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

IN THE ANNULMENT PROCEEDING BETWEEN

VESTEY GROUP LTD
(RESPONDENT ON ANNULMENT)

AND

BOLIVARIAN REPUBLIC OF VENEZUELA
(APPLICANT)

(ICSID CASE NO. ARB/06/4)

DECISION ON ANNULMENT

Members of the ad hoc Committee:
Judge Joan E. Donoghue, *President of the ad hoc Committee*
Dr. Gavan Griffith, *Member of the ad hoc Committee*
Dr. Raëd M. Fathallah, *Member of the ad hoc Committee*

Secretary of the ad hoc Committee:
Ms. Alicia Martín Blanco

Date of dispatch to the Parties: 26 April 2019

REPRESENTATION OF THE PARTIES

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Table of Contents

I. PROCEDURAL HISTORY

1. On 12 August 2016, the Bolivarian Republic of Venezuela ("**Venezuela**" or "**Applicant**") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") an application requesting the annulment of the Award rendered on 15 April 2016 ("**Award**") in the case ("**Original Proceeding**") between Vestey Group Ltd ("**Vestey**" or "**Respondent**") and Venezuela. The Application on Annulment ("**Application**") was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"). Venezuela seeks annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention.

2. With its Application, Venezuela also requested a stay of enforcement of the Award pursuant to Article 52(5) of the ICSID Convention.

3. On 16 August 2016, the Secretary-General informed the Parties that the Application had been registered on that date and that the Chairman of the Administrative Council of ICSID would proceed to appoint an *ad hoc* Committee ("**Committee**") pursuant to Article 52(3) of the ICSID Convention. The Parties were also notified that, pursuant to Arbitration Rule 54(2), enforcement of the Award had been provisionally stayed.

4. By letter of 8 November 2016, in accordance with Arbitration Rule 52(2), the Secretary-General notified the Parties that the Committee had been constituted – composed of Joan E. Donoghue (U.S.) as President, Gavan Griffith (Australian) and Raëd M. Fathallah (Canadian/Lebanese) as Members – and that the annulment proceeding was deemed to have begun on that date. The Parties were also informed that Ms. Alicia Martín Blanco, Legal Counsel, ICSID, would serve as Secretary of the Committee.

5. On 10 November 2016, a first advance payment was requested from the Applicant pursuant to ICSID Administrative and Financial Regulations 14(3)(d) and (e).

6. In order to afford the Parties an opportunity to submit their arguments on the stay of enforcement, on 18 November 2016 the Committee established a procedural calendar of submissions on this issue, including the possibility to present oral arguments at the first session, and informed the Parties that it had decided to extend *pro tem* the provisional stay of enforcement until it had heard both Parties and reached a decision on its continuation.

7. On 21 November 2016, the ICSID Secretariat circulated a draft agenda and procedural order approved by the Committee in preparation for the first session and invited the Parties to consult and revert with their joint or separate proposals on the proposed items as well as on any item they might wish to include.

8. On 28 November 2016, the Parties submitted their agreements on the draft procedural order, which included an expedited timetable in exchange for which the Respondent had agreed to "forego its right to challenge the continuation of the provisional stay of enforcement granted by the Secretary-General on 16 August 2016."

9. The first session was held on 19 December 2016 by telephone conference. The list of participants was as follows:

Members of the Committee:
Joan E. Donoghue, President of the Committee
Gavan Griffith, Member of the Committee
Raëd M. Fathallah, Member of the Committee

ICSID Secretariat:
Alicia Martín Blanco, Secretary of the Committee

Participants on behalf of the Applicant:
Erika Fernandez, Procuraduría General de la República
Osvaldo Guglielmino, Guglielmino & Asociados
Diego B. Gosis, Guglielmino & Asociados
Veronica Lavista, Guglielmino & Asociados
Guillermo Moro, Guglielmino & Asociados

Pablo Parrilla, Guglielmino & Asociados

Participants on behalf of the Respondent:
Nigel Blackaby, Freshfields Bruckhaus Deringer
Sylvia Noury, Freshfields Bruckhaus Deringer
Ben Love, Freshfields Bruckhaus Deringer

10. During the first session, the President consulted with the Parties regarding the first advance payment, which had been due on 10 December 2016 and was still outstanding. The President noted the Committee's concern and indicated that it nonetheless had decided to hold the first session in the expectation that payment would soon be made and in order to maintain the schedule agreed by the Parties. The President also invited the Parties' comments on the potential impact of the advance payment issue on the stay of enforcement. Both Parties confirmed that their agreement remained in place in the expectation that payment would be made shortly. The Respondent reserved its rights concerning the stay of enforcement should a late payment delay the submission of the Applicant's Memorial.

11. On 30 December 2016, the Committee issued Procedural Order No. 1 containing the Parties' agreements and the Committee's decisions on procedure, including a schedule of submissions. On the same date, the Secretary-General informed the Parties of the lack of payment and invited either Party to make the requested advance payment within 15 days pursuant to ICSID Administrative and Financial Regulations 14(3)(d) and (e).

12. On 23 January 2017, after several confirmations by the Applicant of its commitment to make the requested advance payment as soon as possible and to inform the Committee of any developments in this regard, the Secretary confirmed that the advance payment had not yet been received and, pursuant to the Committee's instructions, invited the Parties to inform the Committee of their respective views on whether the proceeding should be suspended, and the stay of enforcement lifted, as of 31 January 2017.

13. The Parties provided their respective views on 27 January 2017. The Respondent submitted that it is the Applicant's sole responsibility to pay the advances requested in the

annulment proceeding and that, in light of the Applicant's default, ICSID should move to suspend the proceeding, which the Respondent proposed should take effect on the date of filing of the Applicant's Memorial assuming no payment has been made by that time, at which point the Respondent would reconsider whether to request that the stay of enforcement be lifted. The Applicant reiterated its commitment to pay and submitted that the payment situation did not impact the Parties' agreements, including the agreement not to request that the stay of enforcement be lifted as long as the calendar of submissions was respected, which the Applicant was committed to do. Accordingly, the Applicant requested that the proceeding not be suspended and that no decision be adopted concerning the stay of enforcement.

14. On 30 January 2017, the Respondent stated that "the Applicant's continued non-payment of the advance on costs does indeed affect the Respondent's position regarding the stay," given that "its agreement not to contest the stay was contingent on the proceedings advancing in accordance with the timetable agreed," which would be affected by a potential suspension caused by the Applicant's default. It was on that basis that the Respondent had reserved its right to request that the stay of enforcement be lifted if payment was not made by the deadline for the submission of the Applicant's Memorial.

15. On 30 January 2017, the Secretary-General moved that the Committee suspend the proceeding for lack of payment pursuant to ICSID Administrative and Financial Regulations 14(3)(d) and (e).

16. On 6 February 2017, the Committee suspended the proceeding for lack of payment and lifted the stay of enforcement of the Award. The Committee reasoned that, without prejudice to the Committee's decision on the allocation of costs, the Applicant on annulment bears the sole responsibility for making advance payments for costs. Payment was now eight weeks overdue and the Applicant had not provided any specific indication as to the date when payment should be expected despite repeated requests by the Committee. The Committee considered that it was not appropriate for the Centre to continue to incur costs and for the Committee members to continue to accrue fees under these circumstances. Neither did the Committee consider it appropriate to defer the

suspension of the proceedings to the date of submission of the Applicant's Memorial, as suggested by the Respondent. The Committee noted that the proceeding could be quickly resumed and the timetable could be readjusted, possibly maintaining the hearing dates, should payment be received. Regarding the stay of enforcement, the Committee reasoned as follows: "The Respondent has indicated that it seeks to preserve its right to seek the lifting of the stay of enforcement. However, once these proceedings are suspended, the Committee would not be in a position to act on a request to lift the stay, were such a request to be made. For this reason, the Committee has decided to lift the stay of enforcement, simultaneous with the stay of these proceeding [sic]. The Committee notes that, in the event that the proceeding [sic] are resumed, Rule 54 permits a Party to request a stay of enforcement of the Award."

17. On 6 April 2017, following confirmation of the advance payment, the proceeding was resumed and the Committee invited the Parties to try to agree on a revised schedule which, if possible, should maintain the hearing dates.

18. On 13 April 2017, the Parties submitted their agreement on the revised schedule. In exchange for the Applicant's agreement to the revised timetable, which maintained the hearing dates, the Respondent agreed not to oppose a request to reinstate the stay of enforcement pending the outcome of the annulment proceedings, and the Applicant requested that the Committee stay enforcement of the Award pursuant to the terms of the Parties' agreement.

19. On 18 April 2017, the Applicant submitted its Memorial on Annulment ("**Memorial**").

20. On 27 April 2017, the Secretary-General notified the Parties of the Committee's decision to reinstate the stay of enforcement in accordance with ICSID Convention Article 52(5) and Arbitration Rules 54(1) and (4). The Committee indicated that the circumstances in this case, specifically the terms of the Parties' agreement, called for a stay of enforcement of the Award.

21. On 20 June 2017, the Respondent submitted its Counter-Memorial on Annulment ("**Counter-Memorial**").

22. On 12 July 2017, the Applicant was requested to make a second advance payment pursuant to ICSID Administrative and Financial Regulations 14(3)(d) and (e).

23. On 25 July 2017, the Applicant submitted its Reply on Annulment ("**Reply**").

24. On 21 August 2017, the Committee noted that the second advance payment was still outstanding and invited the Applicant to provide information on the steps taken to effect payment as well as a date when payment should be expected. The Committee further noted the proximity of the hearing and the fact that cancellation costs would be incurred if the hearing dates were to be cancelled after confirmation of the hearing services, which costs might exceed the then-current balance in the case account. The Committee stated that it intended to continue to plan for the hearing until 7 working days prior to the hearing and that, if no payment had been received by that date, the hearing dates would be cancelled.

25. On 21 August 2017, the Parties were invited to confer and try to reach agreement on the organization of the hearing.

26. On 24 August 2017, the Applicant informed the Committee that the payment process was started immediately after the second advance payment request was received. In any event, the Applicant assured the Committee that payment would be made before expiry of the deadline provided by the Committee for cancellation of the hearing dates.

27. On 29 August 2017, the Respondent submitted its Rejoinder on Annulment ("**Rejoinder**").

28. On 6 September 2017, the Secretary-General informed the Parties that payment was still outstanding and invited either Party to make the requested advance payment within 15 days pursuant to ICSID Administrative and Financial Regulations 14(3)(d) and (e).

29. On 6 September 2017, the Parties submitted their agreement on the organization of the hearing. On 8 September 2017, the Committee invited the Parties to agree to certain revisions to the hearing schedule.

30. On 15 September 2017, the Respondent reiterated its position that the Applicant is solely responsible for any advance payments requested for the conduct of the annulment proceedings. The Respondent submitted that the "ongoing default risks substantial

prejudice to Vestey, which expressly agreed not to challenge Venezuela's request to stay enforcement of the Award in exchange for an expedited procedural timetable, culminating in the Hearing in October 2017." Accordingly, Vestey reserved all its rights, including to request that the stay of enforcement be lifted should Venezuela fail to pay by the deadline provided by the Committee.

31. On 22 September 2017, the Applicant informed the Committee that "the restrictions recently imposed by the United States Government" on Venezuela had delayed payment, which had to be made to a US account. Notwithstanding these difficulties, the Applicant estimated that confirmation of payment would be made within the next 48 working hours.

32. On 29 September 2017, the Committee informed the Parties that ICSID had not received a notification from the World Bank's financial services that the funds corresponding to the second advance payment request had been received. Pursuant to the Committee's communication of 21 August 2017, the Committee informed the Parties that the hearing dates would be cancelled that same day by 5 pm Washington, D.C. time unless by that time ICSID had received a notification of payment from the World Bank's financial services. At 5:37 pm Washington, D.C. time that day, the Committee informed the Parties that, not having received a notification of payment, the hearing dates were accordingly cancelled.

33. On 5 October 2017, the Respondent requested that "in accordance with Regulation 14(3)(d) of ICSID's Administrative and Financial Regulations, the Secretary-General move the Committee to suspend the present annulment proceeding effective immediately" and that "in accordance with Rule 54(3) of the Arbitration Rules, the Committee lift the stay of enforcement of the Award effective immediately, in order to avoid further prejudice to Vestey arising out of Venezuela's revocation of the parties' bargain."

34. On 14 October 2017, the Secretary-General moved that the Committee suspend the proceeding pursuant to ICSID Administrative and Financial Regulations 14(3)(d) and (e). On the same date, the Committee invited the Applicant to provide comments on the requests to suspend the proceeding and lift the stay of enforcement of the Award. On 17 October 2017, the Applicant informed the Committee of its intention to effect

payment as soon as possible and stated that it would keep the Secretariat apprised of any developments in this process.

35. On 18 October 2017, the Secretary-General informed the Parties of the Committee's decision to suspend the proceeding for lack of payment and to lift the stay enforcement of the Award. Regarding the suspension, the Committee noted that the proceeding could not continue because there were insufficient funds to cover the next step, namely the hearing. Regarding stay of enforcement, the Committee noted as follows:

> *The Committee had originally found that the circumstance that required the stay of enforcement of the Award was the Respondent's agreement not to object a request for the stay of enforcement in exchange for an expedited schedule culminating in the October hearing dates. The cancellation of these dates and the suspension of the proceeding as a result of the Applicant's failure to make the requested payment has now prevented compliance with the expedited schedule agreed as a condition not to oppose the stay of enforcement. Since this condition is no longer met, the Committee understands that there is no longer an agreement by the Respondent not to oppose Venezuela's request for a stay of enforcement, which Vestey confirmed in its communication of October 5, 2017. In the absence of this agreement, which constituted the circumstance requiring the stay of enforcement of the Award, the Committee must conclude that the circumstances no longer require that the enforcement of the Award be stayed. Accordingly, the stay of enforcement of the Award is hereby lifted.*

36. Following payment by the Applicant, the proceeding resumed on 7 December 2017.

37. On 5 February 2018, following a series of consultations with the Parties, new hearing dates were set for 2 and 3 August 2018.

38. On 6 July 2018, having consulted with the Parties, the Committee issued a new hearing schedule that took into account the Parties' respective positions and permitted the Committee to deliberate after the close of the second hearing day. The Committee also invited the Parties to confirm whether they agreed with its assessment that a pre-hearing conference call was not necessary, which the Parties confirmed on 9 and 11 July 2018 respectively.

39. The hearing was held on 2 and 3 August 2018 in the World Bank facilities in Paris. Present at the hearing were:

Members of the Committee:
Joan E. Donoghue, President of the Committee
Gavan Griffith, Member of the Committee
Raëd M. Fathallah, Member of the Committee

ICSID Secretariat:
Alicia Martín Blanco, Secretary of the Committee

Participants on behalf of the Applicant:
Reinaldo Enrique Muñoz Pedroza, Procuraduría General de la República
Henry Rodríguez Facchinetti, Procuraduría General de la República
Osvaldo Guglielmino, Guglielmino & Asociados
Mariana Lozza, Guglielmino & Asociados
Guillermo Moro, Guglielmino & Asociados
Pablo Parrilla, Guglielmino & Asociados
Alejandro Vulejser, Guglielmino & Asociados
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Ben Love, Freshfields Bruckhaus Deringer
Annie Pan, Freshfields Bruckhaus Deringer
Elizabeth Forster, Freshfields Bruckhaus Deringer

40. At the end of the hearing, having consulted with the Parties, the Committee decided various post-hearing matters, including corrections to the transcript and timing and format of costs submissions. The Committee also decided that post-hearing briefs were not authorized, but that the Committee might revert to the Parties with questions should any arise during deliberations.

41. On 4 September 2018, the Parties submitted their agreed corrections to the hearing transcripts.

42. On 15 October 2018, the Parties submitted their respective costs submissions. In response to the Committee's request, the Parties submitted further details regarding their fees and expenses on 14 November 2018.

43. On 8 February 2019, the Committee declared the proceeding closed in accordance with ICSID Arbitration Rules 53 and 38(1).

II. REQUESTS FOR RELIEF

44. The Applicant requests that:[1]

(i) the Award rendered in this case be annulled pursuant to Article 52 of the ICSID Convention and Arbitration Rule 50; and

(ii) Vestey Group Ltd. be ordered to pay all costs and legal expenses arising from these proceedings.

45. The Respondent requests that the Committee:[2]

(a) REJECT Venezuela's Request for Annulment in its entirety; and

[1] Reply, para. 244.

[2] Rejoinder, para. 128.

(b) ORDER that Venezuela bear all costs and expenses incurred by Vestey in connection with the present annulment proceeding, including the fees of the Centre, the costs and fees of the *Ad Hoc* Committee and Vestey's full legal fees and expenses.

III. OVERVIEW OF THE PARTIES' POSITIONS

46. In the Award, the Tribunal found that it had jurisdiction and that Venezuela had breached the expropriation provision (Article 5(1)) of the 1995 Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela ("**Treaty**").[3] The Applicant seeks annulment of the Award under Article 52 of the ICSID Convention, alleging manifest excess of powers (subparagraph (1)(b)), serious departure from a fundamental rule of procedure (subparagraph (1)(d)) and failure to state the reasons on which the Award is based (subparagraph (1)(e)).[4]

47. The Respondent contends that Venezuela's Application constitutes "an improper use of ICSID's annulment mechanism to frustrate or delay enforcement of the Award" and should be dismissed with costs. According to Vestey, "all of Venezuela's arguments for annulment are premised on its disagreement with the substance of the Tribunal's findings in the Award." As such, Venezuela's Application falls outside the grounds for annulment under Article 52(1) of the ICSID Convention.[5] Vestey points to the length and detail of Venezuela's Memorial in which, according to Vestey, Venezuela repeats the factual and legal arguments that it had raised in the Original Proceeding.[6] It adds that its decision not to oppose Venezuela's stay of enforcement request cannot be seen as an indication of the credibility of the Application.[7] Vestey took this decision in the context of an agreement in exchange for an expedited procedural calendar, consistent with its desire to conclude this proceeding as soon as possible.

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[3] Award, para. 472.

[4] Memorial, para. 2; Reply, para. 2.

[5] Counter-Memorial, paras. 2-7.

[6] Counter-Memorial, para. 77.

[7] Rejoinder, para. 6.

48. The Applicant rejects the contention that this annulment proceeding constitutes an attempt to re-litigate the case or that it is part of a dilatory strategy, and affirms that it is exercising its right under the ICSID Convention to bring annulment proceedings, which is particularly obvious in this instance because the Parties agreed to an expedited procedure and Vestey twice declined to oppose the stay of enforcement of the Award. The Applicant also disagrees that the length and detail of its argument for annulment show anything other than its "intention to present arguments in the most rigorous and detailed manner possible in an attempt to contribute to the task of the Committee."[8]

49. Before considering the specific grounds for annulment raised by the Applicant, the Committee addresses the legal standard to be applied in an annulment proceeding (generally and with respect to each of the subparagraphs of ICSID Convention Article 52(1) invoked by the Applicant). The summaries of Party positions that appear below are not intended to be a comprehensive survey of all points that they made, but rather to identify their principal positions. The Committee has taken into account the full range of arguments advanced by the Parties.

IV. THE LEGAL STANDARDS RELEVANT TO ANNULMENT

A. THE GENERAL STANDARD OF ANNULMENT

(1) The Parties' Positions

a. Applicant's Position

50. The Applicant acknowledges the extraordinary nature of the annulment mechanism,[9] the finality of ICSID awards[10] and the distinction between appeal and annulment.[11] According to the Applicant, the possibility of annulment does not jeopardize the finality of awards. To the contrary, annulment is the mechanism that ensures the integrity of the system and "provides finality and enforceability only to decisions which do not materially contradict

[8] Reply, paras. 42-43, 112-113.
[9] Reply, para. 22.
[10] Reply, para. 23.
[11] Reply, paras. 30-34.

the letter and the object and purpose of the ICSID Convention, and which have not been rendered in violation of its rules."[12] The Applicant maintains that its arguments do not refer to reasonable disagreements with the Tribunal on the facts or the law, but are limited to serious defects befitting the grounds for annulment in Article 52(1) of the ICSID Convention.[13]

51. The Applicant considers that the grounds for annulment are to be interpreted neither narrowly nor extensively, but in accordance with the interpretation principles of public international law.[14]

52. The Applicant rejects the proposition put forward by Vestey according to which the Committee would have discretion not to annul the Award despite having found that a ground for annulment exists. According to the Applicant, a Committee's discretion is limited to the evaluation of arguments and documents under consideration, and does not encompass the decision whether to annul an award where a ground for annulment has been found to exist. Under those circumstances, "annulment committees have no discretion at all; rather, they have the strict duty to order annulment."[15]

b. Respondent's Position

53. Vestey submits that the remedy of annulment is designed to safeguard the integrity of the arbitration and not the substantive correctness of the Award. It follows that annulment is not equivalent to appeal and does not permit a substantive review of the Award or substitution of the Committee's own views on the facts or the law for those of the Tribunal. To the contrary, the remedy of annulment is "limited and exceptional." Consistent with its "narrow and extraordinary character," the ICSID Convention only provides for five grounds for annulment that should be considered exhaustive and interpreted restrictively.[16]

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[12] Reply, para. 23.

[13] Reply, para. 27.

[14] Reply, paras. 35-37.

[15] Reply, paras. 38-41.

[16] Counter-Memorial, paras. 41-44, relying, *inter alia*, on ICSID Secretariat, 'Updated Background Paper on Annulment for the Administrative Council of ICSID', 5 May 2016, paras. 73, 74 ("Updated Background Paper on Annulment"); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, 30 December 2015 ("*Tulip v. Turkey*"), para. 41; *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Decision on Annulment, 10 July 2014 ("*Alapli v. Turkey*"),

Vestey disagrees with Venezuela's reliance on a line of jurisprudence suggesting that the object and purpose of the ICSID Convention does not support an interpretation of the grounds for annulment that is narrow or restrictive,[17] and contends that the drafting history of the treaty confirms that it "was designed purposefully to confer a limited scope of review."[18]

54. Even in the event that a ground for annulment were established, "annulment is not an automatic consequence," as Article 52(3) of the ICSID Convention vests the Committee with the authority, not the obligation, to annul the Award should a ground for annulment be verified, and Venezuela has not provided any authority in support of its contrary position. The Committee's discretion to annul should be exercised "in harmony with the narrow object and purpose of the annulment remedy and its underlying policy considerations." In particular, the Committee must take into account the gravity of the circumstances and whether they had, or could have had, a material impact on the Award. In addition, the Committee retains discretion to determine whether any ground for annulment affects the Award in full or in part, regardless of the Applicant's characterization. In this case, the grounds for annulment affecting the land components of Vestey's investment, if established, can have no impact on the non-land components of the compensation awarded.[19] The Committee should bear in mind that, where a decision in an award is supported by two lines of reasoning, the Committee "would have to find annullable errors in both lines of reasoning." This is because an annullable error in only

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para. 232; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Decision of the *ad hoc* Committee on the Application for Annulment, 24 January 2014, para. 118; *MCI Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on Annulment, 19 October 2009, para. 24*; Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9), Decision on Annulment, 15 January 2016, paras. 28, 129; *EDF International S.A. and others v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision, 5 February 2016 ("*EDF v. Argentina*"), paras. 64-66; and *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007 ("*CMS v. Argentina*"), paras. 136, 158.

[17] Rejoinder, para. 20, citing Reply, paras. 35-37.

[18] Rejoinder, para. 20, relying on the Updated Background Paper on Annulment, para. 71.

[19] Counter-Memorial, paras. 46-47, relying, *inter alia*, on C.H. Schreuer, The ICSID Convention: A Commentary, (Cambridge University Press, 2d ed., 2009) ("C.H. Schreuer"), pp. 1039-1040; *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of Award of 5 June 1990 and Supplemental Award of 17 October 1990, 3 December 1992, para. 1.17; *EDF v. Argentina*, para. 73; and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 ("*Vivendi I*"), para. 69; Rejoinder, paras. 21-23.

one of those lines of reasoning would have no impact on the outcome of the Award which, as a result, should not be annulled.[20]

(2) The Committee's Analysis

55. As can be seen in the above summary of the positions of the Parties, there is considerable common ground on several general points relevant to the standard of review to be applied by the Committee. Citing prior decisions of *ad hoc* committees, the Parties agree that annulment is an extraordinary measure. They recognize that annulment is distinct from appeal. They agree that the purpose of annulment is to preserve the integrity of the ICSID system of investor-State arbitration.

56. In view of the Parties' agreement on these general points, which are regularly recited by *ad hoc* committees, this Committee sees no reason to dwell on them. The Committee proceeds on the basis that annulment is an exceptional remedy that is distinct from an appeal, which is intended to ensure the integrity of ICSID arbitration proceedings, not their substantive correctness.

57. As to the interpretation of Article 52 of the ICSID Convention, the Committee considers that no special rule of interpretation – such as the "restrictive" interpretation suggested by Vestey – applies here. The Committee will interpret the ICSID Convention in light of the law of treaty interpretation,[21] in what has been called an "objective" manner.[22] There is no doubt that annulment is a circumscribed ground of review, limited by the confined terms of Article 52 of the ICSID Convention.

58. An *ad hoc* committee may annul an award partially or entirely. If a decision contained in an award is supported by two alternative lines of reasoning, there is a basis to annul the award only if the *ad hoc* committee finds an annullable error in both lines of reasoning. The Committee notes Respondent's assertion that an *ad hoc* committee has the discretion

[20] Transcript, Day 1, pp. 98-99.

[21] *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007 ("*Soufraki v. UAE*"), para. 21.

[22] *Sociedad Anónima Eduardo Vieira v. Republic of Chile* (ICSID Case No. ARB/04/7), Decision of the *ad hoc* Committee on the Request for Annulment of Sociedad Anónima Eduardo Vieira, 10 December 2010, para. 242.

not to annul an award even if it finds that there is a ground on which to do so. The Committee will return to this point if it finds one or more grounds for annulment to apply.

59. Bearing in mind these general points regarding the mechanism of annulment, the Committee turns to the three sub-paragraphs of Article 52(1) of the ICSID Convention on which the Applicant relies. For each sub-paragraph, this Decision first summarizes the Parties' positions on the applicable legal standard and then sets out the Committee's analysis of that legal standard. Thereafter, the Committee examines, under each sub-paragraph of Article 52(1), the particular grounds for annulment asserted by the Applicant, beginning in each case with a summary of the Parties' positions, followed by the Committee's conclusions.

B. THE LEGAL STANDARD APPLICABLE TO AN ALLEGED MANIFEST EXCESS OF POWERS

(1) The Parties' Positions

a. Applicant's Position

60. The Applicant states that it agrees with a two-prong approach to this ground, starting with a determination of whether there was an excess of powers, followed by a determination of whether the excess was manifest.[23] The Applicant does not dispute that the "manifest" element of the standard requires a certain level of gravity or impact on the outcome of the case.[24] However, it disagrees with Vestey's interpretation that "manifest" means obvious from a simple reading and without deeper analysis, which is not supported by the Convention, the existing annulment decisions and the works of scholars. According to the Applicant, the excess of powers need not be apparent on its face and therefore does not bar analysis, including by reviewing evidence and legal instruments.[25]

[23] Reply, para. 44.

[24] Reply, para. 56.

[25] Memorial, paras. 32-33; Reply, paras. 44-55, 66, relying on *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010 ("*Sempra v. Argentina*"), para. 212; and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision of the *ad hoc* Committee on the Application for Annulment, 2 November 2015 ("*Occidental v. Ecuador*"), para. 57.

61. The Applicant considers that an excess of powers can occur when a Tribunal (i) inappropriately exercises, or does not exercise, jurisdiction or (ii) when it fails to apply the applicable law.[26]

62. First, regarding the exercise of jurisdiction where none exists (or the non-exercise of jurisdiction where it exists), the Applicant argues that a determination of whether there has been a manifest excess of powers with regard to jurisdiction necessarily entails the power to review in full or *de novo* the decision on jurisdiction. The application of ICSID Convention Article 52 in this manner is not prevented by the principle of *Kompetenz-Kompetenz*.[27] Moreover, according to the Applicant, Vestey acknowledges as much when it states that "the Tribunal's decision on jurisdiction […] can only be overturned if it is manifestly wrong."[28]

63. Second, regarding the failure to apply the applicable law, the Applicant states that it agrees with Vestey that this ground for annulment applies when the Tribunal ignores the applicable law or applies a law other than the applicable law. However, the Applicant disagrees with Vestey that the failure must have been complete or *in toto* rather than concerning "any specific portion or provision," and considers that failure to apply the applicable law also includes a misapplication or error in the application of the law that rises to the degree of depriving the applicable law of its "ordinary scope" or of its "actual normative effect."[29] The Applicant further rejects the notion that "a mere reference to the applicable law in the award is sufficient" for the award not to be subject to annulment. To the contrary, this ground for annulment turns on whether the Tribunal eventually applied the applicable law.[30] As explained by the Applicant during the hearing:

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[26] Memorial, para. 34; Reply, para. 57.

[27] Reply, paras. 58-67 (relying on *Vivendi I*, para. 86; *Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009, para. 74; and *Occidental v. Ecuador*, para. 189) and para. 114.

[28] Reply, para. 114.

[29] Reply, paras. 68-74 (relying on *Occidental v. Ecuador*, para. 47; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Decision on Annulment, 26 February 2016, para. 130; and *Sempra v. Argentina*, para. 159) and paras. 126-128.

[30] Reply, paras. 128, 151.

> [I]*t is not enough to identify the system of law that has to be applied. It is necessary to identify which rule of that system of law has to be applied and which are the conditions that each of those rules has in order to be able to conclude that the Tribunal indeed applied those rules of the system of law that it had to apply.*[31]

64. The Applicant agrees with Vestey that a "tenable" decision on jurisdiction cannot constitute manifest excess of powers.[32] According to the Applicant, the only way to ascertain whether the decision was reasonable or tenable is "to analyze its content in relation to the applicable legal rules, the positions adopted by the parties and the evidence on the record."[33]

b. Respondent's Position

65. Vestey states that it agrees with Venezuela regarding "certain basic principles" of this standard, including the two-step analysis, whereby the Committee first determines whether there was an excess of powers and then determines whether the excess was manifest. An excess of powers can exist where the Tribunal inappropriately exercises (or fails to exercise) jurisdiction or when it fails to apply the law agreed by the parties. An excess of powers will be manifest where it is, *inter alia*, "obvious, evident and perceived without difficulty."[34]

66. Vestey does not agree with Venezuela's characterization of this ground as permitting a review of the substantive correctness of the Tribunal's findings on jurisdiction or the merits, which "represent, at best, minority views in the ICSID jurisprudence that otherwise advocates for circumspection in reviewing tribunal decisions alleged to contain 'manifest' excesses of power meriting annulment."[35] To the contrary, Vestey contends that to establish whether there has been a manifest excess of powers, a committee's remit is subject to limits largely stemming from the "manifest" element of the analysis. First, the excess must be both material to the outcome of the case and obvious from a

[31] Transcript, Day 2, p. 218.

[32] Reply, para. 75.

[33] Reply, paras. 75-77.

[34] Counter-Memorial, para. 51.

[35] Counter-Memorial, para. 52; Rejoinder, para. 37.

simple reading of the Award, without deeper analysis.[36] Second, this ground does not permit a *de novo* assessment of jurisdiction, which implies that "where a manifest excess of jurisdiction is alleged based solely on the tribunal's incorrect assessment of facts or appreciation of evidence produced by the parties, there can be no basis for annulment" and that a tenable or reasonable decision on jurisdiction is not subject to annulment.[37] Third, an erroneous application of the law or a partial failure to apply the law do not constitute a manifest excess of powers. Instead, "only a *complete* failure to apply the correct law, rather than any specific portion or provision, may amount to a manifest excess of powers." In other words, the enquiry should be "limited to ascertaining whether the Tribunal identified the proper law applicable to the issue at hand and attempted to apply that law to such issue. It is beyond the Committee's remit to verify whether the Tribunal's application of the law was complete or correct."[38] Even a manifest error of law fails to meet this standard, and the small number of committees that have endorsed the approach that a particularly gross or egregious misapplication or misinterpretation of the law might amount to a failure to apply it altogether have noted the exceptional nature of such a case.[39]

(2) The Committee's Analysis

67. The five grounds on which the Applicant claims that the Tribunal manifestly exceeded its powers raise two fundamental objections: that the Tribunal exercised jurisdiction that it did not have and that it failed (in several respects) to apply the applicable law. The Committee's observations regarding the relevant legal standards are made in light of

[36] Counter-Memorial, paras. 52-58, relying, *inter alia*, on *Soufraki v. UAE*, para. 40; *Vivendi I*, para. 86; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Hungary* (ICSID Case No. ARB/07/22), Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2012 ("*AES v. Hungary*"), para. 31; and *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on the Application for Annulment, 8 January 2007 ("*Repsol v. Ecuador*"), para. 36.

[37] Counter-Memorial, paras. 59-64, relying, *inter alia*, on *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 ("*Azurix v. Argentina*"), para. 68; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Decision of the *ad hoc* Committee, 25 March 2010 ("*Rumeli v. Kazakhstan*"), para. 96; and *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision of the *ad hoc* Committee, 1 March 2011 ("*Duke Energy v. Peru*"), para. 99.

[38] Counter-Memorial, paras. 65-72 (emphasis in original), relying, *inter alia*, on C.H. Schreuer, p. 964; and *Duke Energy v. Peru*, para. 212.

[39] Counter-Memorial, paras. 65-72, relying, *inter alia*, on C.H. Schreuer, p. 964; and *Duke Energy v. Peru*, para. 212; Rejoinder, paras. 26-52.

the particular grounds for annulment invoked by the Applicant, without attempting a comprehensive survey of the law.

68. As to the legal standard applicable to annulment on the basis of manifest excess of powers, the Applicant accepts the Respondent's assertion that a "manifest" excess of powers must have a certain level of "gravity, seriousness or materiality to the outcome of the case."[40] The question of materiality has particular relevance when an applicant in annulment asserts that the exercise of jurisdiction by a tribunal was a manifest excess of powers. The Committee concurs with the observation of the committee in *EDF* that "the most obvious instance of an excess of powers by a tribunal is the decision of an issue which falls outside the jurisdiction of the tribunal."[41]

69. The Respondent maintains that a manifest excess of powers must be evident on the face of the Award. The Respondent also considers it unnecessary for the Committee to enter into an examination of the materials on which the Tribunal's decision is based.[42] The Applicant disagrees with both of these propositions, instead maintaining that an *ad hoc* committee is not precluded either from engaging in inquiry and analysis of the award or from reviewing evidence and legal instruments that were before the Tribunal.[43]

70. In the view of the Committee, in order for a tribunal's excess of powers to be manifest, it must be readily discernible. As the *EDF* committee said, however, this does not mean that the excess of powers must "leap out of the page on a first reading of the Award."[44] Depending on the issues raised by an application, it may be necessary for the parties to identify with considerable elaboration the reasons for their respective positions regarding an asserted ground for annulment. In addition, the particular circumstances on which an applicant premises a claim for annulment may mean that, in order to assess the competing contentions of the parties, an *ad hoc* committee should take into account not only the award itself, but also extracts from the record of the proceedings before the tribunal. Once the

[40] Reply, para. 56, quoting Counter-Memorial, para. 57.
[41] *EDF v. Argentina*, para. 191.
[42] Counter-Memorial, para. 54(c).
[43] Reply, para. 49.
[44] *EDF v. Argentina*, para. 193.

issues have been presented to the *ad hoc* committee, the excess of powers must be obvious in order to provide a basis for annulment.

71. In respect of the contention that the Tribunal's decision on jurisdiction manifestly exceeded its powers, the Committee rejects Venezuela's invitation to conduct a *de novo* review of the Tribunal's jurisdiction. Its task is not to express its own views on the matter of jurisdiction or to substitute its views for the conclusions of the Tribunal.[45] Rather, its role is limited to a determination of whether the Tribunal manifestly exceeded its powers when it decided to exercise jurisdiction.

72. With respect to the legal standard applicable to the Committee's review of the Applicant's contention that a tribunal manifestly exceeded its powers by failing (in several respects) to apply the applicable law, the Parties agree that a tribunal commits an excess of powers by failing to apply the law as agreed by the parties.[46] For Venezuela, annulment is warranted not only when a tribunal ignores the applicable law or fails entirely to apply it, but also when it fails to apply any particular provision or portion of the applicable law. In the Committee's view, Venezuela ignores the "fundamental distinction between erroneous application of the law and a failure to apply the law."[47] If a tribunal has correctly identified the applicable law and has in fact applied that law in the award, there is no scope for an *ad hoc* committee to delve into the correctness of a tribunal's interpretation or application of the applicable law. This does not mean that a committee's inquiry ends once it observes that the tribunal has recited that a particular body of law applies to an issue before it. As stated by the *ad hoc* committee in *MTD v. Chile*:

> *An award will not escape annulment if the tribunal while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be "manifest," not arguable,*

[45] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Annulment, 5 May 2017 ("*Vivendi II*"), para. 117; and *Azurix v. Argentina*, para. 69.

[46] Memorial, para. 47; Counter-Memorial, para. 138.

[47] *Sempra v. Argentina*, para. 173.

> *and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.*[48]

73. Thus, if the Committee has satisfied itself that the Tribunal has correctly identified the applicable law and has in fact applied it, there can be no basis for annulment on the ground that the Tribunal failed to apply the applicable law and thus manifestly exceeded its powers. If the Committee were to consider whether it agreed with the Tribunal's interpretation and application of the applicable law, it would cross the line between an annulment proceeding, which seeks to preserve the integrity of the process, and an appeal.

74. The Committee notes that the Parties also endorse what has been described as a "two-step" approach to a decision on whether a tribunal has manifestly exceeded its powers, whereby a committee first decides whether there has been an excess of powers and then, if it so determines, decides whether that excess of powers was manifest. As has been recognized,[49] however, not all *ad hoc* committees have followed this approach. Certainly, a committee cannot annul an award unless it finds both that there was an excess of powers and that the excess of powers was manifest. This does not mean that the ICSID Convention dictates one specific sequence that committees must follow in their reasoning. An *ad hoc* committee must frame its analysis in the manner that best enables it to consider fully the Parties' positions on each asserted ground for annulment.

C. THE LEGAL STANDARD APPLICABLE TO AN ALLEGED SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

(1) The Parties' Positions

a. Applicant's Position

75. The Applicant observes that there is a basis for annulment under subparagraph (d) of Article 52(1) of the ICSID Convention if there is a departure that is serious from a rule of procedure that is fundamental. A "fundamental rule of procedure" has a wider connotation than the specific arbitration rules applicable to an ICSID proceeding and refers to the

[48] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007 ("*MTD v. Chile*"), para. 47 (footnote omitted).

[49] Memorial, para. 29, citing C.H. Schreuer, para. 142, p. 940.

minimal procedural standards under international law, including the right to be heard before an independent and impartial tribunal. A determination that the departure was "serious" requires an analysis of the specific facts of the case.[50]

76. Concerning the question whether a "serious" departure also requires a degree of importance or materiality measurable by the prejudice to the parties, the Applicant contends that it is sufficient that the departure "had the potential of having an impact on the award." The Applicant rejects the notion that there is a requirement to demonstrate that the departure "was a determining factor in the outcome of the proceeding" or to show that, without the departure, the award would have been "favorable" or "different." Such a requirement would deprive the ground for annulment of any *effet utile*.[51]

b. Respondent's Position

77. Vestey states that "certain basic principles relating to this ground are not in dispute, including that" it is a dual requirement encompassing the need for the rule to be fundamental and for the departure to be serious, that a fundamental rule of procedure refers to a "set of minimal standards of procedure" that includes the parties' "right to be heard before an independent and impartial tribunal," and that whether the departure was serious depends on the specific facts of the case.[52]

78. However, Vestey disputes "Venezuela's incomplete articulation of the 'seriousness' requirement […] which Venezuela considers satisfied if the departure from the relevant rule merely had the potential to have an effect on the award."[53] According to Vestey, while this element has been interpreted to include an impact or potential for impact on the award, it also includes a requirement of "importance or materiality consistent with the ordinary meaning of 'serious', measurable by the prejudice to the parties."[54] Specifically, it must

[50] Memorial, paras. 57-60; Reply, para. 78.

[51] Reply, paras. 78-85, relying on *Teco Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016 ("*Teco v. Guatemala*"), para. 85; and *Tulip v. Turkey*, para. 78.

[52] Counter-Memorial, para. 155.

[53] Counter-Memorial, para. 156.

[54] Counter-Memorial, para. 158.

deprive the affected party of the protection intended by the rule from which the Tribunal departed.

(2) The Committee's Analysis

79. In several respects, the Parties agree on the legal standard applicable to the determination whether there has been a serious departure from a fundamental rule of procedure under subparagraph (d) of Article 52(1) of the ICSID Convention. They agree that a party's right to be heard is among these fundamental rules and that there is a dual requirement, both that the departure be "serious" and that rule of procedure at issue be "fundamental." They recognize that an *ad hoc* committee's application of this legal standard is inevitably very fact-specific.

80. The Parties use different formulations to describe the threshold that must be crossed to give rise to a "serious" departure from a fundamental rule of procedure. Venezuela suggests that the bar is low, *i.e.*, that the departure "had the potential to"[55] or "could have had"[56] an impact on an award. Vestey considers that a "serious" departure is one that is more than minimal[57] and that annulment committees have endorsed a requirement of importance or materiality, "measurable by the prejudice" to the party.[58]

81. As noted by the committee in *Tulip v. Turkey*, because a determination with respect to any point in an award is likely to be the result of a number of factors, it is difficult to assess whether or to what extent a change in one parameter would have changed the outcome in an arbitral proceeding.[59] Thus, to establish that a departure from a fundamental rule was "serious," it cannot be necessary to demonstrate that it would have altered the outcome. At the same time, it is not sufficient that a departure from a fundamental rule of procedure may have had, or had the potential to have, an impact on the result, as Venezuela urges. To determine whether a tribunal's departure from a fundamental rule of procedure is serious enough to provide a basis for annulment, it is necessary to consider whether, in the

[55] Memorial, para. 64.

[56] Reply, para. 81.

[57] Counter-Memorial, para. 159, citing *Tulip v. Turkey*, para. 78.

[58] Counter-Memorial, para. 158.

[59] *Tulip v. Turkey*, para. 78.

particular circumstances of a case, the departure was of such a nature that there was a genuine prospect of a different result.

82. The rule of procedure invoked by Venezuela is the right to be heard, which undoubtedly is fundamental. When the Committee turns to the specific grounds on which Venezuela contends that the award should be annulled, it will consider whether the Tribunal denied Venezuela its right to be heard and, if so, whether there was a genuine prospect that the result would have been different absent such denial.

D. THE LEGAL STANDARD APPLICABLE TO AN ALLEGED FAILURE TO STATE REASONS

(1) The Parties' Positions

a. Applicant's Position

83. The Applicant contends that the absence of qualifiers such as "manifest" or "serious" in subparagraph (e) of ICSID Convention Article 52(1) means that there are no limitations that call for a restrictive interpretation of the provision, which is consistent with the fundamental importance of intelligible reasoning for the validity of awards.[60]

84. Venezuela maintains the failure to state reasons in this particular case relates to "fundamental issues," to a "decisive factor" or to a question that is "determinant for understanding the reasoning of the award."[61] The Applicant further contends that "a simple failure to mention a source that was discussed at length during the proceedings [is not to be confused] with the fact—present in this case—that the Tribunal's failure to state reasons makes it impossible to understand the Tribunal's reasoning."[62]

85. The Applicant rejects the sufficiency of reasons that were implicit and reasonably inferable from "a simple reading of the Award and the case file"[63] and contends that committees have an "obligation to annul" rather than seeking to redress a failure to state reasons by

[60] Reply, paras. 89-95.
[61] Reply, paras. 97-98.
[62] Reply, para. 100.
[63] Reply, paras. 101-102.

reconstructing arguments allegedly implicit to "the point where the committee takes on the tribunal's own task of rendering a decision."[64]

86. Finally, the Applicant disputes Vestey's contention that contradictory reasons only amount to failure to state reasons when they "equate to no reasons at all." To the contrary, the Applicant contends that this is only "the most extreme example of this ground" and that an award must be annulled where there are "contradictory," "inadequate," "insufficient," "unintelligib[le]," "absent" or "frivolous" reasons on a point that is essential to the outcome of the case.[65]

b. Respondent's Position

87. Vestey states that it agrees with Venezuela regarding "certain basic principles relating to this ground." In particular, the parties must be able to follow the Tribunal's reasoning to its conclusion, that a complete lack of reasoning as well as frivolous or contradictory reasons can amount to failure to state reasons, and that incorrect or unconvincing reasons are not within the Committee's remit and cannot amount to failure to state reasons.[66]

88. However, Vestey disagrees with Venezuela's "attempt to expand the tribunal's obligation to state reasons beyond the minimum requirement established by the *MINE* committee, as well as its suggestion that mere inconsistency, as opposed to genuine contradiction, in the tribunal's reasoning can be a basis for annulment."[67] According to Vestey, the obligation to state reasons is a minimum requirement that imposes a high threshold despite the absence of qualifying language attached to this ground and gives due regard to tribunals' discretion as to the way in which they express their reasoning. To determine whether insufficient or inadequate reasoning merits annulment, committees have considered whether the reasoning concerned a question on which the tribunal's decision would have turned. They have stated that there is no need for the Tribunal to provide "reasons for its reasons," to address every single argument presented by the parties, to explain its valuation

[64] Reply, paras. 104-106.

[65] Reply, paras. 108-110, relying on *Sempra v. Argentina*, para. 167; *Alapli v. Turkey*, paras. 198, 202.

[66] Counter-Memorial, para. 106.

[67] Counter-Memorial, para. 107.

of each piece of evidence, to provide references supporting a proposition (particularly where they are well known or contained in the parties' submissions), or to expressly set out the reasons where they are implicit and reasonably inferred.[68] Regarding implicit reasons, Vestey does not dispute that reasons should not be constructed where none exist, but contends that a committee should seek to understand those reasons "from the record before the tribunal" and with "reasonable efforts."[69]

89. This high threshold also applies to contradictory reasons. Vestey submits that, for those to amount to a failure to state reasons, they must cancel each other out and equate to no reasons at all. Committees have distinguished genuine contradictions from compromises resulting from weighing conflicting considerations and have also, to the extent possible, favored an interpretation that confirms the consistency of a decision rather than its alleged contradictions.[70] Vestey contends that contradictions in additional or supplementary reasons do not meet the standard, and argues that the legal authorities relied on by Venezuela do not support its attempt to lower the standard for contradictory reasons.[71]

(2) The Committee's Analysis

90. Under subparagraph (1)(e) of Article 52 of the ICSID Convention, there is a basis to annul an award that "has failed to state the reasons on which it is based." The ground for annulment is closely related to Article 48(3) of the ICSID Convention, which provides: "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."

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[68] Counter-Memorial, paras. 107-111, relying, *inter alia*, on *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on the Application for Partial Annulment of the Arbitral Award dated 6 January 1988, 14 December 1989 ("*MINE v. Guinea*"), para. 5.09; *Alapli v. Turkey*, para. 202; *Vivendi II*, para. 158; *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, 5 February 2002, paras. 81, 100-101; *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision of the *ad hoc* Committee on the Application for Annulment, 30 July 2003, para. 222; *Occidental v. Ecuador*, para. 101; *Rumeli v. Kazakhstan*, para. 104; and *Soufraki v. UAE*, para. 128. See also Rejoinder, paras. 89-92.

[69] Rejoinder, para. 91, relying on *Rumeli v. Kazakhstan*, paras. 138, 179; and *Vivendi II*, para. 158.

[70] Counter-Memorial, paras. 112-116, relying, *inter alia*, on *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision of the *ad hoc* Committee on the Request for Annulment, 7 January 2015 ("*Daimler v. Argentina*"), paras. 77-78; and *Teco v. Guatemala*, para. 65.

[71] Rejoinder, paras. 95-97, relying, *inter alia*, on *Sempra v. Argentina*, para. 167; and *Alapli v. Turkey*, paras. 200-202.

91. The requirement to state reasons means that an award must permit a reader to follow the logic of the tribunal "from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law."[72] As stated by the *ad hoc* committee in *Vivendi I*, "[p]rovided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e)."[73]

92. It is accepted that annulment may be predicated both on the entire absence of reasons and on insufficient, inadequate or contradictory reasons.[74] However, reasoning is not insufficient simply because the tribunal does not set out "its consideration and treatment of each piece of evidence adduced by either party."[75] A tribunal is required to state the reasons for its decision, but not necessarily the reasons for its reasons. It is not up to an *ad hoc* committee to construct its own reasons for a decision by a tribunal. This does not exclude a finding that a tribunal's reasons are sufficiently implicit in the considerations and conclusion in the award, if they reasonably may be inferred from the terms used in the decision.[76] "[I]f reasons are not stated but are evident and a logical consequence of what is stated in an award, an *ad hoc* committee should be able to so hold."[77]

93. In summary, insufficient or inadequate reasoning only provides a ground for annulment under Article 51(1)(e) of the ICSID Convention if a tribunal's reasons "are so inadequate that the coherence of the reasoning is seriously affected."[78]

94. In the Committee's view, contradictory reasons that fall within subparagraph (e) of Article 52(1) of the ICSID Convention are reasons that "cancel each other and will not enable the reader to understand the tribunal's motives."[79] When contradictory reasons

[72] *MINE v. Guinea*, para. 5.09.

[73] *Vivendi I*, para. 64. See also *CMS v. Argentina*, paras. 53-55 (citing *Vivendi I* and *MINE v. Guinea*).

[74] See, *e.g.*, *Sempra v. Argentina*, para. 167.

[75] *Rumeli v. Kazakhstan*, para. 104.

[76] *Soufraki v. UAE*, para. 128.

[77] *Rumeli v. Kazakhstan*, para. 83.

[78] *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Application for Annulment of the Award, 1 November 2006, para. 21.

[79] *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision of the *ad hoc* Committee on the Application for Annulment, 21 February 2014, para. 102.

"neutralize" each other,[80] they are tantamount to no reason at all. However, an *ad hoc* committee should take care not to find contradiction when a tribunal's reasons can more accurately be described as a reflection of the conflicting considerations that the tribunal was required to balance in reaching its conclusions.[81]

95. Having set out its views on the legal standards applicable to an alleged manifest excess of powers, an alleged serious departure from a fundamental rule of procedure and an alleged failure to state reasons, the Committee turns to the specific grounds on which the Applicant seeks annulment.

V. THE GROUNDS ON WHICH THE APPLICANT CLAIMS THAT THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS

96. According to the Applicant, the Tribunal manifestly exceeded its powers because it (a) exercised jurisdiction it did not have by deciding a dispute that was different from the dispute originally submitted;[82] (b) failed to apply the applicable law by assuming jurisdiction by estoppel in disregard of its own finding that jurisdiction cannot be acquired by estoppel;[83] (c) failed to apply the applicable law by not admitting the Applicant's objection to jurisdiction in disregard of Arbitration Rule 41(2);[84] (d) failed to apply the applicable law and acted outside its scope of jurisdiction by creating property rights that did not otherwise exist under Venezuelan law;[85] and (e) failed to apply the applicable law by recognizing property rights for unidentified assets.[86]

A. EXERCISE OF JURISDICTION OVER A DISPUTE THAT WAS DIFFERENT FROM THE DISPUTE SUBMITTED TO ARBITRATION

[80] *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 22 September 2014, para. 221.

[81] *CMS v. Argentina*, para. 54; *Vivendi I*, para. 65.

[82] Memorial, paras. 105-140; Reply, paras. 112-137.

[83] Memorial, paras. 141-147.

[84] Memorial, paras. 148-151.

[85] Memorial, paras. 164-195; Reply, paras. 146-181.

[86] Memorial, paras. 218-226; Reply, para. 199, 204-206, 210-212, 216-217, 221.

(1) The Parties' Positions

a. Applicant's Position

97. The Applicant maintains that the Tribunal exercised jurisdiction over a dispute that was different from the dispute that Vestey submitted to arbitration. Venezuela first asserted the lack of identity between the dispute as set out in out in the Request for Arbitration and the dispute that was before the Tribunal in its opening statement at the hearing in the Original Proceeding.[87] (The Tribunal referred to this objection as the "lack of identity" objection, and the Committee will also do so). The Tribunal's conclusion regarding Venezuela's objection to jurisdiction was that:

> [T]*he Tribunal considers this objection untimely and thus inadmissible. This being so, it notes that if the objection were admissible, it would not succeed on the merits. Indeed, the Tribunal cannot follow the Respondent when it argues that the present dispute is entirely different from the one presented in the Request for Arbitration.*[88]

98. The Applicant relies on this conclusion by the Tribunal to advance two grounds for annulment. First, it maintains that, by deciding that the objection was untimely and thus finding it inadmissible, the Tribunal seriously departed from a fundamental rule of procedure. That ground for annulment is addressed below in section VI.A. Second, the Applicant points to the Tribunal's subsidiary conclusion that the objection would have failed on the merits and claims that this was a manifest excess of the Tribunal's powers.

99. The Applicant submits that the Tribunal "manifestly exceeded its powers when it asserted jurisdiction over a dispute which had no identity with the dispute that gave rise to the arbitral proceeding, taking into account the way that dispute was formulated in the Arbitration Request."[89] The Applicant sets out a "series of facts" that were cited in the request and asserts that this series of facts "and no other, was the object of the dispute stated by Vestey Group in the arbitration proceedings."[90] The Applicant claims that the dispute

[87] Award, para. 132.

[88] Award, para. 150.

[89] Memorial, para. 3.

[90] Memorial, paras. 105-109.

originally brought to arbitration in 2005 was settled on 17 March 2006 through the conclusion of a settlement agreement ("**the 2006 Agreement**"),[91] following which Vestey sought and obtained numerous suspensions of the ICSID proceeding between 2006 and 2011. These requests show that the "agreement reached by the parties was being satisfactorily implemented," and that the only reason why Vestey did not request the discontinuation of the ICSID case, as required by the 2006 Agreement, was "the possibility of obtaining additional benefits from the Republic."[92]

100. Despite the fact that the dispute had been settled, Vestey decided to resume the ICSID proceeding "in violation of the letter and the spirit of the agreement."[93] Vestey did so by submitting claims based on issues which had not been included in the Request for Arbitration, the "only possible link" being "Vestey's claim with respect to the requirement demanding that the chain of title to the farms be proven."[94] The Applicant contends that, in its Rejoinder on Jurisdiction, Vestey impliedly recognized that the requirement to prove a chain of title was already applicable in 2001. According to the Applicant, this means that all of Vestey's claims post-dating the 2006 Agreement were either new (and different from the dispute submitted to arbitration) or formed part of the original dispute (and had therefore been settled with the 2006 Agreement or abandoned by Vestey since its Rejoinder on Jurisdiction). As this only became apparent with the Rejoinder on Jurisdiction, Venezuela's objection to jurisdiction based on the above facts and made during its opening statement at the hearing was submitted at the first procedural opportunity.[95] Nonetheless, the Tribunal in the Award considered the objection untimely and, as a consequence, inadmissible.[96]

101. According to the Applicant, "the critical date for analyzing whether all of the jurisdictional requirements have been met—which requirements undoubtedly include the specific definition of the dispute—is the date of registration of the proceeding." Because the

[91] Reply, paras. 119-120.

[92] Memorial, paras. 105-120.

[93] Reply, para. 12.

[94] Counter-Memorial, para. 25(b); Reply, para. 121.

[95] Memorial, paras. 122-127; Reply, para. 121.

[96] Memorial, paras. 128-129.

Tribunal's jurisdiction was limited to the dispute brought with the Request for Arbitration, which was settled in 2006, the Tribunal's decision of a different dispute exceeds those limits and was therefore made in excess of its jurisdiction.[97]

102. To make this determination, the Applicant contends that the Committee is not precluded from considering its jurisdictional objection *de novo*, including by analyzing the submissions of the Parties, the supporting evidence or the relevant legal instruments. The fact that the Tribunal "dismissed each of these arguments in the Award," as claimed by Vestey, does not preclude this exercise. The problem lies in the way that the issue of jurisdiction was treated in the Award.[98]

103. The Applicant contends that the Tribunal's decision that the jurisdictional objection would have failed on the merits is "fundamental to the determination of the rights of the parties" and, therefore, it cannot be argued that "the manifest excess of powers by the Tribunal is not sufficiently important or substantial to warrant annulment."[99]

b. Respondent's Position

104. Vestey recalls that Venezuela raised its jurisdictional objection based on the alleged lack of identity of the disputes for the first time during the hearing in 2015. Vestey explains that the Tribunal allowed Venezuela the opportunity fully to brief this objection but ultimately rejected it as inadmissible in the Award, noting that Arbitration Rule 41(1) would have required Venezuela to submit its objection at the earliest opportunity, namely when the arbitration resumed in 2011. Even on Venezuela's case that the novelty of the claims only became apparent in May 2014 with Vestey's Rejoinder on Jurisdiction, the Tribunal found that an 8-month time lapse did not meet the standard under Arbitration Rule 41(1), of which Venezuela was not absolved by virtue of the Tribunal's ability to consider the objection *ex officio* under the second paragraph of the same rule. Despite having rejected the objection on admissibility grounds, the Tribunal went on to consider the substance of the objection, including the effect of the 2006 Agreement and, having

[97] Memorial, paras. 130-136.

[98] Reply, paras. 115-118 (relying on *Sempra v. Argentina*, paras. 159-186) and 125.

[99] Reply, para. 124.

analyzed it, made a subsidiary decision that the objection failed on the merits, finding that the new factual developments densified the dispute but did not change its nature and identity. The Tribunal further held that Vestey's claims would, in any event, be admissible as ancillary claims under Arbitration Rule 40(1).[100]

105. Vestey contends that the Tribunal's decision may only be annulled on this ground if it is "manifestly wrong," for which determination the Committee cannot undertake a *de novo* examination of the Tribunal's jurisdiction. Instead, the Committee would have to determine that the Tribunal wrongly assumed jurisdiction in a manner that is "clear, obvious and evident from a simple reading of the Award, discernible without deeper analysis, without examination of underlying documents and without being subject to debate."[101] Vestey maintains that Venezuela's invitation to the Committee to review the submissions and evidence of the underlying arbitration is "inconsistent with the plain meaning of 'manifest' and the nature and scope of the annulment remedy, which cannot be used as an avenue for appeal."[102]

106. Vestey submits that Venezuela's request would fail "[r]egardless of how much analysis and review Venezuela asks the Committee to undertake" because "findings of fact cannot be revised at the annulment stage […] even when they underlie an alleged excess of jurisdiction." The Committee is bound by the Tribunal's findings on the identity of the dispute described in the Request for Arbitration and that which was resolved in the Award. Accordingly, Venezuela's assertion must fail as it depends entirely on the Committee coming to a different conclusion on this factual matter.[103] In any event, the Tribunal's rejection of the objection is primarily based on untimeliness, and therefore the Tribunal's factual findings only provide an alternative ground for the same result.[104]

[100] Transcript, Day 1, pp. 102-110.
[101] Counter-Memorial, para. 78.
[102] Counter-Memorial, paras. 77-79.
[103] Counter-Memorial, para. 80.
[104] Transcript, Day 1, p. 115.

(2) The Committee's Analysis

107. The Committee begins by recalling that the Tribunal's primary basis for rejecting the identity-of-disputes objection was its untimeliness. Its conclusion that the objection failed on the merits was subsidiary to the decision that the objection was inadmissible.

108. Each Party has propounded the approach that it urges the Committee to take with respect to this issue. Venezuela urges *de novo* review. Vestey asserts that the findings of the Tribunal were factual and not amenable to review in annulment. However, in this annulment proceeding, each Party reinforced its positions by citing documents in the record before the Tribunal, including the Request for Arbitration, the 2006 Agreement and extracts from written and oral submissions in the Original Proceeding, which references placed the Parties' respective assertions in context.

109. In summary, the Applicant's contention, both in this annulment proceeding and before the Tribunal, is that the dispute presented in the Request for Arbitration was settled in the 2006 Agreement and that the dispute before the Tribunal in the arbitration proceeding, once it was resumed in 2011, was different from the dispute presented in the Request for Arbitration.

110. The Tribunal observed that, pursuant to Article 25(1) of the ICSID Convention, it must have jurisdiction over a "dispute." It stated its conclusion as to the substance of Venezuela's identity-of-disputes objection as follows:

> *In the present case, the dispute hinges on the lawfulness of Venezuela's introduction of rules for the elimination of idle estates and the measures taken against Vestey's cattle farming business under such rules. While the factual matrix of the dispute has evolved and the formulation of the claims has followed this evolution, the essence of the dispute is unchanged. A review of the chronology confirms the unity or identity of the dispute.*[105]

111. The Tribunal also noted the general way in which Vestey (the Claimant in the Original Proceeding) framed the dispute in the Request for Arbitration:

[105] Award, para. 151.

> *In the Request for Arbitration filed in 2005, the Claimant noted that "the Land Law provided a new legal framework for state intervention with rural land in Venezuela" and that the "dispute concerns the illegal treatment and confiscation by Venezuela of the country's principal cattle farming business, which has been owned by Vestey for some 90 years."*[106]

112. Venezuela urged the Committee to construe the dispute presented in the Request for Arbitration more narrowly than did the Tribunal. The Committee declines to do so. It notes that the Request for Arbitration stated that Venezuela "has taken, or is in the process of taking, concrete steps to confiscate most if not all of Vestey's farms in Venezuela" and that "the Government is intent on confiscating most if not all of Vestey's land."[107] The Request for Arbitration also noted the "constantly evolving nature of Venezuela's Measures" and reserved Vestey's right to "specify, supplement, or amend its claims."[108]

113. The Tribunal concluded that the 2006 Agreement "did not put an end to the dispute so described."[109] In support of this conclusion, it stated that the Parties "do not dispute that it [that is, the 2006 Agreement] merely suspended the arbitration."[110] In this annulment proceeding, however, Venezuela asserted that the 2006 Agreement required Vestey to discontinue the case (rather than merely to suspend it) and insisted that the 2006 Agreement settled the dispute contained in the Request for Arbitration.

114. Although it appears that the Parties entered into the 2006 Agreement with the expectation that it would lead to settlement of the dispute presented in the Request for Arbitration,[111] the Tribunal concluded that the 2006 Agreement "did not bring about a solution to the dispute," citing Vestey's continuing complaints about Venezuela's measures (as described in Vestey's Reply in the Original Proceeding).[112] It reached this conclusion after framing

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[106] Award, para. 152 (footnote omitted), quoting RFA, paras. 7, 52.

[107] RFA, paras. 30, 86, 91 (cited in Vestey's Opening Presentation, p. 31).

[108] RFA, paras. 103, 106.

[109] Award, para. 153.

[110] Award, para. 153.

[111] 2006 Agreement, para. 6 (the 2006 Agreement was reached "in order to amicably resolve and prevent disputes involving the farms"); Memorial, para. 115.

[112] Award, para. 154.

its inquiry with reference to Article 25(1) of the ICSID Convention, having examined the 2006 Agreement and the Request for Arbitration.

115. The Tribunal's conclusion that the 2006 Agreement did not settle the dispute that was set out in the Request for Arbitration leaves open the possibility that the dispute changed so much after the filing of the Request for Arbitration that the Tribunal manifestly exceeded its powers by exercising jurisdiction in this case. However, as the Committee has previously noted, the Request for Arbitration indicated that Vestey had reason to anticipate the possibility that additional measures would be applied to its investment and expressly reserved Vestey's right to update its claims. The Tribunal also observed that "history did not stand still" after the arbitration was initiated, and that developments after the filing of the Request for Arbitration "densified the dispute," but did not change its "nature and identity."[113] It pointed to statements by Vestey indicating that it continued its objections to Venezuela's measures.[114] And documents from the Original Proceeding[115] that were brought to the attention of the Committee confirm the Tribunal's conclusions.

116. The Committee concludes that it was open to the Tribunal to reach the conclusion that it would have rejected Venezuela's identity-of-disputes objection to jurisdiction, had it found the objection admissible. Hence the Tribunal did not manifestly exceed its powers in rejecting this objection by Venezuela on the merits, on a subsidiary basis.

117. As previously noted,[116] when two lines of reasoning support a tribunal's decision, the award can survive an annulment challenge even if one ground of reasoning is found to be a basis for annulment. However, because the Tribunal's conclusions regarding the substance of the identity-of-disputes objection were subsidiary to its rejection of the objection as inadmissible, the Committee will also address Venezuela's contention that the

[113] Award, para. 155.

[114] Award, para. 156.

[115] Vestey's Opening Presentation, p. 16. See *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Annulment, 1 February 2016, para. 167.

[116] See *supra*, para. 58.

decision on inadmissibility was a serious departure from a fundamental rule of procedure (see Section VI.A below).[117]

B. FAILURE TO APPLY CUSTOMARY INTERNATIONAL LAW BY APPLYING ESTOPPEL PRINCIPLES TO FIND JURISDICTION

(1) The Parties' Positions

a. Applicant's Position

118. The Applicant contends that "it is well recognised in international law" that it is not appropriate to dismiss an objection to jurisdiction on admissibility grounds.[118] According to the Applicant, during the hearing, the Tribunal recognized that it is a rule of customary international law that jurisdiction cannot be acquired by estoppel. This rule implies that an objection to jurisdiction can be validly raised at any stage of the proceeding. Given that the Tribunal decided in the Award that the objection was untimely and therefore inadmissible, the Applicant argues that the Tribunal failed to apply the "rule of law" it had previously identified, which "was applicable to the case," thus manifestly exceeding its powers.[119]

119. The Award does not state that the Tribunal based its decision on jurisdiction on application of the principle of estoppel. However, according to the Applicant, the Tribunal "clearly identified the principle under consideration as a rule of customary international law" and determined that customary international law governed the interpretation of the ICSID Convention and the BIT. The Applicant further states "[i]f the ICSID Convention—and obviously its rules—must be interpreted in the light of customary international law and, according to the Tribunal, it is a rule of customary international law that jurisdiction cannot be acquired by estoppel, then the Tribunal manifestly exceeded its powers in rejecting the Republic's objection to jurisdiction as inadmissible."[120]

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[117] Transcript, Day 2, pp. 200-203, relying on *Daimler v. Argentina*.

[118] Memorial, paras. 143-147; Reply, para. 129.

[119] Reply, paras. 134-136.

[120] Reply, paras. 130-133.

120. According to the Applicant, it is not accurate that the Tribunal only made "a mere remark" of the rule at the hearing, because the Tribunal made that statement in response to an argument by Venezuela, after hearing the Parties and having deliberated. Thus, "the notion under consideration was practically an obvious issue which was to be easily resolved in the affirmative."[121]

121. The Applicant contends that the Award is not protected by the Tribunal's identification of customary international law as part of the applicable law because the Tribunal then failed to apply this particular part of the applicable law. The Award must, accordingly, "be annulled in full by the Committee."[122]

b. Respondent's Position

122. Vestey contends that Venezuela has not identified a finding by the Tribunal that the prohibition against acquiring jurisdiction by estoppel was the legal rule applicable to its jurisdictional objection (even if that were customary international law on this point and even if the Tribunal acknowledged that customary international law governs treaty interpretation). To the contrary, Vestey contends that the Tribunal applied the specifically applicable legal standards under the Arbitration Rules, which would have displaced customary international law in any event to the extent that the two differed. Moreover, the Tribunal decided the objection on the merits on a subsidiary basis only.[123]

(2) The Committee's Analysis

123. The basis for this ground for annulment appears to be the statement by the President of the Tribunal at the hearing that "there is no estoppel in terms of jurisdiction."[124] Venezuela asserts that it is well-established under international law that jurisdiction cannot be acquired by estoppel and thus that a party's objection to jurisdiction may be raised at any point in a proceeding.[125] On Venezuela's reasoning, this asserted rule of customary

[121] Reply, para. 132.

[122] Reply, paras. 134-137, relying on *Sempra v. Argentina*, paras. 165, 195.

[123] Rejoinder, paras. 61-62; Transcript, Day 2, pp. 258, 259.

[124] Memorial, para. 145, quoting Tribunal Hearing Tr. Day 1, 281:8-282:3.

[125] Memorial, para. 144.

international law was the applicable law, which the Tribunal failed to apply when it rejected the identity-of-disputes objection as untimely.

124. In the view of the Committee, there is no indication that the Tribunal exercised jurisdiction on the basis of estoppel, nor that it considered that the admissibility of an objection to its jurisdiction was to be decided on the basis of customary international law. The Tribunal instead identified the ICSID Convention and Arbitration Rules as the law applicable to the admissibility of the objection, and it applied that law to the facts and circumstances of this case. Accordingly, there is no basis to accept this ground for annulment.

C. FAILURE TO APPLY ARBITRATION RULE 41(2) BY NOT ADMITTING THE APPLICANT'S OBJECTION TO JURISDICTION

(1) The Parties' Positions

a. Applicant's Position

125. The Applicant states that Arbitration Rule 41(2), which forms part of the "proper law," allows tribunals to consider their jurisdiction on their own initiative at any stage of the proceeding.[126] *A fortiori* pursuant to this rule, the Tribunal could have considered whether it had jurisdiction over the dispute at the request of a Party. The Applicant contends that the Tribunal's decision to find the objection inadmissible is not an erroneous application of the applicable law but is instead a failure to apply the applicable law that must lead to the annulment of the Award on the grounds of manifest excess of powers.[127]

b. Respondent's Position

126. Vestey contends that the Tribunal applied "the same system of law Venezuela argues to be applicable" when it decided on the admissibility of Venezuela's objection, namely international law and, specifically, Rule 41(1) of the Arbitration Rules, as prescribed by Article 8 of the Treaty. Because the Tribunal identified and applied the law that Venezuela considers applicable there is no failure to apply the applicable law. Any further review of the correctness of the Tribunal's application of the ICSID Convention and Arbitration

[126] Memorial, paras. 141, 148-150, relying on *Daimler v. Argentina*, paras. 107-110.

[127] Memorial, paras. 151-152.

Rules is beyond the powers of the Committee and would not rise to a complete non-application of the proper law.[128]

(2) The Committee's Analysis

127. It appears to the Committee that this ground for annulment is premised on Venezuela's view that Arbitration Rule 41(2) permits a tribunal to consider its own jurisdiction at any time, and that, because the Tribunal nonetheless found Venezuela's objection to be untimely, it failed to apply the applicable law, and thus manifestly exceeded its powers.

128. As previously noted, the Committee considers that Venezuela offers an unduly expansive interpretation of the scope of review available to an *ad hoc* committee when an applicant in annulment contends that a tribunal has failed to apply the applicable law and thus has manifestly exceeded its powers. The Tribunal identified the applicable law (the ICSID Convention and the Arbitration Rules) and applied it. Venezuela asks the Committee, in essence, to second-guess the manner in which the Tribunal applied the applicable law. Such inquiry is beyond the scope of an annulment proceeding. This ground for annulment therefore fails.

* * *

129. In support of the next two grounds for annulment, as well as others to be addressed in later sections of this Decision, Venezuela relies on parts of the Award that address property rights claimed by Vestey. Accordingly, in the interest of clarity and efficiency, and before turning to the specific grounds for annulment, the Committee summarizes the parts of the Award that address Vestey's claim to property rights.

130. In the arbitration, Venezuela asserted in opposition to Vestey's expropriation claim that Vestey did not have title to all of its farms. The Tribunal recognized that it therefore needed to assess whether Vestey held title. Vestey contended that Venezuela was estopped from challenging title in the Arbitration, having previously recognized title in the 2006

[128] Counter-Memorial, paras. 82-87; Rejoinder, para. 56.

Agreement and in productivity certificates that Venezuela had issued.[129] The Tribunal rejected this contention. It stated:

> *For a private person to have a claim under international law arising from the deprivation of its property, it must hold that property in accordance with applicable rules of domestic law. The principle of estoppel cannot create otherwise inexistent property rights. This is so if one grounds the principle of estoppel on international law.*[130]

131. The Tribunal also stated that Venezuelan law "leaves no room for the acquisition of property by estoppel."[131] It continued by observing that one means of acquiring title under Venezuelan law "could be compared to estoppel in the sense that it implies that acquiescence to peaceful possession can create property rights. The creation of property rights through acquisitive prescription is, however, subject to stringent legal conditions."[132]

132. The Tribunal then turned to the Parties' disagreement over the value of registered title under Venezuelan law. It concluded that, under Venezuelan law, registration is not an independent mode of acquisition of property, but that it creates a presumption that the act underlying the registration is valid. It stated that, in the present case:

> [T]*hat underlying act is the contract for the transfer of property. Such contract does constitute an independent mode of acquisition of a property right, a matter that is uncontroversial. Unless it is invalidated through the means established by law, the registration obliges any third party, including this Tribunal, to presume that the property right has been validly transferred by operation of the registered property transfer agreement.*[133]

133. The Award further stated: "[i]n the absence of a judicial decision to the contrary, the Tribunal will thus consider that the registered property transfer agreements presented by Vestey validly transferred the property rights over the land plots."[134]

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[129] Award, paras. 251-256.

[130] Award, para. 257.

[131] Award para. 258.

[132] Award, para. 259.

[133] Award, para. 268.

[134] Award, para. 272.

134. There were some discrepancies between the areas indicated in the registered titles and the areas claimed by Vestey. The Tribunal found that these discrepancies did not *per se* affect the validity or existence of registered title. It stated that the outcome "could have been different if the registry extracts made reference to land plots different from those claimed by the Claimant. However, in this instance, the physical defining features and names of the registered plots coincide with those claimed by Vestey. The divergences merely involve the precise surfaces"[135] of the registered land, which, the Tribunal concluded, could be relevant for valuation purposes, but has no bearing on the existence or validity of a registered title.

135. Having concluded that Vestey had valid title to the farms based on registered title, the Tribunal then turned to acquisitive prescription, stating that "even if the registrations were not deemed to confer valid title, Vestey would hold such title on the ground of acquisitive prescription."[136] It set out its understanding of the relevant provisions of Venezuelan law, including Article 1979 of the Civil Code, and concluded that the requirements for acquisitive prescription set out in Article 1979 had been met.[137]

136. The Tribunal then considered Venezuela's argument, based on Article 691 of the Code of Civil Procedure of Venezuela, that acquisitive prescription requires a declaration from Venezuela's courts. It concluded that Article 691 of the Code of Civil Procedure confirms that a judicial declaration is not a condition for acquisitive prescription and that, if a judicial declaration were a prerequisite, Article 1979 of the Civil Code (setting out the requirements for acquisitive prescription) would be rendered inutile. "The only understanding that reconciles these two provisions is that one acquires a property right once it meets the substantive requirements prescribed in Article 1979, while the rules of the Code of Civil Procedure provide a legal process to formally declare that acquisition has validly occurred."[138]

[135] Award, para. 275.
[136] Award, para. 276.
[137] Award, para. 279.
[138] Award, para. 283.

137. The Tribunal's conclusion that Vestey had valid title was therefore based on two lines of reasoning that are set out in the Award, *i.e.*, the presumptions that the Tribunal found to arise from registered title and acquisitive prescription.

138. The Tribunal also addressed Venezuela's argument that Vestey was estopped from invoking acquisition by prescription in the arbitration proceeding because it did not raise the defense at the time of the recovery proceedings. The Tribunal stated that Vestey had, in fact, relied on acquisitive prescription in seeking to annul a resolution effecting recovery in judicial proceedings in 2005, in which the court dismissed the argument as procedurally inapposite, and concluded:

> *In any event, the Tribunal can discern no requirement in the applicable legal framework according to which the beneficiary of an acquisitive prescription must invoke the prescription before any court or authority or otherwise inform third parties. Therefore, even if Vestey had never invoked the acquisitive prescription it would not change the legal position, i.e. that it had acquired ownership in accordance with Article 1979 of the Civil Code.*[139]

D. FAILURE TO APPLY VENEZUELAN LAW BY CREATING PROPERTY RIGHTS

(1) The Parties' Positions

a. Applicant's Position

139. The Applicant recounts that the Tribunal established that Vestey had property rights based on "(a) the fact that Vestey had a registered deed of title that was not timely challenged by the Republic, and (b) the fact that Vestey has allegedly acquired the land by acquisitive prescription."[140]

140. Regarding the unchallenged registered titles, the Tribunal stated that the presumption of the validity of registered title binds third parties, including the Tribunal, "until or unless the contrary is established by a competent Venezuelan court." In the absence of a contrary decision by a Venezuelan court, the Tribunal concluded that "the registered property

[139] Award, para. 284.

[140] Memorial, para. 167; Reply, paras. 147, 152-157.

transfer agreements presented by Vestey validly transferred the property rights over the land plots."[141]

141. The Applicant argues that in so reasoning, the Tribunal applied "erroneous and inapplicable rules […] by regarding two obviously separate and distinct issues as equivalent: the validity of the deeds of title and the acquisition of property rights."[142] It presented to the Committee the interpretation of Venezuelan law on which it premises this assertion, which is not recited here.[143] Venezuela maintains that it does "not disagree with the Tribunal's interpretation of Venezuelan law" but contends that the Tribunal, having correctly identified the applicable law, "finally decided not to apply it."[144] The Applicant concludes that the Tribunal manifestly exceeded its powers "because it failed to apply the law it had regarded as applicable" and because "it acted outside its scope of jurisdiction," both of which are manifest because they arise directly from the text of the Award.[145]

142. Regarding acquisitive prescription, the Applicant states that "the Tribunal considered that Vestey acquired the land that is the subject matter of its claim by acquisitive prescription" despite the absence of a court decision to such effect, which would have been "merely declarative." It states that, without a court decision "it is legally impossible to consider that acquisitive prescription has ever occurred," not less because "a court cannot compensate, on its own initiative, for the parties' failure to raise the issue of acquisitive prescription," because an international tribunal "is not even the appropriate jurisdictional body before which the issue of acquisitive prescription should be filed" or because Vestey did not "make any claim that could lead to the Tribunal's favourable decision in the Award."[146] The Applicant also states that there is no relevant court decision on acquisitive prescription because Vestey did not invoke or otherwise refer to it in any proceeding before Venezuelan courts except for a defense brought in a proceeding concerning a farm that "is

[141] Reply, para. 156 (emphasis omitted).
[142] Memorial, paras. 168-170.
[143] Memorial, paras. 171-173; Reply, paras. 157-160.
[144] Reply, para. 147.
[145] Memorial, para. 174; Reply, paras. 163-165.
[146] Memorial, paras. 175-188; Reply, paras. 166-175, 177-180.

not part of the present dispute under the 2006 Agreement." As summarized by the Applicant:

> *Therefore, when the Tribunal claims in the Award that Vestey acquired property rights by acquisitive prescription, it manifestly exceeds its powers under the terms of Article 52(1)(b) of the ICSID Convention, as it acts outside the scope of jurisdiction and decides the creation of property rights in land, which rights can only be established by the courts of the Republic, when there is no controversy as to the fact that such competent courts have never declared so, either because Vestey never filed an action in this regard, or because when the issue was raised by way of defence the judges hearing the respective case denied it.*[147]

b. Respondent's Position

143. Vestey contends that there is no failure to apply the proper law here. Venezuela acknowledges that the proper law in this case is Venezuelan law, and that is also the law applied by the Tribunal to determine the existence of Vestey's property rights. In particular, having analyzed and interpreted various sources of Venezuelan law to determine the land ownership requirements, the Tribunal then applied those and concluded that Vestey held valid title to the land under Venezuelan law "on the basis that it: (i) held registered title in respect of the land claimed (without having to demonstrate a perfect chain of title in addition); and (ii) in any event, would have acquired title by acquisitive prescription."[148]

144. Accordingly, the Tribunal did not create property rights, nor did it ever purport to create property rights. The Tribunal merely determined, as a factual matter, that Vestey held valid title and property rights under Venezuelan law, a determination that was "squarely within the Tribunal's power" and cannot be substituted by the Committee's own interpretation of Venezuelan law or appreciation of the facts. Therefore, since the Tribunal purported to apply the same law as considered applicable by Venezuela, the Committee must dismiss

[147] Memorial, para. 188.

[148] Counter-Memorial, paras. 89-92.

the claim that the Tribunal exceeded its powers in this regard. Even a clearly erroneous or incomplete application of the proper law would not give rise to an excess of powers.[149]

145. Venezuela's real argument, according to Vestey, is that the Tribunal failed to interpret Venezuelan law correctly or failed to give effect to its specific provisions. In particular, Venezuela contends that the Tribunal decided not to apply either or both of the perfect-chain-of-title requirement (concerning the existence and validity of the property rights) and the requirement of judicial declaration (concerning the acquisition of rights through acquisitive prescription).[150]

146. According to Vestey, the Tribunal did not fail to apply these requirements but expressly found that they were not applicable (regarding the perfect chain of title) or non-existent (regarding the judicial declaration), on the basis of its interpretation and application of Venezuelan law.[151]

147. Vestey concludes that, since Venezuela has failed to establish an excess of powers, there is no need to examine whether excess satisfies the requirement that it be manifest. In any event, Venezuela's assertion that the excess is manifest because it "clearly arises from the text of the Award" is negated by Venezuela's extensive references and lengthy arguments on the evidence before the Tribunal. This claim must therefore be dismissed.[152]

(2) The Committee's Analysis

148. The Tribunal found that Vestey held valid title to the land that it claims on two bases, namely that it held registered title to that land and that, even if Vestey did not have valid title, it would hold such title on the ground of acquisitive prescription. Venezuela challenges both lines of reasoning set out in the Award, claiming that the Tribunal failed to apply the applicable law, which was a manifest excess of powers.

[149] Counter-Memorial, paras. 93-94; Rejoinder, para. 77.

[150] Rejoinder, paras. 67-72, 74.

[151] Rejoinder, paras. 72-75; Transcript, Day 1, pp. 130-135 and Day 2, pp. 239-250.

[152] Counter-Memorial, paras. 95-96.

149. The Tribunal noted that the Parties agreed that Venezuelan law governed ownership of the land in question.[153] It then examined various provisions of Venezuelan law related to the value of registered title under Venezuelan law, addressing the Parties' competing interpretations of Venezuelan law. It concluded that, in the absence of a judicial decision to the contrary, it would consider that "the registered property transfer agreements presented by Vestey validly transferred the property rights over the land plots."[154]

150. So expressed, in its reasons the Tribunal both identified Venezuelan law as the law applicable to this aspect of the dispute and applied that law. There is no indication that it instead applied a different body of law. Venezuela's objections to the Tribunal's conclusions regarding registered title are criticisms of the correctness of the Tribunal's interpretation and application of Venezuelan law. So characterized, its objections are beyond the purview of an annulment proceeding.

151. The Tribunal also applied Venezuelan law to decide whether, even if registrations of title were not deemed to confer valid title, Vestey would hold title on the basis of acquisitive prescription.[155] The Award sets out the Tribunal's analysis of provisions of Venezuelan law that it applied.[156] Again, Venezuela's objections are based on its disagreement with the manner in which the Tribunal interpreted and applied the applicable law, *i.e.,* Venezuelan law.

152. Venezuela also suggests that the Tribunal's "creation of property rights" was an excess of its jurisdiction.[157] As noted above, the Tribunal applied Venezuelan law to reach its conclusions regarding the existence of property rights. Venezuela does not substantiate the assertion that the Tribunal "created" property rights. This assertion does not provide a basis to conclude that the Tribunal manifestly exceeded its powers.

[153] Award, para. 252.
[154] Award, para. 272.
[155] Award, para. 276.
[156] Award, paras. 276-284.
[157] Reply, paras. 164-165.

153. In summary, the Committee finds that the Tribunal did not manifestly exceed its powers and thus that there is no basis to annul the Award pursuant to subparagraph (b) of Article 52(1) of the ICSID Convention.

E. FAILURE TO APPLY THE APPLICABLE LAW BY RECOGNIZING PROPERTY RIGHTS FOR UNIDENTIFIED ASSETS

(1) The Parties' Positions

a. Applicant's Position

154. The Applicant considers that the Tribunal failed to apply Venezuelan law by recognizing property rights in what it describes as "unidentified property," because it failed to apply the applicable law (Venezuelan law) to determine the existence of the alleged real property rights. The Applicant explains that although the Tribunal confirmed the lack of identity between the titles that Vestey possessed and the land that it claimed, it "did not invalidate Vestey's claim with respect to this land, but merely reduced the amount of damages for the alleged expropriation, as if the hectares of land were fungible goods."[158]

155. The Applicant states that, under Venezuelan law, "property rights are not interchangeable and for a right in rem to exist, its identification must be accurate and concrete." As a consequence, "if it is not possible to determine the actual surface area, there can be no property rights in it."[159]

156. According to the Applicant, the Tribunal manifestly exceeded its powers when it purported to apply Venezuelan law and instead "created rights in clear violation of the domestic law that it had to apply and disregard[ed] the fundamental concepts of real property rights and the general principles of private law."[160] As to this alleged error, the Applicant contends that it is the Committee's duty to determine whether the Tribunal "observed such applicable

[158] Memorial, para. 224; Reply, para. 213 (footnote omitted).

[159] Memorial, paras. 221-223; Reply, paras. 211-212.

[160] Memorial, para. 225; Reply, para. 210.

law and relied on it to resolve the dispute" as opposed to merely purporting to apply it but actually applying a different law.[161]

157. In addition, during the hearing, the Applicant contended that the Tribunal both failed to apply the law applicable to compensation when it awarded damages for uncertain or indeterminate surfaces of land, and ignored the applicable evidentiary rules on burden of proof when it relied on unreliable sources to quantify the value of that land.[162]

b. Respondent's Position

158. Vestey contends that the Tribunal applied the same law that Venezuela considers to be applicable. Specifically, the Tribunal applied Venezuelan law to determine whether the surface area discrepancies between the registered titles and the surface areas occupied and operated by Vestey affected the existence or validity of Vestey's registered titles, and concluded that they did not because "Venezuelan law does not provide for such a consequence," although said discrepancies "may be relevant for valuation purposes."[163]

159. Since the Tribunal endeavored to apply the proper law to the matter of existence and validity of Vestey's property rights, there was no excess of powers. An erroneous or incomplete application of the proper law would not qualify as failure to apply the applicable law, and any review into whether the proper law was applied correctly would be beyond the Committee's remit. Moreover, absent a showing of excess of powers, there is no need to examine whether the "manifest" requirement has been met, and the Committee must dismiss this claim.[164] Vestey contends that, as with the argument concerning Vestey's property rights, Venezuela's argument here is "essentially a complaint that the Tribunal failed to adopt Venezuela's view on Venezuelan law." However, the Tribunal did not fail to apply the proper law when it rejected Venezuela's position on

[161] Reply, para. 214, relying on *MTD v. Chile*, para. 47.
[162] Transcript, Day 1, pp. 42-48 and Day 2, pp. 214-217.
[163] Counter-Memorial, paras. 98-99 (emphasis omitted).
[164] Counter-Memorial, paras. 100-101.

Venezuelan law and found that the discrepancies in surface area did not invalidate Vestey's rights.[165]

160. Vestey also responds to an argument developed by Venezuela in its Reply in this annulment proceeding, to the effect that the Tribunal exceeded its powers when it found that "the physical defining features and names of the registered plots coincide with those claimed by Vestey." According to Vestey, Venezuela fails to explain how a factual conclusion, which is squarely within the Tribunal's powers, can amount to an excess of powers. This argument must also be rejected.[166]

161. To the extent that Venezuela has argued that the Tribunal failed to apply the proper law to its decision on compensation, Vestey submits that the Tribunal correctly endeavored to apply international law as the law applicable to determine "the effect of the discrepancies in surface area raised by Venezuela on the amount of compensation to which Vestey was entitled in relation to the land assets," and therefore this claim must equally be rejected.[167]

162. During the hearing, Vestey noted that Venezuela had made new arguments at the hearing concerning failure to apply the proper law based on the surface area discrepancies, namely that the Tribunal's determination of compensation was uncertain, which contradicts international rules of law on compensation, that the international rule of the burden of proof had not been followed, and that the Tribunal was wrong to decide to use the lesser of the surface areas of land. Vestey contends that the Tribunal applied principles of international law to its assessment of damages, such that any misapplication thereof would not be grounds for annulment, and that in any event international law on this matter is that damages be established with reasonable confidence, not with certainty. Vestey further contends that the Tribunal applied the principle of burden of proof and found in its discretion that it had been met. Finally, Vestey contends that the Tribunal's decision to award damages for the lesser of the land claimed was a factual determination squarely within its powers and that Venezuela's argument is a disagreement with how the Tribunal

[165] Rejoinder, paras. 81-82.

[166] Rejoinder, para. 83.

[167] Counter-Memorial, para. 102.

should have valued the plots of land.[168] In any event, Vestey contends that the argument based on the Tribunal's decision to compensate for the lesser of the land claimed is not relevant to all farms and would not have had a material impact on the unit price, which was already established at the lowest unit value determined by Claimant's expert.[169]

(2) The Committee's Analysis

163. In the Original Proceeding, the Tribunal addressed Venezuela's objection that the land areas in the registered titles did not coincide with the areas claimed by Vestey. Vestey's response was that the discrepancies were due to the fact that the old registered titles did not employ modern measurement techniques.[170] The Tribunal concluded that the discrepancies "do not *per se* affect the validity or existence of the registered titles. Venezuelan law does not provide for such a consequence." It also observed that Venezuela could have initiated judicial action to challenge the title, pursuant to Article 43 of the Law on Public Registries, but it had not done so.[171]

164. As noted earlier, the Parties agree that the applicable law for determining the ownership of the land claimed by Vestey is Venezuelan law. The Tribunal invoked Venezuelan law as the applicable law and the Award indicates that it applied that law. It found that Venezuelan law did not have the consequences asserted by Venezuela.

165. The Applicant's objections to the Tribunal's conclusions on this point must be characterized as objections to the correctness of the conclusions that the Tribunal reached in interpreting Venezuelan law and in applying it to the facts as it found them. Alleged error in application of the correct law does not suffice to support annulment.

166. Venezuela's contention that the Tribunal failed to apply the applicable law in determining compensation is equally unavailing. The Award sets out the Parties' respective positions on the standard of compensation, including their positions on the relationship between the standard in customary international law and the standard set out in the applicable bilateral

[168] Transcript, Day 2, pp. 261-269.
[169] Transcript, Day 2, pp. 271-272.
[170] Award, para. 273.
[171] Award, para. 274.

investment treaty.[172] It then states the Tribunal's conclusions on this point, giving the reasons for those conclusions. The objections that Venezuela raised in the annulment hearing go to the substance of the Tribunal's conclusions regarding the standard of compensation.

167. For these reasons, this ground for annulment is rejected.

VI. THE GROUNDS ON WHICH THE APPLICANT CLAIMS THAT THE TRIBUNAL SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE

168. The Applicant alleges that the Tribunal seriously departed from a fundamental rule of procedure when it deprived the Applicant of its right to be heard by (a) deciding a dispute that was not the same as that originally submitted;[173] and (b) basing its decision to assume jurisdiction on a provision that had not been invoked.[174]

A. DEPRIVATION OF THE RIGHT TO BE HEARD BY DECIDING A DIFFERENT DISPUTE

(1) The Parties' Positions

a. Applicant's Position

169. According to the Applicant, the Tribunal's decision to assume jurisdiction over a different dispute allowed the Tribunal "to hear matters that had not been raised by Vestey in its Request for Arbitration" and "implies a breach of a fundamental rule of procedure because it violates a set of minimum standards […] specifically the right to be heard."[175]

170. The Applicant contends that the Tribunal's departure was "undoubtedly serious" because it "seriously impair[ed] the right of defence of the Republic and the principle of identity of disputes."[176]

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[172] Award, paras. 320-324.

[173] Memorial, para. 158; Reply, paras. 138-145.

[174] Memorial, paras. 153-157, 160.

[175] Memorial, para. 158.

[176] Reply, para. 138.

171. The Applicant rejects the argument that it is not complaining about any specific violation of its right of defense and that its real issue relates to the substance of the Tribunal's decision on jurisdiction. The Applicant confirms that it is not seeking to re-litigate the merits of the objection. Its argument relates to the fact that it "formulated its defence in this case on the premise that Vestey's claims were those invoked in its Request for Arbitration" and that, following the 2006 Agreement, "Vestey's only remaining claim was the one relating to the need to prove the chain of title." Once Vestey abandoned that argument in the Rejoinder on Jurisdiction, Venezuela raised a new objection at the first procedural opportunity (during its opening statement at the hearing). However, the objection was considered inadmissible, so Venezuela's arguments on the merits of the objection were deprived of any "useful effect." According to the Applicant, its right to be heard and its right of defense have been violated because "the Tribunal assumed jurisdiction over a different controversy than the one submitted in the Request for Arbitration, after the Republic raised its objection at the first useful procedural opportunity."[177]

b. Respondent's Position

172. Vestey observes that Venezuela does not appear to complain about "any specific violation of its right to be heard on the allegedly different dispute" decided by the Tribunal, which is not surprising since Venezuela was not denied the right to address the claims post-dating the Request for Arbitration (to which the entirety of the arbitration was devoted), nor was Venezuela denied the opportunity to present its objection based on the alleged lack of identity of the disputes (even if Venezuela did so as late as the hearing).[178]

173. Instead, Venezuela appears to complain about the substance of the Tribunal's decision on jurisdiction, which is "evident from its continued insistence that the Tribunal exercised jurisdiction over a '*different*' dispute, when the Tribunal in fact found the disputes were one and the same." According to Vestey, it is the conduct of the proceedings and not the

[177] Reply, paras. 139-141.

[178] Counter-Memorial, para. 166.

content of the decision that can be a basis for annulment under this ground, and so this request must be dismissed.[179]

174. To the extent Venezuela argues that it was deprived of the right to be heard by the Tribunal declaring the objection inadmissible, Vestey contends that the dismissal took place *after* the Tribunal had honored Venezuela's right to be heard by granting it ample opportunity to brief its objection both on admissibility and on the merits.[180]

(2) The Committee's Analysis

175. The Committee here considers whether the Tribunal violated Venezuela's right to be heard, and thus engaged in a serious departure from a fundamental rule of procedure, when it rejected as untimely Venezuela's lack-of-identity-of-disputes objection and found that, as a subsidiary matter, the objection would have failed on the merits, had it been admissible.

176. As the Award indicates, Venezuela first raised the alleged lack-of-identity-of-disputes objection in its opening statement at the hearing in the Original Proceeding.[181] Vestey objected on the grounds of timeliness and substance.[182] The Award contains excerpts from the transcript of the hearing in which the President of the Tribunal sought to clarify whether Venezuela was raising a jurisdictional objection.[183] Rather than ruling on the matter at the hearing, the Tribunal gave Venezuela an opportunity to make an additional written submission with respect to its jurisdictional objection, to which Vestey was given an opportunity to reply in writing. The Parties also addressed the objection in post-hearing briefs.[184]

177. The Tribunal considered the requirement that a jurisdictional objection be raised "as early as possible" (Arbitration Rule 41(1)), in light of Venezuela's claim that it only learned of what it termed as Vestey's abandonment of its original claim when Vestey filed its

[179] Counter-Memorial, paras. 167, 171 (emphasis in original and footnote omitted).
[180] Rejoinder, paras. 121-122; Transcript, Day 1, p. 119.
[181] Award, para. 132.
[182] Award, paras. 140-143.
[183] Award, para. 132, fn. 96.
[184] Award, para. 143.

Rejoinder on Jurisdiction, eight months before the start of the hearing. The Award indicates that the Tribunal was not persuaded by Venezuela's assertion that Vestey's Rejoinder on Jurisdiction demonstrated the termination of the original dispute.[185] "Be this as it may," the Tribunal wrote, a delay of eight months "does obviously not meet the 'as early as possible' requirement."[186]

178. The Tribunal added:

> *If Venezuela really believed that the 2006 Settlement Agreement settled the dispute,* [ICSID Arbitration Rule 41(1)] *would have required it to raise its objection at the time when the arbitration resumed in 2011. Similarly, if the supposed novelty of the claims only became apparent in May 2014* [when Vestey filed its Rejoinder on Jurisdiction], *the rule would have required Venezuela to react well before the hearing.*[187]

179. In addition, the Tribunal considered and rejected Venezuela's argument that its delay in raising a jurisdictional objection was without consequence in light of Arbitration Rule 41(2), which provides that a tribunal may on its own initiative consider, at any stage of the proceeding, whether a dispute or ancillary claim is within its jurisdiction. It found that a tribunal's discretionary power to review its jurisdiction at any time does not absolve a party of compliance with Arbitration Rule 41(1).[188]

180. Thus, although Venezuela did not raise the identity-of-disputes objection until the hearing, the Tribunal gave Venezuela the right to be heard, as to both the timeliness and the substance of its objection to jurisdiction, in an additional written submission and in post-hearing briefs.[189] After giving Venezuela these opportunities to set out its views, the Tribunal found the objection to be untimely and thus inadmissible. The Tribunal also

[185] Award, para. 156.
[186] Award, para. 147.
[187] Award, para. 149.
[188] Award, para. 149.
[189] Award, paras. 41-43.

indicated that, even if the objection had been admissible, it would not have succeeded on the merits.[190]

181. Venezuela asserts that it was denied a right to be heard because it based its defense before the Tribunal on the arguments that Vestey had made in its Request for Arbitration and, according to Venezuela, Vestey abandoned that argument in its Rejoinder on Jurisdiction.[191] The Award amply demonstrates, however, that Venezuela submitted arguments and evidence to the Tribunal on the dispute that was the subject of the Award, and that the Tribunal considered Venezuela's views.

182. For these reasons, the Committee concludes that the Tribunal's decision to reject Venezuela's identity-of-disputes objection did not violate Venezuela's right to be heard and thus that this ground for annulment must be rejected.

B. DEPRIVATION OF THE RIGHT TO BE HEARD BY RELYING ON A PROVISION THAT WAS NOT INVOKED

(1) The Parties' Positions

a. Applicant's Position

183. Arbitration Rule 40(1) permits a party to present incidental or ancillary claims directly arising out of the subject-matter of the dispute. Arbitration Rule 40(2) requires that any such claims by a claimant be made no later than in the reply. The Applicant observes that the Tribunal stated that "the Respondent does not object to the admissibility of the Claimant's ancillary and new claims under ICSID Arbitration Rule 40(1), and rightly so" and that the Tribunal disagreed with the characterization of the dispute as entirely different from the one submitted in the Request for Arbitration.[192]

184. The Applicant labels as "misleading" the Tribunal's statement that Venezuela did not object to the admissibility of Vestey's ancillary and new claims under Arbitration Rule 40(1). It contends that Vestey never made an application under this rule and that

[190] Award, paras. 150-156.

[191] Reply, para. 141.

[192] Memorial, para. 153.

"the Tribunal treated claims submitted by Vestey but not included in its Request for Arbitration as ancillary claims, without being required to do so by either party." According to the Applicant, had Vestey brought a request under Arbitration Rule 40(1), it "would have been required to define the subject-matter of its ancillary claims and their link to the dispute brought in its Request for Arbitration." However, as no such request was filed, the Applicant "did not have —and could not have had— the opportunity to address a request that was never made." Accordingly, the Applicant was not guaranteed the right to be heard, which constitutes a serious departure from a rule of procedure.[193]

185. During the hearing, the Applicant also explained that its right to be heard was not protected by the Tribunal's indication that "it would have upheld that proposition of ancillary claims had it ever been fostered by Vestey." This is because "the right to be heard is not just the right to put out there arguments for a Tribunal or Committee that has already taken a decision," but requires the opportunity to convince a Tribunal or Committee on the particular topic.[194]

b. Respondent's Position

186. Vestey points out that the Parties exchanged submissions on whether the claims post-dating the Request for Arbitration would qualify as ancillary claims under Arbitration Rule 40(1) and whether Vestey would have been required to invoke this rule formally in order to introduce ancillary claims as such. It was with the benefit of these submissions that the Tribunal made its observation on Arbitration Rule 40(1). Vestey contends that the Tribunal was not required to adopt a different procedure concerning ancillary claims, as none is specified in either Arbitration Rule 40 or ICSID Convention Article 46. Even if such a requirement existed and was considered fundamental, Venezuela cannot show that any departure therefrom was serious, given that Venezuela had repeated opportunities to respond on the substance. Any such complaint would be further undermined by the Tribunal's indication that it would have admitted Vestey's claims had Venezuela objected

[193] Memorial, paras. 154-157, 160; Reply, paras. 144-145.

[194] Transcript, Day 1, pp. 79-80.

to them under Arbitration Rule 40 (as it had the burden to do pursuant to Arbitration Rule 41(1)).

187. Vestey considers that it is unnecessary for the Committee to decide whether the departure was "serious" given that it has been established that there was no departure at all. Venezuela has not shown either of the two requirements of this ground for annulment, namely whether the departure was materially prejudicial to Venezuela and whether the Tribunal would have reached a different decision had Venezuela had "a further opportunity to reiterate its theory that Vestey's ancillary claims could not be admitted under [Arbitration] Rule 40(1) for failure to follow some special procedure." This ground for annulment must accordingly be dismissed.[195]

(2) The Committee's Analysis

188. Venezuela maintains that it was denied the right to be heard with respect to Vestey's claims because Vestey failed to identify its claims as "incidental or additional" claims as required by Arbitration Rule 40. According to Venezuela, this was a serious departure from a fundamental procedural rule.[196]

189. After Venezuela raised its jurisdictional objection at the hearing in the Original Proceeding, it was given leave to make an additional submission in support of the identity-of-disputes objection. In that additional submission, Venezuela, citing Arbitration Rule 40(1), noted that Vestey had made no ancillary claims.[197] Venezuela repeated this position in a post-hearing brief, in which it also stated that Arbitration Rule 40(1) must be specifically invoked when an ancillary claim is brought.[198]

190. In its post-hearing brief in the Original Proceeding, Vestey reiterated both its objection on timeliness and its position on the substance of the objection that the 2006 Agreement did not settle the dispute between the Parties. It also stated that even if the Tribunal were to

[195] Counter-Memorial, paras. 170-171.

[196] Reply, para. 143.

[197] Venezuela's additional submission, ARE-2, para. 9.

[198] Venezuela's post-hearing brief, AAE-2, paras. 18, 43-44.

classify claims made in Vestey's Reply as ancillary claims within the scope of Arbitration Rule 40(1), Venezuela's objection would have been time-barred.[199]

191. After the Tribunal heard the range of arguments presented by the Parties in respect of Venezuela's identity-of-disputes objection, it decided that the objection was untimely and thus inadmissible. On a subsidiary basis, the Tribunal concluded that the identity-of-disputes objection would not have succeeded on the merits, because the developments after the filing of the Request for Arbitration "densified" the dispute but did not "change its nature and identity." These are the grounds – primary and subsidiary – on which the Tribunal based its decision with respect to Venezuela's identity-of-disputes objection.

192. Having reached these conclusions, the Tribunal added:

> […] *the Respondent does not object to the admissibility of the Claimant's ancillary and new claims under ICSID Arbitration Rule 40(1), and rightly so. The current claims are indeed closely connected to the original claims, as they both concern violations of the BIT by measures taken under the Land Law against the Claimant's cattle farming business.*[200]

193. Contrary to Venezuela's assertion, the Committee does not consider that, by mentioning Arbitration Rule 40(1), the Tribunal "relied on a provision that was not invoked." The Award states that the Tribunal "notes that the Respondent does not object to the admissibility of the Claimant's ancillary and new claims under ICSID Arbitration Rule 40(1), and rightly so. The current claims are indeed closely connected to the original claims."[201] Thus, having already rejected the identity-of-disputes objection as untimely and having concluded, on a subsidiary basis, that the objection would also fail on the merits, the Tribunal added a further observation suggesting that it also would have rejected the objection if Venezuela had raised it under Arbitration Rule 40(1). This observation by the Tribunal does not equate to a denial of Venezuela's right to be heard.

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[199] Vestey's second post-hearing brief, ARE-5, paras. 37-39, 66-68.

[200] Award, para. 157.

[201] Memorial, para. 153; Award, para. 157.

194. The Committee notes Vestey's contention, relying on Arbitration Rule 27, that Venezuela waived its right to seek annulment on the basis of what it contends to have been a failure to follow procedures required by Arbitration Rule 40, because it did not raise this point in the Original Proceeding.[202] The above summary of the Original Proceeding makes clear, however, that Venezuela made assertions regarding the procedural requirement of Arbitration Rule 40 in the Original Proceeding.

195. For these reasons the Committee concludes that the Tribunal did not violate a fundamental rule of procedure by relying on a rule of procedure that was not invoked.

VII. THE GROUNDS ON WHICH THE APPLICANT CLAIMS THAT THE TRIBUNAL FAILED TO STATE REASONS

196. Venezuela has submitted a number of arguments in support of the contention that the Tribunal failed to state the reasons on which the Award is based, which can be grouped into six points. Point (A) is the contention that the Tribunal assumed jurisdiction by estoppel contrary to its previous finding that jurisdiction cannot be acquired by estoppel.[203]

197. The other five ways in which the Award allegedly failed to state the reasons on which it is based (Points (B)-(F) below) are tied to the Tribunal's conclusions regarding title to, and valuation of, the real property at issue (see paragraphs 129-138 above). In summary, Venezuela contends that the Tribunal:

(b) contradicted itself when it created property rights having previously found that it did not have jurisdiction to create property rights;[204]

(c) failed to explain the assimilation between having an unchallenged registered title and having acquired property rights, or how acquisitive prescription had occurred despite the absence of a court declaration;[205]

[202] Counter-Memorial, paras. 168-169; Rejoinder, paras. 123-126; Transcript, Day 1, p. 120:1-25 – p. 124:1-15.
[203] Memorial, paras. 162-163; Reply, paras. 142-145.
[204] Memorial, paras. 192-193 y 205; Reply, paras. 182-198.
[205] Memorial, para. 166.

(d) determined that Vestey had acquired property rights through the Applicant's failure to challenge its registered titles, contrary to its finding that property rights cannot be acquired by estoppel under Venezuelan law;[206]

(e) made an unexplained determination, based on Vestey's unsupported statements, that compensable property rights exist having found that the deeds do not match the land claimed, also in contradiction with the Tribunal's finding that only the surface area in the title documents is subject to compensation;[207] and

(f) contradicted itself by drawing different inferences from a Party's failure to act depending on which Party benefitted from those inferences.[208]

A. ASSUMING JURISDICTION BY ESTOPPEL HAVING FOUND THAT JURISDICTION CANNOT BE ACQUIRED BY ESTOPPEL

(1) The Parties' Positions

a. Applicant's Position

198. The Applicant states that, during the hearing in the Original Proceeding, the Tribunal held that jurisdiction cannot be acquired by estoppel. Notwithstanding this finding, the Tribunal considered that Venezuela's jurisdictional objection was not admissible because it had been filed in breach of Arbitration Rule 41(1). "If, as the Tribunal contends, jurisdiction cannot be acquired by estoppel, the alleged violation of a procedural rule by the Republic cannot be opposed to it, thereby establishing the Tribunal's jurisdiction."[209]

b. Respondent's Position

199. According to Vestey, Venezuela relies on a contradiction between a remark made by the President of the Tribunal at the hearing (that jurisdiction cannot be based on estoppel) and the Tribunal's reasoning in the Award. However, even if the President's remark could be read as accepting Venezuela's proposition that jurisdiction cannot be acquired by estoppel,

[206] Memorial, paras. 196-199.
[207] Memorial, paras. 207-217, 226.
[208] Memorial, paras. 201-204.
[209] Memorial, para. 163.

"Venezuela has not identified any aspect of the Award in which the Tribunal relies on the principle that jurisdiction cannot be acquired by estoppel," and the request must be dismissed on this basis alone.[210]

200. Vestey contends that there is no contradiction between the Tribunal's recognition of the principle of estoppel and its dismissal of Venezuela's objection as untimely. The Tribunal "concluded that it had (and had always had) jurisdiction over the dispute before it. The principle that jurisdiction cannot be acquired by estoppel was therefore irrelevant to the present case."[211]

201. Finally, even if Venezuela were correct that there is "a certain theoretical tension" between the principle and Arbitration Rule 41(1), "this clearly would not be a contradiction in the Tribunal's reasoning but rather a scenario in which the Tribunal would be required to arrive at a legal solution balancing two potentially conflicting legal rules." Because annulment is not appeal, that solution cannot be reviewed by the Committee. In any event, Vestey considers the Tribunal's decision "unsurprising" given that the principle of *lex specialis* would result in the rule trumping the principle.[212]

202. Vestey concludes that there is no contradiction, much less one that would merit annulment, since the Tribunal also dismissed the objection on the merits. Accordingly, Venezuela's request must be rejected.[213]

(2) The Committee's Analysis

203. Point (A) is premised on an asserted contradiction between a statement made by the President of the Tribunal at the hearing – that jurisdiction cannot be based on estoppel – and the Tribunal's decision pursuant to Arbitration Rule 41(1) that the identity-of-disputes objection was untimely and thus inadmissible, which Venezuela characterizes as an assumption of jurisdiction by estoppel. The Committee sees no such

[210] Counter-Memorial, paras. 119-120.

[211] Counter-Memorial, para. 121.

[212] Counter-Memorial, para. 122.

[213] Counter-Memorial, para. 123. In its Rejoinder, at paras. 3 and 85, Vestey notes that the allegation of failure to state reasons regarding the Tribunal's decision to reject the objection based on the alleged lack of identity of the disputes has been dropped by Venezuela, which is a "[t]estament to the meritless nature of this annulment application."

contradiction. The Award does not indicate that the Tribunal's decision on jurisdiction was governed by customary international law (which, according to the Applicant, contains a rule that jurisdiction cannot be acquired by estoppel). Instead, the Award applies the ICSID Convention and the Arbitration Rules and sets out the reasons for the Tribunal's conclusions that the objection was untimely. It also states that, even if the objection had been admissible, it would have failed in substance.[214] The President's statement at the hearing does not contradict the Tribunal's stated reasons for rejecting Venezuela's jurisdictional objection, on the basis of the ICSID Convention and Arbitration Rules.

204. Accordingly, the Committee finds that Point (A) does not meet the requirements of subparagraph (1)(e) of ICSID Convention Article 52.

B. CREATION OF PROPERTY RIGHTS HAVING FOUND THAT THE TRIBUNAL CANNOT CREATE PROPERTY RIGHTS

(1) The Parties' Positions

a. Applicant's Position

205. The Applicant contends that the Tribunal "failed to state reasons when it claimed, on the one hand, that creating property rights which did not previously exist as such under the applicable domestic law was outside its scope of jurisdiction but, on the other hand, created non-existent rights under the applicable Venezuelan law."[215]

206. Specifically, the Tribunal "decided to create rights based on an alleged acquisitive prescription as a means of acquiring property" despite the absence of a court decision, in contradiction with the Tribunal's recognition that a court declaration is "an essential requirement for acquisitive prescription to validly take place."[216] The Tribunal also relied on unchallenged registered deeds of title to determine the existence of property rights, despite the fact that "registration of a deed title relates only to the validity of the specific transaction or specific transactions being registered, but it cannot establish the existence or

[214] See *supra*, paras. 124, 175-180.

[215] Memorial, para. 205 (footnote omitted).

[216] Reply, paras. 193-197.

validity of transactions that have never taken place throughout the entire chain of title, nor can it create non-existent property rights because such transactions never existed."[217]

b. Respondent's Position

207. According to Vestey, the assertion that the Tribunal created property rights is based only on Venezuela's disagreement with the Tribunal's interpretation and application of Venezuelan law and must therefore be dismissed. The Tribunal "never sought to 'create' property rights which did not otherwise exist under Venezuelan law but instead upheld the validity of the property rights Vestey (through Agroflora) already held under Venezuelan law."[218] There is no contradiction between the finding that Vestey had property rights and the recognition that the Tribunal cannot create otherwise nonexistent property rights.[219]

(2) The Committee's Analysis

208. The Committee understands Venezuela to assert in Point (B) that there is a contradiction between (1) the Tribunal's observation that, for a person to have a claim under international law for deprivation of property, it must hold that right under domestic law and (2) the Tribunal's conclusions that Vestey acquired property rights under Venezuelan law through registered contracts of purchase and through acquisitive prescription.

209. The Committee does not find in the Award the "creation" by the Tribunal of property rights that Venezuela advances as the basis of a contradiction in reasoning. Instead, as previously noted by the Committee, the Tribunal stated clearly that such rights as exist must be founded on domestic law. It then set out the reasons why, in its view, Vestey had those rights under Venezuelan law, as a consequence of registered title or, in the alternative, acquisitive prescription.[220] Venezuela evidently regards the Tribunal's conclusions on Venezuelan law to be incorrect, but that is not a basis for an annulment.

[217] Transcript, Day 1, p. 38.

[218] Counter-Memorial, para. 136; Rejoinder, para. 101(d).

[219] Transcript, Day 1, p. 153.

[220] See *supra*, paras. 129-138.

210. Accordingly, the Committee finds that Point (B) does not meet the requirements of subparagraph (1)(e) of ICSID Convention Article 52.

C. UNEXPLAINED ASSIMILATION BETWEEN HAVING AN UNCHALLENGED REGISTERED TITLE AND HAVING ACQUIRED PROPERTY RIGHTS, AND UNEXPLAINED DETERMINATION OF ACQUISITIVE PRESCRIPTION IN THE ABSENCE OF A COURT DECLARATION

(1) The Parties' Positions

a. Applicant's Position

211. The Applicant contends that the Tribunal failed to provide the reasons for its "theory that the registration of a deed of title that has not been annulled implies the acquisition of a valid property right over land."[221]

212. The Tribunal also failed to "justify why, being an international arbitral tribunal constituted under the ICSID Convention, it could determine the occurrence of acquisitive prescription in favour of Vestey, despite the fact that the Venezuelan law rules cited and regarded by the Tribunal as applicable undoubtedly require that a domestic court issue a final decision for property rights to be considered acquired by acquisitive prescription."[222] According to the Applicant, it is not possible to understand how the Tribunal concluded that Vestey had acquired ownership of the land through acquisitive prescription considering that a judge (and, *a fortiori*, an arbitrator) cannot address acquisitive prescription on his or her own initiative and that Vestey did not obtain (or attempt to obtain) a court declaration of acquisitive prescription regarding any of the farms at issue.[223]

213. The Applicant contends that there is a contradiction between the Tribunal's conclusion that Vestey had acquired the land by acquisitive prescription and the Tribunal's premises "(a) that under Venezuelan law there are strict rules for the acquisition of property, (b) that Article 1956 of the Venezuelan Civil Code provides that no court —let alone an arbitral tribunal— can compensate, on its own initiative, for the parties' failure to raise the

[221] Memorial, para. 166.

[222] Memorial, para. 166.

[223] Memorial, para. 200.

issue of acquisitive prescription, and (c) that Vestey did not have a court declare that acquisitive prescription had taken place nor did it try to obtain such a declaration from the competent local authorities with respect to the land that is the subject matter of the dispute submitted to arbitration."[224] In particular with regard to the stringent legal conditions necessary for acquisitive prescription provided for in Article 690 in the Civil Code of Procedure, Venezuela contends that the Tribunal entirely disregarded those requirements, including the need to assert acquisitive prescription before Venezuelan courts by the interested party. Furthermore, the Tribunal acknowledged that Vestey invoked acquisitive prescription before Venezuelan courts regarding a farm that is no longer part of the dispute. According to Venezuela, this admission contradicts the Tribunal's finding that it was not possible for a title-holder to initiate this action. It also contradicts the Tribunal's finding that the proceeding was merely declaratory, given that the court ultimately rejected Vestey's submission.[225]

b. Respondent's Position

214. Vestey rejects the allegation that the Tribunal advanced a theory according to which the registration of a deed of title that had not been annulled implied the acquisition of a valid property right over land. To the contrary, Vestey explains that the Tribunal expressly stated that registration was not an independent mode of acquisition of property.[226]

215. Regarding acquisitive prescription, Vestey contends that this request must be dismissed because "the Tribunal did offer a reasoned and structured analysis on this point (however much Venezuela may disagree with it)." In particular, the Tribunal found (on a subsidiary basis) that Vestey had acquired ownership by acquisitive prescription because the "strict conditions" under Venezuelan law had been met, which did not include a judicial declaration or a requirement that acquisitive prescription be invoked before any court or authority or otherwise to inform third parties.[227]

[224] Reply, paras. 186-187.

[225] Transcript, Day 1, pp. 58-63.

[226] Counter-Memorial, para. 127.

[227] Counter-Memorial, paras. 128-130; Rejoinder, para. 101(b).

216. In any event, even if there was a deficiency in the Tribunal's reasoning concerning acquisitive prescription, any such deficiency would not affect the Tribunal's primary basis to conclude that Vestey had valid title to the land, namely its holding valid registered titles.[228]

(2) The Committee's Analysis

217. The Committee understands Point (C) to be an objection that the Tribunal failed to state the reasons for its two conclusions with respect to title (*i.e.*, its decision that Vestey had title to the land based on the presumption of validity for registered title and its decision on acquisitive prescription).

218. The Committee finds a clear statement of the Tribunal's reasons in the Award, summarized above. Contrary to Venezuela's contention, the Award does not state that Vestey acquired title through registration. It specifies that a contract for transfer of property was an uncontroversial mode of transferring property and that, unless registration of title is invalidated through means established by law, registration of title requires the Tribunal to presume the validity of that title.[229]

219. As to acquisitive prescription, the Committee considers that the asserted contradiction between the reasoning that the Award sets out in support of the Tribunal's conclusion and the alternative reasoning that Venezuela advances is in fact a reflection of Venezuela's disagreement with the Tribunal's conclusions regarding Venezuelan law. Review of the correctness of the Tribunal's conclusions is beyond the scope of an annulment proceeding.

220. Accordingly, the Committee finds that Point (C) does not meet the requirements of subparagraph (1)(e) of ICSID Convention Article 52.

D. DETERMINATION OF ACQUISITION OF PROPERTY RIGHTS BY MEANS AMOUNTING TO ESTOPPEL HAVING FOUND THAT PROPERTY RIGHTS CANNOT BE ACQUIRED BY ESTOPPEL

[228] Counter-Memorial, para. 131; Rejoinder, para. 101(b).

[229] Award, para. 268.

(1) The Parties' Positions

a. Applicant's Position

221. According to the Applicant, the Tribunal found that Vestey had acquired ownership of the land as a result of Venezuela's failure to challenge its registered title, "which is to say that Vestey acquired ownership of the land by estoppel." This finding of the Tribunal is contradicted by the Tribunal's statement that ownership of land cannot be acquired by estoppel under Venezuelan law. The fact that the Tribunal relies on a "presumption" of validity of an unchallenged registered title does not correct the contradiction because, for an un-rebutted presumption to result in the registered titles being sufficient to prove the existence of property rights, it would have to be possible to acquire property rights "by virtue of an omission," which is what the Tribunal had stated could not happen under Venezuelan law.[230]

222. The Applicant accepts that the Tribunal did not expressly declare in the Award that property rights had been acquired by estoppel. According to the Applicant, however, the Tribunal asserted that Vestey had acquired property rights as a result of an omission, namely Venezuela's alleged failure to timely challenge the registered title. The assertion that property rights have been acquired "on the basis of one of the parties' acts or omissions" constitutes "a concept known as estoppel," which means that the Tribunal's assertion is equivalent to a declaration that Vestey had acquired ownership of the land by estoppel, thus contradicting the Tribunal's position that Venezuela's law does not allow for the acquisition of property by estoppel.[231]

b. Respondent's Position

223. Vestey contends that there is no contradiction, as there is no finding in the Award that Vestey acquired ownership of the land by estoppel or as a result of a failure by Venezuela to challenge Vestey's registered titles. What the Tribunal found was that, in the absence

[230] Memorial, paras. 197-199.

[231] Reply, paras. 182-185.

of a successful challenge to those titles, Venezuelan law required the Tribunal to presume their validity.[232]

224. According to Vestey, Venezuela conflates the issues of acquisition of property (through the contracts for the transfer of property that underlie the registration) and proof of ownership (through the registration of a title that has not been legally invalidated) in an attempt to establish a contradiction in the Tribunal's reasoning. Venezuela does so despite the Tribunal's efforts to explain that it was not holding that ownership had been acquired by holding a registered title, but rather that the validity of the contract by which ownership had been acquired had to be presumed as a result of holding a registered title.[233]

(2) The Committee's Analysis

225. Venezuela recognizes that the Tribunal did not expressly rely on estoppel when it found that Vestey had valid title to the land at issue, but maintains nonetheless that the Tribunal's conclusion that Vestey had acquired title based on a Party's acts or omissions was equivalent to a conclusion that Vestey had acquired title through estoppel. This conclusion, according to Venezuela, contradicted the Tribunal's statement that property rights cannot be established through estoppel.

226. Contrary to the Applicant's assertion, the Tribunal did not conclude that Vestey had acquired ownership of land as a result of Venezuela's alleged failure to challenge title (which the Applicant equates with the acquisition of ownership by estoppel).[234] Instead, the Award states the Tribunal's agreement with Venezuela's contention that registration was not a means of acquiring title and that a contract was an independent means of transferring property. It then sets out the Tribunal's conclusion that registration creates a presumption that the act underlying the registration is valid and that, unless a property right has been invalidated through the means established by law, third parties, including the Tribunal, must presume the validity of the registered title.[235] This conclusion as to

[232] Counter-Memorial, para. 125; Rejoinder, para. 101(a).

[233] Counter-Memorial, paras. 126-127.

[234] Memorial, para. 197.

[235] Award, paras. 267-268.

Vestey's ownership of the land is based on the Tribunal's application of cited provisions of Venezuelan law. There is no contradiction between this reasoning and the Tribunal's observation that property rights cannot be established through estoppel.

227. Accordingly, the Committee finds that Point (C) does not meet the requirements of subparagraph (1)(e) of ICSID Convention Article 52.

E. UNEXPLAINED DETERMINATION OF THE EXISTENCE AND SCOPE OF PROPERTY RIGHTS HAVING FOUND THAT THE DEEDS DO NOT MATCH THE LAND CLAIMED, ALSO IN CONTRADICTION WITH THE TRIBUNAL'S FINDING THAT ONLY THE SURFACE AREA IN THE TITLE DOCUMENTS IS SUBJECT TO COMPENSATION

(1) The Parties' Positions

a. Applicant's Position

228. According to the Applicant, "the Republic proved that the deeds of title submitted by Vestey did not refer to the land claimed," "Vestey was forced to admit that 'the titles on the record are not a reliable source of information of the actual size of the land'" and "the Tribunal expressly acknowledged that the deeds of title submitted by Vestey did not match the size of the land claimed."[236]

229. Notwithstanding the above, the Tribunal found that Vestey had demonstrated its legal title in respect of a large portion of the area claimed. The Applicant contends that the Tribunal did not indicate the reasons why it regarded as valid the information provided by Vestey in its first post-hearing brief regarding the surface area of the titles despite "the errors and the false and inaccurate data contained therein" when compared to the titles. The Tribunal's inconsistency is, according to the Applicant, "manifest and easily verifiable" by simply reading the information contained in the table attached to Vestey's first post-hearing brief and comparing it to the deeds of title of the farms. As an example, the Applicant refers to the El Carmen Farm.[237]

[236] Memorial, paras. 207-209.

[237] Memorial, paras. 210-214; Reply, paras. 199-206.

230. The Applicant rejects Vestey's contentions according to which (first) the Tribunal found that the discrepancies did not affect the existence or validity of the deeds of title, (second) the Tribunal's reasoning is apparent from a simple review of the deeds, including El Carmen Farm, (third) the Tribunal has no obligation to consider each and every argument and, (fourth) in any event, the Tribunal implicitly rejected Venezuela's allegations.[238]

231. Regarding the first of Vestey's arguments, the Applicant contends that the Tribunal's assertion that any discrepancies may be relevant for valuation purposes but have no bearing on the existence or validity of the titles because "the physical defining features and names of the registered plots coincide with those claimed by Vestey" is "[simply] false, is not supported by any documents and the Tribunal has not stated reasons therefor."[239] The fact that Venezuela did not refer to those defining features during the Original Proceeding "is not sufficient reason to regard them as valid" given that, as of today, the Applicant still does not know exactly which defining features were relied on by the Tribunal and could not have anticipated that the Tribunal would rely on unidentified features of the land to confirm Vestey's ownership.[240]

232. Regarding the second of Vestey's arguments, the Applicant contends that Vestey's citation of the deed containing the alleged defining features and names of the El Carmen Farm actually shows that the surface area is indeterminate and that the alleged defining features and names are inaccurate, ridiculous and insufficient to reveal the Tribunal's reasoning. Moreover, the deed of title to the El Carmen Farm states that the surface area had not been ascertained and would be determined later by appropriate means, which confirms the undetermined size of the farm. The Applicant maintains that neither the title nor the footnoted references provided by Vestey in the table annexed to its first post-hearing brief are sufficient to conclude that the farm is either 5,106 or 4,644.21 hectares. Vestey itself confirmed that the measurements were indicative and subject to verification and, in the Original Proceeding, Vestey's expert admitted to the differences in surface areas amongst

[238] Reply, paras. 207-208.

[239] Reply, paras. 209-210.

[240] Reply, para. 215.

the documents submitted and stated that she had relied on the information provided by her employer for the purposes of her expert testimony and that the inaccuracies in surface areas also extended to Matapalos, Morichito, Los Cocos, Los Viejitos, La Bendición Ramera, Turagua, Punta de Mata, Las Palmeras, Cañafístolo and La Cueva.[241]

233. Regarding the third and fourth of Vestey's arguments, the Applicant contends that a tribunal has an obligation to address an argument put forward by a party "when the argument in question is the cornerstone of the case." In any event, the reasons supporting the Tribunal's conclusions "are not obvious and cannot be inferred from a simple review of the case file." In particular, a review would only reveal that no willing buyer would have considered the documents containing the references and descriptions as reliable to determine the surface area of the farms. According to the Applicant, the Tribunal's simple statement that "the physical defining features and names of registered plots coincide with those claimed by Vestey" is insufficient to explain why it regarded Vestey's measurements as valid in circumstances where their inaccuracies had been demonstrated and confirmed and where the Tribunal did not explain which physical features were being relied on for this purpose. This lack of reasoning not only fails "to guarantee that the tribunal's decision was not arbitrary" but it also affects the Applicant's right of defense. The Tribunal awarding compensation based on the lesser of the land surface area is also insufficient without specifying the particular hectares in respect to which expropriation was being compensated.[242]

234. The Applicant maintains that it is contradictory to determine the existence and valuation of property whose delimitation the Tribunal had acknowledged could not be ascertained.[243] In addition, the Applicant contends that the Tribunal's decision is "manifestly contradictory" given that the Tribunal awarded compensation for land which surface area is not included in the deeds of title after having found that "only the surface area figuring in the title documents is compensable."[244] In general, "the absence of coherent and

[241] Reply, paras. 218-239.

[242] Reply, paras. 234-242.

[243] Memorial, paras. 224, 226.

[244] Memorial, para. 216.

adequate reasoning" to understand why the Tribunal validated the surface area claimed by Vestey, together with all of the above constitutes, according to the Applicant, "clear grounds for annulment in accordance with Article 52(1)(e) by which the Committee should abide."[245]

b. Respondent's Position

235. Regarding the allegedly unexplained determination that compensable property rights validly exist despite the lack of identity between the land claimed and the land documented, Vestey explains that the Tribunal addressed this matter expressly in the Award and found that there was a correspondence in essence between the documented and the claimed land, such that the observed discrepancies did not affect the existence or validity of Vestey's property rights over the land. Because the Tribunal did find that the registered titles identified the land claimed, the Tribunal "did not contradict itself when proceeding to assess compensation for the land."[246]

236. According to Vestey, Venezuela's main issue seems to be with the reason for the Tribunal's conclusion that there was no lack of identity of the land, namely that "the physical defining features and names of the registered plots coincide with those claimed by Vestey," which Venezuela considers to be "false" and unsupported by evidence or reasoning. "Venezuela's allegation that the Tribunal's conclusions [are] false is a complaint that the Tribunal incorrectly appreciated the evidence and is not subject to annulment review." Vestey also submits that the lack of references to underlying documents would in any event not be grounds for annulment, and neither would the Tribunal's decision not to provide reasons for what is already a reason in support of its conclusion. Vestey finds it unsurprising that the Tribunal did not feel the need to provide an extensive elaboration on the identity of the plots based on their defining features or names, seeing as Venezuela's argument in the arbitration on this issue was based on the discrepancies in surface areas and not on any discrepancies in defining features or names.[247]

[245] Memorial, para. 217; Reply, para. 243.

[246] Counter-Memorial, paras. 139-140; Rejoinder, paras. 106-109.

[247] Counter-Memorial, paras. 141-142; Rejoinder, paras. 106-109.

237. Vestey submits that, in any event, the Tribunal did cite to the relevant documents, in that its references to "registry extracts" and "registered plots" were referencing the title documents filed by Vestey as evidence in support of its claim. According to Vestey, a simple review of these titles reveals the reasons for the Tribunal's conclusion on this issue, including in relation to the El Carmen Farm on which Venezuela relied. This claim must therefore be dismissed.[248] During the hearing, Vestey noted that Venezuela had made new arguments at the hearing concerning failure to state reasons based on the physical defining features and names of the registered plots and whether they coincided with those claimed. Vestey rejects those allegations on the merits but, in any event, contends that this is an issue of valuation of the evidence undertaken by the Tribunal that cannot be revised on annulment.[249]

238. Regarding Venezuela's claim of failure to give reasons for the Tribunal's decision on compensation for the land, Vestey contends that it must also be rejected because the Tribunal did give reasons for its decision to compensate only the lesser of the documented and the claimed surface areas, namely that a willing buyer would have refused to pay for land that did not appear in the registered titles. Vestey explains how Venezuela considers that, for this purpose, the Tribunal blindly adopted the figures provided in Vestey's table and did not address Venezuela's arguments concerning their lack of reliability. According to Vestey, failure to address each and every argument put forward by the Parties is not a ground for annulment. In any event, it is clear that the Tribunal implicitly rejected Venezuela's arguments on the lack of reliability of the figures when it confirmed that the surface areas in the titles were largely as set out in Vestey's table for every farm, including El Carmen. A simple review of the footnotes accompanying the table reveals that the figures originated in the title documents, and a simple reading of the title documents reveals exactly where the components of the surface area figures came from. In light of the above, this claim must equally be dismissed.[250]

[248] Counter-Memorial, paras. 143-145; Rejoinder, paras. 106-109.

[249] Transcript, Day 2, pp. 274-281.

[250] Counter-Memorial, paras. 146-151; Rejoinder, paras. 110-112.

(2) The Committee's Analysis

239. As previously noted, the Tribunal decided that discrepancies between the area of a particular farm indicated in the registered title and the area of that farm claimed by Vestey did not affect the validity of title, but could be relevant for valuation purposes. It further noted that the outcome "could have been different if the registry extracts made reference to land plots different from those claimed by the Claimant. However, in this instance, the physical defining features and names of the registered plots coincide with those claimed by Vestey."[251]

240. Venezuela objects that the Award does not set out details to support its conclusion that the physical features identified in registered deeds coincided with the descriptions of plots claimed by Vestey. It asserts the Tribunal's conclusion on this point was "false."[252] Venezuela acknowledges that it did not raise discrepancies in physical features in the Original Proceeding but states that it did not know that the Tribunal was going to rely on those features in the Award.

241. In the Committee's view, the Award states the reasoning that led the Tribunal to find sufficient correspondence between the registered plots and the plots claimed by Vestey, based on the evidence before it. Venezuela's complaint that the Tribunal did not elaborate on the details that led to its reasoning are, in the view of the Committee, an unpersuasive insistence that the Tribunal provide not only the reasons for its decisions regarding title, but also the "reasons for its reasons."[253]

242. In the annulment proceeding, the Parties presented excerpts from evidence presented in the Original Proceeding that included the names or the physical features, both as claimed by Vestey and as recorded in registered title deeds, including evidence with respect to the El Carmen Farm. Not surprisingly, Vestey sought to convince the Committee of the consistency of the descriptions, while Venezuela sought to identify discrepancies. It is not for this Committee to conduct its own weighing of such evidence in this annulment

[251] Award, para. 275.

[252] Reply, para. 210.

[253] See *supra*, para. 92.

proceeding. It is sufficient to observe that the record presented to the Committee demonstrates that the Tribunal had ample opportunity to compare the registered title documents to the physical features of the land claimed by Vestey and that it stated its conclusion that the physical defining features and the registered deeds coincided when giving the reasons for its conclusion as to the title to the land.

243. At the stage of valuation, the Award returned to the discrepancies between claimed area and area shown in registered title, observing that a willing buyer would not be expected to pay for surfaces that do not appear in the registered title. The Award includes a table showing, for each farm, both the claimed area and the documented area. The Tribunal designated as the "compensable area" for each farm the lesser of these two figures. The Tribunal used the total compensable area, calculated on this basis, in determining the fair market value of the land.[254]

244. Thus, the Tribunal set out the reasoning on which it based the surface area of each farm that it used for purposes of valuation. Although the Award does not set out evidence that led the Tribunal to adopt the figures that it presented as the claimed area and the documented area for each farm, the Parties placed before the Committee extensive documentation from the Original Proceeding that revealed the kind of evidence that had been available to the Tribunal. There is no basis for the Committee to form its own conclusions with respect to that evidence in this annulment proceeding. It is sufficient to conclude that the Award, on the basis of the record before the Tribunal, stated the reasons for the Tribunal's conclusions regarding the compensable area that it used for purposes of valuation, *i.e.*, the lesser of the claimed area and the documented area for each farm.

245. Accordingly, the Committee finds that Point (E) does not meet the requirements of subparagraph (1)(e) of ICSID Convention Article 52.

F. DIFFERENT INFERENCES DRAWN FROM A PARTY'S FAILURE TO ACT DEPENDING ON WHICH PARTY BENEFITTED FROM THOSE INFERENCES

[254] Award, paras. 369-371.

(1) The Parties' Positions

a. Applicant's Position

246. The Applicant contends that there is a contradiction in the Tribunal's different application of the same approach "depending on whether the resulting decision favoured Vestey or the Republic." In particular, the Tribunal determined that "the Republic's failure to challenge the deeds of title before the competent local authorities was sufficient to validate Vestey's position and that the Republic could not challenge such deeds of title now in the international arbitration." By contrast, the Tribunal determined that "Vestey's failure to raise such issue before the competent local authorities was not necessary in order to establish that it had occurred, and that it was admissible to grant property rights […] even if the defence had been raised for the first time in the context of this international arbitration."[255]

247. The Applicant rejects Vestey's argument that the above constitutes a straightforward application by the Tribunal of Venezuelan law. In particular, to the extent an obligation to show a perfect chain of title to establish ownership existed under Venezuelan law, Venezuela never triggered it, and there is no requirement under Venezuelan law to invoke acquisitive prescription before a local court in order to declare its existence such that Vestey's failure to invoke it was not relevant.[256]

248. Regarding the perfect chain of title argument, Venezuela contends that Vestey's argument is factually incorrect since "the Republic asked Vestey, more than once, for proof of the complete chain of title." In addition, the Tribunal's decision that Venezuela's failure to challenge the chain of title was sufficient to validate Vestey's position that establishing a chain of title was unnecessary contradicts the Tribunal's acceptance that a defect in the chain of tittle affects all subsequent transactions.[257]

249. Regarding the need to have acquisitive prescription declared by a court, Venezuela maintains that a court declaration is required and that "this was acknowledged by the

[255] Memorial, paras. 201-203.

[256] Reply, paras. 188-190.

[257] Reply, para. 191.

Tribunal itself" when it established that "a legal process [is required] to formally declare that acquisition has validly occurred."[258]

b. Respondent's Position

250. Vestey contends that there is no contradiction between holding that, to the extent that an obligation to show a perfect chain of title exists, Venezuela never triggered it (accordingly, Venezuela's failure to trigger this requirement was relevant to its applicability) and holding that Venezuelan law does not require an interested party to invoke acquisitive prescription before a local court or authority to establish its existence (accordingly, Vestey's failure to invoke acquisitive prescription was irrelevant to its existence).[259]

251. Any such contradiction would not be in the Tribunal's reasoning, but would exist under Venezuelan law. Even in this case, such a contradiction would not affect the Tribunal's reasoning, since the Tribunal recognized "that the existing solution represented a solution adopted by *Venezuelan law itself*, balancing the principle that no person can transfer more rights than he or she holds against the practical need for legal certainty in property transactions." Vestey submits that this finding is not open to annulment.[260]

252. Vestey further contends that the Committee must disregard Venezuela's "unwarranted" remarks that the Tribunal's conclusions show any kind of inequality, which Venezuela would have brought under Article 52(1)(b) or (d) of the ICSID Convention if it had "real reason to question the impartiality of the Tribunal," which Venezuela has not done.[261]

(2) The Committee's Analysis

253. Venezuela asserts a contradiction between two conclusions that the Tribunal reached in the Award, based on what it describes as inferences that the Tribunal drew from a party's "failure to act," suggesting that an inference favorable to Vestey was made, but an inference favorable to Venezuela was rejected. The purported contradiction overlooks the fact that

[258] Reply, para. 192, fn. 248.

[259] Counter-Memorial, paras. 132-133; Rejoinder, para. 101(c).

[260] Counter-Memorial, para. 134 (emphasis in original); Rejoinder, para. 101(c).

[261] Counter-Memorial, para. 135.

the two cited portions of the Award address distinct questions arising under different provisions of Venezuelan law. Even assuming that the reasoning of the Tribunal is fairly characterized as two instances in which it drew an inference from a Party's failure to act, these inferences are independent of each other and the consequence of each inference necessarily depends on the particular legal question to which the inference is relevant. The conclusions reached by the Tribunal with respect to distinct questions arising under Venezuelan law cannot be described as contradictory reasoning.

254. Accordingly, the Committee finds that Point (F) does not meet the requirements of subparagraph (1)(e) of ICSID Convention Article 52.

255. Having examined the six points that Venezuela invokes in support of its assertion that the Award failed to state the reasons on which it is based, the Committee rejects that ground for annulment.

VIII. THE CONCLUSIONS OF THE COMMITTEE

256. On the basis of the above analysis, the Committee finds no basis to annul the Award pursuant to subparagraphs (b), (d) or (e) of Article 52(1) of the ICSID Convention.

IX. COSTS

(1) The Parties' Positions

a. Applicant's Position

257. The Applicant contends that there is no presumption in the ICSID Convention, the Arbitration Rules or the BIT to determine costs allocation, nor are there any "specific guidelines." In these circumstances, the practice has been for committees to make no order as to the parties' own costs, and to have both parties share the committee's and ICSID's costs regardless of the success of the annulment application.[262] However, some *ad hoc* committees have awarded costs to the winning party, and other committees have taken into

[262] Applicant's costs submission, paras. 1-2, relying on C.H. Schreuer, para. 133.

account the conduct of the parties as well as "the substance of the case and the arguments invoked."[263]

258. In this particular case, the Applicant argues that all costs, including the Applicant's legal fees and expenses, should be borne by Vestey, with interest, pursuant to the criterion that costs follow the event and taking into account Vestey's conduct throughout the annulment proceeding.[264] Regarding the latter, the Applicant contends that Vestey made false representations intended to mislead the Tribunal and has continued this conduct during the annulment proceeding by pointing to a supposed correlation between the property titles and the land claimed that does not stand scrutiny. The Applicant further contends that Vestey developed a position on acquisitive prescription during the annulment proceeding that contradicts its own position during the original arbitration.[265]

259. Alternatively, in the event that the Award is not annulled, the Applicant contends that each Party should bear its own costs and that the costs of the proceeding should be shared.[266] According to the Applicant, there is no reason to deviate from this practice given that Vestey has not shown that the Applicant did not have sufficiently serious reasons to challenge the Award, that its arguments were frivolous or that its case clearly lacked merit. The Applicant further contends that Vestey has no reason to allege that the Applicant has acted in bad faith in this post-award proceeding. Finally, concerning the argument that the Applicant brings annulment proceedings as a matter of routine, the Applicant contends that it cannot be burdened with costs for exercising a right under the Convention and that the Committee cannot award costs to discourage parties from bringing future annulment proceedings.[267]

[263] Applicant's costs submission, para. 3, relying *inter alia* on *Sempra v. Argentina*, paras. 225, 227; and *Iberdrola Energia S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Decision on Annulment, 13 January 2015, para. 146.

[264] Applicant's costs submission, paras. 4-6, 15.

[265] Applicant's costs submission, para. 5.

[266] Applicant's costs submission, paras. 7, 15.

[267] Applicant's costs submission, paras. 9-10.

260. Even if the Applicant were to bear the costs of the proceeding, Venezuela contends that Vestey should still bear its own legal costs pursuant to the practice resulting from previous annulment decisions.[268]

261. In particular, the Applicant requests that (i) Vestey be ordered to bear all costs of the proceeding, including the arbitration costs at US$524,985.00 (in the amount advanced to the Centre) and the Applicant's legal fees and expenses amounting to US$1,746,566.98, plus interest "calculated at a simple rate which fully compensates the damage sustained from the date of the decision" and, subsidiarily, that (ii) Vestey be ordered to reimburse the Applicant for "half of the administrative costs of these annulment proceedings, including fees and expenses of members of the Committee" amounting to US$262,492.5.[269]

b. Respondent's Position

262. Vestey requests that the Committee order the Applicant to bear Vestey's costs in their entirety, plus interest until the date of payment. Vestey contends that annulment committees have commonly and increasingly relied on the "loser pays" principle, which should only be displaced when the winning party has committed some wrongdoing.[270] The principle applies particularly, though not necessarily, "where the application was 'clearly without merit', was 'to any reasonable and impartial observer, most unlikely to succeed', or failed to 'pose novel or complex questions' or to raise 'valid' arguments."[271]

263. In addition, according to Vestey, the role of an award of costs in furthering the Convention's objective of finality has also been recognized by annulment Committees. In this sense, Vestey contends that "when the remedy is available as of right, the allocation

[268] Applicant's costs submission, para. 11, relying on *EDF v. Argentina*, para. 339.

[269] Applicant's supplementary costs submission, p. 2.

[270] Respondent's costs submission, paras. 1, 4, 7, relying *inter alia* on *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/22), Decision on the Application for Annulment, 2 February 2018, paras. 293-294; and *Repsol v. Ecuador*, para. 88.

[271] Respondent's costs submission, para. 5, relying *inter alia* on *AES v. Hungary*, para. 181; *CDC Group PLC v. Seychelles* (ICSID Case No. ARB/02/14), Decision of the *ad hoc* Committee on the Application for Annulment, 29 June 2005, para. 89; and *Repsol v. Ecuador*, para. 86.

of costs is the only check the system has placed on serial misusers of annulment" who bring annulment proceedings routinely or for dilatory purposes.[272]

264. In accordance with the above, Vestey should be awarded the entirety of its annulment costs if it succeeds on the merits, which is particularly warranted in this case because Vestey has demonstrated that the application for annulment is clearly without merit, lacking in valid arguments and most unlikely to succeed.[273] This result is also supported by the Applicant's conduct during the annulment proceeding, and would serve to discourage future meritless annulment applications submitted in order to delay or obstruct immediate enforcement.[274] Concerning the Applicant's conduct, the Respondent contends that the Republic "failed to pursue the process with reasonable diligence" delaying its conclusion and increasing costs "by twice causing the process to be suspended on account of its failure to pay the advance costs for which the Applicant is responsible."[275]

265. In particular, Vestey seeks reimbursement of its legal fees and expenses in the amount of £685,849.15 as well as interest on this sum "[i]n order to be made whole" at the rate applicable to six-month US sovereign bonds, compounded semi-annually from the date of its costs submissions and until the date of payment. Vestey also requests that the Committee award any other relief it may deem appropriate.[276]

(2) The Committee's Analysis

266. Article 61(2) of the ICSID Convention and Arbitration Rule 47(1)(j) (applied to an annulment proceeding, *mutatis mutandis*, pursuant to Arbitration Rule 53), give an *ad hoc* committee the discretion to allocate as it deems appropriate all costs, including the costs of the proceedings (a committee's fees and expenses, ICSID's administrative fees and direct expenses) as well as the costs and expenses of the parties.

[272] Respondent's costs submission, para. 6, referencing Counter-Memorial, para. 176, and relying *inter alia* on *Repsol v. Ecuador*, para. 86.

[273] Respondent's costs submission, paras. 8-9.

[274] Respondent's costs submission, paras. 8, 10.

[275] Respondent's costs submission, para. 11.

[276] Respondent's supplementary costs submission, paras. 13-14.

267. The costs of the proceeding are as follows:

Committee's fees and expenses	
Judge Joan E. Donoghue	US$84,606.50
Dr. Gavan Griffith	US$74,145.15
Dr. Raëd M. Fathallah	US$71,910.05
ICSID's administrative fees	US$116,000.00
Direct expenses	US$71,353.87
Total	US$418,015.57

268. Venezuela, as the Applicant on Annulment, has been responsible for advance payments, pursuant to Administrative and Financial Regulation 14(3)(e). The above costs have been paid out of those advance payments. Any balance that remains will be refunded to the Applicant.

269. Venezuela's failure to make advance payments in a timely manner led the Committee to suspend the proceedings twice, causing the cancellation of the scheduled hearing dates and the consequent delay in the issuance of a decision on annulment.

270. Taking into account the Parties' cost submissions and having considered the additional details provided in their supplemental cost submissions, the Committee has no reason to question the reasonableness of the fees and expenses submitted by either Party.

271. Venezuela has not prevailed on any of the grounds for annulment that it advanced. Taking into account the outcome of the annulment proceeding and the conduct of the Parties during the course of the proceeding, the Committee considers it appropriate in this case to follow the approach of "cost follows the event," and thus decides that Venezuela should bear all of the costs of the proceeding, amounting to US$418,015.57, as well as Vestey's fees and expenses, amounting to £685,849.15 The Committee notes that it finds no merit in Venezuela's assertion that Vestey made false statements intended to mislead the Tribunal.

272. The Committee makes no award of interest in relation to costs.

* * *

273. On 17 April 2019, the President of the Committee wrote to the Secretary-General as follows:

> *Dear Madam Secretary-General,*
>
> *On 8 February 2019, after the ad hoc Committee had concluded its substantive work on the Decision in Vestey Group Ltd v. The Bolivarian Republic of Venezuela (ICSID Case No. ARB/06/4), this annulment proceeding was declared closed pursuant to Arbitration Rule 38, as is indicated on the ICSID website. The Secretary has informed the Committee that the final technical review and translation of the Decision is nearly complete.*
>
> *Subsequent to closure of the proceeding, the Centre informed the Committee that it had received communications from two individuals, each asserting the sole right to represent the Bolivarian Republic of Venezuela in proceedings before ICSID. Those communications are not part of the record in this proceeding.*
>
> *Having finalized this Decision on Annulment, the Committee considers that its work is complete. The Parties to this proceeding are the Vestey Group Ltd and a State, i.e., the Bolivarian Republic of Venezuela. The two above-mentioned communications do not purport to change the identity of a Party. It is not for this Committee to take a position in respect of matters addressed in the above-referenced communications.*
>
> *The Award ordered the Bolivarian Republic of Venezuela to pay compensation to the Vestey Group Ltd. Pursuant to Article 53 of the Convention, the Award is binding on the Bolivarian Republic of Venezuela and is not subject to any appeal or other remedy except as provided by the Convention. The Decision of this Committee rejects all grounds for annulment. Accordingly, the Committee encourages the Centre to render this Decision on Annulment promptly.*

X. DECISION

274. For the foregoing reasons, the Committee decides:

1. The Bolivarian Republic of Venezuela's Application for Annulment of the Award is dismissed in its entirety;

2. The Applicant shall bear the costs of this annulment proceeding in the amount of US$418,015.57;

3. The Applicant is ordered to pay the Respondent's fees and expenses of £685,849.15.

Dr. Gavan Griffith
Member of the *ad hoc* Committee

Date: APR 25 2019

Dr. Raëd M. Fathallah
Member of the *ad hoc* Committee

Date: APR 25 2019

Judge Joan E. Donoghue
President of the *ad hoc* Committee

Date: APR 25 2019