaris and Talta object to Venezuela's argument that the Tribunal's award of costs in the Decision on Rectification contradicts its decision on costs in the Award. In this regard, the Respondents state that although the Tribunal declined to award costs in the Award because some of Tenaris' and Talta's claims did not succeed, the Tribunal took a different approach

---

[168] Counter-Memorial, paras. 163-174.
[169] *Id.*, para. 167 (referring to *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 dated 3 May 1985 (RLA-164), para. 91); Rejoinder, para. 106.
[170] Counter-Memorial, para. 169; Rejoinder, para. 107.
[171] Counter-Memorial, para. 174; Rejoinder, paras. 110, 115-117.

in the rectification phase, where all of Venezuela's requests failed. Therefore, the Tribunal's differing approach to two distinct situations presents no contradiction.[172]

181. In addition, the Respondents cite the Tribunal's conclusion in the Decision on Rectification that, since the request was not filed in conformity with the intent and the plain meaning of the terms of Article 49(2) of the ICSID Convention, the Tribunal deemed it appropriate that Venezuela paid Tenaris' and Talta's costs related to the rectification proceeding. The Respondents argue that Venezuela's disagreements with the appropriateness of the Tribunal's reasoning do not amount to a failure by the Tribunal to state reasons.[173]

ii. Serious Departure from a Fundamental Rule of Procedure

182. The Respondents contend that the Tribunal did not depart from any fundamental rule of procedure when awarding costs to Tenaris and Talta in the rectification proceeding.

183. The Respondents object to the Applicant's argument that the Tribunal violated the parties' right to equal treatment by requiring Venezuela to pay the costs related to the rectification proceeding. The Respondents state that the Tribunal acted in conformity with the procedural power under Arbitration Rule 28, which grants discretion to the Tribunal to allocate costs to one of the Parties. Likewise, the Respondents argue that there is no procedural right to equal treatment as regards costs allocation.[174]

184. Moreover, the Respondents consider false Venezuela's premise that the allocation of costs to a party requires a frivolous or abusive conduct by such party (although the Tribunal did find in its decision that the rectification request "was not filed in conformity with the intent and plain meaning" of Article 49(2) of the ICSID Convention).[175]

185. The Respondents claim that the Tribunal itself expressly acknowledged that there were many authorities in support of the prevailing party receiving its costs and expenses from the opposing party.

186. In sum, the Respondents state that Venezuela's argument is not about departure from a fundamental rule of procedure, but rather a disguised attempt to appeal the costs award.[176]

---

[172] Counter-Memorial, paras. 150-152; Rejoinder, para. 89.
[173] Counter-Memorial, para. 152.
[174] *Id.*, paras. 175-176. *See also* Rejoinder, paras. 118-119.
[175] Counter-Memorial, para. 177 (internal quotation marks omitted, citing para. 113 of the Decision on Rectification).
[176] *Id. See also* Rejoinder, para. 118.

V. THE PARTIES' REQUESTS FOR RELIEF

A. THE APPLICANT'S REQUEST FOR RELIEF

187. In its Reply, Venezuela requests as follows:

> "The Republic respectfully requests that the *ad hoc* Committee annul the Award in whole and/or in part as the case may be on the grounds set forth in Article 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention.
>
> The Republic respectfully requests that Tenaris and Talta be ordered to bear the costs and expenses incurred by Venezuela in the course of this proceeding." [Committee's translation][177]

B. RESPONDENTS ON ANNULMENT'S REQUEST FOR RELIEF

188. In their Rejoinder, Tenaris and Talta request as follows:

> "The [Respondents] accordingly request that the *ad hoc* Committee:
>
> (a) REJECT Venezuela's request for annulment in its entirety; and
>
> (b) ORDER that Venezuela bear all costs and expenses incurred by the [Respondents] in connection with the present annulment proceedings, including the fees of the Centre, the costs and fees of the ad hoc Committee, and the [Respondents]' legal fees and expenses."[178]

VI. THE COMMITTEE'S ANALYSIS

A. APPLICABLE STANDARD

189. The ICSID annulment regime is governed by Article 52 of the Convention, and, insofar as it is necessary to interpret it and bearing in mind that the Convention is a treaty, the Committee

[177] Reply, paras. 277-278.
[178] Rejoinder, para. 123.

will abide by the provisions of the Vienna Convention on the Law of Treaties ("**Vienna Convention**") which is widely regarded as a compilation of customary international law.

190. The Committee also deems relevant the principles informing the annulment proceeding asserted by annulment committees and summarized by the Secretariat:

> "(1) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (2) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* Committee is limited; (3) *ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own; (4) *ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly; and (6) an *ad hoc* Committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* Committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full."[179]

191. The Committee notes that both Parties admit that the annulment proceeding is an extraordinary proceeding limited to the grounds set forth in Article 52. However, the Parties disagree on how to interpret and apply the grounds for annulment invoked by the Applicant. In particular, while the Applicant states that Article 52 should be interpreted neither expansively nor restrictively, the Respondents insist that the interpretation should be consistent with the objects, purpose and terms of Article 52, which were expressly devised to limit the scope of review. On the other hand, the Parties disagree on whether annulment committees have a duty to annul the award where one of the grounds of Article 52 is identified (Applicant) or whether they have discretion to do so (Respondents). The Committee will analyse the grounds below but notes that the disagreement on whether the Committee has discretion to annul the Award in case it upholds one of the grounds is an issue to be addressed only if necessary.

---

[179] Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016 ("**Background Paper**"), para. 74.

1. MANIFEST EXCESS OF POWERS

192. First, Venezuela bases its Application on the manifest excess of powers by the Tribunal. The Parties disagree on the scope of the adjective "manifest" qualifying "excess." The ordinary meaning of this adjective is "exposed, patent, clear".[180] Applied to "excess," the adjective "manifest" indicates that it must be patent and clear. This is the meaning on which most annulment committees agree as summarized by the Background Paper: "The 'manifest' nature of the excess of powers has been interpreted by *most ad hoc* Committees to mean an excess that is obvious, clear or self-evident, and which is discernable without the need for an elaborate analysis of the award."[181] It should be noted that, in some cases, committees have understood the meaning of "manifest" to require that the excess be "serious or material to the outcome of the case."[182] The seriousness of the excess is explained by the exceptional nature of annulment, a measure which should not be resorted to unless the excess had serious consequences for one of the parties.[183]

193. The Applicant has based its allegations on the interpretation of "manifest" by the annulment committee in the *Occidental* case. In said case, the committee agreed with the parties that "manifest excess" means "perceived without difficulty." Nevertheless, in the following paragraph, in reliance on *Pey Casado*, it added that "[t]he above said, 'manifest' does not prevent that in some cases an extensive argumentation and analysis may be required to prove that the misuse of powers has in fact occurred."[184] In the Committee's opinion, an issue requiring such extensive arguments and analysis could rarely be perceived without difficulty. The Committee will adopt the ordinary meaning of "manifest excess," that is, a clear and patent excess under the rules of interpretation of treaties of the Vienna Convention.

2. FAILURE TO STATE THE REASONS ON WHICH THE AWARD IS BASED

194. Second, the Applicant invokes as grounds for annulment the failure to state reasons. The Parties disagree on *(a)* the implications of the failure to state reasons in Article 52(1)(e) not

---

[180] Diccionario de la lengua española de la Real Academia Española, first entry of the adjective "manifiesto, ta". http://dle.rae.es/?id=OdqKbQC.
[181] Background Paper, para. 83 (emphasis added by the Committee, internal quotations omitted). The Committee refers to the cases cited therein.
[182] *Id.*, para. 83.
[183] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment dated 22 March 2013, para. 102.
[184] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment dated 2 November 2015 (RLA-238) ("***Occidental***"), para. 59.

being qualified by a restrictive adjective, such as manifest or serious; *(b)* whether the award should deal with every question submitted by the Parties to the Tribunal, including the reasons for reasons; and *(c)* whether contradictory reasons call for annulment of the award even though the Tribunal's reasoning can be followed.

195. The Committee considers that the lack of adjectives qualifying the grounds of failure to state reasons does not imply that the text of Article 52(1)(e) should be broadly interpreted. Like the rest of the Convention, it should be neither broadly nor narrowly interpreted. The grounds qualified by "manifest," "serious" or "fundamental" are limited in their interpretation by the ordinary meaning of these adjectives only.

196. The issue of whether a tribunal should deal with every question submitted by the parties is based on Article 48(3) of the Convention. Undoubtedly, the tribunal should do so, and, should it fail to fulfil this duty, the parties may request that it deal with any undecided question, but this is not an issue to be determined by an annulment committee. As stated in the Background Paper:

> "While a Tribunal must deal with every question submitted to it, the drafting history indicates that a failure to do so should not result in annulment. Instead, the ICSID Convention provides another remedy where a Tribunal fails to address a question: the dissatisfied party may request that the same Tribunal issue a supplementary decision concerning the question not addressed."[185]

197. As to the effect of contradictory reasons, what really matters is, on the one hand, whether the contradiction is such as to prevent the tribunal's reasoning from being understood, and, on the other hand, whether the issue subject to this reasoning is material to the tribunal's decision. If the tribunal's reasoning can be followed, then reasons may not be genuinely deemed contradictory.[186]

---

[185] Background Paper, para. 103 (internal quotations omitted).

[186] "[A]nnulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations." *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie générale des eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002, para. 65.

3. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

198. Third, the Applicant claims a serious departure from a fundamental rule of procedure. That is to say, the departure must be serious, and the rule has to qualify as fundamental. It is not enough for the tribunal to have departed from a rule of procedure, or for the departure to have occurred if it is not serious. Both the serious circumstances of the departure and the fundamental nature of the rule must exist.

199. The Parties disagree on whether the Applicant must show that such departure was material to the outcome of the case or whether it is enough to prove that the departure had the potential to produce an effect on the award. The Committee points out that annulment committee decisions are not uniform on this matter. The Background Paper indicates that, in some cases, annulment committees have required that the departure needs to have an impact on the outcome of the award to be serious.[187] On the other hand, Professor Schreuer, in his analysis of the meaning of "serious" in the practice of annulment committees, concludes: "[i]n order to be serious the departure must be more than minimal. It must be substantial. In addition, the cases confirm that this departure must potentially have caused the tribunal to render an award 'substantially different from what it would have awarded had the rule been observed.'"[188]

200. The Committee agrees that it is enough to prove that the serious departure could potentially have a material impact on the outcome of the award. As pointed out by the *Tulip* committee cited by the Applicant in support of its position:

> "To require an applicant to prove that the award would actually have been different, had the rule of procedure been observed, may impose an unrealistically high burden of proof. Where a complex decision depends on a number of factors, it is almost impossible to prove with certainty whether the change of one parameter would have altered the outcome."[189]

---

[187] Background Paper, para. 100.
[188] Christoph H. Schreuer *et al*., *The ICSID Convention: A Commentary*, 2nd edition (Cambridge University Press, 2009), p. 982 in para. 287.
[189] *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment dated 30 December 2015 (CLA-126) ("***Tulip***"), para. 78. Cited in the Reply, para. 66.

201. In any event and to conclude these considerations on the applicable standard, the determination of whether a fundamental rule of procedure has been breached is factual in nature and involves an examination of the conduct of the proceeding before the tribunal.[190] Thus, the seriousness of the departure should be assessed on a case-by-case basis.

202. The Committee will bear these considerations in mind when analysing the Parties' allegations.

B. GROUNDS RELATED TO THE DECISION ON JURISDICTION

203. The Applicant alleges that, by determining that it had jurisdiction over the dispute, the Tribunal manifestly exceeded its powers, seriously departed from a fundamental rule of procedure and failed to state the reasons for its decision.

1. MANIFEST EXCESS OF POWERS

204. The Applicant's allegation of manifest excess of powers by the Tribunal is founded on the Tribunal's failure to apply to the facts of the case the criteria it had adopted itself on the basis of the applicable Treaties in order to determine whether the corporate seat of Tenaris was in Luxembourg or the corporate seat of Talta was in Portugal. Venezuela agrees with the Tribunal's findings on the interpretation of the definition of "investor" in both Treaties but disagrees as regards its application by the Tribunal to the case-specific facts.

205. In its arguments, Venezuela reviews the Tribunal's reasoning in its examination of evidence point by point, but neither questions the limitations of this Committee to re-evaluate the evidence submitted nor considers how an excess of powers can be manifest if the Committee is required to weigh evidence again.

206. Venezuela invites the Committee to conduct "a thorough analysis of the jurisdiction erroneously assumed by the Tribunal, from the outset." [Committee's translation][191] In the Applicant's view, "in light of the evidence on the arbitration record, the application of the legal criteria established by the Tribunal itself could only have led it to conclude that it did not have jurisdiction to hear the dispute.".[192] [Committee's translation]

---

[190] Background Paper, para. 100.
[191] Memorial, para. 28.
[192] Reply, para. 158.

207. The Committee notes that, pursuant to the Arbitration Rules and consistently with the purpose of Article 52 of the Convention, it is for the Tribunal, not the Committee, to weigh the evidence adduced.[193] Annulment committees agree on this point. It would not be proper for this Committee to re-evaluate the evidence, nor is it in a position to do so without addressing the merits.[194] In *Rumeli v. Kazakhstan*, the annulment committee held that "an *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties."[195]

208. The Applicant contends that it is not requesting that evidence be reconsidered, but, "on the contrary, that the elements that the Tribunal itself claimed that it had to demonstrate, were not demonstrated, and that the requirements of both 'place of constitution' and 'seat' not having been met by both Tenaris and Talta, they are not 'nationals' of Luxembourg and Portugal, respectively, the Tribunal thus lacking jurisdiction." [Committee's translation][196] Notwithstanding the Applicant's arguments, for the Committee to be able to decide whether these requirements have been proved, it would have to weigh the substance of the evidence submitted and reach its own conclusion.

209. Venezuela has clarified that the excesses of powers by the Tribunal "are manifest as any reasonably informed third party reading the Award, no inquest being necessary, may readily understand that the Tribunal established that it had to necessarily demonstrate certain parameters in order to determine that both a place of constitution and a seat existed (in accordance with the requirements laid down by both Treaties), but deemed as proven facts of which it had no evidence whatsoever, and, consequently, determined that it had jurisdiction when it did not." [Committee's translation][197] It is enough to dwell on the extensive allegations on this issue to realise that a simple reading of the Award by the Committee or a third party may not arrive at the definite conclusions reached by the Applicant. The fact that the Tribunal "has no evidence whatsoever" itself calls for considerable knowledge of the evidence which is or not on record.

---

[193] Arbitration Rule 34(1).
[194] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment dated 1 March 2011 (CLA-121), para. 214.
[195] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment dated 25 March 2010 (CLA-120) ("***Rumeli v. Kazakhstan***"), para. 96.
[196] Reply, para. 159.
[197] *Id.*, para. 160.

210. In the Reply, the Applicant contends that, "pursuant to Article 52(1)(b) of the ICSID Convention, the ground of manifest excess of powers is established insofar as a tribunal has made a decision outside its jurisdiction or has failed to exercise its jurisdiction in full." [Committee's translation][198] The Respondents interpret this assertion to the effect that Venezuela alleges that a jurisdictional error would in itself entail an excess of powers that warrants annulment of the Award.

211. Although it is not obvious that the text cited from the Reply has the meaning assigned by the Respondents, the Committee, for the avoidance of doubt, clarifies that Article 52 does not distinguish between the effect of jurisdictional errors and errors concerning the merits of the dispute. Such a distinction is alien to the text of Article 52 as several annulment committees have stated.[199] That is to say, in the event of an excess of powers in the decision on jurisdiction, that excess must be as manifest as in the case of the merits. The Committee may not disregard a term included in an article of the ICSID Convention, depending on the subject of analysis.

212. In consideration of the foregoing and reaffirming that it is for the Tribunal to weigh evidence and be the judge of its own competence, the Committee finds that in this respect the Tribunal did not manifestly exceed its powers in its decision on jurisdiction.

213. Venezuela also alleges that, in its decision on jurisdiction, the Tribunal manifestly exceeded its powers by failing to apply the proper law. According to Venezuela, the dispute resolution clauses of both Treaties fail to show "the distinction made by the Tribunal between a *renvoi* to municipal law for the purpose of nationality requirements of place of constitution *vis-à-vis* seat." [Committee's translation][200] Venezuela contends that this distinction is inadmissible and argues that the requirements of *seat* and *siège social* identified by the Tribunal are those imposed by municipal law, not by international law as found by the Tribunal in the Award.

214. In other words, the issue to be determined by the Committee is whether the Tribunal applied international law where the national law of Portugal or Luxembourg was the proper law. First, the Committee notes that the Applicant does not object to the notions of *seat* and *siège social* identified by the Tribunal as it does in the first part of these considerations on

---

[198] *Id.*, para. 129.
[199] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment dated 21 March 2007 (RLA-177), para. 54; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment dated 5 June 2007 (RLA-179), paras. 118-119.
[200] Reply, para. 163.

the jurisdiction of the Tribunal. In that phase, the Applicant alleges that the Tribunal failed to weigh the evidence adduced in view of the requirements for the notions of *seat* and *siège social* to exist.

215. The Tribunal determined that, on the basis of the Treaties, the terms *seat* and *siège social* were to be construed under international law, since the Treaties make no *renvoi* to national laws regarding this issue as opposed to the terms "citizen", company "constituted", "nationals", companies that "are constituted and operating" where there is a *renvoi* to national laws. In the case of *seat* and *siège social*, the Tribunal merely considered national laws as "background" and supplementary material to the interpretation of these terms,[201] and insisted that "the interpretation of the terms '*siège social*' and '*sede*' remains a matter of international law alone (there being no express *renvoi* to municipal law for either term) […]."[202] The Tribunal considered national laws in connection with Article 32 of the Vienna Convention "in order to confirm the interpretation at which it has arrived pursuant to Article 31," maintaining that, on such basis, "it may have regard to municipal law (*e.g.*, in order to ensure that the interpretation under Article 31 is not impossible, or unworkable as a practical matter)."[203] Having regarded the "extensive evidence and submissions on Luxembourg, Portuguese and Venezuelan law" as supplementary material, the Tribunal arrived "at the firm conclusion that there is nothing as a matter of Luxembourg, Portuguese or Venezuelan law that causes it to re-consider the interpretation of '*siège social*' and '*sede*' to which the application of Article 31 of the Vienna Convention gives rise."[204]

216. In response to Venezuela's allegation that the definitions of "corporate investor" in the Treaties were to be construed pursuant to Article 25 of the ICSID Convention, the Tribunal reaffirmed that "the interpretation of the terms '*siège social*' and '*sede*' remains a matter of international law alone (there being no express *renvoi* to municipal law for either term)[…]."[205] According to Venezuela, there is nothing that "puts domestic law in tension with international law, so that the latter has to prevail over the former." [Committee's translation][206] In the Committee's opinion, it is not a question of one law being in tension with respect to another in order to determine the proper law. The Tribunal applied national

[201] Award, para. 169.
[202] *Id.*
[203] *Id.*, para. 170.
[204] *Id.*, para. 171.
[205] *Id.*, para. 169.
[206] Reply, para. 164.

law in its interpretation only as a supplementary element under Article 32 of the Vienna Convention. The Committee finds that the Tribunal did not exceed its powers by applying international law to the interpretation of the terms *seat* and *siège social* in the Treaties.[207]

2. FAILURE TO STATE THE REASONS ON WHICH THE AWARD IS BASED

217. According to Venezuela, "it is not possible to understand how the Tribunal, having identified the premises correctly, reached conclusions… which are plainly contradictory therewith." [Committee's translation][208] Second, the Applicant also asserts that the Respondents' argument whereby "the Tribunal had considered the location of board meetings as just one of a number of factors in determining the seat of effective management in Luxembourg"[209] is groundless [Committee's translation].

218. In the Committee's view, both issues are related, and the answer to the first depends on whether the board meetings were actually identified as one factor among others in order to determine the place of effective management.

219. The Tribunal analysed *seat* and *siège social* as defined in the Treaties and concluded the analysis of the text by stating: "if '*siège social*' and '*sede*' are to have any meaning, and not be entirely superfluous, each must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat. And this leads one to apply the other well-accepted meaning of both terms, namely 'effective management', or some sort of actual or genuine corporate activity."[210] The Tribunal continued analysing the text of the Treaties in view of their objects and purposes: "Nothing in the evident objects and purposes of either Treaty suggests that a purely formal test of 'registered office' or 'statutory office' is required. And nothing suggests that a requirement of a genuine link would somehow undermine any object or purpose. On the contrary, if anything, requiring some

---

[207] The Committee is aware that, in the *CFHL* case discussed by the Parties at the Hearing, the tribunal considered that "it would not be consistent to use a completely different principle to define 'siège social' when it is not put into question that both conditions are cumulative. The character of Investor is a single capacity and cannot depend on two different sources." Tr. Day 2, 246:11-16 (citing *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award dated 22 June 2017 (RLA-266) ("***CFHL***"), para. 210). The tribunal's finding in such case does not imply that the Tribunal's interpretation in the Award was erroneous; it merely shows that the text of the Treaty may be read differently. The tribunal itself noted that the definition of company in Article 1(2) of the Cameroon treaty was ambiguous (award, para. 205). It is not the function of the Committee to choose which of the interpretations could be more convincing.
[208] Reply, para. 171.
[209] *Id.*, para. 174.
[210] Award, para. 150.

genuine link with one Contracting State would appear to be consistent with the bilateral / reciprocal nature of each Treaty."[211]

220. Then, the Tribunal indicates that, "[h]aving arrived at a meaning for both terms in the context in which they appear here, there is then a question as to the precise test that each imports."[212] To that effect, the Tribunal considers it critical "to take into account the actual nature of each company, and its actual activities."[213] Given the Respondents' nature of holding companies, "the Tribunal considers that the test of actual or effective management must be a flexible one, which takes into account the precise nature of the company in question and its actual activities."[214] The Tribunal distinguishes between the existence of Tenaris as a holding company and the existence and operation of its subsidiaries located outside Luxembourg. The Tribunal finds: "Accordingly, the Tribunal considers Venezuela's focus upon the extent of activity of, and net sales generated by, Tenaris' subsidiaries outside Luxembourg, and the number of subsidiaries Tenaris has in countries other than Luxembourg, is misconceived. It is Tenaris' own operation within Luxembourg that must be examined for the purposes of the Luxembourg Treaty."[215]

221. Next, the Tribunal refers to the organization and structure of Tenaris in accordance with the Luxembourg Registry of Commerce and Corporations and its articles of association and highlights a number of "key points"[216] with respect to the actual management of Tenaris and its business in Luxembourg. Among others, the Tribunal mentions the fact that annual general meetings of shareholders and board of directors' meetings are held in Luxembourg, that its books and records are kept in Luxembourg, and that its auditors are Luxembourgish. As to other criteria raised by Venezuela by reference to Luxembourg law, the Tribunal agrees with the Respondents that they are irrelevant or inaccurate, as "the test to be applied in each Treaty here is ultimately one of international law, not Luxembourg law."[217] Nonetheless, "for completeness,"[218] the Tribunal explains the reasons why the criteria raised by the Applicant are dismissed.

---

[211] *Id.*, para. 153.
[212] *Id.*, para. 197.
[213] *Id.*, para. 198.
[214] *Id.*, para. 200.
[215] *Id.*, para. 204 (internal footnotes omitted).
[216] *Id.*, para. 207.
[217] *Id.*, para. 217.
[218] *Id.*

222. The Tribunal conducts the same exercise with regard to Talta and finds as to both companies that, in view of the nature of each company and the Treaty provisions, both companies have shown that their respective seats are in Luxembourg and Portugal.

223. The Committee has thoroughly reviewed the Tribunal's reasoning. In the Committee's opinion, the Tribunal's considerations can be followed without difficulty and have a logical sequence. They are determined by the application of international law to the terms *seat* and *siège social*, as well as the Respondents' nature of holding companies.[219] It is noteworthy that the evidence analysed by the Tribunal goes beyond board meetings, and, thus, the Applicant's emphasis on such lack of evidence should be placed in the broader context analysed by the Tribunal. Therefore, the Committee determines that the Tribunal did not fail to state reasons.

3. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

224. The Applicant's allegations are grounded on the premise that the Tribunal weighed evidence arbitrarily on the basis of mere presumptions and shifted the burden of proof to the respondent in the arbitral proceeding. On the first point, the Applicant specifies that "it does not question the Tribunal's findings with respect to a specific evidentiary element, but rather that the Tribunal presumed facts that Tenaris and Talta were to prove in order for it to assert its jurisdiction but they did not demonstrate them." [Committee's translation][220] According to the Applicant, the Tribunal thus violated its right of defence and the equality of arms between the Parties.

225. The shortage of evidence about which the Applicant complains is difficult to perceive without the Committee evaluating the sufficiency of what was proved and, ultimately, the value attached by the Tribunal to the evidence submitted, which is beyond the scope of competence of the Committee. The Committee refers to its considerations on failure to state reasons in the foregoing section.

---

[219] The Committee notes that the tribunal in the *CFHL* case, which was discussed by the Parties at the Hearing (*see supra* note 207), agrees with the Tribunal on taking into consideration the nature of holding companies as well as on conducting a flexible analysis of the criteria in order to determine the place of actual management. Award, paras. 242-243.

[220] Reply, para. 125.

226. As to the second point, the Applicant refers to the jurisprudence of the International Court of Justice and arbitral tribunals to demonstrate the effectiveness of the principle whereby it is for the party alleging a fact to show its existence. The Parties do not disagree on this point. As stated by Tenaris and Talta: "It is undisputed that the Claimants had the burden of proving facts necessary for the Tribunal to assert jurisdiction, just as any party bears the burden of proving the facts it asserts."[221]

227. Venezuela's allegation is based on that, "in the instant case, the Tribunal shifted the burden of proof when contending that 'the Respondent has been singularly unable to identify and demonstrate any other corporate seat for Tenaris, outside of Luxembourg'. It was not for the Republic to prove that Tenaris had other corporate seats, but for Tenaris to show that its corporate seat was indeed in Luxembourg." [Committee's translation but for the Award quotation][222]

228. The Committee observes that Venezuela's allegation is based on paragraph 216 of the Award whereby "the Tribunal notes that the Respondent has been singularly unable to identify and demonstrate any other corporate seat for Tenaris, outside of Luxembourg. It was not until its Rejoinder that it posited Argentina, but in the Tribunal's view this has no foundation. In particular, the Respondent has been unable to point to any consistent acts of management of Tenaris itself (as distinct from its subsidiaries) taking place elsewhere."[223] This paragraph follows considerations by the Tribunal based on the evidence on record that lead the Tribunal to conclude that "the 'effective' centre for such activity was Luxembourg."[224] The Tribunal lists the pieces of evidence and only later refers to the shortcomings in Venezuela's allegations. As it clearly follows from the text of the Award, Venezuela had raised its arguments against the Respondents' claims and these deserved a response from the Tribunal. In its context, the paragraph cited does not entail a demand by the Tribunal for Venezuela to submit evidence, but rather the other side of each party proving the facts that it alleges. The Tribunal addressed the criteria asserted by Venezuela, rejected them because they were based on Luxembourg law and considered them irrelevant or inaccurate, but still explained each one of them. The Committee finds that the Tribunal neither shifted the burden of proof nor breached any fundamental rule of procedure.

[221] Rejoinder, para. 95 (internal footnotes omitted).
[222] Reply, para. 117.
[223] Award, para. 216.
[224] *Id.*, para. 205.

C. GROUNDS RELATED TO THE DECISION ON EXPROPRIATION

1. MANIFEST EXCESS OF POWERS

229. Venezuela bases this ground on the fact that the Tribunal failed to apply the proper law to the dispute, analysed expropriation only from the standpoint of Venezuelan law, and applied neither international law nor the Treaty provisions for dispute resolution.

230. This ground is related to the failure to state reasons to be addressed by the Committee *infra*. The Committee highlights, in particular, that the proper law applicable to expropriation under the Treaties is Venezuelan law, and there is no dispute that this was the law applied by the Tribunal. As stated *infra*, the Tribunal limited itself to follow the Treaty provisions on the application of Venezuelan law in order to determine whether the expropriation was lawful.

2. FAILURE TO STATE THE REASONS ON WHICH THE AWARD IS BASED

231. The Applicant alleges that the Tribunal failed to state reasons as it did not explain how the breach of requirements under Venezuelan law amounts to a breach of the Treaties, and "why it considers that the phrase '*in accordance with the legislation in force*' is an 'explicit' reference to a version of Venezuelan law under which court remedies that the Claimants could have availed themselves of would not be considered." [Committee's translation][225] The Applicant further alleges the lack of explanation in the comparisons made by the Tribunal with the cases *Generation Ukraine* and *ADC v. Hungary*. According to Venezuela, "paragraphs 490 to 492 of the Award are a typical case where it is not possible to understand how the Tribunal proceeded from Point A to Point B and eventually to the conclusion that, for those reasons, there was an expropriation in violation of the Treaties."[226] [Committee's translation]

232. The Committee has reviewed the Tribunal's considerations on the expropriation and, in particular, the paragraphs highlighted by Venezuela in its allegations. The Tribunal's considerations must be analysed based on the text of the Treaties. The Treaties require that expropriation be carried out under "legal procedures" and "in accordance with the legislation in force", respectively. The Tribunal carefully analysed the requirements for an

[225] Memorial, para. 122. Italics in the original.
[226] *Id.*, para. 121.

expropriation to comply with Venezuelan law, including payment of fair compensation.[227] The Committee does not find it difficult to follow the reasoning of the Tribunal, no additional reasons being necessary to explain the passage from Venezuelan to international law. An instrument of international law may require compliance with certain requirements under domestic law, as in the present case. In the event that such requirements are not met, the breach of domestic law translates into a breach of international law. The Committee is aware of the fact that not every breach of domestic law is a breach of international law, but in this case it is the Treaties that provide that a breach of domestic law results in a breach of international law.

233. In paragraph 494 of the Award "[t]he Tribunal further concludes that the failure of Venezuela to observe the requirements of its own nationalisation legislation is sufficient to constitute a breach of Article 4(a) of the Portuguese Treaty, which has an explicit *renvoi* to Venezuelan domestic law through the language: '*in accordance with the legislation in force.*'"[228] In the next paragraph, the Tribunal expresses that it is satisfied that "Venezuela has breached the requirement of Article 4(1)(b) of the Luxembourg Treaty to the extent that its conduct was not: '*in accordance with legal procedures.*'"[229]

234. These conclusions follow the enumeration of violations of Venezuelan law. The Tribunal links the violation of Venezuelan law to the provisions of the Treaties. The latter were applied by the Tribunal in reference to Venezuelan domestic law. The Committee does not find any lacuna in the Tribunal's reasoning to connect the Treaties to the Tribunal's findings in this regard.

235. As previously indicated, the Applicant argues that the Tribunal failed to explain why, in referring to Venezuelan law, it only applies certain provisions and does not include the judicial remedies to which the Respondents could have resorted. As stated in the Award, "Venezuela urges the Tribunal to have in mind […] that an investor cannot assume that a lack of diligence in pursuing local remedies will have no bearing upon the success of any eventual treaty claim that it might seek to bring."[230] The Tribunal considered this argument and pointed out that "Venezuela had put in place a 'tailor made' process, which Venezuela

[227] Award, paras. 481 *et seq*.
[228] Award, para. 494. Italics in the original.
[229] *Id.*, para. 495. Italics in the original.
[230] *Id.*, para. 490.

itself then chose not to follow,"[231] adding that Venezuela could not expect that "the obligation to observe those requirements [lay] solely on the investor's shoulders."[232]

236. The Applicant has critically referred to the use of precedents by the Tribunal, either because it refers to only a few or does not explain in which way they differ from or are similar to the present case. The Committee notes that nothing in the ICSID Convention requires tribunals to rely on precedents for their decisions or to refer to them. However, it is apparent that tribunals (and annulment committees) cite frequently previous decisions and case-law trends on certain matters may be observed. The persuasive value of certain precedents has often been confirmed by ICSID arbitral tribunals. Notwithstanding the above, it seems clear to the Committee that the use (or lack of use) of precedents may not be a ground for annulment, as apparently claimed by the Applicant when stating that: "The Tribunal merely notes, in a single paragraph, that the present case is similar to *ADC v. Hungary* without providing any reason for such a conclusion, again incurring in failure to state reasons."[233] [Committee's translation] The Applicant further alleges that the Tribunal compares this case to certain aspects of *Generation Ukraine*, but fails to explain the reasons for such comparison. The Committee will not discuss how the Tribunal took into account the relevance or the persuasive value of those cases. The Committee will merely note the limited scope of the precedents used by the Tribunal in the underlying arbitration in order to establish a ground for annulment.

237. In conclusion, the Committee dismisses the Applicant's allegations concerning a failure to state reasons on the decision on expropriation.

D. GROUNDS RELATED TO THE DAMAGE ASSESSMENT METHODOLOGY

1. MANIFEST EXCESS OF POWERS

238. The Committee considers and dismisses in section VI(D)(3) *infra* that the use by the Tribunal of a methodology not advocated by the Parties constitutes —in the circumstances of this case— a violation of a fundamental rule of procedure. The same considerations apply herein. The Applicant relies on a case to which refers the annulment committee in *Wena Hotels* and on another case of the French Court of Cassation. In the latter, the Court decided that

[231] *Id.*, para. 492.
[232] *Id*.
[233] Memorial, para. 124.

arbitrators might only rule on what they had been authorized to. A basic maxim which could be hardly questioned.

239. As regards *Wena Hotels*, the reference is to a citation of a case about boundary lines in the decision on annulment. The committee cites it to explain the concept of manifest excess of powers in general terms. Clearly, when a tribunal sets boundaries without consulting the parties is exceeding its powers; it is a good example that illustrates the concept of excess. However, in the underlying arbitration, the purpose was not to set boundaries but merely to assess damages. Neither of those two cases cited by the Applicant is of assistance to the Committee.

240. Although there was some agreement between the Parties on the DCF method, the Tribunal pointed out that, as it was used by the Parties' experts, it yielded extreme results that the Tribunal found barely useful according to its own considerations. Like other tribunals cited by the Committee have done, the Tribunal searched for elements in the allegations and evidence presented by the Parties that helped it render a decision. As concluded by the Committee, the Tribunal acted within its discretion in assessing damages and did not manifestly exceed its powers.

241. The Applicant further adduces the alleged double counting of damages as evidence of manifest excess of powers. According to the Applicant, the Tribunal's mandate did not include "granting unjust enrichment in favor of Claimants."[234] [Committee's translation] The Committee shall treat this allegation together with the ground of failure to state reasons to which it is closely related.

2. FAILURE TO STATE THE REASONS ON WHICH THE AWARD IS BASED

i. Failure to Explain the Tribunal's Approach or Methodology

242. According to Venezuela, the Tribunal does not precisely define the valuation approach it uses. Under the Treaties, the Tribunal should calculate the Fair Market Value. The Committee notes that the Tribunal, after discarding the DCF and market multiples valuation methods, cites Kantor and considers that "[t]he best evidence of a company's value, or course [*sic*], may be the actual price received in an arm's-length transaction for the sale of an interest in that very business."[235] Then, it lists the conditions that the agreed price must meet in order

[234] *Id.*, para. 169.
[235] Award, para. 555.

to express the Fair Market Value. The Tribunal concludes its analysis of the sale of Matesi in these terms:

> "Having considered all of the evidence before it, the Tribunal is satisfied that the resulting transaction was freely entered into by the buyers and seller, at arm's length, in a reasonably open market, with both the seller and the buyers having reasonable knowledge of the relevant facts and other market circumstances. The Tribunal is, thus, satisfied that the agreed price of US$ 60.2 million for Talta's 50.2% interest in Matesi is an appropriate reflection of the Fair Market Value of Talta's interest in the Matesi plant."[236]

243. In view of the Tribunal's reasoning, it is evident that the Tribunal adopts the arm's-length sale approach. The Committee does not deem that it was necessary for the Tribunal to explain beyond the statements in this paragraph to know which approach it used.

ii. The Tribunal Failed to Explain why it Missed Key Steps in Calculating Damages

244. The Applicant refers to two steps, both relating to Matesi's debt. According to the Applicant, the Tribunal did not take into account the company's debt and included the Talta Loan in the calculation of damages. The Committee considers them together.

245. The Tribunal had decided that the Talta Loan was an investment, separate from the acquisition of the company, and had been expropriated. The Tribunal explained:

> "Turning briefly to the issue of the Talta Loan, the Tribunal has given careful consideration to the arguments of Respondent to the effect that this loan was non-performing, or was never intended to be repaid, or that the US$ 27.1 million remaining as unpaid on Matesi's books should not be considered an investment – or, if it is, it should be excluded from the calculation of compensation, because it amounts to double counting.
>
> As set out earlier, the Tribunal has concluded that, pursuant to the Investment Agreement, Talta had committed to advance an

[236] *Id.*, para. 566.

> additional US$ 60 million partially to finance the purchase of the Posven assets and to contribute to the costs of refurbishment. It is thus satisfied that the outstanding balance of the Talta Loan – whether it is considered still to be a loan or, instead, a contribution to the equity of Matesi – represents a legitimate investment by Talta for which Talta must be compensated."[237]

246. The Tribunal lists the Applicant's arguments and, in the Committee's view, its reasoning can be followed. According to the Tribunal, the Talta Loan represented an additional investment to purchase the Posven assets and to contribute to the costs of refurbishment of Matesi. The issue was again discussed as part of the Request for Rectification. The Tribunal merely referred to its statements in the Award and concluded: "The double-counting issue was thus addressed and rejected in the Tribunal's Award."[238]

247. In light of the foregoing, the Committee finds that the Tribunal did not miss any key steps in the calculation of damages, as claimed by the Applicant, and that nothing in the Tribunal's decision leads the Committee to conclude that such decision entailed an unjust enrichment of the Respondents since the Tribunal considered the Talta Loan to be an additional investment.

iii. The Contradictions in the Tribunal's Analysis

248. The Applicant alleges that contradictions arise from dismissing the DCF and market multiples approaches on account of their uncertainties or lack of reasonable certainty and, nevertheless, relying on a valuation approach which suffered from the same sort of uncertainties.

249. The Committee notes that the Tribunal analysed in detail these uncertainties:

> "Given the normal need for adjustments during the start-up period, the ups and downs of pellet production and delivery, and the brevity of operation of the plant under its owners, serious questions are presented in using the available data from this short, initial period to construct a DCF model. Similarly, the prospects for future supplies of pellets and iron seem even more problematic. In addition, the

[237] *Id*., paras. 568-569.
[238] Decision on Rectification para. 105.

> sharp decline in CVG FMO pellet production adds another obstacle to the reliable projection of Matesi's future free cash flow – and therefore also for the application of the DCF approach.
>
> Finally, these uncertainties are compounded by other government interventions in the market place, as well as unstable inventories and shortages of a wide range of products in the Venezuelan market. It is not appropriate for this Tribunal to express itself, either positively or negatively, on the policies of the government of Venezuela. It observes, simply that general economic conditions in Venezuela as well as the business situation at Matesi did not, at the time of expropriation – or later – give rise to the likelihood that Matesi's free cash flows could be projected with reasonable certainty."[239]

250. Likewise, it pointed to the uncertainties of the market multiples approach:

> "As the Tribunal has indicated above, in the context of the DCF method, the uncertainties presented in the Venezuelan market at the time of the expropriation presented complex circumstances which render comparisons of the value of Matesi with even ostensibly similar companies in other countries very difficult indeed. The Tribunal is not persuaded that the five companies selected by Claimants' experts as most comparable to Matesi (all of which operate in India and which make somewhat different products with different technologies) provide reliable guidance to the Tribunal on the basis of which it might proceed to achieve a satisfactory finding of value in this case."[240]

251. Venezuela's allegation concerns the Tribunal's observations after concluding that: "[it was] satisfied that the resulting transaction was freely entered into by the buyers and seller, at arm's length, in a reasonably open market, with both the seller and the buyers having reasonable knowledge of the relevant facts and other market circumstances."[241]

---

[239] Award, paras. 526-527.
[240] *Id*., para. 532.
[241] *Id*., para. 566.

252. The Tribunal explains that "a sale closer to the date of expropriation would likely be more fair and more reliable."[242] This would evidently be the case, but this consideration does not mean that the Tribunal considered it as reliable or less reliable than the DCF or the market multiples approach. The Tribunal further explains that the nationalization of the steel industry has contributed to "an environment in which the traditional approaches to establishing fair market value confront serious difficulties." Clearly, this consideration is general and affects all methodologies that seek to calculate the fair market value, including those used by the Parties.

253. The Applicant submits that the Tribunal's reluctance to accept Matesi's sale price is unexplained, as well as why the Tribunal considered it unfair and unreliable. First, the Tribunal uses less categorical terms and says that the date of expropriation would "*likely* be more fair and more reliable."[243] The Tribunal's reluctance is explained by the preceding considerations. The Tribunal had previously explained that using Matesi's sale as a valuation basis does away the uncertainties inherent to future cash flows and of finding comparable companies. The fact that the Tribunal, in its careful reasoning, stated the difficulties following the nationalization of the industry or the time elapsed since the sale of Matesi, does not mean that the uncertainties why the Tribunal rejected the other valuation methods are less valid.

254. The Applicant has referred to the annulment of the award in *Teco v. Guatemala* in support of its allegation of contradictory reasons of the Tribunal. According to the Applicant, this award was annulled because "the reasons to decide on the historical damages claim were not clear, mainly because the expert reports on that matter had not been reviewed, which made it difficult to follow the tribunal's reasoning on such claims."[244] [Committee's translation]

255. The Tribunal reviewed the expert reports but dismissed them for the aforementioned reasons. The Tribunal evaluated degrees of certainty and determined the price that, in its opinion, was more certain. In the Committee's view, the Tribunal indisputably explained that the actual price paid in a sale, even if it dates back a few years, is more certain than a price calculated on the basis of uncertain future cash flows or doubtfully comparable companies *per se* or on account of the markets they operate in.

---

[242] *Id*., para. 567.
[243] Italics added by the Committee.
[244] Memorial, para. 177 (referring to *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment dated 5 April 2016 (RLA-244) ("***Teco v. Guatemala***"), para. 138).

3. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

i. Burden of Proof and Due Process

256. The Applicant alleges that, in rejecting the methodologies advanced by the Respondents, the Tribunal decided that the latter failed to satisfy their burden of proof. Notwithstanding that decision, "instead of dismissing Claimants' damages claim in view of the apparent failure to satisfy their procedural burden, the Tribunal adopted a new methodology never discussed by the parties and ordered payment of damages, replacing the claimants' intended role."[245] [Committee's translation]

257. A distinction should be drawn between the evidence of the damage caused and the assessment of its amount. The expropriation of Matesi is undisputed. The purpose of the arbitration was to determine whether the expropriation had been unlawful and the relevant quantum, if any. After addressing the first issue, the Tribunal stated: "In light of the evidence before it, the Tribunal is in no doubt that Venezuela failed to implement the procedures that it had put in place to effect the nationalisation of SIDOR and its subsidiaries and, specifically, Matesi."[246] The Tribunal based its decision on Venezuela's liability on the evidence produced in the context of the proceedings. The next step is to determine the quantum of the damage established. In the Committee's view, the Tribunal did not "replace the claimants' intended role", in terms of burden of proof. Upon determining the quantum, the facts are established. The issue raised by Venezuela is the Tribunal's discretion to calculate damages, which is addressed *infra*.

ii. Violation of the Parties' Right to be Heard

258. The Applicant claims that "the opportunity to discuss and argue about the damages methodology to be adopted by the Tribunal is essential because, as acknowledged by several *ad hoc* committees, the use of a methodology different from that advanced by the parties is a substantial defect that changes the outcome of the case."[247] [Committee's translation] In turn, the Respondents argue that "it was within the discretion of the tribunal to adopt the Parties' positions on that issue or a third position based on the evidence before it, even if it

[245] *Id.*, para. 159.
[246] Award, para. 493.
[247] Memorial, para. 162.

did not choose to solicit additional submissions on the position eventually adopted."[248] According to the Respondents, "[a] tribunal is not required to submit its chosen methodology to the parties for advance comment. All that a Tribunal is required to do is to render a damages award that fits within the applicable legal framework […]"[249]

259. In the Award, the Tribunal notes that the experts agree on the definition of fair market value. Also, there is some consensus —at least superficially— among the experts as regards the appropriate methodology (DCF). However, whereas Venezuela's experts concluded that Talta's interest in Matesi was nil, Tenaris' and Talta's experts calculated such interest —and therefore the damage payable by Venezuela— at USD 239 million. In view of this discrepancy and the market circumstances in Venezuela, the Tribunal stated that it had "carefully considered both the DCF and 'market multiples' approaches, as put forth and then critiqued by the Parties' respective experts and counsel."[250] Then, the Tribunal made the following considerations about the valuation approaches:

> "The Tribunal recognises that parties in investment cases may be prone to adopt dramatically contrasting approaches to the presentation of quantum issues in order to maximise a position – or to minimise that of the opposing party. Such a conflict can result in little or no engagement between the methodological arguments and valuation theories advanced by the opposing parties. In consequence, tribunals have based their findings upon other evidence and argument in the record introduced by each party in an attempt to arrive at a quantum determination in which they consider that they can have the requisite degree of confidence. In so doing tribunals have, per force, sometimes made use of valuation procedures, which are generally acknowledged to be sound, but which differ from the principal valuation theories advanced by the parties. That is the position in this case in that, for the reasons set out below, the Tribunal has concluded that in the circumstances of

[248] Counter Memorial, para. 169.
[249] Rejoinder, para. 106.
[250] Award, para. 523.

> this case, there are major flaws in the principal approaches adopted by both Claimants and by Venezuela."[251]

260. Several tribunals in other cases have made similar considerations when they believed that the approaches used by the parties were unconvincing, and have performed their own valuation without turning to the parties. In *Gemplus v. Mexico*: "The Tribunal does not consider the DCF method to be an appropriate methodology to apply on the facts of the present case; and it rejects the Claimants' case on the use of the DCF method […]."[252] Similarly, the Tribunal rejects any method other than the DCF method advanced by the respondent and concludes: "Having rejected the Parties' respective primary cases, as to their respective DCF and Non-DCF methods, *it is necessary for the Tribunal to steer an appropriate middle course, between Scylla and Charybdis* […]"[253]

261. The same line of reasoning was adopted by the tribunal in *Khan v. Mongolia*:

> "The Tribunal has been presented with three principal methodologies by the Parties: DCF, market comparables and market capitalisation. The Tribunal examines each of the methodologies below, but has ultimately come to the conclusion that – while all of them are valid and widely-used methods for valuing mines – none of these methodologies are wholly satisfactory in the present case. This conclusion is not a reflection on the expert witnesses, all of whom the Tribunal found to be helpful and professional. Ultimately, however, the Tribunal considers that the true value of Khan's investment is better reflected by the offers made for the mine or for Khan Canada's shares in and around the relevant period than by the more traditional methodologies advanced by the Parties."[254]

262. In *National Grid*, the Tribunal appointed its own expert after consulting with the parties, which were given the opportunity to raise their objections on said expert's recommendations. Nevertheless, the Tribunal in *National Grid* held as follows:

---

[251] *Id*., para. 523 (internal footnote omitted).
[252] *Gemplus, S.A., SLP, S.A., Gemplus Industrial, S.A. de C.V., and Talsud S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award dated 16 June 2010 (RLA-195) ("***Gemplus v. Mexico***"), paras. 13-72 and 13-73.
[253] *Id*., para. 13-75. Italics added by the Committee.
[254] *Khan Resources and others v. Mongolia*, UNCITRAL, Award dated 2 March 2015 (CLA-125) ("***Khan v. Mongolia***"), para. 390.

> "As indicated earlier, the Tribunal, in reaching these conclusions, has carefully studied the reports and declarations of each of the experts as well as the presentations of legal counsel. In lieu of relying directly or solely on the opinion or valuation of any of the experts, we have made use of their opinions and compared them to available market information. In so doing, the Tribunal has attempted to carefully evaluate the reasonableness of its conclusions."[255]

263. The committee in *Adem Dogan* affirmed that "the Tribunal was not bound, either by the terms of the BIT or any agreement between the Parties, to apply a specific method of valuation."[256]

264. The Committee clarifies that, in its opinion, the *Pey Casado* case does not support the Applicant's thesis. Contrary to its allegations, *Pey Casado* did not concern the implementation of a different methodology to calculate damages by the Tribunal, but rather the Tribunal awarded damages for denial of justice and discrimination where the claimant had alleged damages solely for expropriation.[257]

265. In view of the Tribunal's careful review of the valuation methods, its arguments about the appropriateness or inappropriateness of each such method, the use of the elements on the record and upon which the Tribunal relied to calculate damages, and taking into account a tribunal's discretion on this matter, the Committee concludes that the Tribunal did not violate the Parties' right to be heard.

iii. Violation of the Parties' Right to Equal Treatment

266. The Applicant alleges that the fact that the Tribunal has added the amount of the Talta Loan to the valuation of Matesi is "inexplicable, unacceptable and illogical" [Committee's translation]. According to the Applicant, the amount of such loan constitutes unjust enrichment in favor of the Respondents. The allegation is succinct and is based on the fact

---

[255] *National Grid v. Argentine Republic*, UNCITRAL, Award dated 3 November 2008 (CLA-76) ("***National Grid***"), para. 289.
[256] *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9 Decision on Annulment dated 15 January 2016 (RLA-262) ("***Adem Dogan***"), para. 219.
[257] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment dated 18 December 2012 (RLA-216) ("***Pey Casado***"), in particular, paras. 261-271.

that, as stated by Venezuela, the Tribunal compensated the Respondents twice. This issue was discussed both during the proceedings and in the request for rectification. Whether the amount of the Talta Loan constitutes unjust enrichment depends on the reasons provided by the Tribunal to include it as compensation. The failure to state reasons for damages has been claimed separately, and the Committee has already addressed the alleged unjust enrichment as part thereof.[258]

E. GROUNDS RELATED TO THE COSTS AWARD REGARDING THE REQUEST FOR RECTIFICATION

267. Venezuela alleges that the Tribunal's decision to order Venezuela to pay the costs of the other party's defence related to the Request for Rectification involved two grounds for annulment: the Tribunal seriously departed from a fundamental rule of procedure and failed to state the reasons for such decision on costs. The Committee has inverted the order that these grounds have been alleged, as the Committee must first determine if the Tribunal's decision is well-founded to determine if there existed a serious departure from a fundamental rule.

268. Before addressing these grounds, the Committee shall refer to the applicable rules and practice of arbitral tribunals that the Parties have amply presented.

269. First, Article 61(2) of the ICSID Convention provides that "[…] the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award." The Convention leaves it up to the Tribunal to determine costs and their allocation between the parties.

270. The underlying principles of the preparatory works of the ICSID Convention and the practice of ICSID tribunals, as well as other arbitration systems, have been summarized by Professor Schreuer and partially cited by the Applicant. These include: If a party has completely prevailed, the other may have to bear the arbitration costs and all or part of the prevailing party's expenses; lack of cooperation with the tribunal by either party, violation of ICSID's exclusive jurisdiction, etc. shall be reflected on the decision on costs; and if one party is held liable for a part of the proceedings, it should bear the relevant expenses. Moreover, "[i]n the

[258] *See* paras. 245-247 *supra*.

absence of reasons to decide otherwise, each party should bear half of the costs of the arbitration including the charges for the Centre's services and the fees and expenses of the arbitrators and should pay for its own expenses in preparing and presenting its case".[259] This last principle is the only principle quoted by the Applicant in its allegations.

271. The Tribunal decided that "the Request in this case was not filed in conformity with the intent and the plain meaning of the terms of Article 49(2) of the ICSID Convention. Accordingly, the Tribunal finds it appropriate that Venezuela should bear Claimants' costs incurred in connection with the rectification proceeding, namely US$73,457.40."[260] This decision follows after considerations in which the Tribunal finds that the Request for Rectification is not intended to cure an error which does not affect the substance of the findings made in the Award as contended by the Applicant.[261] In these considerations, the Tribunal notes that it had already ruled upon the double counting issue. According to the Tribunal's reasoning, Venezuela questions the methodology and resulting calculations and invites the Tribunal "to undertake a comprehensive re-evaluation of Claimants' stake in Matesi, premised on steps, which it says are relevant to the DCF methodology, which the Tribunal had expressly rejected. Moreover, it is suggested that the Tribunal might entertain further expert evidence or even another hearing before it rules on the Request. None of these proposals is consistent with the steps necessary to correct a straightforward clerical, arithmetical or similar error in the Award."[262]

272. Thus, the Tribunal amply explained to what extent the request departed from the concept of rectification and, in exercise of its discretion, did not need to say anything else in support of its decision on costs.

273. The Applicant describes the decision on costs as contradictory with the Tribunal's acknowledgement that making use of rectification proceedings is a right and an integral part of the ICSID arbitration system. The Committee observes that the fact that it is a right does not necessarily mean that its exercise is gratuitous for the exercising party if the Tribunal finds it groundless. The Tribunal, as acknowledged by the Applicant, must take into account the interests of both parties in order to treat them equally.

---

[259] Schreuer, *The ICSID Convention*, *supra* note 188, p. 1236.
[260] Decision on Rectification, para. 113.
[261] *Id*., paras. 108-110.
[262] *Id*., para. 110.

274. In view of the reasons stated by the Tribunal, the Committee has no difficulty in concluding that the Tribunal's decision on costs in the rectification proceeding did not entail a serious departure from a fundamental rule of procedure and was reasoned.

VII. DECISION ON COSTS

A. STATEMENT OF COSTS OF THE APPLICANT

275. The Applicant submits that, in principle, each party should bear its own costs incurred in relation to the annulment proceeding, unless there is procedural abuse or substantial grounds for departing from the usual rule.[263] In this case, Venezuela requests that Tenaris and Talta be ordered to pay the Applicant's costs and expenses related to the annulment proceedings,[264] as follows:

a.	Legal fees (Foley Hoag LLP):	USD 475,984.50
b.	Legal fees (GST LLP):	USD 687,627
c.	Hearing expenses:	USD 16,175.15
d.	Other expenses:	USD 18,310.58
e.	Costs of the proceedings (ICSID costs, and fees and expenses of the Committee):	USD 400,000
f.	Registration Fee of the Request for Annulment:	USD 25,000
	TOTAL:	**USD 1,623,097.23**

[263] Reply, paras. 269-276.
[264] *Id.*, para. 278.

B. STATEMENT OF COSTS OF THE RESPONDENTS ON ANNULMENT

276. The Respondents submit that the Applicant should bear, in whole, the Respondents' costs and expenses incurred in relation to the annulment proceeding, including ICSID costs, the fees and expenses of the *ad hoc* Committee, and the Respondents' legal fees and expenses,[265] as follows:

a.	Legal fees:	USD 1,285,523.70
b.	Translations:	USD 15,088.00
c.	Travel expenses:	USD 6,433.57
d.	Copying:	USD 11,336.22
e.	Courier:	USD 1,615.82
f.	Online research:	USD 73.64
g.	Hearing equipment:	USD 573.29
	TOTAL:	**USD 1,320,644.24**

C. COSTS OF THE PROCEEDING

277. 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 221,269.22
ICSID's administrative fees	USD 74,000.00
Direct expenses[266]	USD 61,308.91
Total:	**USD 356,578.13**

[265] Rejoinder, paras. 120-122, 123(b).
[266] 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).

278. The costs listed *supra* were advanced by the Applicant, in accordance with Regulation 14(3)(e) of ICSID Administrative and Financial Regulations.

D. DECISION OF THE COMMITTEE

279. Article 61(2) of the ICSID Convention —applicable to this proceeding by virtue of Article 52(4) of the ICSID Convention— provides the following:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid."

280. This provision, together with Arbitration Rule 47(1)(j) (applicable to this proceeding under Arbitration Rule 53), grants discretion to the Committee to determine the allocation of costs it deems appropriate in the present proceeding.

281. The Committee has decided to reject the Request for Annulment in whole and, accordingly, the Applicant shall bear all fees and expenses of the Committee Members, and the charges for the use of the facilities of the ICSID. On the other hand, while the alleged grounds for annulment have been rejected by the Committee, the underlying fundamental questions posed by them justify that each Party shall bear all expenses incurred in connection with its own defence.

VIII. DECISION

282. For the reasons stated *supra*, the Committee decides:

(1) To fully dismiss the Request for Annulment.

(2) That the Applicant shall bear the costs of the proceeding, including the fees and expenses of the members of the Committee.

(3) That each Party shall bear the expenses incurred in connection with its own defence.

Professor Fernando Cantuarias Salaverry

Member of the *ad hoc* Committee

Date: 8 August 2018

Professor Diego P. Fernández Arroyo

Member of the *ad hoc* Committee

Date: 8 August 2018

Dr. Andrés Rigo Sureda

President of the *ad hoc* Committee

Date: **8 August 2018**