

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

Caratube International Oil Company LLP

v.

Republic of Kazakhstan

(ICSID Case No. ARB/08/12)

Annulment Proceeding

**DECISION ON THE ANNULMENT APPLICATION
OF CARATUBE INTERNATIONAL OIL COMPANY LLP**

Members of the *Ad Hoc* Committee

Mr. Juan Fernández-Armesto, President
Tan Sri Dato Cecil W.M. Abraham, Member
Judge Hans Danelius, Member

Secretary of the *Ad Hoc* Committee

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ABBREVIATIONS AND ACRONYMS

Applicant/Claimant/CIOC	Caratube International Oil Company LLP
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	Award issued by the Arbitral Tribunal on June 5, 2012
BIT	Treaty between the United States of America and the Republic of Kazakhstan concerning the encouragement and reciprocal protection of investment of May 19, 1992
CCC	Consolidated Contractors (Oil and Gas) Company S.A.L.
C I	Claimant's Memorial on Annulment
C II	Claimant's Reply on Annulment
Committee	<i>Ad hoc</i> Committee composed of Mr. Juan Fernández-Armesto as President, Tan Sri Dato Cecil W.M. Abraham, and Judge Hans Danelius
Contract	English version of Contract No. 954 dated May 27, 2002 relating to the exploration and production of hydrocarbons in the Caratube Field in the Baiganin District of the Aktobe Oblast Region of Kazakhstan.
EUR	Euros
HT	Transcripts of Hearing on Annulment of September 12, 2013
ICSID Convention/Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID/Centre	International Centre for Settlement of Investment Disputes
Kazakhstan/Respondent	Republic of Kazakhstan
Letter of Transmittal	The Letter of Transmittal of the BIT by the President of the United States to the U.S. Senate, September 7, 1993

Mr. Hourani	Mr. Devincci Hourani
Parties	Caratube International Oil Company LLP and Republic of Kazakhstan
R I	Respondent's Counter-Memorial on Annulment
R II	Respondent's Rejoinder on Annulment
Secretary	Secretary of the Committee
Secretary-General	Secretary-General of the International Centre for Settlement of Investment Disputes
Tribunal	Tribunal which rendered the Award issued on June 5, 2012
U.S.	United States of America
USD	United States Dollar
Vienna Convention	Vienna Convention on the Law of Treaties of May 23, 1969

LIST OF CASES CITED

- AES** *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, June 29, 2012.
- Aguas del Tunari** *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005.
- Amco II** *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Annulment Decision, December 17, 1992.
- Azurix** *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009.
- Bogdanov** *Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V (114/2009), May 30, 2010.
- CMS** *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007.
- Duke Energy** *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee, March 1, 2011.
- Enron** *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010.
- Fraport** *Fraport AG Frankfurt Airport Service Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, December 23, 2010.
- Helnan** *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, June 14, 2010.
- Klöckner I** *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on the Application for Annulment Submitted by Klöckner, May 3, 1985.
- Klöckner II** *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on the Application for Annulment, May 17, 1990.
- Lucchetti** *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly*

	<i>Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Peru</i> , ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007.
Malaysian Historical Salvors	<i>Malaysian Historical Salvors, SDN, BHD v. Malaysia</i> , ICSID Case No. ARB/05/10, Decision on the Application for Annulment, April 16, 2009.
Malicorp	<i>Malicorp Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited, July 3, 2013.
MINE	<i>Maritime International Nominees Establishment v. Republic of Guinea</i> , ICSID Case No. ARB/84/4, Decision on Annulment, January 6, 1988.
MTD	<i>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile</i> , ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007.
Phoenix Action	<i>Phoenix Action Ltd v. Czech Republic</i> , ICSID Case No. ARB/06/5, Award, April 15, 2009.
Romak	<i>Romak S.A. (Switzerland) v. The Republic of Uzbekistan</i> , UNCITRAL, PCA Case No. AA280, Award, November 26, 2009.
Rumeli	<i>Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan</i> , ICSID Case No. ARB/05/16, Decision of the <i>ad hoc</i> Committee on the Application for Annulment, March 25, 2010.
Sempra	<i>Sempra Energy International v. Argentine Republic</i> , ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, June 29, 2010.
Soufraki	<i>Hussein Nuaman Soufraki v. United Arab Emirates</i> , ICSID Case No. ARB/02/7, Decision of the <i>ad hoc</i> Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007.
Víctor Pey Casado	<i>Víctor Pey Casado and President Allende Foundation v. Republic of Chile</i> , ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, December 18, 2012.
Vivendi I	<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic</i> , ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002.
Wena	<i>Wena Hotels Limited v. Arab Republic of Egypt</i> , ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), February 5, 2002.

I. PROCEDURAL HISTORY

1. On October 2, 2012, Caratube International Oil Company LLP filed with the Secretary-General of ICSID an application requesting the annulment of the Award of the Tribunal rendered on June 5, 2012 in ICSID Case No. ARB/08/12 in the arbitration proceeding between CIOC and the Republic of Kazakhstan.
2. CIOC's Application was made within the time period provided in Article 52(2) of the ICSID Convention.
3. On October 5, 2012, the Secretary-General registered the Application and transmitted a Notice of Registration to the parties on the same date. In that Notice, the Secretary-General observed that the Application contained a request for a stay of enforcement of the Award in accordance with Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings. The Secretary-General informed the parties that the enforcement of the Award was provisionally stayed, pursuant to Rule 54(2).
4. On November 5, 2012, the Centre informed the parties of the ensuing recommendation to the Chairman of the Administrative Council of the appointment of Mr. Juan Fernández-Armesto (Spain), Tan Sri Dato Cecil W.M. Abraham (Malaysia), and Judge Hans Danelius (Sweden) to the ad hoc Committee, each of whom was designated to the ICSID Panel of Arbitrators by his State of nationality.
5. By letter of November 12, 2012, in accordance with Rule 52(2), the Secretary-General notified the parties that the ad hoc Committee was constituted and was composed of Mr. Juan Fernández-Armesto, as President, Tan Sri Dato Cecil W.M. Abraham and Judge Hans Danelius, as members. The parties were also informed that Ms. Milanka Kostadinova, Team Leader/Legal Counsel, ICSID, would serve as Secretary.
6. On December 10, 2012, Applicant filed a request to the Committee to continue the provisional stay of enforcement of the Award until rendition of the Committee's decision on the annulment application.
7. On December 14, 2012, the Secretary wrote to the parties, on behalf of the Committee, inviting Respondent's comments on Applicant's request for continuing stay of enforcement of the Award.
8. On January 10, 2013, Respondent submitted observations on Applicant's request. Respondent consented to the stay, but requested that the Committee order Applicant to provide a bank guarantee or other equivalent security for the amount due under the Award.
9. On January 11, 2013, the Committee held its first session by telephone conference. Procedural Order No. 1 was issued on January 17, 2013. In order to give the parties an opportunity to fully present their observations on the issue of continuing stay of enforcement, the Committee invited Applicant and Respondent

to file a further round of written observations by January 21, 2013 and by January 31, 2013, respectively.

10. On January 21, 2013, Applicant filed its response to Respondent's observations of January 10, 2013, concerning the request for continuing stay of enforcement of the Award.
11. On January 25, 2013, CIOC filed a Memorial on Annulment.
12. On January 31, 2013, Kazakhstan filed further observations on the request for continuing stay of enforcement of the Award.
13. On March 14, 2013, the Committee, having duly deliberated and carefully analyzed each party's position on the stay request, issued its Decision on Applicant's Request for Continuing Stay of Enforcement of the Award.
14. The Committee determined that the stay of enforcement of the Award should continue throughout the annulment proceeding, without a financial security. The Committee reserved its right to revisit at any time, at the request of either party, its decision and order the modification or termination of the stay, and/or amend its decision regarding the posting of a security. None of the parties requested so.
15. On May 10, 2013, Kazakhstan filed a Counter-Memorial on Annulment.
16. On June 28, 2013, CIOC filed a Reply on Annulment.
17. On August 23, 2013, Kazakhstan filed a Rejoinder on Annulment.
18. A hearing for CIOC's Application for annulment of the Award was held on September 12, 2013 at the World Bank Office in Paris.
19. Present at the hearing were:

THE AD HOC COMMITTEE

Mr. Juan Fernández-Armesto, President
Tan Sri Dato Cecil W.M. Abraham, Member
Judge Hans Danelius, Member

ICSID SECRETARIAT

Ms. Milanka Kostadinova

COUNSEL FOR CLAIMANT: Derains & Gharavi

Dr. Hamid Gharavi
Mr. Stephan Adell
Ms. Sophia von Dewall
Ms. Dipna Gunnoo
Ms. Olga Kuprenkova

Caratube International Oil Company LLP

Mr. Nassib Chedid (local co-counsel)

COUNSEL FOR RESPONDENT: Curtis, Mallet-Prevost, Colt & Mosle LLP

Mr. Peter Wolrich
Mr. Geoffroy Lyonnet
Ms. Gabriela Alvarez-Avila
Ms. Sabrina Ainouz
Ms. Marie-Claire Argac
Ms. Claire Selden

Republic of Kazakhstan

Mr. Nurlan Nurgabylov
Mr. Meyram Tautenov

ENGLISH LANGUAGE COURT REPORTER

Mr. Trevor McGowan, The Court Reporter, Ltd.

20. On October 15, 2013, each party filed a Statement of Costs.
21. The Committee declared the proceedings closed on December 23, 2013.
22. During the course of the proceedings, the Members of the Committee have deliberated by various means of communication and have taken into account all pleadings, documents and evidence before them.

II. THE PARTIES' POSITIONS

1. INTRODUCTION

23. Parties to the underlying arbitration were CIOC, Claimant, a Kazakh company, and Kazakhstan, Respondent.
24. The basic rule in the ICSID Convention regarding jurisdiction of the Centre (Article 25(1)) provides that an ICSID tribunal lacks jurisdiction over disputes between a Contracting State – and Kazakhstan is a Contracting State – and a national or company of that same Contracting State. This basic rule is, however, subject to a specific exception: Article 25(2)(b) offers standing to a local company from the Contracting State, provided that
- such company is under foreign control, and
 - there is an agreement between the parties to treat the company, because of foreign control, as a national of another Contracting State.
25. CIOC filed the arbitration against Kazakhstan arguing that it met the requirements set forth in Article 25(2)(b) of the Convention, because it was 92% owned and controlled by an American citizen, Mr. Hourani. CIOC further argued that its investment, “a significant oil field in an oil rich area of the country”, had been expropriated by Kazakhstan giving rise to damages and compensation in excess of USD 1.1 billion¹.
26. Respondent requested the Tribunal to reject CIOC’s claims for lack of jurisdiction.
27. The Tribunal concurred and concluded
- “that the facts presented and proved by Claimant do not satisfy Claimant’s burden of proof to establish jurisdiction of this Tribunal.
- Accordingly, the Tribunal finds that it does not have jurisdiction over the claims raised in this case”².
28. In essence, the Tribunal accepted that Mr. Hourani was the formal owner of 92% of the capital of CIOC, but held that mere formal ownership of shares was not sufficient basis for finding jurisdiction under the provisions of the Convention and the BIT. On that basis, the Tribunal issued an Award dismissing Claimant’s claims, without considering the merits of the dispute, and ordered Claimant to pay Respondent USD 3.2 million for its legal costs.

2. APPLICANT’S POSITION

29. The Award dismissed jurisdiction because

¹ Award, at 2 (quoting Claimant’s Memorial of May 14, 2009, at 7).

² *Ibidem*, at 468 and 469.

“Claimant failed to discharge its burden of proof with regard to the fact that CIOC was an investment of U.S. national (Devincci Hourani) as required by Article VI(8) of the BIT”³.

30. This holding was reached – argues Applicant – notwithstanding the undisputed fact that Mr. Hourani is a U.S. citizen since 2001 and the Tribunal’s own findings that “indirect evidence appears to show that Mr. Hourani was an owner of a 92% share in CIOC”⁴.
31. Applicant argues that this is a textbook case of annulment, since the Award denied jurisdiction pursuant to an imaginary requirement, not raised by Respondent nor shared with Claimant: the condition that a majority shareholding by a U.S. national in a Kazakh company is not sufficient to qualify the company as a U.S. national⁵.
32. Applicant is requesting annulment of the Award in its entirety, arguing that the Tribunal violated
 - Article 52(1)(b) of the Convention by manifestly exceeding its powers,
 - Article 52(1)(d) of the Convention by seriously departing from a fundamental rule of procedure, and/or
 - Article 52(1)(e) of the Convention by failing to state the reasons on which the Award was based⁶.
33. These three grounds for annulment must be applied – in CIOC’s submission – to three findings of the Tribunal:
 - The first is the Tribunal’s holding that the U.S. national must own or control and invest in CIOC to comply with the foreign nationality test.
 - The second is the definition and application by the Tribunal of the “control” and “investment” requirements set forth in the BIT and the Convention.
 - The third is an *obiter dictum* made by the Tribunal, in relation to the contractual submission to ICSID jurisdiction.

3. **RESPONDENT’S POSITION**

34. Respondent argues that there is not a single ground for annulment of the Award. Under the guise of a claim for annulment, Applicant is in fact seeking to obtain an entire de novo review of the Tribunal’s jurisdiction over CIOC’s claims. However, annulment is not an appeal and Applicant’s attempt to appeal the Award through annulment proceedings must be rejected⁷.
35. Respondent adds that the Award clarifies, consistently with the double-keyhole approach of ICSID jurisdiction, that in order for Claimant to benefit from Mr.

³ Award, at 457.

⁴ *Ibidem*, at 395, C I, at 5.

⁵ C I, at 2.

⁶ C I, at 244.

⁷ R I, at 4.

Hourani's U.S. nationality and for the Tribunal to have jurisdiction, Claimant must have established that the foreign nationality requirements of both the ICSID Convention and the BIT are met. Claimant failed to do so, and consequently the Tribunal declined jurisdiction on two separate and independent grounds:

- (i) Claimant failed to provide sufficient proof that it controlled CIOC, as required by Article 25(2)(b) of the Convention.
- (ii) Claimant also failed to prove that CIOC is an investment of a U.S. national, as required by Article VI(8) of the BIT⁸.

36. Respondent therefore disagrees with Applicant and requests the Committee to issue a decision dismissing Applicant's application for annulment.

37. Finally, both parties ask for reimbursement of costs.

* * *

38. In order to decide this annulment proceeding, the Committee will

- briefly summarize the Award, including the proven facts and the findings of the Tribunal,
- provide a conceptual overview of the three grounds for annulment invoked by Applicant,
- analyze the application of these grounds for annulment to the three findings of the Tribunal (nationality test, definition of control and investment and *obiter dictum*), and
- consider the issue of costs.

⁸ *Ibidem*, at 110.

III. THE AWARD

1. FACTS

39. Mr. Hourani is a U.S. citizen. He received his U.S. citizenship in 2001. Before that he did not hold the nationality of any country, being a stateless Palestinian refugee born in Lebanon.
40. In 2002, after convening a public tender, the Kazakh Ministry of Energy and Mineral Resources signed Contract No. 954 with a company called Consolidated Contractors (Oil and Gas) Company S.A.L., incorporated in Lebanon. Under the Contract, which included an ICSID arbitration clause, CCC acquired certain rights for the exploitation of the so-called Caratube oil field situated in Kazakhstan, against the payment of an amount in excess of USD 9 million.
41. A few months after signing the Contract, CCC transferred the Contract to CIOC, as documented in a Transfer Agreement dated August 8, 2002. At that time, CIOC was controlled by Mr. Fadi Hussein, a Danish citizen and a distant cousin of Mr. Hourani.
42. In mid-2004 Mr. Hourani acquired 85% of the shares in CIOC from Mr. Hussein, against payment of a price of 850,000 Tenge. A year later, in April 2005, Mr. Hourani acquired an additional 7% shareholding in CIOC from Mr. Waheeb Antakly for 70,000 Tenge (the total price of 920,000 Tenge being equal to approximately USD 6,500)⁹.
43. Mr. Hourani never made any capital contribution to CIOC. The company was funded through loans and other financings provided by JOR Investments Inc., a Lebanese corporation apparently not related to Mr. Hourani.
44. In February 2008 the Ministry of Energy and Mineral Resources issued a notice of termination, alleging that CIOC had breached the Contract and requesting that CIOC hand over the Contract territory, return geological information, fulfil the outstanding obligations and rehabilitate the Contract area. Termination was confirmed in a letter from the Ministry dated May 14, 2008.
45. Claimant commenced ICSID arbitration against Respondent on June 16, 2008. The Award dismissing jurisdiction was issued on June 5, 2012. The application for annulment was filed on October 2, 2012.
46. Subsequently, CIOC and Mr. Hourani have jointly commenced a new, separate ICSID arbitration against Kazakhstan. This arbitration is still pending.

⁹ Award, at 437.

2. THE TRIBUNAL'S REASONING

47. The essential part of the Award is the Tribunal's analysis of its own jurisdiction, which led the Tribunal to the conclusion that it lacked jurisdiction to adjudicate the dispute¹⁰.

A. Legal Provisions

48. The Award interpreted the following legal provisions:

Provisions on the Tribunal's Competence to Decide on Jurisdiction

49. The starting point of the analysis was Article 41 of the Convention which reads:

“(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute”.

50. Further the Tribunal noted that Rule 41(2) of the Arbitration Rules provides that

“The Tribunal may at its own initiative consider, at any stage of the proceedings, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence”.

51. The Tribunal then agreed with the *Aguas del Tunari* decision that a tribunal's authority also includes

“the power to consider ways in which an ambiguous or unclear objection may bear on jurisdiction and to restate the objections, as appropriate, so as to allow a full examination of jurisdiction”¹¹.

Article 25(2)(b) of the Convention

52. Claimant is an entity incorporated in Kazakhstan and the key question for the Tribunal was whether Claimant satisfied the conditions which allow a local company to be treated as a national of another Contracting State for the purposes of ICSID arbitration. The provision addressing this issue in the ICSID Convention is Article 25(2)(b), which provides that “national of another Contracting State” means:

“any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that

¹⁰ *Ibidem*, at 309 et seq.

¹¹ Award, at 309, referring to *Aguas del Tunari*, at 78.

date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”.

53. The Tribunal pointed out that Contracting States to the Convention can agree on the conditions of their submission to ICSID jurisdiction as long as their agreement does not contradict the meaning of the Convention. Article 25(2)(b) sets foreign control as such outer limit, an objective requirement that cannot be replaced by an agreement. It is a floor below which the parties’ agreement cannot reach. The parties’ agreement cannot contradict the meaning of the Convention (e.g., by stipulating that *any* local company should be treated as foreign nationals), and to the extent that any such agreement contradicts the Convention, the Tribunal must find that there is no agreement providing jurisdiction under Article 25(2)(b)¹².

Article VI(8) of the BIT

54. The Tribunal then turned to Article VI(8) of the BIT, which is the provision containing the parties’ agreement:

“For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention”.

55. The Tribunal noted that Article VI(8) of the BIT contains the conditions agreed between Kazakhstan and the United States of America for the application of Article 25(2)(b) of the ICSID Convention. The key requirement in Article VI(8) is that the local company be “an investment of nationals or companies of the other Party”.

56. The BIT contains a definition of the term “investment” in Article I(1)(a), which provides:

“1. For the purposes of this Treaty,

(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

- (i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;
- (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
- (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
- (iv) intellectual property which includes, inter alia, rights relating to:

¹² Award, at 336 and 337.

literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and
(v) any right conferred by law or contract, and any licenses and permits pursuant to law”.

57. Article I(1)(a) defines investment from the perspective of assets, claims and rights to be protected. But the Tribunal pointed out that BIT protection is not granted simply to any formally held asset, one of the goals of the BIT being the stimulation of capital flows, and consequently protected investments must be assets which result from such a flow of capital. Even though the BIT definition of investment does not expressly qualify the contributions by way of which the investment is made, the existence of such contribution as a requisite to the protection of the BIT is implied¹³. Consequently, the Tribunal considered that the term “investment” denotes an economic arrangement requiring a contribution to make a profit and thus involving some degree of risk¹⁴.
58. In the Tribunal’s view, the burden is on Claimant to show that it fulfils the criteria set out by Article 25(2)(b) of the Convention and Article VI(8) of the BIT.

B. Application to the Case

59. Having set the legal framework, the Tribunal then applied it to the case at hand.

First Requirement: The U.S. Nationality

60. The Tribunal pointed out that the first requirement set forth in Article VI(8) was the U.S. nationality of Mr. Hourani. This requirement was not contested by Respondent, and the Tribunal concurred and found that Mr. Hourani was indeed a U.S. citizen during the relevant period.

Second Requirement: Ownership

61. The second requirement was Mr. Hourani’s ownership of 92% of the share capital of CIOC. Here the Tribunal accepted that there was evidence showing that Mr. Hourani was the owner of 92% of the share capital of CIOC and concluded

“that jurisdiction cannot be denied for the mere reason that Claimant has not fully complied with its burden of proof regarding ownership by the U.S. national, Devincci Hourani”¹⁵.

Third Requirement: Control

62. The third requirement was control, which the Tribunal interpreted to mean actual control over CIOC. The starting point for the Tribunal’s examination was that

¹³ Award, at 351.

¹⁴ Award, at 360.

¹⁵ Award, at 396.

Claimant had the burden of proof¹⁶. Weighing the available evidence, the Tribunal came to the conclusion that Mr. Hourani had not provided sufficient proof of control. The Tribunal was not satisfied that the legal capacity to control, without evidence of actual control, was enough in light of Mr. Hourani's characterization of his purported investment in CIOC¹⁷.

63. The Tribunal thus concluded that Mr. Hourani had proven ownership but not control of CIOC. However, as Article I(1)(a) of the BIT requires ownership *or* control, and based on indirect evidence Claimant *could* be regarded as owned by Mr. Hourani, the Tribunal then moved to analyze further conditions for treating CIOC as a U.S. national under the BIT¹⁸.

Fourth Requirement: Investment Made by Mr. Hourani

64. In answering the question whether CIOC was an investment of Mr. Hourani the Tribunal first enquired whether he had made any contribution and had taken any risk, because, in the Tribunal's view, the existence of an investment requires a contribution to make profit and thus involves some degree of risk¹⁹.
65. The starting point of the Tribunal's enquiry was that Mr. Hourani had only paid a nominal price equivalent to USD 6,500 for his 92% share in CIOC. This nominal price raised doubts about the existence of an investment in which at least USD 9.4 million had already been sunk. Indeed, the Tribunal considered that payment of only a nominal price and lack of any other contribution by the purported investor must be seen as an indication that the investment was not an economic arrangement, was not covered by the term "investment" as used in the BIT and thus was an arrangement not protected by the BIT²⁰.
66. The Tribunal then analyzed Mr. Hourani's allegation that he had contributed a personal guarantee for the financing of CIOC and, after weighing the evidence, concluded that the evidence presented did not confirm that Mr. Hourani had contributed a substantial personal guarantee of CIOC's debt to JOR Investments Inc.
67. The Tribunal concluded that even if Mr. Hourani had acquired formal ownership and nominal control over CIOC, no plausible economic motive had been given to explain the negligible purchase price. No evidence had been presented of a contribution of any kind made or any risk undertaken by Mr. Hourani. There had been no capital flow between him and CIOC that had contributed anything to the business venture operated by CIOC²¹.
68. Claimant insisted that the origin of capital used in investments is immaterial. Although the Tribunal acknowledged this to be correct, the capital must still be

¹⁶ Award, at 401.

¹⁷ Award, at 407.

¹⁸ *Ibidem*.

¹⁹ Award, at 409.

²⁰ Award, at 435.

²¹ Award, at 455.

linked to the person purporting to have made an investment. In this case the Tribunal found that there was no evidence of such link²².

* * *

69. Summing up, the Tribunal concluded

- that Claimant had failed to discharge its burden of proof with regard to the fact that CIOC was an investment of a U.S. national, as required by Article VI(8) of the BIT²³,
- that the facts presented and proved by Claimant did not satisfy Claimant's burden of proof to establish jurisdiction, and
- that the Tribunal therefore did not have jurisdiction over the claims raised in the case²⁴.

²² Award, at 456.

²³ Award, at 457.

²⁴ Award, at 468-469.

IV. GROUNDS FOR ANNULMENT

70. Applicant is invoking three grounds for annulment:
- that the Tribunal manifestly exceeded its powers in violation of Article 52(1)(b) of the Convention,
 - that the Tribunal seriously departed from a fundamental rule of procedure in violation of Article 52 (1)(d) of the Convention, and/or
 - that it failed to state the reasons on which the Award is based in violation of Article 52(1)(e) of the Convention.
71. The Committee will briefly review these standards, in light of the arguments presented by both parties.
72. The starting point of such analysis is Article 53(1) of the Convention, which explicitly states that the award “shall not be subject to any appeal”. The award may however be subject to annulment if an *ad hoc* committee finds that one or more of the five grounds for annulment established in Article 52(1) apply. The powers of *ad hoc* committees are limited to annul awards issued by tribunals – not to amend or replace such awards, nor to review the merits of the dispute. Factual findings and weighing of evidence made by tribunals are outside the remit of *ad hoc* committees²⁵, except in those cases where the applicant can prove that the errors of fact or of law committed by the tribunal are so egregious as to give rise to one of the grounds for annulment listed in Article 52(1) of the Convention.

1. MANIFEST EXCESS OF POWERS

73. Applicant invokes as a first ground for annulment that by rendering the Award “the Tribunal has manifestly exceeded its powers” (Article 52(1)(b) of the Convention).
74. In this respect, the Committee notes that the power of any arbitral tribunal derives from the authority vested upon it through the consent of the parties; if arbitrators address disputes not included in the powers granted, or decide issues not subject to their jurisdiction or not capable of being solved by arbitration, their decision cannot stand and must be set aside.

A. Failure to Exercise Jurisdiction

75. The Committee further points out that excess of power can be committed both by overreach and by defect. Awards can be annulled if tribunals assume powers to which they are not entitled, and also if arbitrators do not use the powers that have been vested upon them by the parties. ICSID annulment committees have at the request of the investor set aside awards in cases where the tribunal, having jurisdiction, failed to exercise its powers. Somewhat paradoxically, a manifest

²⁵ *Malicorp*, at 119.

shortfall in the exercise of jurisdiction may also constitute a manifest excess of power and lead to annulment of the award²⁶.

76. In the history of ICSID there seem to be only three instances where committees have used their power to annul awards on the ground that the tribunal had failed to exercise jurisdiction²⁷.

- The first case is *Vivendi I*, where the committee partially annulled the award, because the tribunal had dismissed a claim on the ground that such claim could have been dealt with by a national court²⁸.
- The second case is *Helnan*, in which the award was also partially annulled, due to the tribunal's failure to exercise jurisdiction: the tribunal had imposed the requirement that an administrative decision before being construed as constituting a treaty breach had to be challenged in local courts²⁹.
- In the third case, *Malaysian Historical Salvors*, the committee annulled the award on jurisdiction rendered by the sole arbitrator, on the ground that the arbitrator manifestly exceeded his powers by failing to exercise jurisdiction over a treaty dispute³⁰; the crux of this case was whether the requirement that an investment represent a contribution to the economic development of the host state, was or was not a condition for jurisdiction under Article 25(1) of the Convention; the arbitrator found that it was, the majority of the committee found otherwise and annulled the award on jurisdiction³¹.

B. Failure to Apply the Proper Law

77. The Committee notes that 'excess of power' is a polysemic concept, which can be argued not only in cases of failure to exercise jurisdiction, but also in the context of tribunals failing to choose the proper law. Powers vested on arbitrators are not unlimited, but restricted. Arbitrators are only authorized by the parties to make their adjudication in accordance with applicable law, not on the basis of a law different from that agreed by the parties. If arbitrators do otherwise, they violate the empowerment received from the parties and their decision merits annulment.

78. Accepting this principle *ad hoc* committees have concluded that arbitrators manifestly exceed their powers if they

- totally disregard applicable law, or
- ground their award on a law other than the applicable law provided for in Article 42 of the Convention – i.e. the rules of law agreed by the parties,

²⁶ *Vivendi I*, at 115; *Malaysian Historical Salvors*, at 80.

²⁷ R I, at 75; C II, at 27.

²⁸ *Vivendi I*, at 102.

²⁹ *Helnan*, at 28-57.

³⁰ *Malaysian Historical Salvors*, at 56-82.

³¹ *Malaysian Historical Salvors*, at 61-81.

or, subsidiarily, the law of the Contracting State party to the dispute and such rules of international law as may be applicable³².

79. It is important to emphasize here that in order for an award to be annulled, the committee must find that the error committed by the tribunal consisted of applying the wrong law, not of wrongly interpreting the correct law. To understand the contrary would imply transforming the well-settled standard of failure to apply the proper law into an error of law standard, changing the nature of the ICSID annulment procedure, and transforming it into an appeal mechanism. Accepting this principle, *ad hoc* committees have made it clear that an error in the interpretation of the proper law does not constitute a manifest excess of powers³³.
80. The parties have discussed whether the concept of manifest excess of power can be stretched to cover errors of law³⁴.
81. The Committee finds the correct position to be that misinterpretation or misapplication of the proper law, even if serious, does not justify annulment. That being said, in exceptional circumstances, a gross or egregious error of law, acknowledged as such by any reasonable person, could be construed to amount to a failure to apply the proper law, and could give rise to the possibility of annulment³⁵. But the threshold for applying this exceptional rule must be set very high³⁶ – otherwise the annulment mechanism permitted by the Convention would expand into a prohibited appeal system.

C. The Meaning of “Manifest”

82. Article 52(1)(b) of the Convention only permits annulment if a dual requirement is met: there must be an excess of power, and the excess of power must be “manifest”.
83. The parties have discussed the precise meaning of the term “manifest”. For Respondent, manifest means self-evident, while for Applicant the term implies that the excess must be serious. Applicant adds that establishing the existence of an excess of power may require a detailed analysis of complex factual and legal questions³⁷.
84. The Committee agrees with Respondent that the term “manifest” basically corresponds to “obvious” or “evident”. However, this does not prevent that in some cases an extensive argumentation and analysis may be required to prove that such a manifest excess of power has in fact occurred³⁸.
85. Applicant has argued that any excess of power which relates to jurisdiction would in itself comply with the manifest test. Such a conclusion does not derive from the

³² *Azurix*, at 46 and 136; *CMS*, at 49; *Lucchetti*, at 98; *Soufraki*, at 45; *Enron*, at 67; *Helnan*, at 55; *Sempra*, at 205-207.

³³ *Duke Energy*, at 99; *Sempra*, at 164.

³⁴ C II, at 47; R II, at 47.

³⁵ *Soufraki*, at 86.

³⁶ *AES*, at 33.

³⁷ C II, at 54; R II, at 50.

³⁸ *Victor Pey Casado*, at 69.

wording of Article 52(1)(b) and has not been accepted by previous *ad hoc* committees³⁹. Nor does the Committee find any sufficient basis for applying in this respect different rules to jurisdiction and merit.

2. **SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE**

86. The second ground for annulment invoked by Applicant is that the Tribunal has engaged in a serious departure from a fundamental rule of procedure, in violation of Article 52(1)(d) of the Convention.

87. The Committee considers that serious violations of due process, which undermine the principles that each party has a right to be heard on equal terms and to contradict the arguments of the other party, justify annulment of an award; justice cannot be achieved through a deeply flawed procedure. Serious departure from a fundamental rule of procedure is a ground frequently invoked by applicants, normally in conjunction with other grounds. But the hurdles for the acceptance of this ground are high: in only a few cases has it led to the annulment of ICSID awards⁴⁰.

88. The hurdles are reflected in the wording of Article 52(1)(d), which involves three requirements:

- The procedural rule must be fundamental.
- The tribunal must have departed from it.
- The departure must be serious.

89. Applicant has focused its arguments on two rules of procedure, from which the Tribunal allegedly departed: (A.) the right to be heard, and (B.) the burden of proof.

A. **Right to Be Heard** (and *iura novit curia*)

90. Applicant identifies the right to be heard as a fundamental procedural rule, and submits that the Tribunal used in its Award legal reasoning which had never been argued by or disclosed to the parties. Applicant avers that by so doing the Tribunal violated its procedural rights⁴¹. Respondent disagrees and argues that the parties' right to be heard does not prevent a tribunal from adopting its own reasoning or even raising new arguments⁴².

91. What the parties are discussing is, in fact, the relationship between two legal principles:

- the parties' right to be heard, and

³⁹ Schreuer: "The ICSID Convention: A Commentary" (CUP 2ed.), 2010, p. 943, at 149; *Soufraki*, at 118 and 119; *MTD*, at 54.

⁴⁰ *Amco II*; *Fraport*; *Victor Pey Casado*.

⁴¹ *C I*, at 116.

⁴² *HT* p. 85, l. 24.

- the tribunal's right (or even duty – a tribunal confronted with inept pleadings cannot content itself with the less implausible of the parties' arguments⁴³) to apply the principle *iura novit curia*.

92. *Ad hoc* committees have a number of times been confronted with the issue whether tribunals can *sua sponte* raise legal arguments which had not been pleaded by the parties. Schreuer has summarized the findings by saying that committees

“have uniformly rejected the idea that the tribunals in drafting their awards are restricted to the arguments presented by the parties”⁴⁴.

93. But this conclusion is subject to an important *caveat*: a tribunal (and also a committee) is only free to adopt its own solution and reasoning without obligation to submit it to the parties beforehand, if it remains within the legal framework established by the parties. And *vice versa*: if a tribunal prefers to use a distinct legal framework, different from that argued by the parties, it must grant the parties the opportunity to be heard. As the committee in *Klöckner I* held⁴⁵:

“The real question is whether, by formulating its own theory and argument, the Tribunal goes beyond the “legal framework” established by the Claimant and Respondent. This would for example be the case if an arbitral tribunal rendered its decision on the basis of tort while the pleas of the parties were based on contract”.

94. Consequently, tribunals do not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically advanced by the parties, provided that the tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal.

95. That tribunals are entitled, within certain limits, to proceed without asking for the parties' views, does not mean that it is always good practice to do so. If *iura novit curia* is exercised, an invitation to the parties to comment on the new legal arguments may reduce the risk of errors or mistakes. And as the arbitrator in *Bogdanov* wrote, tribunals should avoid that parties be

“surprise[d] by the consideration of legal issues that were not taken into consideration in the proceedings”⁴⁶.

96. But surprise in itself does not give rise to a ground for annulment. As the committee in *Vivendi I* wrote,

⁴³ Paulsson: “International Arbitration and the Generation of Legal Norms”, in ICCA Congress Series No. 13 at 879.

⁴⁴ Schreuer: “Three Generations of ICSID Annulment Procedures” in “Annulment of ICSID Awards” (Gaillard/Banifatemi eds.), 2004, p. 30.

⁴⁵ *Klöckner I*, at 91.

⁴⁶ *Bogdanov v. Moldova*, SCC case 93/2004, quoted in Bigge: “*Iura Novit Curia* in Investment Treaty Arbitration”, Kluwer Arbitration Blog, December 29, 2011.

“[i]t may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d) of the ICSID Convention.”⁴⁷.

B. Burden of Proof

97. A breach of the general principles on burden of proof can also lead to an infringement of Article 52(1)(d) of the Convention. As the committee in *Klöckner II* stated,

“a reversal of the burden of proof could well lead to a violation of a fundamental rule of procedure. It all depends on the importance, for the decision of the Tribunal, of the subject regarding which the burden has been reversed”⁴⁸.

C. Seriousness

98. There is an additional requisite: Article 52(1)(d) of the Convention requires that a departure from a fundamental rule of procedure, if it is to provoke the annulment of an award, must also be “serious”.
99. A departure is serious if the violation of the fundamental rule of procedure produced a material impact on the award. The applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied. As the *Wena* committee stated, what the applicant must simply demonstrate is

“the impact that the issue may have had on the Award”⁴⁹.

3. FAILURE TO STATE REASONS

100. The third ground for annulment on which Applicant relies is that the award has failed to state the reasons on which it is based, as required by Article 52(1)(e) of the Convention.
101. The obligation to state reasons stems from Article 48(3) of the Convention, which requires the tribunal to “deal with every question submitted to the Tribunal” and to “state the reasons upon which it is based”. Unreasoned awards can be annulled, because parties are entitled to be able to ascertain to what extent a tribunal’s findings are sufficiently based on a correct interpretation of the law and on a proper evaluation of the facts⁵⁰. But as long as reasons have been stated, even if incorrect or unconvincing, the award cannot be annulled on this ground. Article

⁴⁷ *Vivendi I*, at 84.

⁴⁸ *Klöckner II*, at 6.80.

⁴⁹ *Wena*, at 61; *Víctor Pey Casado*, at 78.

⁵⁰ *Lucchetti*, at 98.

52(1)(e) does not permit any inquiry into the quality or persuasiveness of reasons. As was stated in *MINE*,

“the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or of law”⁵¹.

102. Nonetheless, *ad hoc* committees have held that contradictory or frivolous reasons are to be equated with a failure to state reasons and can result in annulment⁵². Contradictory reasons cancel each other and will not enable the reader to understand the tribunal’s motives⁵³. Frivolous reasons are those manifestly irrelevant and knowingly so to the tribunal⁵⁴. But an examination of the reasons presented by a tribunal cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based. Committees do not have the power to review the adequacy of the reasons set forth by the tribunal in its award. Rather, the role of the committee is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion. Broadening the scope of Article 52(1)(e) to comprise decisions with inadequate reasons would transform the annulment proceeding into an appeal.

⁵¹ *MINE*, at 5.09.

⁵² *Amco II*, at 1.18.

⁵³ *Klöckner I*, at 116.

⁵⁴ Broches: “Observations on the finality of ICSID awards” in *ICSID Review*, 321 (1991), at 366.

V. THE TRIBUNAL'S FOREIGN NATIONALITY TEST

103. Applicant alleges that there are three separate reasons warranting the annulment of the Award on the invoked grounds:
- The first relates to the Tribunal's holding that the U.S. national must "own or control" an investment in CIOC to comply with the foreign nationality test.
 - The second is the definition and application by the Tribunal of the "control" and "investment" requirements set forth in the BIT and in the Convention.
 - The third refers to an *obiter dictum* made by the Tribunal with regard to the contractual submission to ICSID jurisdiction.
104. The first of these allegations will be analyzed in this section, and the other two in subsequent sections (VI and VII).

1. APPLICANT'S POSITION

105. Applicant submits that the Tribunal dismissed jurisdiction on the ground that

"Claimant failed to discharge its burden of proof with regard to the fact that CIOC was an investment of U.S. national (Devincci Hourani) as required by Article VI(8) of the BIT"⁵⁵.

106. Applicant avers that, in doing so, the Tribunal violated Article 52(1)(b), (d) and (e) of the Convention.

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

107. Applicant argues that by failing to exercise jurisdiction, the Tribunal manifestly exceeded its powers, in violation of Article 52(1)(b) of the Convention⁵⁶. In particular, the Tribunal failed to apply or alternatively manifestly erred in applying the provisions of the BIT and of the Vienna Convention to the foreign nationality test under Article VI(8) of the BIT and the associated "ownership or control" requirement of Article I(1)(a) of the BIT⁵⁷.
108. Applicant points out that, pursuant to Article VI(8) of the BIT, a local Kazakh company like CIOC must be treated as a "foreign national" for the purposes of Article 25(2)(b) of the Convention and be given access to ICSID arbitration, if it qualifies as "investment" of U.S. "nationals or companies". In Applicant's opinion, the requirement of foreign nationality was satisfied by the mere fact that Mr. Hourani owned 92% of the shares in CIOC⁵⁸. The Tribunal, however, went on to examine the alternative requirement of "control" contained in Article I(1)(a) of the BIT, and moreover added to the foreign nationality test the requirements that

⁵⁵ Award, at 457.

⁵⁶ C I, at 146.

⁵⁷ C I, at 147.

⁵⁸ C I, at 152.

the person exercising ownership or control should prove that it had made an investment in the local investment vehicle – CIOC – and that a link existed between CIOC’s capital and Mr. Hourani⁵⁹.

109. Applicant therefore considers that the Tribunal imposed a “foreign capital” requirement to the BIT’s notion of “foreign nationality”, contained in Article VI(8) of the BIT, and thereby altered and exceeded the scope of such rule, as agreed between two sovereign states. It subsequently found, by replacing the foreign nationality test of Article VI(8) by its self-created test, that CIOC did not qualify as an investment of the U.S. national Mr. Hourani and did not qualify as a foreign investment for purposes of ICSID jurisdiction⁶⁰.
110. In Applicant’s opinion, the Tribunal reached this conclusion despite the clear wording of Article I(1)(a) of the BIT, which does not require that the investment be made by a U.S. national directly in the local company. To the contrary, this provision of the BIT only requires the investment to be “owned or controlled” by a U.S. national. Applicant considers that the Tribunal’s reasoning and conclusion run counter to the express wording of the BIT⁶¹ and that the Letter of Transmittal of the BIT confirms that the assets enumerated in the non-exclusive list of Article I(1)(a) constitute investments without any further requirements having to be satisfied⁶².
111. Applicant concludes that the Tribunal, although acting under the pretext of Article I(1)(a) and Article VI(8) of the BIT, in reality did not apply these provisions and hence failed to apply the applicable law, or misapplied the BIT in such egregious manner that it amounts to effective disregard of the applicable law. In both cases, the error by the Tribunal indisputably amounts to a manifest excess of powers. This error, in Applicant’s view, is both flagrant and incomprehensible⁶³.
112. Applicant points out that the Tribunal thus effectively failed to exercise the jurisdiction conferred upon it by the BIT and Article 25(2)(b) of the Convention and to apply the law agreed by the parties, and this failure constitutes manifest excess of power. Applicant argues that it is settled that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant treaty, but also if it fails to exercise a jurisdiction which it possesses under that instrument⁶⁴.

B. Article 52(1)(d): Serious Departure from a Fundamental Rule of Procedure

113. Applicant also argues that the Tribunal seriously departed from a fundamental rule of procedure by depriving CIOC of its right to be heard, in violation of Article 52(1)(d) of the Convention. This is because the objection applied by the Tribunal was not raised by Respondent.

⁵⁹ C I, at 153; C II, at 109.

⁶⁰ C I, at 154.

⁶¹ C I, at 155.

⁶² C II, at 112.

⁶³ C I, at 157.

⁶⁴ C I, at 168, by reference to *Vivendi I*, at 86.

114. The record shows that Claimant in its Memorial based the Tribunal’s jurisdiction on the satisfaction of the foreign nationality test under Article VI(8) of the BIT, while in its Counter-Memorial Respondent based its objections to jurisdiction exclusively on the requirement of a *bona fides* investment under Article 25 of the ICSID Convention⁶⁵.
115. As Applicant sees it, the Tribunal did not merely restate unclear and ambiguous objections raised by Respondent, but rather relied on new legal provisions and arguments which had not been raised by Respondent in the proceedings⁶⁶.
116. Such new legal provisions were not shared by the Tribunal during the proceedings and so Claimant was not heard on the objection ultimately applied by the Tribunal and was deprived of the opportunity to correct the misapplication of the law by providing the Tribunal with appropriate arguments⁶⁷.
117. What is more, Applicant points out that the Tribunal was aware of this serious departure from a fundamental rule of procedure, because in the Award⁶⁸, it attempts to preemptively justify its behaviour in anticipation of a challenge, relying on its right, under Rule 41(2) of the Arbitration Rules, to raise *ex officio* jurisdictional questions at any time of the proceedings⁶⁹.
118. Applicant emphasizes that any prerogative the Tribunal may have to raise *ex officio* new grounds or arguments, cannot override the principle of due process which implies that “the parties shall be treated with equality and each party shall be given opportunity to present his case”⁷⁰, and that they must be “given the right to be heard before an independent and impartial tribunal”⁷¹, including the right of a party “to state its claim or its defense and to produce all arguments and evidence in support of it”⁷². In *Víctor Pey Casado* the *ad hoc* committee held that the tribunal’s right to independently proceed to the evaluation of a category of damages, did not relieve it from its obligation to “allo[w] each party the right to present its arguments and to contradict those of the other party”⁷³.
119. Applicant argues that where a tribunal bases its conclusions on arguments that are beyond the legal framework established by the parties, the tribunal is under the obligation to hear the parties first and to allow them to advance their arguments⁷⁴. In the present case, the Tribunal failed to hear the parties on issues that proved to be critical for its conclusion on jurisdiction. The Tribunal therefore departed from a fundamental right of procedure, and this departure was “serious”⁷⁵.
120. Applicant accordingly concludes that the Tribunal should have – at the very least – afforded CIOC the opportunity to be heard and to present its case on these *ex*

⁶⁵ C II, at 137.

⁶⁶ C I, at 172.

⁶⁷ C I, at 170.

⁶⁸ Award, at 309.

⁶⁹ C I, at 171.

⁷⁰ *MINE*, at 5.06.

⁷¹ *Wena*, at 57.

⁷² *Ibidem*.

⁷³ *Víctor Pey Casado*, at 262.

⁷⁴ C II, at 159.

⁷⁵ C II, at 169.

officio and/or completely reshuffled objections. Applicant argues that the Tribunal failed to do so⁷⁶ and that it acted in violation of the fundamental right to be heard embodied in Article 52(1)(d) of the Convention and reached a result which could have been different from what it would have been had such a rule been observed⁷⁷.

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

121. Applicant advances a third argument: the Tribunal also violated Article 51(1)(e) of the Convention, by basing its findings on an incomprehensible reasoning tantamount to a failure to state reasons.
122. Applicant finds it impossible to see what support the Tribunal mustered to sustain its conclusions, and to follow the little motivation the Tribunal has provided. The Tribunal – it is alleged – jumps from one notion to another, from one treaty to another, from one article to another, in a manner which defies common sense. In Applicant’s view, the Tribunal failed to render an award which at the minimum enables the reader to follow the reasoning on points of fact and law, as required by Articles 48(3) and 52(1)(e) of the Convention⁷⁸.

2. RESPONDENT’S POSITION

123. Respondent rejects Applicant’s contention that the Award should be annulled, on the ground that the Tribunal erred when it applied the foreign nationality test.

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

124. Respondent argues that the Tribunal did not exceed its powers when applying the foreign nationality test⁷⁹.
125. Respondent finds it obvious that there can be no excess of powers, let alone a manifest excess of powers, on the ground that the Tribunal failed to apply the relevant provisions of the applicable law. The rare instances when committees have annulled awards by reason of the tribunal’s failure to apply the applicable law were extreme cases in which the tribunal simply ignored the relevant provisions, or the applicable law as a whole.
126. Respondent avers that the Tribunal, in determining whether Claimant met the foreign nationality test under Article 25(2)(b) of the Convention, applied the relevant provisions of the BIT in accordance with the Vienna Convention. The Tribunal correctly turned to Article VI(8) of the BIT and the definition of investment contained in Article I(1)(a) of the BIT. The Tribunal interpreted “investment” in accordance with its ordinary meaning, in its context and in light of the BIT’s objective and purpose, pursuant to Article 31(1) of the Vienna Convention. The Tribunal held that the term “investment” had an inherent

⁷⁶ C I, at 177.

⁷⁷ C I, at 178.

⁷⁸ C I, at 179.

⁷⁹ R II, at 79.

meaning, which included the existence of contribution over a period of time and requiring some degree of risk⁸⁰. The Tribunal noted that even though the BIT required “ownership” or “control”, the BIT could not go beyond the objective outer limits of the Convention, which expressly requires that control be established, as only control can be the basis for jurisdiction⁸¹.

127. Respondent therefore considers that, in applying Articles VI(8) and I(1)(a) of the BIT, the Tribunal did not commit any error, let alone an egregious error wanting annulment. The Tribunal’s analysis thus meets “reasonable”, “plausible” or “tenable” standards, which exclude a finding of manifest excess of powers⁸².

B. Article 52(1)(d): Serious Departure from a Fundamental Rule of Procedure

128. Respondent also denies that the Tribunal departed from a fundamental rule of procedure, because the question of the foreign nationality of CIOC was actually argued during the proceedings. The parties debated the issues whether there was an investment of Mr. Hourani and whether Mr. Hourani actually controlled such investment. Applicant’s artificial argument that Respondent’s objection was based on the ICSID Convention and not on Article VI(8) of the BIT, while Article VI(8) contains the foreign nationality agreement required under Article 25(2)(b) of the Convention, must be rejected⁸³.

129. In any event, even if it were considered that CIOC was not heard on the question of control and/or investment (which Respondent denies), the Tribunal’s reasoning undoubtedly remained within the legal framework established by the parties when they debated foreign nationality for the purposes of ICSID jurisdiction⁸⁴.

130. Furthermore, Article 41(2) of the Arbitration Rules confers on ICSID tribunals the power to address jurisdictional questions of its own motion. This means that, in Respondent’s opinion, an arbitral tribunal is perfectly free to reformulate or clarify an objection to its jurisdiction made by one of the parties. In accordance with the principle *iura novit curia*, the parties’ right to be heard does not require an ICSID tribunal to submit to the parties every new reason on which it bases its decision⁸⁵.

131. Respondent avers that the issue of the applicable test for determining CIOC’s nationality was amply debated by the parties. Even if this were not the case, the Tribunal was empowered to reformulate or even raise a new argument or reasoning, without first submitting it to the parties, provided that such argument or reasoning remained within the legal framework established by the parties. Article VI(8) of the BIT was indeed part of the legal framework established by the parties. All relevant provisions of the Convention and the BIT were in the debate, and the Tribunal was not bound to submit its interpretation to the parties

⁸⁰ R I, at 120.

⁸¹ R I, at 123.

⁸² R I, at 137.

⁸³ R I, at 140.

⁸⁴ R II, at 93.

⁸⁵ R I, at 158.

beforehand. Therefore, Respondent concludes that the Tribunal did not violate Claimant's right to be heard or depart from any rule of procedure⁸⁶.

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

132. Respondent finally argues that the Tribunal did not fail to state reasons.
133. Respondent avers and explains that the reasoning of the Tribunal on the points of law and fact related to the foreign nationality requirements of the BIT and the ICSID Convention are clear, precise and logically developed⁸⁷.
134. Furthermore, Respondent argues that the adequacy and sufficiency of reasons are irrelevant for annulment purposes. The applicable standard requires only that the award contain reasons that support the tribunal's decision, even if the line of reasoning adopted by the tribunal contains errors of law or of fact. Applicant seeks to appeal the Tribunal's decision, but has not presented a single plausible argument against the Tribunal's well argued, logical and comprehensible conclusion that CIOC did not meet the foreign nationality test⁸⁸.

3. DECISION BY THE COMMITTEE

A. Introduction

135. The foreign nationality test of Mr. Hourani revolves around three legal provisions:

Article 25(2)(b) of the Convention:

“(2) “National of another Contracting State” means:

...

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”.

Article VI(8) of the BIT:

“For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention”.

⁸⁶ R I, at 170.

⁸⁷ R I, at 172.

⁸⁸ R II, at 112.

Article I(1)(a) of the BIT:

“1. For the purposes of this Treaty,
(a) “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts ...”.

136. In the Award, the Tribunal construed these provisions as follows:

- Article 25(2)(b) of the Convention must be interpreted as a floor below which the parties’ agreement cannot reach; the term foreign control is flexible and deferential and is meant to accommodate a wide range of agreements between the parties; however, if the agreement plainly contradicts the meaning of the Convention, e.g. by stipulating that any locally incorporated company should be treated as a foreign national, the tribunal cannot go beyond the mandatory limits established by Article 25⁸⁹.
- Article VI(8) of the BIT, applied to the circumstances of the present case, permits CIOC to be treated as a U.S. company, provided that it is an investment of a U.S. national⁹⁰.
- Article I(1)(a) defines investment as an economic arrangement requiring a contribution to make profit and thus involving some degree of risk.

137. The facts which the Tribunal declared as proven are the following:

- In 2002 CIOC purchased its main asset, the Contract, from CCC and paid approximately USD 9.4 million⁹¹.
- In 2004-2005 Mr. Hourani, a U.S national, purchased 92% of the share capital of CIOC, a Kazakh company, for a price of approximately USD 6.500⁹².
- Even though there was evidence which appeared to show that Mr. Hourani was the owner of 92% of the shares in CIOC, Claimant has not provided sufficient evidence that Mr. Hourani exercised actual control over CIOC. The Tribunal, weighing the available evidence, established that (i) no plausible economic motive was given to explain the negligible purchase price he paid for the shares; (ii) no evidence was presented of a contribution of any kind or any risk undertaken by Mr. Hourani; (iii) there was no capital flow between him and CIOC that contributed anything to the business venture operated by CIOC⁹³.

138. On the basis of these findings, the Tribunal concluded that Claimant had failed to discharge its burden of proof with regard to the fact that CIOC was an investment – i.e. an economic arrangement requiring a contribution to make profit and thus involving some degree of risk – of a U.S. national as required by Article VI(8) of

⁸⁹ Award, at 336-337.

⁹⁰ Award, at 361.

⁹¹ Award, at 437 and 453.

⁹² Award, at 437.

⁹³ Award, at 455.

the BIT⁹⁴ with the consequence that the Tribunal lacked jurisdiction over Claimant's claims.

139. Applicant alleges that in reaching this conclusion the Tribunal committed separate violations of Article 52(1)(b), (d) and (e) of the Convention. The Committee will address these allegations in three separate sections (B through D *infra*).

B. Manifest Excess of Powers

a. The Parties' Positions

140. In order to justify its request for annulment, Applicant argues

“that the Tribunal, although acting under the pretext of Article I(1)(a) and Article VI(8) of the BIT, in reality did not apply Article I(1)(a) and Article VI(8) of the BIT and hence failed to apply the applicable law or misapplied the BIT in such a[n] “egregious” manner that “it amounts to effective disregard of the applicable law.” In both cases, the error by the Tribunal indisputably amounts to a manifest excess of power”⁹⁵.

141. The starting point of Applicant's line of reasoning is that the Tribunal acknowledged that Mr. Hourani, who undisputedly was a U.S. national, owned 92% of the capital of CIOC. And – in Applicant's opinion – such ownership should have been sufficient to comply with the foreign nationality test of Articles VI(8) and I(1)(a) of the BIT (a test which requires that the investment be “owned or controlled” by a U.S. national). Since the Tribunal accepted that Mr. Hourani was the owner of 92% of CIOC, the necessary consequence should have been that CIOC met the foreign nationality test. By holding otherwise and by replacing these norms with its own rules, the Tribunal totally disregarded Articles I(1)(a) and VI(8) of the BIT⁹⁶.
142. Respondent is of the contrary opinion: it submits that the Tribunal indisputably applied the relevant provisions of both the Convention and the BIT, and consequently there could be no excess of power based on the Tribunal's failure to apply the applicable law⁹⁷.

b. The Committee's Construction of the Concept

143. The Committee has already clarified the standards which an applicant must meet in order to annul an award for manifest excess of powers:
- The arbitrators must have manifestly exceeded their powers by totally disregarding the law, or by grounding their award on a law other than the applicable law⁹⁸.

⁹⁴ Award, at 457.

⁹⁵ C I, at 156.

⁹⁶ C I, at 167; C II, at 101.

⁹⁷ R I, at 126.

⁹⁸ See para. 78 *supra*.

- Misinterpretation or misapplication of the proper law, even if serious, does not justify annulment⁹⁹.
- In exceptional circumstances, however, a gross or egregious error of law, acknowledged as such by any reasonable person, could be construed to amount to failure to apply the proper law¹⁰⁰.

144. Under normal circumstances errors of law do not permit annulment: applicant must prove a gross or egregious error of law, which can be perceived by any reasonable person. If the tribunal's legal interpretation is reasonable or tenable, even if the committee might have taken a different view on a debatable point of law, the award must stand – otherwise the annulment procedure would expand into an appeal mechanism, in contravention of the clear wording of the Convention¹⁰¹.

c. Analysis of the Award

145. The Committee notes that the Tribunal in its Award indicated as applicable law Article 25(2)(b) of the Convention¹⁰² as well as Articles VI(8) and I(1)(b) of the BIT¹⁰³. Additionally it found that the factual element of foreign control under Article 25(2)(b) of the Convention could not be examined independently from the agreement on nationality contained in the applicable investment treaty, because it is the investment treaty that would normally contain the test by which such foreign control is established in the circumstances of the case. Moreover, to the extent that the investment treaty would contradict the Convention, the Tribunal must find that there is no agreement providing jurisdiction under Article 25(2)(b). For these reasons, the Tribunal found that it must first turn to Article VI(8) of the BIT¹⁰⁴.

146. After examining the case in relation to Article VI(8) of the BIT, the Tribunal concluded that Claimant had failed to discharge its burden of proof with regard to the fact that CIOC was an investment of the U.S. national Mr. Hourani as required by Article VI(8). At the least, the Tribunal was not satisfied that Claimant had established the fact of that investment¹⁰⁵.

147. In summary, under Article 25(2)(b) a local juridical person can only have standing in ICSID arbitration, if two requirements are met:

- The local juridical person must be under “foreign control”.
- The two Contracting States must have agreed that the juridical person, because of foreign control, shall be treated as a foreign national.

148. In investments between the U.S. and Kazakhstan the provision in which such agreement is formalized is Article VI(8) of the BIT (a rule which includes a

⁹⁹ See para. 79 *supra*.

¹⁰⁰ See para. 81 *supra*.

¹⁰¹ *Rumeli*, at 96.

¹⁰² Award, at 329-337.

¹⁰³ Award, at 339-362.

¹⁰⁴ Award, at 337-338.

¹⁰⁵ Award, at 457.

cross-reference to Article 25(2)(b) of the Convention). When the the BIT Parties drafted Article VI(8) they could have chosen to simply reproduce the wording of Article 25(2)(b), recognizing standing to any U.S. controlled Kazakh juridical person (and *vice versa*). However, the BIT has a wording of its own.

(i) Local juridical person ...

149. According to Article VI(8), the local juridical person shall be a company, but it appears from Article I(1)(b) of the BIT that the term “company” shall be given a very wide meaning. According to Article I(1)(b), “company” of a Party means any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for a pecuniary gain, or privately or governmentally owned or controlled.

(ii) ... under foreign control ...

150. The Tribunal emphasized that Article 25(2)(b) sets “foreign control” as an outer limit, an objective requirement that cannot be replaced by an agreement: it is a floor below which the parties’ agreement cannot reach¹⁰⁶. This implies that all companies which are investments of foreign nationals must also be under foreign control.

(iii) ... treated as a foreign national

151. Of more importance in the present case is the fact that, according to Article VI(8), the company shall be “an investment of nationals or companies of the other Party”. Consequently, while Article 25(2)(b) of the Convention refers to juridical persons which the parties, “because of foreign control”, have agreed should be treated as nationals of another Contracting State, Article VI(8) of the BIT mentions “any company ... that ... was an investment of nationals or companies of the other Party”. This terminological distinction was given considerable weight by the Tribunal in its Award.

* * *

152. In a second step, the Tribunal tried to give meaning to the concept “company which is an investment of nationals of the other Party”¹⁰⁷. Since the term investment is defined in Article I(1)(a) of the BIT, the Tribunal decided to use that definition for the purposes of Article VI(8).

153. The Tribunal then went on to examine the wording of Article I(1)(a), which states that “investment means every kind of investment ... such as equity, debt, and service and investment contracts” and adds a non-exhaustive list of assets covered by the general notion of “investment”.

154. Applying Article 31(1) of the Vienna Convention, the Tribunal found:

¹⁰⁶ Award, at 336.

¹⁰⁷ Award, at 343.

“Article I(1)(a) of the BIT defines ‘investment’ from the perspective of assets, claims and rights to be protected (or accorded specific treatment, prescribed in the following provisions of the BIT). As one of the goals of the BIT is the stimulation of flow of private capital, BIT protection is not granted simply to any formally held asset, but to an asset which is the result of such a flow of capital. Thus, even though the BIT definition of ‘investment’ does not expressly qualify the contributions by way of which the investment is made, the existence of such a contribution as a prerequisite to the protection of the BIT is implied”¹⁰⁸.

155. The Tribunal thus concluded that the term investment as used in Articles I(1)(a) and VI(8) of the BIT means “an economic arrangement requiring a contribution to make a profit and thus involving some degree of risk”¹⁰⁹.

156. On this legal basis, the Tribunal analyzed the facts, weighed the evidence marshalled by the Parties and reached these conclusions:

- Indirect evidence appeared to show that Mr. Hourani was the owner of a 92% share in CIOC, and jurisdiction could not be denied for the mere reason that Claimant had not fully complied with its burden of proof regarding ownership by the U.S. citizen Mr. Hourani¹¹⁰.
- Even if Mr. Hourani acquired formal ownership and nominal control over CIOC, no plausible economic motive was given to explain the negligible purchase price he paid for the shares and to explain his investment in CIOC. No evidence was presented of a contribution of any other kind or any risk undertaken by Mr. Hourani. There was no capital flow between him and CIOC that contributed anything to the business venture operated by CIOC¹¹¹.

157. Consequently, Claimant failed to discharge the burden of proof with regard to the fact that CIOC was an investment of a U.S. citizen (Mr. Hourani), as required by Article VI(8) of the BIT. At the least, the Tribunal was not satisfied that Claimant had established the fact of that investment¹¹².

d. The Committee’s Decision

158. Factual findings and weighing of evidence made by a tribunal are outside the powers of review of an annulment committee, except if the applicant can prove that the errors of fact are so egregious, or the weighing of evidence so irrational, as to constitute an independent cause for annulment. The respect for tribunals’ factual findings is normally justified because it is the tribunal who controlled the marshalling of evidence, and had the opportunity of directly examining witnesses and experts.

¹⁰⁸ Award, at 351.

¹⁰⁹ Award, at 360.

¹¹⁰ Award, at 395-396.

¹¹¹ Award, at 455.

¹¹² Award, at 457.

159. In the present case, the Tribunal carefully analyzed and weighed the available evidence, and explained in some detail the reasons for its findings¹¹³. The Committee sees no reason why the Tribunal’s factual findings with regard to Mr. Hourani’s involvement should not stand.
160. Confronted with the factual conclusion that it had not been shown that Mr. Hourani, although formal owner of CIOC, had made any contribution, that he was running any risk and exercised actual control over the company, the Tribunal decided to deny jurisdiction, on the basis that CIOC was not “an investment of [a U.S.] national” as required by Article VI(8) of the BIT.
161. The Tribunal’s conclusion presents a difficulty, which has been emphasized by Applicant: Article I(1)(a) of the BIT defines investment as every kind of investment “owned or controlled” by a national or a company of the other Party. In Applicant’s opinion, since the Tribunal found that Mr. Hourani was the owner of 92% of the share capital of CIOC, the necessary consequence should be that such investment meets the definition of Article I(1)(a) (“owned *or* controlled” by a U.S. national) and that CIOC must be deemed to be an investment of a U.S. national for the purposes of Article VI(8).
162. The Tribunal confronted this difficulty by reiterating that the term investment has an inherent meaning identified by tribunals and commentators which includes the existence of a contribution over a period of time and requires some degree of risk. Accordingly, the Tribunal considered that the term “investment” in Article I(1)(a) of the BIT denoted “an economic arrangement requiring a contribution to make a profit and thus involving some degree of risk”¹¹⁴.
163. The Committee acknowledges that the term “investment”, as used in the Convention and in different BITs, has been the object of much debate, and that there is no unanimous opinion on the precise requirements which an investment must meet. However, the position adopted by the Tribunal – that an investment requires a contribution by the investor and some degree of risk – finds support in many previous awards and in legal doctrine. This position is therefore clearly tenable and the Award cannot on this point be considered to be based on a manifest excess of powers.
164. Although the Tribunal accepted that Mr. Hourani owned an equity participation in CIOC, and that equity is among the categories of assets specifically mentioned as investments in Article I(1)(a), it concluded that Mr. Hourani’s equity stake failed to qualify as an investment for the purposes of the foreign nationality test, because Mr. Hourani’s investment in CIOC did not meet the inherent characteristics of an investment: a contribution over a period of time and the assumption of some degree of risk¹¹⁵.
165. Summing up, the Tribunal decided to deny CIOC’s standing, because it had not been shown that Mr. Hourani had made any contribution, that he had assumed any risk and that he exerted actual control. The fact that Mr. Hourani had not paid more than a negligible purchase price for the shares (without plausible economic

¹¹³ See Award, at 424-456.

¹¹⁴ Award, at 360.

¹¹⁵ *Ibidem*.

justification) undoubtedly also influenced the Tribunal's decision. To deny jurisdiction, the Tribunal thus chose the route of attaching an inherent meaning to the concept of "investment", as used in Article VI(8), and of finding that Mr. Hourani had failed to prove the elements which constitute such inherent meaning.

166. For annulment purposes a mere divergence of opinion or of interpretation between the committee and the tribunal is irrelevant. An award should not be annulled if the tribunal's approach is reasonable or tenable, even if the committee's opinion diverges from that of the tribunal. Bearing this principle in mind, the Committee concludes that the Tribunal's findings are tenable, and that the Award does not meet the high threshold required for annulment because of manifest excess of powers.
167. The Committee also notes that the Tribunal's findings are not unprecedented. In *Romak*, which also denied jurisdiction, the Tribunal based its finding on the argument that the term investment had an inherent meaning which included the existence of

"contribution that extends over a certain period of time and that involves some risk"¹¹⁶.

168. The Committee thus finds no basis for considering that the Tribunal failed to apply the applicable law or misapplied it in such egregious manner as to amount to disregard of that law. The Committee must therefore reject Applicant's request for annulment for manifest excess of powers.

C. Serious Departure from a Fundamental Rule of Procedure

169. Applicant also argues that the Award should be annulled because the Tribunal seriously departed from a fundamental rule of procedure.
170. The Committee has already summarized its understanding of this ground of annulment: tribunals can *sua sponte* raise legal arguments which had not been pleaded, without having to revert to the parties, and without violating the parties' right to be heard, provided that the tribunal's arguments can be fitted within the legal framework argued during the procedure¹¹⁷.

a. Applicant's Position

171. Applicant points out that the Tribunal based its conclusion not on Article 25 of the Convention, the framework discussed by the parties, but on the notion of "investment" contained in Articles I(1)(a) and VI(8) of the BIT. In Applicant's submission, the Tribunal did so *ex officio*, without giving the parties the opportunity to state their views, and moreover upon grounds that were not advanced by Respondent, nor shared by the Tribunal with Claimant during the

¹¹⁶ *Romak*, at 207.

¹¹⁷ See para. 94 *supra*.

proceedings. In so doing, the Tribunal deprived Claimant of its right to be heard¹¹⁸.

b. Respondent's Position

172. Respondent disagrees: in its opinion the nationality test was in debate and in any event the Tribunal was empowered to reformulate or even raise new jurisdictional arguments, provided they remained within the legal framework¹¹⁹.

c. The Committee's Findings

173. The Committee notes that the Tribunal declined jurisdiction on the basis that Claimant had not proved that CIOC was an investment of the U.S. citizen Mr. Hourani, as required by Article VI(8) of the BIT. The question is thus whether the Tribunal, in reaching this conclusion, went beyond the framework of the dispute and ruled on a matter on which Claimant had not had a reasonable opportunity to comment.

(i) The Framework of the Dispute

174. The issue of whether CIOC was an investment under Article VI(8) of the BIT was raised by Claimant for the first time. Claimant's initial contention in the arbitral proceeding was that its claims complied with the conditions in Article 25 of the Convention as well as Article VI(8) of the BIT. In its Memorial, Claimant specifically averred that

“it is therefore clear that the requirements of Article VI(8) of the Treaty, and thus Article 25(2)(b) of the ICSID Convention, are satisfied”¹²⁰.

175. In a subsequent memorial, Claimant stated that it had an investment in Kazakhstan that met the definition of “investment” in both the BIT and the ICSID Convention¹²¹. Claimant added that, since Respondent did not deny that CIOC had made an investment that met the definition in the BIT and the requirement of the ICSID Convention, Claimant did not have to dwell further on this subject¹²².

176. Respondent's comments on the jurisdictional aspects mainly related to the ICSID Convention, arguing that Mr. Hourani had made no contribution of money or assets of any significance and had taken no risk. Moreover he had not made any *bona fides* investment¹²³. However, Respondent also added¹²⁴:

“Such behavior is not of the sort the Convention and the Treaty [i.e. the BIT] were intended to protect and this Tribunal should not condone it by granting jurisdiction in this case”.

¹¹⁸ C II, at 157.

¹¹⁹ R II, at 94.

¹²⁰ Memorial of May 14, 2009, at 42.

¹²¹ Reply Memorial of July 31, 2010, the heading before 130.

¹²² Reply Memorial, at 147.

¹²³ Counter-Memorial of December 22, 2009, at 40, and Rejoinder of December 14, 2010, at 44.

¹²⁴ Rejoinder of December 14, 2010, at 44.

(ii) The Committee's Decision

177. Since Article VI(8) of the BIT contains the agreement between the United States and Kazakhstan which is necessary to give effect to the nationality exception in Article 25(2)(b) of the Convention, there is a very close link between both provisions. Whilst it is true that the debate between the parties essentially concerned the issue whether the Tribunal had jurisdiction under Article 25 of the Convention, it is equally accurate that both parties also referred to the BIT.
178. The Committee thus finds that the basis of Claimant's claims was the existence of an investment protected under Article 25(2)(b) of the Convention in conjunction with Article VI(8) of the BIT. Although Respondent mainly relied on arguments derived from Article 25 of the Convention, it must have been clear to Claimant that the provisions of the Convention and the BIT were closely linked and in reality inseparable as far as the scope of protection of investments was concerned. Article 25(2)(b) of the Convention and Article VI(8) of the BIT were therefore both part of the legal framework on the basis of which the jurisdictional issue would be examined and decided by the Tribunal.
179. It follows that the Tribunal's reasoning in the Award, which was mainly based on Article VI(8) of the BIT, did not involve any new element extraneous to the parties' debate in their submissions to the Tribunal. On the contrary, Claimant had every reason to expect that Article VI(8) of the BIT would be part of the relevant legal considerations in the case and Claimant must be considered to have had full opportunity to comment on the repercussions of Article VI(8) in its submissions to the Tribunal.
180. The Committee thus concludes that the Tribunal's reasoning never went beyond the legal framework defined by the parties, and that Claimant's right to be heard remained unaffected.

D. Failure to State Reasons

a. The Parties' Positions

181. Applicant argues that the Award should also be annulled, because the Tribunal failed to state reasons for its foreign nationality test.
182. In Applicant's view, the Tribunal violated Article 52(1)(e) of the Convention by basing its findings on incomprehensible reasoning, tantamount to a failure to state reasons: in reaching its conclusion the Tribunal jumped from one notion to another, from one treaty to another and from one provision to another, in a manner that defies common sense¹²⁵.
183. The Respondent disagrees: in its opinion the reasoning of the Tribunal on foreign nationality is clear, precise and logically developed¹²⁶.

¹²⁵ C I, at 179.

¹²⁶ R I, at 172.

b. The Committee's Findings

184. The Tribunal started its Award with sections devoted to the interpretation of Article 25(2)(b) of the Convention and Article VI(8) of the BIT and to the burden of proof. In a subsequent section, the Tribunal analyzed the question: “Does Claimant satisfy the requirements of Article VI(8) of the BIT?” The Tribunal then used separate sub-sections to discuss the nationality of Mr. Hourani, the ownership or control of CIOC and the question whether CIOC was an investment of Mr. Hourani. In each of the sections and sub-sections, the Tribunal summarized the parties’ positions, and explained its own conclusions, quoting precedents and authorities in support.
185. It is not the Committee’s task to judge the quality or the persuasiveness of the Tribunal’s reasoning. The Convention requires arbitrators to state reasons for their decisions, but the requirement is satisfied if the reasoning can be followed. Only reasons considered as contradictory or frivolous can be equated to a failure to state reasons and may lead committees to the setting aside of the award¹²⁷.
186. In the present case, the Committee considers that there would be no difficulty for a normal reader of the Award to understand the Tribunal’s arguments and to follow its line of reasoning leading up to its final conclusions. Nor can the Committee find the reasoning in any way contradictory or frivolous.
187. The Committee thus concludes that the reasoning provided by the Tribunal is adequate, complies with the requirement of Article 52(2)(e) and does not justify annulment of the Award.

¹²⁷ See para. 102 *supra*.

VI. DEFINITION OF CONTROL AND INVESTMENT

188. The Committee has analyzed in the previous section Applicant's first ground for annulment: the foreign nationality test.
189. The second ground for annulment alleged by Applicant relates to the definition and application by the Tribunal of the "control" and "investment" requirements set forth in the BIT and in the Convention. This second ground will be analyzed in this section.

1. APPLICANT'S POSITION

190. Applicant contends that the Tribunal made two erroneous interpretations, and subsequent applications, of the notions of (A.) "ownership or control" and (B.) "investment", which constituted separate violations.

A. Ownership or Control

191. During the hearing before the Committee, counsel for Applicant summarized Applicant's argument as follows¹²⁸: the Tribunal accepted that Mr. Hourani was owner of 92% of the share capital of CIOC, and that he thus satisfied the nationality test of Article 25(2)(b) of the Convention; but then the Tribunal went on to state that Claimant had failed to discharge its burden of proof with regard to the fact that CIOC was an investment of a U.S. national, as required by Article VI(8) of the BIT. In holding this and in rejecting jurisdiction, the Tribunal, in Applicant's opinion, committed two independent violations of Articles 52(1)(b), (d) and (e) of the Convention each of which constitutes an excess of power and warrants annulment:

- The first is that the Tribunal additionally required that control be interpreted as actual control, majority shareholding not being sufficient to comply with this requirement.
- The second is that the Tribunal decided to add a further requirement, that of control, which is not referred to in Article VI(8).

192. First, the Tribunal committed independent breaches of these Articles when setting the standard of "ownership or control", since from the wording of Article I(1)(a) of the BIT it is clear that this provision requires *either* "ownership" *or* "control". But the Tribunal came to the conclusion that, by application of Article 25(2)(b) of the Convention, the ownership requirement could be dispensed with, and disregarded the fact that Mr. Hourani was the undisputed legal owner of a 92% stake in CIOC and could thus control CIOC¹²⁹.

193. Furthermore, the Tribunal found the requirement of "control" to mean "actual control", despite its contrary prior holding that majority ownership implies "a presumption of control". This "actual control" test finds no basis in the BIT.

¹²⁸ HT p. 11 *et seq.*

¹²⁹ C I, at 186.

Article I(1)(a) of the BIT in fact only requires formal control – conveyed by ownership – by a U.S. national, as opposed to actual control. This self-created criterion of “actual control” is contrary to every single case where a similarly worded U.S. BIT has been invoked¹³⁰.

194. Applicant thus considers that the Tribunal acted in manifest excess of powers by failing to apply both the very text of the BIT and the Vienna Convention and by establishing that “control” means “actual control”, and this, in Applicant’s opinion, warrants in itself the annulment of the Award¹³¹.
195. Additionally the Tribunal did establish the “actual control” test without the parties having advanced this argument. The Tribunal did so at its own instigation, without ever giving CIOC the opportunity to comment¹³².
196. Secondly, the Tribunal committed further independent breaches of Articles 52(1)(b), (d) and (e) of the Convention when applying its flawed “actual control” test. Notably, the Tribunal violated Article 52(1)(d) by failing to reverse the burden of proof from Claimant to Respondent and by stating that Claimant had the burden of proof to demonstrate that Mr. Hourani exercised “actual control”¹³³.
197. Applicant also considers that the Tribunal failed to explain why the evidence submitted by CIOC was insufficient to establish that Mr. Hourani exercised “actual control” over CIOC. The Tribunal drew a general negative inference from the withdrawal of documents previously submitted by CIOC, which affected Claimant’s credibility in the proceedings. In doing so, the Tribunal rendered an Award the reasoning of which the reader cannot follow, but which also constitutes a manifest excess of powers and a serious departure from a fundamental rule of procedure¹³⁴.

B. Investment

198. Applicant further considers that the Tribunal, in examining the meaning of the term “investment” under Article I(1)(a) of the BIT, failed to apply or alternatively manifestly erred in the application of the definition of “investment”, in a manner that constitutes multiple independent violations of Article 52(1)(b) of the Convention. The Tribunal, instead of applying the broad and clear definition of “investment” provided for in the BIT, as was done in other cases involving a U.S. BIT, manifestly disregarded the BIT’s express provisions and embarked on a mission to redefine the term “investment” restrictively¹³⁵.
199. The Tribunal came to the conclusion that “investment” denotes an economic arrangement requiring a contribution to make a profit and thus involving some degree of risk. In doing so, the Tribunal disregarded or alternatively grossly misapplied the BIT and the Vienna Convention, by importing into the definition of the term investment the notions of contribution and risk, as developed by other

¹³⁰ C I, at 189.

¹³¹ C I, at 198.

¹³² C I, at 199.

¹³³ C I, at 203.

¹³⁴ C I, at 212.

¹³⁵ C I, at 220.

tribunals, not in relation to the BIT, but to the ICSID Convention. In Applicant's opinion, these acts of the Tribunal constitute a manifest excess of powers¹³⁶.

200. Moreover the Tribunal established the meaning of the term investment under Article I(1)(a) of the BIT *ex officio*, without asking the parties for their views – which constitutes an Article 52(1)(d) violation¹³⁷. Applicant accepts that in the course of the arbitration, the parties debated the notion of investment under the ICSID Convention – but never under the BIT¹³⁸. The Tribunal's failure to first approach the parties on the question of the definition of investment in the BIT is a serious departure from the legal framework established by the parties. Applicant regards this failure as a serious departure from a fundamental rule of procedure¹³⁹.
201. Applicant finally argues that the Award should be annulled for violation of Article 52(1)(e) of the Convention, for failure to state reasons in relation to the definition and application of the term investment¹⁴⁰.

2. **RESPONDENT'S POSITION**

202. Respondent disagrees with Applicant's contentions, both as regards ownership or control and as regards the definition of investment.

A. **Ownership or Control**

203. Respondent argues that Applicant's assertion that the Tribunal could simply have dispensed with an assessment of the control requirement under Article 25(2)(b) is wrong and cannot constitute a basis for annulment: the requirement of control must be considered objectively, independently from the relevant BIT's agreement on foreign nationality¹⁴¹.
204. Thus Applicant's argument that since the BIT required "ownership or control" and "ownership" had been established, the Tribunal could have dispensed with an assessment of the alternative control requirement simply ignores the objective outer limit set out in the Convention itself. Even if ownership had been conclusively established, this would not have dispensed the Tribunal from assessing whether the objective, outer limit of control under Article 25(2)(b) of the Convention was respected.
205. Respondent denies Applicant's contention that the Tribunal did not define actual control on the basis of the arguments advanced by the parties. Actual control, as compared with legal control, had been amply debated by the parties in the context of Article 25(2)(b) of the Convention. Consequently, the Tribunal did not violate CIOC's right to be heard on the interpretation of the requirement of control nor

¹³⁶ C I, at 229.

¹³⁷ C I, at 232.

¹³⁸ C II, at 239.

¹³⁹ C II, at 240.

¹⁴⁰ C I, at 235.

¹⁴¹ R I, at 181.

did it manifestly exceed its powers in requiring that actual control be established for this purpose¹⁴².

206. Respondent further alleges that the Tribunal did not exceed – let alone manifestly exceed – its powers, nor did the Tribunal violate any rule of procedure by requiring that Claimant establish Mr. Hourani’s control of CIOC in order to benefit from his U.S. nationality for the purpose of ICSID jurisdiction¹⁴³.
207. Applicant also argues that the Tribunal failed to state reasons when setting the standard of “ownership or control”. However, what the Tribunal concluded is that the definition of foreign control in the BIT could not go beyond the “outer limits” established in Article 25(2)(b) of the Convention, and thus control needed to be proven¹⁴⁴.
208. In sum, with respect to the Tribunal’s interpretation and application of the control requirement under Article 25(2)(b) of the Convention, Applicant is unable to establish manifest excess of powers, violation of a procedural rule or deficiency in the analysis, reasoning and conclusions of the Tribunal that would warrant annulment.

B. Investment

209. Respondent also denies that the Tribunal exceeded its powers by manifestly disregarding the BIT’s express provisions for interpreting the term investment. The Tribunal held that the inherent meaning of the term investment included the existence of a contribution over a period of time and required some degree of risk. Respondent submits that from the Tribunal’s sequential and reasoned analysis it is clear that it did not disregard Article I(1)(a) of the BIT. Rather, the Tribunal logically and methodically interpreted this provision. Consequently, Applicant’s claim that the Tribunal exceeded its power by failing to apply or by grossly misapplying the definition of investment under Article I(1)(a) must fail¹⁴⁵.
210. Applicant’s second argument, that the Tribunal exceeded its power by “importing” into the definition of investment under the BIT the notions of contribution and risk must also be rejected¹⁴⁶. In addition to the Tribunal in this case, a number of other investment treaty tribunals have, despite broad formulations of the term “investment” contained in the respective BITs, found that there is an intrinsic or objective meaning of the term, which is generally linked to the requirements of contribution, risk and duration of the investment, and which must be complied with in order to qualify as a protected investment¹⁴⁷.
211. Respondent adds that the question of the inherent meaning of investment for the purposes of CIOC’s foreign nationality test was debated by the parties, and the parties’ respective positions were taken into account by the Tribunal in its

¹⁴² R I, at 201.

¹⁴³ R I, at 216.

¹⁴⁴ R II, at 124.

¹⁴⁵ R I, at 231.

¹⁴⁶ R I, at 234.

¹⁴⁷ R I, at 250.

decision¹⁴⁸. In any event, the Tribunal had the power to interpret the BIT definition of investment without first submitting its interpretation to the parties.

212. Applicant's third argument is that the Award must be annulled on the ground that the Tribunal failed to state reasons in relation to the definition and application of the term investment under the BIT. The Respondent disagrees: the Tribunal provided ample and detailed reasons in 15 paragraphs as to how it reached its conclusion on the definition of investment under the BIT and supported those reasons with numerous cases and commentaries. Under the guise of an alleged failure to state reasons, Applicant is in fact criticizing the Tribunal's reasoning itself¹⁴⁹.
213. The Tribunal also explained in great detail why it considered that Mr. Hourani had made no "investment" in CIOC: the ownership of shares was not in itself sufficient to establish the existence of a protected investment under the BIT and did not dispense CIOC of its burden of establishing the existence of an economic arrangement requiring a contribution to make profit and thus involving some degree of risk¹⁵⁰.
214. Respondent finally points out that it is a well-established principle that committees cannot reassess the probative value of the evidence in the record as if they were a court of appeal. In short, Applicant may dislike the Tribunal's analysis of the evidence and subsequent conclusions but is unable to show how the Tribunal failed to state reasons for its decision. Applicant's claim for annulment on this ground must be rejected¹⁵¹.

3. THE COMMITTEE'S DECISION

A. Introduction

The Two Alleged Violations

215. Applicant alleges that the Tribunal committed two independent violations, when in its Award it analyzed the "ownership or control" requirement and then added a self-invented additional requirement that there be an "investment of Mr. Hourani":
- The Tribunal violated the "ownership or control" requirement established in Article I(1)(a) for two reasons: (i) because it required actual control, when formal control was sufficient, and disregarded that Mr. Hourani was owner of 92% of the share capital of CIOC and did hold formal control; and (ii) because it put the burden of proving actual control on CIOC.
 - The Tribunal also failed to apply the definition of "investment" set forth in Article I(1)(a) of the BIT.

¹⁴⁸ R I, at 258.

¹⁴⁹ R I, at 261.

¹⁵⁰ R I, at 263.

¹⁵¹ R I, at 265.

216. In Applicant’s opinion the Tribunal’s decisions gave rise to a manifest excess of powers, serious departures from fundamental rules of procedure and a failure to state reasons.
217. Respondent disagrees and denies that any of the alleged violations occurred.

Analysis of the Tribunal’s Findings

The starting point for the analysis of CIOC’s allegation must be the factual context established by the Tribunal. After weighing the available evidence it observed that

“[a] putative transaction to pay USD 6,500 for 92% for an enterprise into which over USD 10 million have been invested and for which later a relief of over USD 1 billion is sought calls for explanation and justification”¹⁵².

218. Another important element in the Tribunal’s evaluation of the evidence, was the withdrawal by CIOC of certain documents previously submitted:

“... while the allegedly forged documents were withdrawn by Claimant during the hearing (C-162, C-175, C-238, C-239, C-240, Aliyev 25; see Tr, day 6, pp. 228–229), and therefore the Tribunal will not rely on them, and while the Tribunal sees no indication that counsel for Claimant were aware of any doubts regarding these documents, the Tribunal cannot overlook that their submission and later withdrawal throw a doubt on Claimant’s credibility. This has a bearing on the Tribunal’s evidentiary evaluation of the fact that Claimant did not provide any documents showing the exercise of effective control by Devincci Hourani”¹⁵³.

219. Against this evidentiary and factual background, the Tribunal reviewed CIOC’s standing and came to the following conclusions:

- CIOC, a Kazakh company, is only authorized to institute ICSID arbitration against the Republic of Kazakhstan if it can prove that it is an investment of a U.S. national, as required by Article VI(8) of the BIT.
- For the purposes of the BIT, investments include equity holdings owned or controlled by U.S. nationals [Article I(1)(a)].
- There is evidence which proves that Mr. Hourani was the owner of 92% of the capital of CIOC.

220. The Tribunal established that it lacked jurisdiction to adjudicate Claimant’s claims because CIOC did not meet the Article VI(8) test for two independent reasons.

221. The first reason is that Article 25(2)(b) of the Convention requires control, and the existence of control of the local company represents an outer limit, which Contracting States cannot disregard. The Tribunal found that “control” should be understood in this context as “actual control” and considered that CIOC had been

¹⁵² Award, at 437.

¹⁵³ Award, at 405.

unable to prove that it was actually controlled by Mr. Hourani. On this point the Tribunal concluded:

“Thus, there is not sufficient evidence of exercise of **actual control over CIOC** by Devincci Hourani. In view of the above considerations, the Tribunal concludes that Claimant has not provided sufficient proof for control as required by Art. 25(2)(b) of the ICSID Convention However, as Article I(1)(a) of the BIT requires ownership *or* control of an investment and, based on indirect evidence, Claimant could be regarded as owned by Devincci Hourani, a U.S. national, the Tribunal moves now to analyse further conditions for treating CIOC as a U.S. national under the BIT”¹⁵⁴.

222. The second reason is that Article VI(8) of the BIT refers to an investment of a U.S. national. The Tribunal has found that investment has an inherent meaning, which requires the investor to make a certain contribution and assume a certain risk, and that CIOC has been unable to prove that Mr. Hourani met this test. The conclusion reached with regard to absence of control was as follows:

“Claimant insisted throughout the proceedings that it presented all necessary evidence to prove that the Tribunal has jurisdiction. The Tribunal disagrees. Claimant failed to discharge its burden of proof with regard to the fact that CIOC was an investment of U.S. national (Devincci Hourani) as required by Article VI(8) of the BIT”¹⁵⁵.

223. It is important to bear in mind that in the Tribunal’s analysis the two requirements are cumulative: if CIOC fails to prove that it is controlled by Mr. Hourani *or* that Mr. Hourani has made an investment by way of contribution and assumption of risk, the necessary result will be dismissal of the claim for lack of jurisdiction.
224. Since the inexistence of an investment by Mr. Hourani is the main reason for the Tribunal’s decision, the Committee will analyze this requirement in first place [B] *infra*]. Thereafter, the Committee will refer to the control requirement [C] *infra*].

B. The Requirement That CIOC Be an Investment of Mr. Hourani

225. CIOC claims that the Tribunal, in interpreting the term “investment” used in Articles I(1)(a) and VI(8) of the BIT and concluding that CIOC failed to establish that it was an investment of Mr. Hourani
- manifestly exceeded its powers,
 - seriously departed from a fundamental rule of procedure, and
 - failed to state reasons for its conclusion.

¹⁵⁴ Award, at 407; emphasis in the original.

¹⁵⁵ Award, at 457.

a. Manifest Excess of Powers

The Tribunal's Findings

226. The Tribunal based its interpretation of the term “investment” on its ordinary meaning, in light of the object and purpose of the BIT, as required by Article 31 of the Vienna Convention. The Tribunal first looked at dictionary definitions of investment to ascertain its ordinary meaning. Then it looked at the preamble of the BIT, in which the parties refer to investment as a “flow of private capital” from one contracting state to the other. The Tribunal noted that Article I(1)(a) of the BIT defines investment from the perspective of assets to be protected, but that the protection is not granted to any formally held asset, but only to assets which result from such a flow of capital. From this the Tribunal induced that the existence of a contribution is a prerequisite to the protection of the BIT¹⁵⁶.
227. The Tribunal also indicated that the origin of the capital invested was immaterial for jurisdictional purposes. However, the Tribunal insisted that
- “there still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor”¹⁵⁷.
228. The Tribunal confirmed its interpretation of the term “investment” with the drafting history of the U.S. model BITs. It cited the 2004 U.S. model BIT, which changed the circular definition of investment to
- “every asset ... that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”¹⁵⁸.
229. The Tribunal referred to Kenneth Vandeveld, the leading authority on U.S. BITs, who noted that
- “the 2004 U.S. Model BIT continues the U.S. practice of limiting investment to those assets that have the character of an investment”¹⁵⁹.
230. Based on the above, the Tribunal held that the inherent meaning of the term investment – as used in Articles I(1)(a) and VI(8) of the BIT – requires the existence of a contribution over a period of time and some degree of risk¹⁶⁰.
231. The Tribunal then applied this finding to the present case, concluding that Mr. Hourani’s formal ownership of a 92% equity stake in CIOC is insufficient; for Mr. Hourani to hold an investment, he must also prove that he made a

¹⁵⁶ Award, at 351.

¹⁵⁷ Award, at 355.

¹⁵⁸ RLA 4, Article 1.

¹⁵⁹ K. Vandeveld: “U.S. International Investment Agreements”, 2009, at 122; RLA 5.

¹⁶⁰ Award, at 360.

contribution to the company and that he assumed some risk (citing the *Romak* decision¹⁶¹).

Applicant's Disagreement

232. Applicant disagrees with the Tribunal's argument.
233. It alleges that the Tribunal disregarded the fact that the BIT is a *lex specialis*: instead of establishing the meaning of investment included in Article I(1)(a) of the BIT by examining its proper context, the Tribunal construed its meaning pursuant to the Convention, by importing into the definition of investment under the BIT the notions of contribution and risk developed by tribunals in relation to Article 25 of the Convention¹⁶².

The Committee's Decision

234. The Tribunal's main finding is that the term "investment", as used in Article VI(8) of the BIT, has an inherent meaning, which requires contribution and risk assumption by the investor – two elements which Mr. Hourani was unable to prove.
235. ICSID Tribunals have analyzed the term investment predominantly in the context of Article 25 of the Convention. A number of tribunals have reached the conclusion that the existence of an investment requires some inherent characteristics. While the precise definition of such characteristics has been the object of debate, it is commonly accepted that contribution and risk assumption form part of the core elements which characterize an investment¹⁶³.
236. In the present case, the Tribunal decided to extend the inherent meaning of investment, developed in the context of Article 25 of the Convention, to Article VI(8) of the BIT, a provision which is intimately linked with and includes a cross-reference to Article 25(2)(b). The Tribunal's decision is not unreasonable: if the mere holding of equity, without contribution or risk, is not to be considered an investment for obtaining jurisdiction under Article 25(1), it seems reasonable that the same factual situation, but in the circumstances described in Article VI(8), should produce the same result.
237. The Committee has already established
- that an award can be annulled if the arbitrators have manifestly exceeded their powers by totally disregarding the law, or by grounding their award on a law other than the applicable law¹⁶⁴;
 - that misinterpretation or misapplication of the proper law, even if serious, does not justify annulment¹⁶⁵; and

¹⁶¹ Award, at 360; *Romak*, at 207.

¹⁶² C I, at 228.

¹⁶³ Schreuer: "The ICSID Convention: A Commentary" (CUP 2ed.), 2010, p. 128, at 153.

¹⁶⁴ See para. 78 *supra*.

¹⁶⁵ See para. 79 *supra*.

- that only in exceptional circumstances a gross or egregious error of law, acknowledged as such by any reasonable person, could be construed to amount to failure to apply the proper law¹⁶⁶.

238. Measured against that standard, the Tribunal's finding that the inherent meaning of investment requires a contribution and some assumption of risk, does not justify the annulment of the Award.

b. Departure from a Fundamental Rule of Procedure

239. Applicant alleges that the Tribunal interpreted and applied the term investment *ex officio*, without asking the parties for their views. Hence, by depriving CIOC of its right to be heard, the Tribunal seriously departed from a fundamental rule of procedure¹⁶⁷.

240. Applicant's allegation cannot succeed, for the same reasons as those already established *supra*¹⁶⁸: CIOC argued its standing based on a legal framework which comprised Articles 25(2)(b) of the Convention and VI(8) of the BIT and specifically pointed out that the requirements of both these Articles were satisfied. Respondent also noted that CIOC's behaviour was not of the sort the Convention and the BIT were intended to protect.

241. It follows that Article VI(8) of the BIT was part of the relevant legal framework on which Claimant could be expected to comment if it wished its arguments to be taken into account by the Tribunal.

242. The Committee thus concludes that Claimant was not deprived of its right to be heard and that there was no breach of a fundamental rule of procedure.

c. Failure to State Reasons

243. Applicant also seeks annulment of the Award on the ground of the Tribunal's alleged failure to state reasons for its definition of investment. Applicant specifically avers that the Tribunal failed to explain why Mr. Hourani, despite his ownership of the shares in CIOC, was not considered to have made an investment in that company¹⁶⁹.

244. The Committee agrees with Applicant that the question why Mr. Hourani, despite being the owner of a majority stake in CIOC, did not meet the Article VI(8) test, is a crucial question in this case. The Award provides the following reasoning for the finding on this point:

- Para. 361 gives the Tribunal's interpretation of the term investment as used in Article VI(8): investment is "an economic arrangement requiring a contribution to make profit and thus involving some degree of risk".

¹⁶⁶ See para. 81 *supra*.

¹⁶⁷ C I, at 232.

¹⁶⁸ See paras. 173-180.

¹⁶⁹ C I at 235-236.

- Para. 455 records the factual findings with regard to Mr. Hourani's investment: although he acquired "formal ownership", "no plausible economic motive was given to explain the negligible purchase price" and "no evidence was presented of a contribution of any kind or any risk undertaken" by him; "there was no capital flow between him and CIOC that contributed anything to the business venture operated by CIOC".
- Para. 457 draws the conclusion: "Claimant failed to discharge its burden of proof with regard to the fact that CIOC was an investment" of Mr. Hourani.

245. The Committee has already established in which cases deficiencies in the reasoning can lead to the setting aside of awards: if the reasoning can be followed and understood by a reader, the award should stand, while contradictory or frivolous reasons will lead to annulment¹⁷⁰. On the other hand, it is not the Committee's role to judge the quality or persuasiveness of the Tribunal's argumentation.

246. Applying this threshold, the Committee finds that the Award has provided sufficient reasoning and cannot be annulled for this cause.

C. The Requirement That CIOC Be Controlled by Mr. Hourami

247. The Tribunal established a second (and additional) reason why CIOC failed to meet the standing requirements necessary to file an ICSID arbitration: Article 25(2)(b) of the Convention requires foreign control of the local corporation, the existence of such control represents an outer limit and is a requirement that cannot be replaced by an agreement¹⁷¹, and Mr. Hourani was unable to prove that he actually controlled CIOC¹⁷².

248. Applicant argues that the Tribunal's findings with regard to control should lead to annulment, under Article 52(1) of the Convention, for two separate reasons:

- First, because Article I(1)(a) of the BIT requires *either* "ownership" *or* "control", and in violation of that rule the Tribunal established an actual control test [(a) *infra*].
- Second, because the Tribunal, when applying this test, failed to reverse the burden of proof from CIOC to Respondent and stated that CIOC had the burden of proof [(b) *infra*].

a. The Actual Control Test

249. The Tribunal's findings with regard to control can be summarized as follows:

- Article 25(2)(b) of the Convention requires foreign control, and this requirement represents an outer limit to ICSID jurisdiction; although Article I(1)(a) of the BIT defines investments as those "owned or

¹⁷⁰ See para. 102 *supra*.

¹⁷¹ Award at 336.

¹⁷² Award at 407.

controlled” by nationals or companies of the other Party, Article 25(2)(b) establishes control as a necessary requirement¹⁷³.

- Control means actual control, and legal capacity to control a company, without evidence of actual control, is therefore not sufficient¹⁷⁴.
- There is not sufficient evidence that Mr. Hourani exercised actual control over CIOC¹⁷⁵.

First Finding

250. The Tribunal’s first finding, that Article 25(2)(b) creates an outer limit, which the Contracting States must respect, has been accepted by a number of tribunals, starting with *Vacuum Salt*:

“The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so”¹⁷⁶.

Second Finding

251. The Tribunal’s second finding is that control as used in Article 25(2)(b) of the Convention means actual control, and that a tribunal may investigate the reality to check whether actual control exists; this also corresponds to a view which is commonly held.

252. Under Article 25(2)(b) a local juridical person, to have access to the ICSID adjudication mechanism, must be under “foreign control”. For these purposes, control is the capacity of a person or a company to decide the main actions to be undertaken by a juridical person. Such juridical persons are usually governed by a corporate body (e.g., the general shareholders meeting), in which decisions are taken by votes. Control is premised on the right to cast a majority of votes in such main corporate body.

253. Control is normally achieved by ownership of a majority stake in the juridical person, which affords a sufficient number of votes, so that the controller can have a decisive influence on any decisions or resolutions.

254. But the owner of the equity may only formally be the owner or can by – tacit or explicit – agreement transfer actual control to a third party (e.g., the owner can enter into a fiduciary arrangement with a third party, holding ownership on behalf of such third party, or he can assign his voting rights to another person). Thus third parties who are not owners of equity stakes can, by contractual arrangements with the formal owners, have actual control over juridical persons¹⁷⁷.

¹⁷³ Award at 336.

¹⁷⁴ Award at 407.

¹⁷⁵ *Ibidem*.

¹⁷⁶ At 36.

¹⁷⁷ Control gives rise to a number of additional issues, like indirect control and joint control by various persons, which are irrelevant for the present discussion.

255. Control is a factual element. The ownership of a majority of the share capital, granting the capacity to cast a majority of the votes, constitutes circumstantial evidence of control and even creates a presumption of control. But, when applying Article 25(2)(b) of the Convention, tribunals may have to establish whether the presumption of control corresponds to the real situation or, in other words, whether the formal majority owners of a company also exercise actual control over the company.

Third Finding

256. In the present case, the Tribunal weighed the evidence regarding the actual control of CIOC in the following manner:

- The submission and later withdrawal by Claimant of certain documents threw “a doubt on Claimant’s credibility”¹⁷⁸.
- Claimant did not provide any documents showing the exercise of effective control by Mr. Hourani¹⁷⁹.
- Mr. Hourani, when heard as a witness, based his evidence of control on his competences under CIOC’s Charter and Incorporation Agreement, but the Tribunal found that “no evidence was shown that such competences and control were actually exercised by him”¹⁸⁰.

257. In view of the above considerations,

“the Tribunal conclude[d] that Claimant ha[d] not provided sufficient proof for control as required by Art. 25(2)(b) of the ICSID Convention.”

258. The Committee has already established that manifest excess of powers in the application of the law only leads to annulment of an award if the arbitrators totally disregarded the law, grounded their award on a law other than the applicable law or committed a gross or egregious error of law¹⁸¹. A tribunal’s weighing of evidence and factual findings must stand, except if the errors of fact are so egregious, or the weighing so irrational, as to constitute independent causes of annulment.

259. Measured against these standards, the Tribunal’s findings that Article 25(2)(b) refers to actual control, and that Mr. Hourani failed to satisfy this requirement, cannot lead to the annulment of the Award.

260. Applicant has also argued that in making these findings the Tribunal violated Articles 52(1)(d) and (e) of the Convention, because it seriously departed from a fundamental rule of procedure and failed to state reasons. These allegations must fail, for the reasons already explained in the previous sections¹⁸².

¹⁷⁸ Award at 405.

¹⁷⁹ *Ibidem*.

¹⁸⁰ Award, at 406.

¹⁸¹ See para. 79 *supra*

¹⁸² See paras. 242 and 246 *supra*.

b. The Failure to Reverse the Burden of Proof

261. Applicant submits that the Tribunal committed a further independent breach, in this case of Article 52(1)(d) of the Convention, by failing to reverse the burden of proof from Claimant to Respondent and by stating that Claimant – as opposed to Respondent – had the burden of proof to demonstrate that Mr. Hourani exercised actual control over the Kazakh company¹⁸³.

The Tribunal's Findings

262. The Tribunal's findings with regard to the burden of proof can be summarized as follows:
263. The starting point of the Tribunal's investigation was that the parties had generally agreed

“that Claimant bears the burden of proof to establish that the Tribunal has jurisdiction over the present dispute”¹⁸⁴.

264. The Tribunal then added that

“if majority ownership is shown, such a finding implies a presumption of control, even though it will have to be examined whether in the present case this presumption is a sufficient indication of control”¹⁸⁵.

265. The Tribunal then analyzed whether Mr. Hourani could be considered as owner of 92% of the equity of CIOC; the Tribunal concluded that certain indirect evidence appeared to show that Mr. Hourani was an owner of a 92% share in CIOC and added:

“In view of the above considerations, the Tribunal concludes that jurisdiction cannot be denied for the mere reason that Claimant has not fully complied with its burden of proof regarding ownership by the U.S. national, Devincci Hourani”¹⁸⁶.

266. As a next step, the Tribunal analyzed Mr. Hourani's control of CIOC, stating:

“Again, the starting point for the Tribunal's examination is that Claimant has the burden of proof”¹⁸⁷.

267. The Tribunal's final conclusion, after weighing the available evidence, was that “there is not sufficient evidence of exercise of actual control over CIOC by Devincci Hourani”¹⁸⁸.

¹⁸³ C I at 203.

¹⁸⁴ Award, at 364.

¹⁸⁵ Award, at 382.

¹⁸⁶ Award, at 396.

¹⁸⁷ Award, at 401.

¹⁸⁸ Award, at 407

The Committee's Decision

268. In accordance with the general rule of evidence *actori incumbit probatio* it is CIOC who bears the burden of establishing that the requirements of the applicable legal tests have been met, since CIOC is the one seeking to benefit from Mr. Hourani's U.S. nationality and control. The Committee therefore finds no reason to question the Award's initial assumption that "Claimant bears the burden of proof to establish that the Tribunal has jurisdiction over the present dispute"¹⁸⁹.
269. As a next step, the Tribunal accepted that Mr. Hourani had met his burden of proving that he was the owner of a 92% stake in CIOC. The Tribunal then added that, as a general rule, the majority owner of a company must be presumed to control it, this being a presumption already established in a number of previous awards.
270. Having come to that conclusion, the Tribunal decided that, in the circumstances of the present case, the presumption of control could not be applied in Mr. Hourani's favour. Doubts on this matter were already expressed when the presumption was established ("it will have to be examined whether in the present case this presumption is a sufficient indication of control"¹⁹⁰), and the doubts were confirmed when the Tribunal in its subsequent reasoning unequivocally averred that, as regards control, "Claimant has the burden of proof"¹⁹¹.
271. The Committee finds it appropriate at this juncture to make a few general remarks on the character and scope of the general presumption that a majority owner of a company also controls the company. In the Committee's opinion, this presumption, which is based on an owner's normal legal rights under company law, is valid only as long as there are no special elements which create doubts about the owner's actual control and which therefore justify a closer examination of the facts.
272. In the present case, the Tribunal first found that already the circumstances of Mr. Hourani's acquisition of 92% of the stock in CIOC created doubts about his role as owner. These doubts were further strengthened by the absence of any convincing evidence that he had in reality exercised control over CIOC.
273. The existence of special circumstances justifies in the present case that the Tribunal deviate from the general presumption that majority ownership of a company also entails its control. Consequently, in the absence of the presumption, whether Mr. Hourani controls CIOC is a matter to be proven; and in accordance with the general rule of *actori incumbit probatio* it is for Mr. Hourani to do so.
274. Summing up, the Committee does not find in this respect any violation of Article 52(1)(d) of the Convention which could lead to the annulment of the Award.

¹⁸⁹ Award, at 364.

¹⁹⁰ Award, at 382.

¹⁹¹ Award, at 401.

VII. OBITER DICTUM

275. The Committee will analyze in this section the third ground for annulment alleged by Applicant, which refers to the Tribunal's holding in an *obiter dictum*.

1. APPLICANT'S POSITION

276. Applicant argues that in an *obiter dictum* the Tribunal used a false translation of Clause 27.8 of the Contract (No. 954) regarding CIOC's investment in Kazakhstan.

277. The Tribunal used the following translation:

“...it is hereby agreed that the Contractor is a resident of Lebanon, or in the event of assignment as a national of the resident country of the assignee, and therefore the Contractor shall be treated as a resident of Lebanon, or other country if appropriate, for purposes of the ICSID Convention”¹⁹².

278. The correct translation, in Applicant's opinion, should be the following:

“...it is hereby agreed that the Contractor is a national of Lebanon, or in the event of an assignment, a national of the country of residence of the assignee, and the Contractor will accordingly be considered a national of Lebanon or other relevant country for the purposes of the ICSID Convention”¹⁹³.

279. Applicant argues that the *obiter dictum* must be annulled for two reasons:

- First, the Tribunal seriously departed from a fundamental rule of procedure, because it issued the *obiter dictum* without first hearing the parties, thus depriving CIOC of the opportunity to present its case¹⁹⁴.
- Second, the Tribunal also evidently and manifestly exceeded its powers, because it disregarded the authoritative Russian version of the Contract and applied an incorrect translation, without first verifying whether the English version of this provision was consistent with the authoritative Russian version¹⁹⁵. The Tribunal did so in violation of Article 30.2 of the Contract¹⁹⁶. In deciding as it did, the Tribunal disregarded the applicable norm or committed a gross error of law, which constitutes in itself a manifest excess of power¹⁹⁷.

¹⁹² C I, at 239.

¹⁹³ C I, at 241.

¹⁹⁴ C II, at 255.

¹⁹⁵ C II, at 257.

¹⁹⁶ C II, at 261.

¹⁹⁷ C II, at 264.

280. In the course of the hearing before the Committee, Applicant confirmed that – assuming that the Award was not annulled *in toto* – it was still requesting that the *obiter dictum* itself be annulled¹⁹⁸.

2. RESPONDENT'S POSITION

281. Respondent argues that Applicant's contentions must fail for the following reasons¹⁹⁹:

282. First, the *obiter dictum* character of the observation excludes any possibility of annulment; it has no impact on the decision of the Tribunal and therefore cannot be subject to annulment under Article 52 of the Convention.

283. Second, in any event the grounds for annulment are not present in this case, since the Tribunal did not breach a fundamental rule of procedure by failing to give Claimant the opportunity to discuss Clause 27.8, nor did the Tribunal manifestly exceed its powers by relying on the allegedly wrong version of such clause.

284. Third, Applicant has misrepresented or misunderstood the meaning of the Tribunal's observation.

285. With respect to Applicant's allegation that there was a translation error, neither party ever questioned or criticized the correctness of the translation of Clause 27.8. Consequently, the Tribunal's reliance on the correctness of the English version does not constitute an error. Furthermore, the use of the translation now favoured by Applicant does not affect the meaning of the Tribunal's *obiter dictum*. Any error could not possibly rise to the level of a "manifest" excess of powers or a "serious" departure from a fundamental rule of procedure²⁰⁰.

3. THE COMMITTEE'S DECISION

286. The relevant Section of the Award²⁰¹ is devoted to the interpretation of Article 25(2)(b) of the Convention, and specifically to the necessity of an agreement between the parties for a local juridical person to be considered national of another Contracting State. In its Award, the Tribunal noted that in most of the previous ICSID proceedings concerning Article 25(2)(b) the agreement was negotiated directly between the parties or was implied from an ICSID arbitration clause contained in an investment contract. The Tribunal added:

“In such circumstances, the existence of an express or implied agreement to treat the locally incorporated company as a foreign national gave that company standing in the dispute. In the present dispute the investment contract between the parties (the Contract) contains an ICSID arbitration

¹⁹⁸ HT p. 129, l. 4.

¹⁹⁹ R I, at 266.

²⁰⁰ R II, at 160.

²⁰¹ Section J.II.3.

clause. However, Claimant is relying on the BIT, not the Contract, to establish the Tribunal's jurisdiction"²⁰².

287. At the end of the same paragraph, the Tribunal inserted the following footnote:

"The Tribunal notes that it does not follow from the Contract that Claimant can be treated as a national of another Contracting State. The Contract states that the parties "*agreed that the Contractor is a resident of Lebanon, or in the event of assignment as a national of the resident country of the assignee, and therefore the Contractor shall be treated as a resident of Lebanon, or other country if appropriate, for purposes of the ICSID Convention.*" (C-4, Clause 27.8) This original wording of the Contract, initially concluded between Kazakhstan and CCC, was not addressed in connection with the transfer of the Contract from CCC to CIOC"²⁰³.

288. Applicant submits that in making this observation with regard to Clause 27.8 of the Contract, the Tribunal manifestly exceeded its powers and committed a serious departure from a fundamental rule of procedure. Applicant requests the Committee to annul – if not the Award *in toto* – at least the footnote.

A. Manifest Excess of Powers

289. Applicant's first argument is that the Tribunal manifestly exceeded its powers, because it relied on an inaccurate translation of the Contract, and not on the authoritative Russian version.

290. The translation used by the Tribunal is this:

"... it is hereby agreed that the Contractor is a resident of Lebanon, or in the event of assignment as a national of the resident country of the assignee, and therefore the Contractor shall be treated as a resident of Lebanon, or other country if appropriate, for purposes of the ICSID Convention [...]"²⁰⁴.

291. Applicant avers that the correct translation should be the following:

"... it is hereby agreed that the Contractor is a national of Lebanon, or in the event of an assignment, a national of the country of residence of the assignee, and the Contractor will accordingly be considered a national of Lebanon or other relevant country for the purposes of the ICSID Convention"²⁰⁵.

292. The basic difference between the two versions is that in the translation used by the Tribunal the Contractor is treated as a "resident" of Lebanon, or other country if appropriate, and in the other as a "national" of Lebanon or other relevant country.

²⁰² Award at 330 *in fine*.

²⁰³ Footnote No. 10.

²⁰⁴ C I, at 239.

²⁰⁵ C I, at 241.

Respondent has not agreed to this new translation²⁰⁶ and it is not for this Committee to establish which of the two translations is more accurate.

293. Even apart from the fact that Applicant's allegation concerns a statement in a footnote without any impact on the outcome of the case, the Committee considers that the Tribunal did not manifestly exceed its powers by relying on a –now allegedly incorrect – translation, which had been submitted by Claimant itself²⁰⁷. Since Claimant never drew the Tribunal's attention to the existence of a mistake and never submitted a corrected version, the Tribunal cannot be reproached for having assumed that the translation was accurate.
294. It is therefore misplaced for Applicant to accuse the Tribunal of having committed a manifest excess of powers by relying on an English version of the Contract which Claimant itself had submitted and had never corrected.

B. Serious Departure from a Fundamental Rule of Procedure

295. Applicant's second allegation is that the Tribunal departed from a fundamental rule of procedure, because CIOC was never given the opportunity to state its case in relation to the question addressed in the footnote.
296. This allegation also fails for two reasons.
297. First, both Parties agree that the footnote inserted in the Award is an *obiter dictum*²⁰⁸, *i.e.* an incidental comment made in connection with the Award. This means that what is stated in the footnote is unnecessary to support the main decision, and that it therefore has no precedential value and does not have any effect as *res iudicata*. The Tribunal never again referred or alluded to this footnote in the rest of the document, and its drafting shows that it had no conclusive effect for the dispositive section of the Award, nor did it affect the Tribunal's reasoning.
298. Since *obiter dicta* are purely incidental to a tribunal's determination, inclusion of any such comment in the text of a decision cannot affect the parties' right to be heard, which by its very nature only extends to those issues which are actually adjudicated by the tribunal.
299. Second, in the present case the *obiter dictum* falls squarely within the legal framework established by Claimant in order to prove standing and jurisdiction²⁰⁹. This framework covers Articles VI(8) of the BIT and 25(2)(b) of the Convention, and the Tribunal made the statement in the footnote in the course of its interpretation of the second of these provisions.

* * *

300. On June 5, 2013, CIOC and Mr. Hourani initiated a new ICSID arbitration against the Republic of Kazakhstan, involving the Contract²¹⁰. A question which may

²⁰⁶ R I, at 278.

²⁰⁷ Doc. CA 16, which was originally submitted as Doc. C 4 in the underlying arbitration.

²⁰⁸ C I, at 243; R I, at 267.

²⁰⁹ See para. 274 *supra*.

²¹⁰ R II, at 162.

arise in that proceeding is whether, when applying the Contract, CIOC should be considered a national of another ICSID Contracting State for the purposes of access to ICSID jurisdiction. That is a question for the new ICSID tribunal to determine. Any issue on the meaning and interpretation of the Contract is beyond the scope of decision of the original ICSID Tribunal (and of this Committee).

VIII. COSTS

301. The parties submitted their statements on costs simultaneously on October 15, 2013. Applicant informed the Committee that its total costs incurred in connection with this annulment proceeding were EUR 600,000 in legal fees plus USD 282,913 in ICSID costs (lodging fee and advances) (these amounts having been paid in full)²¹¹. Subsequently, the Applicant made an advance payment of USD 70,000 on December 24, 2013.
302. Respondent declared that its legal fees and expenses in connection with this annulment proceeding were USD 1,758,782 (of which USD 1,158,908 has already been paid)²¹².
303. Each party has asked that its legal and arbitration costs be borne by the other party²¹³.
304. Article 61(2) of the ICSID Convention provides as follows:
- “... the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award”.
305. Article 52(4) extends the application of this provision to annulment proceedings.
306. Respondent acknowledges that the parties have the undeniable right to challenge an award. However, it argues that such right should not be misused in order to obtain an appeal on the merits. Respondent argues that Applicant’s purpose in filing the request was to obtain a review on the merits. For this reason, Applicant should bear the entire costs of the annulment proceedings²¹⁴.
307. The Committee considers that CIOC’s case was not frivolous and that Applicant exercised its right to apply for annulment in accordance with Article 52 of the Convention. In light of the *bona fides* nature of Applicant’s application for annulment, the *ad hoc* Committee considers that Applicant should not bear the entire costs of the proceedings. Therefore the Committee decides
- that the ICSID fees shall be borne by Applicant and
 - that each party shall bear its own legal fees and expenses.

²¹¹ Claimant’s Final Statement of Costs of October 15, 2013.

²¹² Respondent’s Final Statement of Costs of October 15, 2013.

²¹³ C II, at 274; R II, at 167.

²¹⁴ Respondent’s Final Statement of Costs of October 15, 2013.

IX. DECISION

308. For the foregoing reasons, the Committee unanimously decides as follows:

1. The application of Caratube International Oil Company LLP for annulment of the Award issued by the Tribunal on June 5, 2012 is dismissed.
2. Each of the Parties shall bear its own legal fees and expenses, and Caratube International Oil Company LLP shall bear the direct costs of the proceeding, comprising the fees and expenses of the Committee and the costs of using the ICSID facilities, in their entirety.
3. The stay of enforcement of the Award is declared automatically terminated in accordance with Rule 54(3) of the ICSID Arbitration Rules.

The *Ad Hoc* Committee

[Signed]

Mr. Juan Fernández-Armesto
President

Date: 18 February 2014

[Signed]

Tan Sri Dato Cecil W.M. Abraham
Member

Date: 7 February 2014

[Signed]

Judge Hans Danelius
Member

Date: 10 February 2014