INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

TULIP REAL ESTATE AND DEVELOPMENT NETHERLANDS B.V.,	)	
Claimant,	)	
v.	)	ICSID Case No. ARB/11/28
REPUBLIC OF TURKEY,	)	
Respondent.	)	

APPLICATION FOR ANNULMENT OF THE TRIBUNAL'S AWARD

3 July 2014

CROWELL & MORING LLP

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I. Introduction

1. Claimant Tulip Real Estate and Development Netherlands B.V. ("Tulip") respectfully submits this application for annulment of the Tribunal's Award rendered on 10 March 2014 (the "Award") in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey,* ICSID Case No. ARB/11/28. This application is made pursuant to Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules").

2. ICSID Arbitration Rule 50(1) provides that an application for the annulment of an award shall be addressed in writing to the Secretary-General of ICSID and shall (a) identify the award to which it relates, (b) indicate the date of the application, and (c) state in detail the grounds on which it is based.

3. The Award to which this application relates is as set forth above. The date of this application is 3 July 2014. Tulip seeks annulment of the Award pursuant to Article 52(1)(b), (d) and (e) of the ICSID Convention and Rule 50(1)(c)(iii) of the Arbitration Rules on the grounds that:

(1) there has been a serious departure from a fundamental rule of procedure;

(2) the Award failed to state the reasons on which it is based; and

(3) the Tribunal manifestly exceeded its powers.

4. Applicant sets forth in the sections below its reasons for seeking annulment. However, because the grounds for annulment under Article 52 in some circumstances merge into

one another, each of the failures, departures, and deficiencies detailed below can, and do, require annulment on more than one ground. For purposes of efficiency, the grounds for annulment identified in this application are cross-referenced where appropriate. For the avoidance of doubt, however, the defects in the Award that can be challenged under Articles 52(1)(b), (d), and (e) on more than one ground are deemed to be challenged on each such ground, whether or not all grounds are mentioned in each particular instance.

5. Tulip has paid the $25,000 fee for lodging this application as required by Rule 50(1)(d) and the January 1, 2013 Schedule of Fees. This application is timely filed in accordance with Article 52(2) of the ICSID Convention and Rule 50(3)(b)(i) of the Arbitration Rules.

6. This application is accompanied by supporting documentation in conformity with Regulation 30 of the Administrative and Financial Regulations. These documents are annexed hereto as Exhibits CE_A-1 through CE_A-5. These exhibits are as follows:

Exhibit CE_A-1	Evidence of payment of fee to ICSID
Exhibit CE_A-2	Tribunal's Award in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey,* ICSID Case No. ARB/11/28
Exhibit CE_A3	Separate Opinion of Mr. Michael Jaffe in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey,* ICSID Case No. ARB/11/28
Exhibit CE_A-4	Tulip's authorization for the institution of these annulment proceedings and appointment of legal representatives
Exhibit CE_A-5	Bilateral Investment Treaty between the Kingdom of the Netherlands and the Republic of Turkey

7. This application is also accompanied by copies of the relevant legal authorities cited herein, which are numbered CLA_A-1 to CLA_A-21.

II. Background

8. Tulip is a wholly-owned subsidiary of A. van Herk Holding B.V., a company within the Van Herk Groep. The Van Herk Groep is a family of companies based in Rotterdam, the Netherlands, with investments in a variety of sectors, including biotechnology, financial services, energy, and real estate development. The Van Herk Groep owns approximately €1.2 billion in residential and commercial real estate holdings in the Netherlands alone. Its total property assets are roughly €1.5 billion.

9. Tulip was established by the Van Herk Groep in 2007 to consolidate and expand its existing investments in the Turkish real estate market. Through various local special purpose vehicles—which were known as Tulip I, Tulip II, and Tulip JV—Tulip pursued its investment strategy and operations in Turkey. Tulip's substantial investment in these ventures had a fair market value at the time of termination that was estimated by Tulip's damages expert to be in the range of €283 million.

10. The dispute that was the subject of the arbitration concerned a development project on the Western edge of Istanbul known as Ispartakule III. Emlak Konut Gayrimenkul Yatirim Ortakligi A.S. ("Emlak"), a Turkish real estate investment trust, was the contractual counterparty to Tulip JV on that project.

11. Emlak is closely related to the Housing and Development Administration of Turkey ("TOKI"), a state organ situated within the Office of the Prime Minister. TOKI's public mission is to promote development of and access to housing across Turkey. At all relevant times, over 99.9% of Emlak's shares were controlled by TOKI. A majority of Emlak's Board of

Directors were TOKI employees. The Chairman of Emlak's Board and the President of TOKI was the same individual—Mr. Erdogan Bayraktar.

12. On 18 May 2010, the Emlak Board terminated Tulip JV's Contract ("the Contract") for the Ispartakule III Project. The Emlak Board meeting at which that termination was ordered was chaired by Mr. Bayraktar and held in TOKI's governmental offices in Ankara. As a result of that termination decision and Emlak's subsequent efforts to retake the property with the assistance of the Turkish police, Tulip was forced to exit Turkey and ultimately lost the entirety of its investment.

13. Tulip therefore initiated arbitration on 11 October 2011 in order to seek redress under the Netherlands-Turkey Bilateral Investment Treaty ("BIT"). Respondent objected to the Tribunal's jurisdiction on a number of bases, including that Emlak's actions with regard to termination of the Ispartakule III Contract could not be attributed to the Turkish State.

14. In part to respond to Respondent's jurisdictional objections, Tulip sought documentary disclosures and, ultimately, the live testimony of Mr. Erdogan Bayraktar, whom Respondent had not proffered as a witness. The Tribunal ordered both the production of documents and the attendance of Mr. Bayraktar at the evidentiary hearing.

15. Following the resolution of these and other procedural issues, as well as the parties' submission of written pleadings, an eight-day evidentiary hearing was held from 23 September to 2 October 2013 in Paris ("the Hearing"). During the course of the Hearing, as explained further below, the Tribunal ordered Respondent to produce additional documents which Respondent had previously withheld. These documents were then submitted into the

evidentiary record on what was intended to be the final day of fact-witness testimony at the Hearing.

16. The Tribunal issued its Award on 10 March 2014. It was accompanied by a separate opinion of Arbitrator Michael Jaffe (the "Separate Opinion").

17. A review of the Award and Separate Opinion shows that the arbitration conducted by the Tribunal violated basic and fundamental principles of adjudication. These violations, if permitted to stand, undermine "the integrity of the process that yielded [the Award]."[1]

18. In particular, the Tribunal's Majority (Messrs. Gavan Griffith and Rolf Knieper) purported to find, among other things, that there was no basis for attributing Emlak's conduct to the Republic of Turkey under the International Law Commission's Articles on State Responsibility ("ILC Articles"). Rather than reach the necessary and compelled conclusion that Emlak's act of terminating the Ispartakule III Contract was attributable to the state, the Tribunal's Majority instead determined that, in its view, Emlak was not acting under the instructions, direction, or control of the government.

19. In his Separate Opinion, Mr. Jaffe laid out in plain terms how this conclusion bore no relationship to the evidence as it had been presented at the Hearing. The Separate Opinion focuses specifically on the testimony of Mr. Bayraktar (who was a Minister of the Government by the time of the Hearing). "Significantly," Mr. Jaffe wrote, "the majority *all but ignores* the very evidence that they say would be probative [on attribution], namely the evidence found in the

[1] David D. Caron, *Framing the Work of ICSID Annulment Committees*, 6 WORLD ARB. & MED. REV. 173, 176 (2012) (CLA_A-20).

testimony of Erdogan Bayraktar."[2] Mr. Jaffe then went on to quote Mr. Bayraktar's testimony at length, and concluded:

> The formal separateness urged by the Respondent notwithstanding, Mr. Bayraktar's testimony shows that TOKI's sovereign interests drove the termination. On this record, it would be difficult to conclude that the decision to terminate the Ispartakule III Contract was not guided—if not fully directed—by the sovereign's hand.[3]

20. It is clear on the face of the Award that something went very wrong in the process that led to its issuance. Key documents that were produced by Respondent by order of the President of the Tribunal while the Hearing was underway were not even mentioned by the Majority. Key testimony by TOKI and Emlak officials, which was elicited at the Hearing and which was dispositive of the attribution issue, went entirely unremarked upon. These lacunae evince not a failure to be persuaded by the evidence, but a failure to even consider certain evidence.

21. And even though Mr. Jaffe in his Separate Opinion identified for the Majority the numerous reasons why its conclusion on attribution was contradicted by the evidentiary record that the Tribunal expressly and extraordinarily ordered the parties to produce, *i.e.*, testimony from a sitting cabinet minister compelled by the Tribunal itself, the Majority did not even attempt to go back and evaluate how this particular testimony might alter its conclusions in the Award. Nor did the Majority provide any comment or response to the Separate Opinion of Mr. Jaffe. Certainly the Tribunal did not seek to clarify the positions of the parties with respect to

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[2] Separate Opinion, para. 6 (emphasis added) (CE_A-3).
[3] *Id.*, para. 8.

this evidence. In the face of this plainly dispositive evidence and the critique by Mr. Jaffe, the Majority said—nothing.

22. Despite the Majority's conclusion that its holding on attribution entailed that Tulip's claims "fall outside the scope of the Tribunal's jurisdiction,"[4] the full Tribunal (including Mr. Jaffe) endeavored to address the merits of the dispute in the Award as well. The Tribunal's purported determination of the merits, after having already determined that it had no jurisdiction, was unquestionably *obiter dictum*. However, to the extent one considers the Tribunal's merits discussion to have any legal force or effect, it too must be annulled. In particular, the same flawed reasoning present in the attribution decision—which resulted from a willful blindness to the testimony and evidentiary record—infected the Tribunal's analysis of the merits as well.

23. For these and other reasons, which are more fully illustrated below, the Award must be annulled in its entirety.

III. Serious Departure from Fundamental Rules of Procedure

24. Article 52(1)(d) states that a serious departure from a fundamental rule of procedure is ground for annulment. Annulment jurisprudence explains that annulment under Article 52(1)(d) has two elements.

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[4] Award, para. 361 (CE_A-2).

25. First, there must be a serious departure from a rule of procedure. This element is met if, but for the departure from the rule of procedure in question, the tribunal would have reached "a result substantially different" from its eventual conclusion.[5]

26. Second, the rule of procedure has to be fundamental. As the *Wena* committee explained:

> The said provision refers to a set of minimal standards to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given *the right to be heard* before an independent and *impartial tribunal*. This includes the right to state its claim or defense and to produce all arguments and evidence in support of it. This fundamental right has to be *ensured on an equal level*, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.[6]

27. Here, the fundamental rule of procedure which the Tribunal failed to afford Tulip is the right to be heard. In particular, the Tribunal failed to give Tulip access to an impartial Tribunal, and it failed to apply the principle of equality of the parties. These failures, individually and collectively, caused a result that was "substantially different" from what would have occurred if these fundamental rules of procedure had been observed.

A. The Award Demonstrates That the Majority Failed to Afford Tulip the Right to Be Heard with Regard to Submissions Made at the September-October 2013 Hearing

28. It is axiomatic that fundamental rules of procedure include the right to be heard. Long before adoption of the ICSID Convention, the right to be heard was a core principle of

[5] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Decision on Annulment dated 28 Jan. 2002) ("*Wena Annulment*"), para. 58 (CLA_A-18); *MINE v. Republic of Guinea*, ICSID Case No. ARB/84/4 (Decision on Annulment dated 22 Dec. 1989) ("*MINE Annulment*"), para. 5.05 (CLA_A-13); *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14 (Decision on Annulment dated 29 June 2005) ("*CDC Annulment*"), para 48 (CLA_A-4); *Repsol YPF Ecuador SA v. Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10 (Decision on Annulment dated 8 Jan. 2007) ("*Repsol Annulment*"), para. 81 (CLA_A-15).

[6] *Wena Annulment*, para. 57 (emphasis added) (CLA_A-18).

natural justice and due process in international law. Thus, Bluntschli notes in his 1886 codification of public international law:

> *La décision du tribunal arbitral peut être considérée comme nulle: … c) Si les arbitres ont refusé d'entendre les parties ou violé quelque autre principe fundamental de la procedure.*
>
> (The decision of an arbitral tribunal may be considered a nullity … c) if the arbitrators have refused to hear the parties or violated some other fundamental principle of procedure).[7]

29. Bin Cheng similarly explains in his 1953 treatise General Principles of Law:

> "Judicial procedure" has the character of a legal concept independent of particular rules of law applicable to it. In the course of judicial proceedings both parties must be heard – *audiatur et altera pars*.[8]

30. ICSID annulment decisions list the right to be heard as the first example of a fundamental rule of procedure.[9] In the recent *Fraport* annulment decision, the *ad hoc* Committee annulled a jurisdictional decision in its entirety on the basis of a failure to accord the

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[7] JOHANN CASPAR BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIÉ 289 (1886) (CLA_A-19).

[8] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 258 (1953) ("CHENG") (CLA_A-21).

[9] *MINE Annulment*, para. 5.06 (CLA_A-13); *Wena Annulment*, para. 57 (CLA_A-18); *MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7 (Decision on Annulment dated 16 Feb. 2007) ("*MTD Equity Annulment*"), para. 49 (CLA_A-14); *CDC Annulment*, para. 49 (CLA_A-4); *Azurix Corp v. Republic of Argentina*, ICSID Case No. ARB/01/12 (Decision on Annulment dated 1 Sept. 2009) ("*Azurix Annulment*"), para. 212 (CLA_A-2); *Duke Energy International Peru Investments No. 1, Ltd v. Republic of Peru*, ICSID Case No. ARB/03/28 (Decision on Annulment dated 28 Feb. 2011) ("*Duke Annulment*"), para. 168 (CLA_A-6); *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2 (Decision on Annulment dated 18 Dec. 2012) ("*Casado Anulment"*), para. 73 (CLA_A-17); *Malicorp Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18 (Decision on Application for Annulment dated 3 July 2013) ("*Malicorp Annulment*"), para. 36 (CLA_A-11); *Impregilo S.p.A. v. Republic of Argentina*, ICSID Case No. ARB/07/17 (Decision of the *Ad Hoc* Committee on the Application for Annulment dated 24 Jan. 2014) ("*Impregilo Annulment*"), para. 165(CLA_A-10); *Caratube International Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12 (Decision on the Annulment Application of Caratube International Oil Company LLP dated 21 Feb. 2014) ("*Caratube Annulment*"), para. 93 (CLA_A-3).

claimant its right to be heard.[10] Likewise, the *Casado ad hoc* Committee annulled the damages portion of an award on the basis of a failure to accord the respondent its right to be heard.[11] Earlier, the *Amco II ad hoc* Committee annulled a *Decision on Supplemental Decisions and Rectification* on the same basis.[12]

31. The right to be heard is not the same thing as the simple right to speak. It requires more. It requires the Tribunal to *listen*.[13] As those who are charged with administering justice (which is the goal of the ICSID system), arbitrators are required to consider all evidence presented to them by the Parties, whether in the form of documents, witness statements, or live testimony. Indeed, the failure outright to consider evidence obviates the tribunal's ability "to arrive at a judicial conclusion."[14] It is apparent from the Award that this Tribunal did not do so.

32. It is the responsibility of the Tribunal to consider *all* of the evidence—whether it ultimately accepts or rejects that evidence. What is not permitted under the basic rules of procedural fairness is for a Tribunal to selectively consider only part of the evidence in the interest of writing a more compelling Award. In other words, a Tribunal may not make itself willfully blind to certain evidence that it is unable to explain.

1. The Majority Failed to Hear Testimony Demonstrating That the Relevant Acts of Emlak Were Attributable to Turkey

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[10] *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25 (Decision on the Application for Annulment dated 17 Dec. 2010) ("*Fraport Annulment*"), paras. 197-247 (CLA_A-8).

[11] *Casado Annulment,* paras. 269-70 (CLA_A-17).

[12] *Amco Asia Corp. and Others v. Republic of Indonesia,* ICSID Case No. ARB/81/1 (Decision on Annulment of Award of 5 June 1990 and of Supplemental Award of 17 Oct. 1990 dated 3 Dec. 1992) ("*Amco Asia Annulment*"), paras. 9.05-10 (CLA_A-1).

[13] CHENG at 293 ("All these rules are merely different methods designed to ensure that the judge should hear ***and consider*** what each party may have to say on the dispute as fully as possible – not only on the question at issue, but also on the statements of its opponent." (emphasis added)) (CLA_A-21).

[14] *Id*. at 298 (quoting *Status of Eastern Carelia*, 1923 PCIJ (ser. B) No. 5 at 28 (July 23)).

a. The Majority Ignored Key Testimony by Minister Bayraktar Regarding TOKI's Relationship with Emlak

33. The Award states in its recitation of the parties' arguments regarding Article 8 attribution:

> According to the Claimant, the decision to terminate the Contract was made by Emlak under the control of TOKI for non-commercial purposes and in the exercise of State power. In making this argument, the Claimant relies upon, as evidence of TOKI exercising control over Emlak in the decision to terminate the Contract, a statement made by Mr Bayraktar following the termination of the Contract in the Turkish news publication *Milliyet*….[15]

34. Though the Award recites certain other of the evidence that Tulip presented on attribution,[16] this newspaper article, according to the Majority, was the only evidence Tulip "relie[d] upon" for the proposition that TOKI specifically exercised its control over Emlak in the decision to terminate the Contract.[17] No mention is made of Tulip's reliance on any Hearing testimony, or in particular, the testimony of Minister Bayraktar.

35. However, as noted in the Award, following an application by the Claimant, the Tribunal ordered that Mr. Bayraktar, Turkey's then Minister of Environment and Urban Planning, and former Emlak Board Chairman and TOKI President, be called for examination at the Hearing.[18]

36. Claimant was obliged to make such an application because, despite the fact that Mr. Bayraktar was the key official in charge of both Emlak and TOKI and had signed the termination decision and other key documents, Respondent had not submitted a witness

[15] Award, para. 249 (CE_A-2).
[16] *Id.*, paras. 243-48.
[17] *Id.*, para. 249.
[18] *Id.*, para. 37; *see also* Procedural Order No. 2. This order followed an application by the Claimant pursuant to Rule 34(2)(a) of the Arbitration Rules.

statement from him in the arbitration. Specifically, Tulip argued in its request for Mr. Bayraktar's attendance at the Hearing that Minister Bayraktar's personal knowledge of the degree to which Emlak was "independent" of TOKI would be of immense assistance to the Tribunal in resolving Respondent's jurisdictional objection with regard to attribution. Tulip further argued that Mr. Bayraktar's testimony went to the heart of Tulip's case on the merits, given that Mr. Bayraktar was a key decision maker with regard to the administration and termination of the Ispartakule III Contract.

37. Ultimately, the Tribunal directed in its Procedural Order No. 2 that Minister Bayraktar appear and give testimony at the Hearing.[19] For this reason, Mr. Bayraktar's oral testimony at the Hearing is the only record of his evidence, and the parties' submissions on that evidence at the close of the Hearing the only argument as to its import.

38. At the Hearing, Mr. Bayraktar provided testimony on, among other subjects, the relationship between TOKI and Emlak, specifically with respect to the Ispartakule III project. Indeed, given the two hats that he wore during the relevant timeframe, Mr. Bayraktar had personal knowledge of the separation, if any, between Emlak and TOKI in the administration of the Ispartakule III Contract. However, as the Separate Opinion of Mr. Jaffe notes:

> At a time when he was called to testify on the topic of the independence of Emlak, Mr. Bayraktar showed that control and direction were more than mere possibilities. In his testimony, when discussing the Tulip investment and the termination of the Ispartakule III Contract, and without being asked to address TOKI's interest or purpose, Mr. Bayraktar spoke not about Emlak's interest and purpose, but, about TOKI's.[20]

39. Mr. Jaffe then quotes from the testimony of Minister Bayraktar:

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[19] Award, para. 37 (CE_A-2).
[20] Separate Opinion, para. 6 (CE_A-3).

> And allow me to make a couple of clarifications, please. I would definitely like to ensure that the distinguished arbitrators understand our sincere intentions. We were very delighted to see Tulip and its foreign capital enter the Turkish market, and we were more than willing to help them out, obviously in compliance with the laws.
>
> That's exactly the working principle *of TOKI*. *TOKI would like to attract more and more bidders into their tenders*, and we are always delighted to have foreign capital in our tender process. And we also ensure that we facilitate the way contractors work. That's our main working principle. Had that not been our main principle, we would not have been able to build half a million units in eight years, and we did that without getting a single cent from the Treasury.
>
> Until the last moment we never wanted to terminate. *We never want to terminate any contract in TOKI*. […] That's why we really had to make sure that the contracts work.
>
> But there is a contract in front of us. I implemented 30,000 tenders, tender documents, some big, some small. Yes, I had two hats on my head. *Here I was president of TOKI*; on the other hand, I was president of the board of directors of the other institution, of Emlak. But that was natural. And I am repeating, I am repeating over and over again: when I saw Mr. Meyer, he was a European, he was a Dutch citizen, he was the owner of this project, and when I saw him, I said: now the project is safe, and we shall be showing this project as a reference to other European investors. On the one hand, we want to increase our foreign investments; on the other hand, we would like to join the European Union, so we would like to cooperate with European companies. So we really spent an extraordinary effort in order to conclude this project positively.[21]

40. In the Separate Opinion, Mr. Jaffe considers all of the evidence regarding Emlak's relationship with TOKI and concludes that "the evidence establishes that TOKI was not only capable of exerting effective control over Emlak through its control over the voting shares and through its representation on the Board of Emlak; but that, through Mr. Bayraktar, the head of

[21] *Id*. (quoting Transcript Day 3 at 25:8-13, 25:22-26:12, 34:10-18, 52:12-53:3) (emphasis added).

Emlak and the Chairman of TOKI, Emlak was all but read out of the decision-making equation as regards termination of the Ispartakule III Contract."[22]

41. With regard specifically to Mr. Bayraktar's Hearing testimony, Mr. Jaffe writes that "Mr. Bayraktar's testimony at the hearing showed that as a practical matter the lines of separateness between TOKI and Emlak were all but non-existent as regards the termination decision."[23]

42. For unexplained and unexplorable reasons, the Majority does not address this Hearing testimony from the only witness the Tribunal compelled to attend on the very issue with regard to which the witness was called to testify. The Majority does not even address the fact that it was raised by the Separate Opinion as the basis for Mr. Jaffe's disagreement. Instead, the Majority falsely characterizes Tulip's submissions as relying solely on the documentary evidence submitted prior to the Hearing.[24] It simply proceeds as if this testimony the Tribunal itself compelled to be given did not occur.

43. This is not a case where the Majority made a credibility finding, and for that reason discounted Mr. Bayraktar's statements. Indeed, the one and only reference to Mr. Bayraktar's Hearing testimony that appears in the Award (regarding a separate issue raised as to whether TOKI or Emlak had knowledge of litigation over the zoning of the property), indicates

[22] *Id*., para. 3.
[23] *Id*., para. 4.
[24] *See* Award, para. 249 ("According to the Claimant, the decision to terminate the Contract was made by Emlak under the control of TOKI for non-commercial purposes and in the exercise of State power. In making this argument, the Claimant relies upon, as evidence of TOKI exercising control over Emlak in the decision to terminate the Contract, a statement made by Mr Bayraktar following the termination of the Contract in the Turkish news publication *Milliyet*….") (CE_A-2).

that the Tribunal *accepted* Mr. Bayraktar's testimony as credible.[25] There is no separate indication that the Majority considered Mr. Bayraktar's testimony on TOKI's relationship with Emlak to be not credible or unpersuasive. And given the Tribunal's decision in Procedural Order No 2, the Majority could not have considered the testimony to be irrelevant.

44. Mr. Bayraktar's Hearing testimony was new evidence. The Tribunal had specifically ordered that this evidence be provided at the Hearing. And then the Majority failed to recognize or evaluate this evidence that the Tribunal itself had requested. The Tribunal's omissions in this regard not only undermine its conclusions on Article 8, but call into question its conclusions as to Articles 4 and 5 of the ILC Articles as well.

45. Moreover, the Tribunal failed to recognize the legal import under the ILC Articles of a sitting Cabinet Minister ratifying, through his testimony, Claimant's contention that TOKI controlled the decisions of Emlak. Though he was testifying about matters from before his appointment to the Cabinet, Mr. Bayraktar, as he sat in the hearing room, was nevertheless a high-ranking Turkish government official, who was confirming that TOKI directed the actions and decisions of Emlak.

46. Had it given due consideration to Mr. Bayraktar's testimony, the Tribunal would at the very least have solicited the Parties' positions, and perhaps ordered additional briefing, on whether or not the Minister's statements should be taken as ratification.

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[25] *Id.*, para. 406 ("The affirmative witness evidence of Messrs Bayraktar and Yetim, which the Tribunal accepts, is that neither TOKI nor Emlak knew of the zoning litigation at that time when Tulip JV entered into the Contract.").

b. The Tribunal Ignored Testimony by Emlak Officials Indicating That the Reasons Given for Termination Were Pretextual

47. As with Mr. Bayraktar's testimony above, the Tribunal ignored testimony by Emlak officials given at the Hearing which was dispositive of the issue on which the Tribunal purported to hang its subsequent merits determination: contractual breaches as pretext.

48. The Award purports to determine that "[i]t is not established by the evidentiary record that Emlak invoked alleged contractual breaches as a pretext, in fact acting under the control of TOKI to promote or achieve an ulterior purpose of interest to the State."[26] This statement is the lynchpin of the Tribunal's reasoning with respect to the BIT claims. Indeed, the issue of whether or not the "commercial reasons" given in the Emlak Board's May 2010 termination decision were real or pretextual was central to Tulip's submissions. And while the Award credits the testimony of Mr. Murat Kurum, an Emlak official, as establishing that "there were compelling commercial reasons" for the termination,[27] it completely ignores the contrary Hearing testimony of other Emlak officials admitting that the stated reasons for termination were not the actual motivation.

49. Specifically, the 18 May 2010 Emlak Board decision terminating Tulip's contract gave four reasons for the termination, which may be summarized as follows: (1) disputes between the Tulip JV partners, leading to questions about Tulip 1's representation authority; (2) the bankruptcy of Tulip JV partner Mertkan; (3) Tulip JV's allegedly impermissible assignment of receivables to Denizbank; and (4) lack of progress on construction. What Emlak officials

[26] *Id.*, para. 318.
[27] *Id.*, para. 319.

admitted under cross examination at the Hearing, however, was that each of the four stated reasons was wholly pretextual.

50. With regard to the representation authority of Tulip 1 (Reason #1), Mr. Ibrahim Keskin, Emlak's General Counsel at the time of termination, admitted at the Hearing that Emlak had made the decision to continue to accept previously signed powers of attorney authorizing Tulip 1 to represent the partnership.[28] This information was not known until Mr. Keskin's testimony, and so was a basis for Tulip's further submissions made at the Hearing.

51. With regard to the bankruptcy of JV partner Mertkan (Reason #2), Mr. Keskin also admitted at the Hearing that the bankruptcy—and substitution of a new partner in the JV—was still the process of being resolved between Tulip and Emlak at the time the contract was terminated. He therefore stated his view that the lack of construction progress was the actual grounds for termination.[29]

52. With regard to the allegedly impermissible assignment of receivables (Reason #3), the testimony of Mr. Ertan Yetim, an Emlak Board member and TOKI employee, established that Tulip's request to make an assignment was sent on the day before the Emlak Board issued its final decision, and raised justifiable doubt whether it could have been an actual grounds for the Board's termination decision.[30]

53. Finally, as explained in further detail below, the Hearing showed that the alleged lack of progress on construction (Reason #4) was also a mere pretext for termination. In a

[28] Transcript Day 4, 171:21-24 (Keskin).
[29] Transcript Day 5, 26:4-13 (Keskin).
[30] Transcript Day 4, 18:6-19:6 (Yetim).

memorandum dated 4 February 2010, the Construction Control Department recommended that Tulip JV be granted an extension of its completion deadlines to at least July 2011. On 5 February 2010, Mr. Kurum approved and signed this recommendation. Mr. Kurum testified at the Hearing that nothing of commercial significance changed after this initial recommendation to grant Tulip JV an extension.[31] The Majority "accepted" the "evidence of Mr. Kurum" on this subject matter.[32]

54. The above statements were admissions against interest by Respondent's own witnesses. It was Tulip's submission that they demonstrated that, despite what its Board meeting minutes may have said, Emlak was not acting with honesty-in-fact and good faith in its decision to terminate the Contract. Yet the Award does not grapple with how to balance these admissions against the self-serving testimony of Mr. Kurum, which the Tribunal accepts. The Award does not suggest that the Tribunal viewed Mr. Kurum to somehow be more credible than these other Emlak officials on the issue of whether the reasons given for termination were pretextual. It instead simply proceeds as if these statements at the Hearing were never made. This is a failure to give reasons, an act in excess of the Tribunal's powers, and a serious departure from the fundamental procedural right to have one's evidence heard.

55. Though no less damaging to the procedural legitimacy of the arbitration, the Tribunal's failure to consider this testimony in its analysis of the merits issues is at least somewhat more understandable. This is because, as noted above, the Award's entire discussion of the merits is unquestionably *obiter dictum*. The outcome of the case was no longer in doubt once the Majority had reached its determination on attribution. And the conceptual problem with

[31] Transcript Day 6, 34:16-17; 35:9-10 (Kurum).
[32] Award, para. 319.

obiter—the reason why it is not given *res judicata* effect in most domestic legal systems—is that unless an issue is actually litigated and necessarily decided, there is no imperative to fully analyze all the relevant evidence.

56. In other words, the Award's discussion of the merits was a mere rhetorical exercise. Nothing was at stake. The case had already been disposed of on the basis of a lack of attribution, according to the Majority. And given that its conclusions would be of no practical consequence, the finders of fact did not face the same pressures to carefully weigh all of the evidence. So they instead chose to consider only the evidence that supported their conclusion, and ignored everything to the contrary. Again, this is a failure to give reasons, an act in excess of the Tribunal's powers, and further underlines the serious departure from the fundamental procedural right to have one's evidence heard.

2. The Majority Failed to Hear Tulip's Submissions on Documentary Evidence Respondent Produced for the First Time at the Hearing in Violation of Respondent's Disclosure Obligations

57. In an unusual development at the Hearing, a witness presented by the Respondent was ordered by the Tribunal to produce additional documents that were then submitted as exhibits into the evidentiary record.[33]

58. These documents, which were internal Emlak memoranda regarding the decision to terminate the Ispartakule III Contract, were clearly covered by the category of documents

[33] Transcript, Day 5, 10:20-11:5 (Ruttinger and Keskin) ("MR. RUTTINGER: And you mentioned guidance from the construction control department in the memorandum of 4th February 2010. We can put it up on the board if you like. But do you recall what that memorandum discussed and recommended? MR KESKIN: On 4th February 2010, that was not the letter we received before the proposal. It was a different letter, it was a different document. And I took into consideration the assessments contained in that document. MR. RUTTINGER: I don't understand. When did you receive another document from the construction control department?"); Transcript, Day 5, 15:11-12 (Griffith) ("THE PRESIDENT: Mr. Schneider, can I ask whether you've got any objection to this document being produced?").

requested by Claimant during the exchange of document requests in the initial stages of the arbitration. They were not produced at that time as ordered by the Tribunal, nor was there any claim by Respondent that they were being withheld on the basis of privilege. The fact of their existence was simply withheld, in violation of Respondent's disclosure obligations and fundamental rules of procedural fairness.

59. Tulip, and the Tribunal, only learned of the existence of these documents during counsel's cross examination of Mr. Keskin, the former General Counsel of Emlak. Once this fact was disclosed, Tulip's counsel proceeded to ask Mr. Keskin to describe the contents of these additional memoranda. When the witness demurred, indicating he would need to consult the documents again, the Tribunal halted the examination and ordered that it be resumed once the additional documents had been located. As the President of the Tribunal reasoned: "It's never useful to have someone say what is in a document when you can read the document and find out."[34]

60. Thus, on Friday, 27 September, the third-to-last day of the Hearing, three new documents were produced by Respondent at the request of the Tribunal: (1) 11 February 2010 memo written by Emlak's Construction Control Department, (2) 18 May 2010 memo also written by the Construction Control Department, and (3) 18 May 2010 memo written by Emlak's Legal Department. These documents were quickly translated and submitted to the Tribunal as Hearing exhibits H-956, H-957, and H-958, respectively.

61. At the close of the Hearing, the President invited Tulip's counsel to make submissions on these three documents and specifically their substantive import to the

[34] Transcript, Day 5, 18: 15-16 (Griffith).

jurisdictional and merits issues under consideration.[35] And indeed, all three featured prominently in Tulip's closing submissions.

62. The two 18 May 2010 memoranda are discussed, briefly, by the Tribunal in the Award at paragraphs 152 and 153. However, the Tribunal does not acknowledge the existence of the 11 February 2010 Construction Control Department memorandum—which reversed the Construction Control Department's prior written recommendation to grant Tulip an extension issued just one week earlier. The existence and import of this 11 February 2010 memorandum goes entirely unmentioned in the Award's 138 pages.

63. The 11 February 2010 Construction Control Department memorandum is critical to understanding the sequence of events leading up to the termination of the Contract. Per the factual findings of the Award, in a memorandum dated 4 February 2010, Emlak's Construction Control Department recommended that Tulip JV be granted an extension on project deadlines. Mr. Kurum approved and signed this recommendation.[36]

64. On 11 February 2010, the same Construction Control Department issued a second memorandum. This memorandum recommended termination of the Contract for the ostensible reason of construction delays. The Tribunal ordered that Claimant be allowed to recall Mr. Kurum to testify with regard to this new document. During this second cross-examination, Mr. Kurum admitted that "in fact, in the course of those six days", *i.e.*, the days between the first and second Construction Control Department memoranda, "nothing changed."[37]

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[35] Transcript, Day 8, 57:18-58:9 (Griffith and Newberger).
[36] Award, para. 143.
[37] Transcript Day 6, 34:16-17; 35:9-10 (Kurum).

65. The Majority accepted Mr. Kurum's testimony with regard to the substance of "commercial reasons" for termination, referring to testimony given by Mr. Kurum during his first cross examination on Day 4 of the Hearing.[38] This critical evidence—the 11 February 2010 memorandum—was only made available to Tulip on Day 5. When Mr. Kurum was recalled on Day 6 so that he might be confronted with the evidence Respondent previously concealed, Mr. Kurum confirmed that the crucial recommendation to cancel the project lacked any new reasons, commercial or otherwise.

66. If Mr. Kurum could not provide any reasons for the Construction Control Department's change of heart, there was no commercial reason for it. If there was no commercial reason for the Construction Control Department's change of heart, its stated recommendation in the 11 February 2010 memorandum must, logically, be pretext rather than honest exercise of contractual discretion.

67. The Majority's failure to discuss the 11 February 2010 Construction Control Department memorandum, and Mr. Kurum's testimony concerning this document, disregards the Tribunal's own reason to call for the production of the additional Emlak documents at the Hearing in the first place. It violates the commitment made by the President of the Tribunal to hear Tulip's submission on this evidence Respondent previously concealed. The Majority's conduct thus is in violation of its own procedural orders and directly deprived Tulip of the ability to disprove a central premise of the Award.

68. The Majority's failure to hear submissions on the 11 February 2010 Construction Control Department memorandum was outcome determinative. It does not square with the

[38] Award, para. 319.

Tribunal's purported conclusion that "[i]t is not established by the evidentiary record that Emlak invoked alleged contractual breaches as a pretext…."[39] This is because Emlak's Construction Control Department had written a memo that was approved by Mr. Kurum just six days earlier—on 5 February 2010—stating a completely contrary conclusion that ***an extension of time to Tulip was warranted***, and that ***construction delays <u>did not justify termination</u>***. Put simply, these two February 2010 documents—both drafted by the Construction Control Department—cannot be reconciled with each other on the basis of any technical or commercial rationale. It is difficult, if not impossible, to explain the 180 degree reversal by Emlak's Construction Control Department as to the advisability of an extension for Tulip's contract absent an intervening political directive.

69. Indeed, of the four grounds for termination that Emlak gave in its 18 May 2010 decision, it was Tulip's submission that this 11 February 2010 memo affirmatively demonstrated that the fourth and final ground—lack of construction progress—was also pretextual.

70. But rather than grapple with this inconsistency in the documents, or explain its view of what must have occurred during those six days in February 2010, or even dismiss the 11 February 2010 memo as irrelevant and unpersuasive, the Tribunal simply chose to proceed as if it did not exist. As with the evidence on attribution, the Tribunal took a route that it was not allowed to take: ignore evidence which does not square with the Tribunal's conclusions.

71. If the ICSID system is to include hearings as one of the primary modes by which parties may test evidence and make arguments, then those hearings need to mean something. In this case, because of Respondent's decisions not to submit a witness statement from Mr. Bayraktar and to withhold certain documents in violation of its disclosure obligations, Claimant

[39] Award, para. 318 (CE_A-2).

was forced to present some of its evidence for the first time at the Hearing. For a Tribunal to then ignore this evidence in its Award compounds the procedural inequity.

B. The Majority's Failure to Hear Tulip's Hearing Submissions Gives Rise to Justifiable Doubts Regarding the Majority's Impartiality

72. On the final day of the Hearing, during Tulip's closing submissions, Tulip's counsel at one point began to discuss Respondent's violation of its disclosure obligations by failing to produce or even notify Tulip as to the existence of the three Emlak memoranda described above until the Hearing. The President of the Tribunal, Dr. Griffith, then engaged Tulip's counsel in colloquy, suggesting that it would be more productive for Tulip to make its case with regard to these three documents, rather than simply to complain about the manner in which they were produced:

> THE PRESIDENT: Well, I mean, I can't remember the detail of the Redfern columns. […] But I mean, we have the documents now; isn't it best just to make the case on them?
>
> MR. NEWBERGER: Yes. I'm only really discussing as it relates to the merits. This is not about the procedural deficiencies. I'm only noting that these pieces of critical evidence, material evidence, inform us today—Friday night—of when the serious breaches of the BIT really began and what were Respondent's motives. And, if you will, it connected some of the dots for us on the merits of this dispute. That's my point, Mr. President. And that's why we have hearings, thank goodness. That's why we have evidentiary hearings; we don't just submit on the papers….[40]

73. Later that day, the President recalled his colloquy with Mr. Newberger on this point as he brought the proceedings to a close:

> THE PRESIDENT: Well thank you very much. We are really indebted to the amiable cooperation of the parties to secure the completion of the hearings; a

[40] Transcript, Day 8, 57:18 - 58:9 (Griffith and Newberger).

> little bit pressed, but it merely vindicates the Tribunal's gloomy view that we would require eight days rather than, I think, the six originally stated by the parties as sufficing. It does confirm—I agree with Mr. Newberger—the use and utility of having a hearing, even in a paper-based case such as this.[41]

74. Nevertheless, despite the President's assurances that Tulip could make its case on these three critical documents, the 11 February 2010 memo went entirely unremarked upon in the Tribunal's Award. This was one of the documents on which Tulip relied to demonstrate what the Tribunal agreed was the central issue for the merits of the dispute—whether or not Emlak's termination decision was commercially motivated or whether that explanation was pretextual. And yet the Award fails to even acknowledge this argument by the Claimant.

75. This failure gives rise to justifiable doubts about the Tribunal's impartiality. Both parties to an ICSID dispute need to have an equal opportunity to present their arguments and evidence. Both parties have the right to expect that the Tribunal will give equal attention to their claims. It is apparent that this did not occur in this case.

C. The Majority's Attribution Findings Are Inconsistent with the Principle of Equality of the Parties

76. For the reasons discussed in this application, the Majority's attribution findings and conclusions on jurisdiction and the merits are inconsistent with the principle of equality of the parties. For instance, a review of the Award further shows that the Majority failed to apply the evidentiary burdens of proof equally and appropriately to each party on the issues it deemed to be dispositive.

[41] Transcript, Day 8, 212:13-21 (Griffith).

77. First, it should be noted that under public international law, attribution (a jurisdictional issue) is not a matter that should be analyzed according to burdens of proof at all. As the ICJ noted in *Fisheries Jurisdiction*:

> [T]here is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.'"[42]

78. The ICJ further confirmed in the same case that:

> Although a party seeking to assert a fact must bear the burden of proving it, *this has no relevance for the establishment of the Court's jurisdiction*, which is a "question of law to be resolved in the light of the relevant facts."[43]

79. Nevertheless, a close reading of the Award indicates that the Majority considered Tulip to bear the burden of proof with respect to all aspects of jurisdiction. While this is clearly incorrect as a matter of public international law, what makes it an annullable error is that the Tribunal *did not hold Respondent to a similar burden of proof to prove its objection to jurisdiction*.

80. In particular, the Award makes clear that Tulip had established a *prima facie* case that Emlak's act of termination was attributable to the state. The Majority admitted that Tulip

[42] Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 439, 450-51 (4 Dec.) ("Fisheries Jurisdiction") (quoting Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 76, para. 16 and citing *Factory at Chorzow*, 1927, P.C.I.J. (ser. A) No. 9, at 32) (CLA_A-7).

[43] *Id*. at 450 (emphasis added) (citing Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 437, para. 101 and Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 76, para. 16).

had put forward evidence establishing that "from an ordinary company law perspective, Emlak was subject to the control of TOKI and, therefore, the Turkish State."[44]

81. The Majority further conceded that TOKI had "at times used Emlak in order to fulfil a specific public purpose" and that it was therefore "capable of exercising a degree of control over Emlak to implement elements of a particular state purpose."[45]

82. The Majority even admitted that "[t]here is some limited evidence supporting the Claimant's contention that the decision to terminate the Ispartakule III contract was connected to TOKI and the exercise of its public power," pointing specifically to a newspaper article in which Mr. Bayraktar stated that the termination was done "to protect the public interest."[46]

83. Nevertheless, the Majority, pivoting on a single "However," held that "the weight of the evidence is strongly to the contrary, to establish that the decision to terminate the Contract with Tulip JV was made by the Board of Emlak independently, in the pursuit of Emlak's commercial interests and not as a result of the exercise of sovereign power by TOKI."[47]

84. Thus, the Majority acknowledged that Tulip had effectively established a *prima facie* case on attribution, but proceeded as if this was not the case. In the ordinary course of a judicial proceeding, for an issue analyzed according to relative burdens of proof, the evidentiary burden would have necessarily shifted to Respondent to establish with its own evidence that this was not so. Specifically, the Respondent would be expected to show that TOKI was not using

[44] Award, para. 307 (CE_A-2).
[45] *Id.*, para. 308.
[46] *Id.*, para. 310.
[47] *Id.*, para. 311.

Emlak to achieve a sovereign purpose in this particular case and that Emlak's termination of the Ispartakule III Contract was carried out in good faith and with honesty-in-fact.

85. Instead, the Tribunal decided to proceed on the basis that the burden was kept on the side of the Claimant. This is evident throughout the Majority's discussion of attribution:

- In paragraph 318, the Award states that "[i]t is not established by the evidentiary record that Emlak invoked alleged contractual breaches as a pretext, in fact acting under the control of TOKI to promote or achieve an ulterior purpose of interest to the State."[48] This is not the same as saying that the inverse is true—that Respondent has established by the evidentiary record that there was no pretext. The Tribunal quite clearly seems to be employing a burden analysis, and the burden is implicitly still on Tulip.

- In paragraph 319, the Award states that "the evidence of Mr. Kurum (which is accepted by the Tribunal) establishes that there were compelling commercial reasons for termination…." While the Majority seems to be saying that Respondent had established a crucial point, it in fact is requiring Respondent to clear a rather low bar. For it is one thing to say that there were compelling commercial reasons; it is quite another to find that Emlak *actually acted* because of these reasons. Here again, the Award does not put Respondent to its proof to demonstrate that Emlak's actions were not taken at the order of TOKI in pursuit of its sovereign interests.

[48] *Id*., para. 318.

- In paragraph 321, the Award notes weakly that "there were legitimate commercial reasons" for Emlak to act as it did. Again, this is not a finding that these actually *were* Emlak's reasons for terminating the Ispartakule III Contract, only that these *may have* been its reasons for doing so.

- Similarly, in paragraph 321, the Award states that "the evidence militates against the conclusion that the termination of the Contract was pre-textual…." This is not a finding in Respondent's favor but instead the language of burdens, with the implication that Tulip still bore the burden on this point.

86. This was not an even-handed treatment of the parties. Respondent was only expected to establish *some plausible basis* for why Emlak could have acted as it did. And indeed, the Tribunal only made findings about these *possible* motivations, not what Emlak's actual motivation was for terminating Tulip's contract.

87. Tulip, by contrast, was expected to establish by clear and convincing evidence that TOKI *actually was* using Emlak to accomplish a sovereign purpose in this particular case. And this burden did not shift even once Tulip had established a *prima facie* case.

88. This impermissible imbalance in the burdens placed on each party was made worse by the Majority's apparent decision to ignore the Hearing testimony of Minister Bayraktar with regard to attribution.

89. Specifically, although the Majority conceded that the *Milliyet* newspaper article in which Mr. Bayraktar said that the termination was done "to protect the public interest" constituted "some limited evidence" supporting a finding of attribution, the Majority, strangely,

did not consider Minister Bayraktar's Hearing testimony confirming his statements in the Turkish press to be additional evidence to that effect. For, as noted above, Minister Bayraktar's Hearing testimony on the relationship between Emlak and TOKI goes entirely unremarked upon in the Award, a circumstance highlighted by Mr. Jaffe in his Separate Opinion.[49]

90. It is impossible to understand how the Majority could conclude that a newspaper article was "some limited evidence", but was then unable to find support for Claimant's *prima facie* case in the best evidence possibly available – the oral testimony of a sitting government Minister that fully confirmed those newspaper accounts. The reader does not learn on what basis the Tribunal proceeded on this point of critical significance.

IV. Failure to State Reasons

91. Article 52(1)(e) provides that an award may be annulled for a failure to state reasons. Annulment committees have held that the reasons requirement does not require the statement of adequate reasons[50] or require that the tribunal address every argument raised by the parties.[51] Rather, it refers to the statement of contradictory reasons, a material logical gap in reasons, or a failure to address each question posed by the parties. Here, the Award fails in all three ways.

A. The Majority's Conclusion That Emlak's Conduct Was Not Attributable to Turkey Because Turkey Did Not "Instruct" or "Direct" Emlak Is Unmotivated

[49] Separate Opinion, para. 6 (CE_A-3).

[50] *See, e.g., Wena Annulment*, para. 79 ("The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decision were appropriate or not, convincing or not.") (CLA_A-18); *CDC Annulment*, para. 70 (CLA_A-4).

[51] *See, e.g., MCI Power Group LC and New Turbine Inc. v. Ecuador*, ICSID Case No. ARB/03/6 (Decision on Annulment dated 19 Oct. 2009) ("*MCI Annulment*"), para. 67 (CLA_A-12).

92. With regard to attribution under Article 8 of the ILC Articles on State Responsibility, the Award and the Separate Opinion were in agreement that the legal test is disjunctive.[52] In other words, for an entity's acts to be attributable to the state, its actions may be "**on the instructions of, *__or__* under the direction *__or__* control of**"[53] the state. Evidence of any of the three—instructions, direction, or control—is sufficient to establish a basis for attribution under the BIT.

93. The Award states that the Tribunal considered whether any of the categories—instructions, direction, or control—were met.[54] The Award even states in precise terms the question the Majority believed was dispositive to the issue of Article 8 attribution: "The question before the Tribunal is whether TOKI exercised effective control over Emlak and thereby enforced public policy in the administration and termination of the Contract or whether any aspect of the administration and termination of the Contract was performed under the instructions or direction of TOKI in an exercise of sovereign power."[55]

94. However, the Award then goes on to focus almost all of its analytical efforts on the final element—control—and specifically on whether TOKI had "effective control" of Emlak with respect to the decision to terminate the Ispartakule III Contract.

95. No similar effort is made by the Majority to define the standards for "instructions" or "direction" or to elaborate on the kind of evidence that would establish their

[52] Award, para. 303 ("Plainly, the words 'instructions', 'direction' and 'control'…are to be read disjunctively.") (CE_A-2); Separate Opinion, para. 1 ("…I join [the Majority] as well in their observation that the words 'direction' and 'control' in Art 8 are to be read disjunctively.") (CE_A-3).

[53] Award, para. 302 (citing Article 8 of the ILC Articles) (emphasis added).

[54] Award, para. 303 ("The Tribunal has, therefore, considered whether any of the categories of 'instructions', 'direction' or 'control' are met for the purposes of Art 8.") (CE_A-2).

[55] *Id*., para. 305.

occurrence. With regard to its analysis of the "instructions" and "direction" elements, the Award only says the following:

- An analysis of the content and nature of key decisions taken by Emlak's Board with respect to the Contract, including minutes and agenda papers, does not lead to the conclusion that Emlak acted under the governmental control, direction or instructions of TOKI with a view to achieving a certain State purpose.[56]

- There is no basis for the Tribunal to infer that the decision was taken under the control, influence or instruction of TOKI on the basis of any non-commercial considerations.[57]

- Furthermore, there is no evidence of any specific and disproportionate influence by Mr Bayraktar or any instructions from TOKI to make a particular decision for an ulterior sovereign purpose.[58]

96. This is the sum total of the Award's stated reasons for determining that there was no basis for finding attribution under the "instructions" or "direction" elements of ILC Article 8. In contrast to its fulsome discussion of "effective control", "instructions" and "direction" receive only the most cursory mention.

97. Tulip respectfully submits that these conclusory declarations do not constitute a statement of "reasons" under the ICSID standard for annulment. The explanation of reasons needs to put a party in a position where it can understand the Tribunal's reasoning process. Yet the Majority wholly failed to analyze or explain, with any specificity, its holding with respect to these two elements of Article 8 attribution, which it admitted were each in and of themselves sufficient grounds for finding such attribution.

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[56] *Id.*, para. 311.
[57] *Id.*, para. 313.
[58] *Id.*, para. 322.

98. Without any definition of "instructions" or "direction" from the Tribunal, it is not possible to explain why the "limited evidence" which the Tribunal considered connected TOKI to the termination is evidence of "control" but not evidence of instruction or direction.[59] The evidence in question is a statement from Mr. Bayraktar, who was both "head of Emlak and the Chairman of TOKI" at the relevant time.[60] On a *prima facie* basis, his connection of the Contract termination to a public policy decision undertaken at the TOKI level is evidence "that the State used its ownership interest as a vehicle for directing the company." [61] The Tribunal's reasons for disagreeing with this assessment are impossible to reconstruct.

99. The lack of a definition of "instructions" and "direction" makes it similarly impossible to understand why Minister Bayraktar's testimony, as well as the testimony of Emlak employees and the documents produced late at the Hearing by Respondent, would not constitute "evidence" of instruction and direction.

100. Moreover, the Majority's admission that "there is some limited evidence" that the "control" element had been met, but that simultaneously there is "no evidence" and "no basis" for finding the "instruction" or "direction" elements to be satisfied makes little sense from a conceptual standpoint.

101. If there is "some limited evidence" of control but "no evidence" of instruction or direction, then the Majority must have believed either that (1) instructions and direction are

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[59] *Compare id.*, para. 310 (finding "some limited evidence supporting Claimant's contention") *with id.*, para. 322 (finding "no evidence of any specific and disproportionate influence . . . or any instructions from TOKI to make a particular decision for an ulterior sovereign purpose.").

[60] *Id.*, para. 245.

[61] *Id.*, para. 306 (quoting James Crawford, "The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries", Cambridge University Press, (2002) pp. 112-113 (Exhibit CLA-53)).

higher standards than control, or that (2) these elements must be proved by a different kind of evidence than what is required to prove control.[62] But the Majority does not explain which of these motivated its reasoning or why it believes them to be the proper legal standard.

102. The Majority's inadequate and incomplete analysis of attribution also quite clearly infected its purported conclusion as to the merits. As stated in the Tribunal's discussion of the merits:

> This issue is inexorably intertwined with the question of attribution. Indeed, it is difficult in this case clearly to separate the issue of attribution from the question of whether the claims presented by the Claimant arise from the BIT. In this regard, in concluding that the conduct of Emlak is not attributable to the State under Art 5 of the ILC Articles, the Tribunal has already determined that none of the conduct in question amounted to the exercise of governmental (*i.e.*, sovereign) power. Similarly, in holding that the actions of Emlak vis-à-vis Tulip JV and the Ispartakule III project are not attributable to the State under Art 8 ILC Articles, the majority of the Tribunal has concluded that such conduct was not carried out under the instructions, direction or control of the State in pursuit of a sovereign purpose. *In sum, the majority of the Tribunal has concluded that there is no cogent evidence of sovereign interference – i.e., sovereign instructions, direction or control* – in Emlak's contractual relations with Tulip JV.[63]

103. Thus, by its own admission, the Tribunal bootstraps its merits conclusion as to whether there was sovereign interference on its prior conclusion that there was no evidence of "instructions", "direction", or "control." There is no separate analysis. It simply refers back to the Award's prior discussion of each of those three elements as they pertained to the question of attribution.

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[62] That "instructions" or "direction" require a higher standard, or different evidence, are conclusions that makes no logical sense since "control", as the term is well understood to mean in international investment law, would require some form of instruction or direction (typically derived from a substantial, but not majority, ownership interest).

[63] Award, para. 358 (emphasis added) (CE_A-2).

104. But, as explained above, the Award's analysis of whether or not there were "instructions" or "direction" by TOKI as regards the termination of the contract is wholly unmotivated. No reasons were given. No attempt at legal analysis was made. Since therefore the Majority's purported conclusion on the merits relies in substance on the prior discussion of attribution, it too must be annulled (to the extent one even considers it to be part of the Award's *ratio* and not *obiter*) for a failure to state the reasons on which it is based.

B. The Majority's Failure to Address Evidence That the Tribunal Itself Requested to Be Submitted Cannot Be Explained

105. As noted above, certain of the evidence on which Tulip ultimately relied was only available for consideration because the Tribunal itself requested it.

106. While it may not be expected that a Tribunal will cite every piece of evidence in its award and say whether it accepts it, rejects it, or deems it to be irrelevant—at the very least an impartial Tribunal would be expected to state its position with respect to evidence that it specifically requested. A failure to do so is a failure to give reasons.

107. To be sure, arbitral Tribunals are often faced with mountains of documents and pleadings by the time they reach the end of an arbitration proceeding, and this proceeding was no different. But only a very small subset of that evidence was submitted at the Hearing by order of the Tribunal. In this case, it was three memoranda, and one witness.

108. The Tribunal deemed this evidence to be sufficiently relevant to request it. The Tribunal surely had not forgotten about its requests by the time it set about to draft its Award. The fact that certain of this requested evidence is wholly absent from the Award therefore

suggests, at worst, willful blindness, and, at best, inexcusable neglect on the part of the Majority. No other conclusion can plausibly be drawn.

109. In this regard, the Majority's failure to address in the Award evidence that it itself requested—including the testimony of Mr. Bayraktar as to the relationship between Emlak and TOKI, as well as the 11 February 2010 memo—is inexplicable. The Award fails to give any reason why the Tribunal would request additional evidence and then, apparently, ignore that evidence in its analysis of the issues.

C. The Majority's Treatment of the Parties' Evidence on Attribution Is Incomprehensible

110. The Tribunal further failed to state reasons for its Award because its reasoning does not "in fact make it possible reasonably to connect the facts or law of the case to the conclusions reached in the award…."[64] The Award cites only a newspaper article quoting Mr. Bayraktar as evidence in favor of Tulip's attribution case.[65] After quoting this article, the Award simply concludes, "However, the Tribunal considers that the weight of the evidence is strongly to the contrary" and proceeds to recite Respondent's evidence.[66]

111. The Tribunal does not explain why it does not credit the newspaper article it claims is the only evidence on which Tulip relies. Readers of the Award are left only to guess as to why the Tribunal did not find this evidence to be persuasive.

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[64] *Rumeli Telekom AS v. Republic of Kazakhstan*, ICSID Case No ARB/05/16 (Decision of the ad hoc Committee on the Application for Annulment dated 25 Mar. 2010) ("*Rumeli Annulment*"), para. 138 (quoting *Soufraki v, U.A.E.*, ICSID Case No ARB/02/7 (Decision on Annulment dated 5 June 2007), para. 128) (CLA_A-16).

[65] Award, para. 310 (CE_A-2).

[66] *Id*., para. 311.

112. To "connect the facts or law of the case to the conclusions reached in the award" one might reasonably assume that the Majority believed Mr. Bayraktar to have been misquoted. But this implication fails, considering that Mr. Bayraktar repeated similar statements attributed to him–and contradicting the Tribunal's own conclusions–in his live testimony before the Tribunal.[67] It is therefore not possible "reasonably to connect" the Tribunal's reasoning to "facts…of the case."[68]

113. Further examples of the Award's incomprehensible reasons can be found in the evidence that the Majority turns to following its dispositive "However" in paragraph 311 of the Award:

> However, the Tribunal considers that the weight of the evidence is strongly to the contrary, to establish that the decision to terminate the Contract with Tulip JV was made by the Board of Emlak independently, in the pursuit of Emlak's commercial interests and not as a result of the exercise of sovereign power by TOKI. *An analysis of the content and nature of key decisions taken by Emlak's Board with respect to the Contract, including minutes and agenda papers,* does not lead to the conclusion that Emlak acted under the governmental control, direction or instructions of TOKI with a view to achieving a certain State purpose. Rather, the evidence confirms that Emlak acted in each relevant instance to pursue what it perceived to be its best commercial interest within the framework of the Contract.[69]

114. To be clear, Tulip had alleged that TOKI made a politically motivated decision to terminate the Ispartakule III Contract and then exercised its control over Emlak in pursuit of these sovereign ends. In other words, Tulip's submission was that the claims of commercial

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[67] Separate Opinion, para. 6 (quoting Transcript, Day 3 at 25:8-13, 25:22-26:12, 34:10-18; 52:12-53:3) (CE_A-3).

[68] *Rumeli Annulment*, para. 138 (quoting *Soufraki*, para. 128) (CLA_A-16).

[69] Award, para. 311 (emphasis added) (CE_A-2).

interests stated in the termination decision were merely a cover for a politically motivated decision.

115. And yet, inexplicably, the Tribunal determined that the best place to look for evidence of pretext was *in the Emlak Board meeting minutes themselves*—the documents that Tulip alleged were created to cover-up the political motives. If there were a pretext to be found, that is not the place where one would expect to find it.

116. The Tribunal's conclusion that these documents "strongly" establish that there was not pretext fails to constitute a statement of "reasons."

D. The Award's Treatment of Attribution Contradicts Its Purported Resolution of the Merits of the Dispute

117. *Ad hoc* committees have repeatedly acknowledged that genuinely contradictory reasons amount to a lack of reasons.[70] This is tempered by the observation in *Vivendi I* that "tribunals often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be a reflection of such conflicting considerations."[71] This statement in *Vivendi I* confirms that it is not the statements on the face of the Award that must be contradictory, but the rationale for decision must be inconsistent with the legal analysis undertaken by the tribunal.

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[70] *MINE Annulment*, paras 5.08 and 5.09 ("[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review…[T]he 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. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.") (CLA_A-13).

[71] *Compania de Aguas del Aconquija SA and Vivendi Universal SA v. Republic of Argentina*, ICSID Case No. ARB/97/3 (Decision on Annulment dated 3 July 2002) ("*Vivendi I Annulment*"), para. 65 (CLA_A-5).

118. Here, the Award's treatment of the merits reveals a logical inconsistency that constitutes the kind of annullable error contemplated by the failure to state reasons standard.

119. Specifically, the Majority introduces its discussion of the merits by stating that, despite the fact that it had already found that there was no basis for attribution and therefore no jurisdiction for it to decide such questions, "the Tribunal will turn to consider whether the claims presented by the Claimant in respect of Emlak could amount to any violations of the BIT *if the Tribunal were to assume* that they could be characterized as treaty claims *attributable to the Respondent*."[72]

120. The Tribunal therefore makes an assumption, for the purposes of this exercise, that Emlak's actions were attributable to the state. And, as the Majority had previously stated, in order for that assumption to be made, the Majority had to also assume that in its 18 May 2010 termination decision "Emlak invoked alleged contractual breaches as a pretext, in fact acting under the control of TOKI to promote or achieve an ulterior purpose…to the State."[73]

121. By the Tribunal's own admission, this was the starting assumption that had to be made in order to proceed with its analysis of the merits—that the commercial justifications given by Emlak for terminating the contract were a pretext for a political decision by the Turkish state to oust the Dutch investors.

122. Yet, what follows after this are repeated findings contradicting that initial assumption. On Tulip's fair and equitable treatment ("FET") claim, the Tribunal found that "the termination of the Contract was not a violation of [FET] in circumstances where Emlak was

[72] Award, para. 367 (emphasis added) (CE_A-2).
[73] *Id.*, para. 318.

faced with a project that was in substantial financial hardship and beset with severe construction delays."[74]

123. Likewise, on Tulip's expropriation claim, the Tribunal found that "the evidence offered by the Claimant falls short of establishing a violation of the BIT, inasmuch as the termination was pursued within the framework of the Contract and in Emlak's perceived commercial best interests."[75]

124. The premise that Emlak was not in fact acting in its "perceived commercial best interest" but rather on political orders was *assumed* in order for the Tribunal to permit itself to reach the merits questions at all. And yet, once it got there, the Tribunal found that this assumption was, in its estimation, incorrect. This is plainly a logical impossibility. The Award does not and cannot explain the untenable sequence of this reasoning.

125. Indeed, the contradictions and logical gymnastics that were required to allow the Tribunal to plausibly reach the merits in its Award raise the question: why go to the trouble? If the Majority felt confident that the evidence supported its determination on attribution, there was no need to go on and attempt to add further support by impermissibly considering the merits.

126. If instead the Majority was simply trying to protect its award from future annulment, then that is not a proper activity in which a Tribunal should be engaged. It is the job of a Tribunal to administer justice as best it can, not to short-cut the control mechanism that was built into the ICSID system by tailoring its award to try to avoid annulment.

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[74] *Id.*, para. 414.
[75] *Id.*, para. 417.

V. Manifest Excess of Powers

127. Article 52(1)(b) provides that an ICSID award is annullable if "the Tribunal has manifestly exceeded its powers."[76] Annulment jurisprudence explains that manifest excess of powers under Article 52(1)(b) has two elements: (1) excess of powers and (2) manifestness.[77]

128. A tribunal exceeds its powers in at least three situations. First, a tribunal exceeds its powers if it exercises jurisdiction it does not possess. Second, a tribunal exceeds its powers if it fails to exercise jurisdiction with which it is vested. As the *Vivendi* committee explains:

> It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power.[78]

129. Third, a tribunal exceeds its powers if it acts outside of the terms of reference set by the parties, such as when it fails to apply the applicable law to the dispute or otherwise fails to make a tenable determination of jurisdiction or merits. For instance, the *MINE* committee held:

> [T]he parties to the dispute [have] unlimited freedom to agree on the rules of law applicable to the substance of their dispute and require[] the tribunal to respect the parties' autonomy and to apply those rules. From another perspective, the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal is authorized to function. Examples of such derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex*

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[76] ICSID Convention, art. 52(1)(b).
[77] *Duke Annulment*, para. 98 (CLA_A-6).
[78] *Vivendi I Annulment*, para. 86 (CLA_A-5).

> *aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.
>
> Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment.[79]

130. Excess of powers further must be "manifest." As the *Fraport ad hoc* Committee set out:

> The fact that difficult questions of law are raised, requiring extensive argument, is not necessarily conclusive of whether or not the Tribunal manifestly exceeded its powers. Instead, because the purpose of the inquiry is to determine the reasonableness of the Tribunal's approach, there is necessarily a heavy burden upon the applicant to establish a manifest excess of powers. The Committee must determine the reasonableness of the Tribunal's approach in light of the evidence and submissions which were before the Tribunal, and not on the basis of new evidence.[80]

131. The *ad hoc* Committee in *Duke v. Peru* stated further:

> An *ad hoc* committee will not therefore annul an award if the tribunal's disposition on a question of law is tenable, even if the committee considers that it is incorrect as a matter of law. The existence of a manifest excess of powers can only be assessed by an ad hoc committee in consideration of the factual and legal elements upon which the arbitral tribunal founded its decision and/or award based on the parties' submissions. Without reopening debates on questions of fact, a committee can take into account the facts of the case as they were in the record before the tribunal to check whether it could come to its solution, however debatable. Is the opinion of the tribunal so untenable that it cannot be supported by reasonable arguments? A debatable solution is not amenable to annulment, since the excess of powers would not then be 'manifest.'[81]

A. The Tribunal's Merits Conclusions Are Not Tenable

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[79] *MINE Annulment,* paras. 5.03-.04 (CLA_A-13).
[80] *Fraport Annulment*, para. 45 (CLA_A-8).
[81] *Duke Annulment,* para. 99 (CLA_A-6).

132. The Tribunal's purported determination as to the merits of Tulip's BIT claims constitutes a manifest excess of powers. First, as noted above, the Tribunal's merits analysis proceeds from a premise that the Tribunal itself then refutes. A rational decision maker cannot simultaneously believe that it has jurisdiction on the basis that Emlak's acts were attributable to the state in these circumstances and then find that nevertheless "the termination was pursued within the framework of the Contract and in Emlak's perceived commercial best interests."[82]

133. More importantly, in purporting to resolve the merits of the dispute, the Tribunal was exercising jurisdiction that, by its own admission, it did not have. The Tribunal had already determined, by Majority, that the Emlak Board's act of terminating the Ispartakule III Contract was not attributable to the state under the ILC Articles. Once that determination was made, the Tribunal's power to speak with the force of law on any other subject – merits, damages, etc.— was necessarily precluded.

134. Put differently, the Majority's determination that Emlak's acts were not attributable to the state, and therefore that the Tribunal had no jurisdiction under the BIT, was at least properly within the Tribunal's *competence–competence.* By contrast, the Tribunal's purported determination of the merits of the BIT dispute was only permissible if the Tribunal had already satisfied itself that it affirmatively had jurisdiction under the ICSID Convention. As is apparent from the Award, that was not the case here.

135. The Tribunal's findings with regard to the merits are therefore not tenable as a legal matter. On their face, they exceed the powers of the Tribunal. This is the reverse of the situation outlined in the *Vivendi I* annulment above. Here, a Tribunal, in purporting to resolve

[82] Award, para. 417 (CE_A-2).

the merits of the BIT claims, exercised a jurisdiction that it claimed not to have. Thus, to the extent that one considers these pronouncements to have any legal force (and not to be simply *obiter dictum*) one must necessarily conclude that they are a manifest excess of powers.

136. To be clear, the Tribunal's exercise of jurisdiction, which the Tribunal concluded it lacked, is not made permissible simply because the Majority reached that jurisdictional dismissal in a manner requiring annulment. Annulment concerns the control of the arbitral process of decisionmaking, not the appeal of its result. A manifest failure by a tribunal to stay within the jurisdiction the tribunal itself set is an untenable arrogation of power. As a matter of process, if ICSID arbitration is to have integrity, a tribunal at least has to abide by its own jurisdictional determinations. Or more prosaically, two annulable wrongs don't make an annulment-proof right.

B. The Tribunal's Attribution Conclusions Are Not Tenable

137. As with the Tribunal's merits conclusions, the Majority's conclusions with regard to attribution are not tenable, and as such constitute a manifest excess of powers.

138. No reasonable tribunal could conclude on the basis of the evidence presented—*all* of the evidence presented—that Emlak's termination decision was not attributable to Respondent. Likewise, no reasonable tribunal could fail to recognize the significance of:

a) A sitting government minister;
b) Confirming in his live testimony the government's interest in and responsibility for the acts in question;
c) After having previously made statements to the press *at the time of the decision* that the acts in question were indeed undertaken for a sovereign purpose.

139. However, that appears to be what occurred in this case. The Majority's conclusion that the acts in question were not attributable to Turkey under these circumstances is not an incorrect application of the law, it is rather a wholesale failure to apply the international law governing attribution.[83]

VI. Relief

140. For the foregoing reasons, Tulip respectfully requests that the Award be annulled in its entirety.

[83] *See, e.g., Helnan Int'l Hotels AS v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19 (Decision on Application for Annulment dated 29 May 2010) ("*Helnan Annulment*"), para. 51 ("But it is an entirely different matter to impose upon an investor, as a condition 'to become an international delict for which [the Contracting State] would be held responsible under the Treaty,' a requirement that the decision of a Government Minister, taken at the end of an administrative process, must in turn be challenged in the local courts. Such a decision is one for which the State is undoubtedly responsible at international law, in the event that it breaches the international obligations of the State. Moreover, the characterisation of such an act as unlawful under international law is not affected by its characterisation as lawful under internal law. Thus a decision by a municipal court that the Minister's decision was lawful (a judgment which such a court could only reach applying its own municipal administrative law) could not preclude the international tribunal from coming to another conclusion applying international law.") (internal citations omitted) (CLA_A-9).

Respectfully Submitted,

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