

Libananco Holdings Co. Limited v. Republic of Turkey  
(ICSID Case No. ARB/06/8) – Annulment Proceeding

Excerpts of Decision on Annulment dated May 22, 2013 made pursuant to  
Rules 48(4) and 53 of the ICSID Arbitration Rules of 2006

Applicant

Libananco Holdings Co. Limited (“Libananco”, company incorporated under the laws of Cyprus)

Respondent

Republic of Turkey

Ad Hoc Committee (appointed by the Chairman of the Administrative Council of ICSID under Article 52(3) of the ICSID Convention)

Andrés Rigo Sureda (President of the Committee, Spanish)

Hans Danelius (Swedish)

Eduardo Silva Romero (Colombian/French)

Decision

Decision on Annulment of May 22, 2013 in English concerning the Award of September 2, 2011 in English available at: <http://italaw.com/sites/default/files/case-documents/ita0466.pdf>.

Instrument relied on for consent to ICSID arbitration

Energy Charter Treaty (“ECT”)

Procedure

*Applicable Arbitration Rules:* ICSID Arbitration Rules of 2006

*Place of Proceedings:* Washington, D.C.

*Procedural Language:* English

*Full procedural details:* Available at:  
<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C77&tab=Tab3>

Factual Background

The full factual background is described in the Award of September 2, 2011, available at: <http://italaw.com/sites/default/files/case-documents/ita0466.pdf>.

The dispute concerned the seizure, on June 12, 2003, by the Republic of Turkey of two Turkish utility companies, Cukurova Elektrik Anonim Sirketi (“ÇEAŞ”) and Kepez Elektrik Turk Anonim Sirketi

("Kepez") in which Libananco (Claimant in the original arbitration) held shares, as well as the cancellation of concession agreements entered into by these two companies and the Respondent. Libananco claimed that the actions of the Respondent amounted to an expropriation under the ECT.

The Award concluded that the Tribunal had no jurisdiction over the dispute because Libananco had failed to establish ownership of the two companies on the critical date of the alleged expropriation, June 12, 2003. Consequently, the Tribunal dismissed Libananco's claims in their entirety and ordered Libananco to pay a portion of the Respondent's legal fees and advance on costs.

Libananco subsequently applied for annulment of the Award on the grounds provided for in Article 52(1)(b), (d) and (e) of the ICSID Convention. On May 22, 2013, the *ad hoc* Committee dismissed Libananco's application for annulment.

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# EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**LIBANANCO HOLDINGS CO. LIMITED**  
*Applicant*

v.

**REPUBLIC OF TURKEY**  
*Respondent*

ICSID Case No. ARB/06/8  
**ANNULMENT PROCEEDING**

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## DECISION ON ANNULMENT

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**Members of the *ad hoc* Committee**

Dr. Andrés Rigo Sureda, President  
Judge Hans Danelius  
Dr. Eduardo Silva Romero

**Secretary of the *ad hoc* Committee**

Ms. Martina Polasek

*Representing Applicant*

Mr. Robert Volterra  
Mr. Stephen Fietta  
Mr. Ashique Rahman  
Mr. Bernhard Maier  
*Volterra Fietta*  
London, United Kingdom

Prof. Andreas Lowenfeld  
New York, United States

*Representing Respondent*

Dr. Veijo Heiskanen  
Mr. Matthias Scherer  
Ms. Laura Halonen  
*LALIVE*  
Geneva, Switzerland

*Date of dispatch to the Parties: May 22, 2013*

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## I. PROCEDURAL HISTORY

1. On December 12, 2011, Libananco Holdings Co. Limited (“Applicant”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application requesting the annulment of the award rendered on September 2, 2011 (“Award”) in the case between Applicant (“Claimant” in the original proceedings) and the Republic of Turkey (“Respondent”). The application (“Application”) was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”).
2. Under Article 52(5) of the ICSID Convention and Rule 54(1) of the Arbitration Rules, the Application contained a request for a stay of enforcement of the Award, concerning the amount of US\$15,602,500.00 and interest in favor of Respondent.
3. On December 20, 2011, the Secretary-General informed the parties that the Application had been registered on that date. The parties were also notified that, pursuant to Rule 54(2) of the Arbitration Rules, enforcement of the Award was provisionally stayed.
4. By letter of February 14, 2012, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the parties that an *ad hoc* Committee (“Committee”) had been constituted – composed of Dr. Andrés Rigo Sureda (Spanish) as President, and Judge Hans Danelius (Swedish) and Dr. Eduardo Silva Romero (Colombian and French) as Members – and that the annulment proceeding was deemed to have begun on that date. The parties were also informed that Ms. Martina Polasek would serve as Secretary of the Committee.
5. On February 16, 2012, the Committee invited Applicant to file the reasons for the request for stay of enforcement of the Award by March 2, 2012 and Respondent to file its observations thereon within fourteen days from Applicant’s submission of reasons. The Committee received Applicant’s statement of reasons for the continued stay of enforcement on March 2, 2012 and, after an extension, Respondent’s observations on the Applicant’s request on March 23, 2012.

6. On March 14, 2012, Applicant filed a Request for Provisional Measures. By letter of March 15, 2012, the Committee invited Respondent to file its observations on the Request for Provisional Measures by March 23, 2012. The Committee received Respondent's observations on March 23, 2012, a reply by Applicant on March 29, 2012 and a rejoinder by Respondent on April 9, 2012.

7. By agreement of the parties the Committee held its first session in Paris, France, on April 11, 2012. Present at the session were:

Attending on behalf of Applicant

[...]

Attending on behalf of Respondent

[...]

8. The parties made two rounds of oral submissions on Applicant's requests for stay of enforcement of the Award and provisional measures. They also agreed on a number of procedural matters. Among other things, it was agreed that the place of proceedings would be Washington, D.C. and that the applicable arbitration rules would be the Arbitration Rules in force as of April 10, 2006.

9. On May 7, 2012, the Committee issued its Decision on Applicant's Request for a Continued Stay of Enforcement of the Award. The Committee decided to continue the stay of enforcement of the Award until the Committee's final decision on the Application. While the Committee noted that the parties did not dispute the power to impose conditions on the stay of enforcement, it rejected Respondent's request that a continued stay should be conditional on the provision of security. It noted that it was common ground that Applicant had no significant assets and that it could not reasonably conclude, based on the information before the Committee, that Applicant's financial backers should be expected to provide security. It further found that there was no evidence that Respondent's chances of obtaining enforcement of the Award would

deteriorate as a result of the stay of enforcement, if the Application should eventually be rejected. It balanced the impacts of a continued unconditional stay of enforcement and a conditional stay with security, concluding that requiring security in this case would affect Applicant's situation in a disproportionate manner.

10. Also on May 7, 2012, the Committee issued its Decision on Applicant's Request for Provisional Measures. Applicant had requested that the Committee issue protective orders relating to Respondent's alleged illicit espionage of Applicant, its representatives, its counsel, witnesses and experts in the underlying arbitration. According to Applicant, the requested provisional measures derived directly from the findings of fact and determinations made by the Tribunal in the underlying arbitration. Respondent allegedly continued its espionage following certain protective orders issued by the Tribunal on May 1, 2008. The Committee stated that it was doubtful that it had the power to rule on a request for provisional measures in view of the absence of a specific reference in Article 52(4) of the ICSID Convention to Article 47 of the Convention dealing with provisional measures.<sup>1</sup> However, the Committee found that Applicant had in any event not established the need for such measures in order to preserve its rights in the proceedings before the Committee. Without evidence that Respondent was engaging in activities harmful to Applicant's procedural rights or interests in the annulment proceeding, the Committee could not find a sufficient basis for issuing orders identical to those which were issued by the Tribunal in 2008.

11. On May 9, 2012, Applicant filed its Memorial on Annulment ("Memorial"), accompanied by 91 exhibits and legal authorities (C-285 to C-379), as well as expert reports of [...] (C-331), [...] (C-370) and [...] (C-377). Following a request by Respondent, Applicant produced the originals in Turkish of Exhibits C-305 and C-340.

12. On July 23, 2012, Respondent filed its Counter-Memorial on Annulment ("Counter-Memorial"), including 55 exhibits (R-1073 to R-1127) and 14 legal authorities (RLA-13 to RLA-26) and an expert report of [...].

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<sup>1</sup> Article 52(4) of the Convention provides that "the provisions of Article 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee."

13. On August 22, 2012, Applicant filed a Reply on Annulment (“Reply”) with exhibits and legal authorities (C-380 to C-397), including a second expert report of [...] and an expert report of [...].

14. By letter of September 3, 2012, Respondent requested that the expert reports of [...] be declared inadmissible and struck from the record of the annulment proceeding because they were new evidence on the subject matter of the parties’ underlying dispute concerning a key issue on jurisdiction. Filing the expert reports for the first time in the annulment proceeding was, according to Respondent, meant to reopen the subject matter of the dispute before the Tribunal, countering the purpose of the annulment process.

15. Applicant responded to Respondent’s motion of September 3, 2012 by letter of September 12, 2012, arguing that Respondent’s request had no legal basis under the ICSID Convention and Arbitration Rules. Applicant further stated that the three expert reports were relevant to one ground of annulment (Article 52(2)(b)) in this case and that Respondent’s motion must therefore be rejected.

16. The Committee ruled on the admissibility of the three expert reports in its Procedural Order No. 1 dated September 17, 2012. The Committee made a *prima facie* finding that the expert reports might have some bearing on whether the Tribunal manifestly exceeded its powers. It therefore rejected Respondent’s motion but decided to consider the expert reports only to the extent that they were relevant to the grounds for annulment pleaded by Applicant.

17. On September 21, 2012, Respondent filed its Rejoinder on Annulment (“Rejoinder”), accompanied by 12 exhibits (R-1128 to R-1139) and 5 legal authorities (RLA-27 to RLA-31), a second expert report of [...] and an expert opinion of [...].

18. On November 30, 2012, pursuant to the Committee’s directions, the parties exchanged letters on whether or not they wished to cross-examine the other party’s experts. Respondent requested the cross-examination of [...] while Applicant declined to cross-examine Respondent’s experts.

19. On December 11, 2012, the President of the Committee held a pre-hearing telephone conference with the parties concerning the organization of the hearing on annulment. Following



the telephone conference, the President deliberated with the co-members on a number of disputed issues. The Committee's decisions were included in its Procedural Order No. 2 of December 13, 2012. Among other things, it was decided that [...] would be heard via video link at The Hague, with a member of the ICSID Secretariat present to assist with any documents presented to him. It was also decided that Applicant's representatives could attend the hearing via video link from the World Bank offices in Paris.

20. The hearing on annulment was held at the World Bank facilities in Washington, D.C. on January 14 and 15, 2013. Present at hearing were:

Attending on behalf of Applicant  
*In Washington, D.C.*

[...]

*In Paris*

[...]

Attending on behalf of Respondent  
*In Washington, D.C.*

[...]

21. There were two rounds of oral arguments and a cross-examination of [...] through video link. At the end of the hearing, it was agreed that the parties would not file post-hearing briefs, but would submit statements of costs and proposed corrections to the transcript of the hearing within 30 days of the last hearing day.

22. Accordingly, Respondent filed its submission on costs and proposed corrections to the transcript on February 22, 2013 and Applicant filed its corresponding submission on February 25, 2013.

23. In accordance with Arbitration Rules 38(1) and 53, the proceedings were declared closed on May 6, 2013.

## II. THE AWARD

24. The Award of September 2, 2011 was rendered by a Tribunal composed of Mr Michael Hwang S.C. (President), Mr Henri C. Alvarez Q.C. (appointed by Applicant, Claimant in the original proceedings) and Sir Franklin Berman Q.C. (appointed by Respondent). It was an award on jurisdiction, finding that the Tribunal had no jurisdiction over the dispute and dismissing all of Claimant's claims. In addition, the Award ordered Claimant to pay Respondent US\$602,500 in reimbursement of the expended portion of the Respondent's advance on costs as well as US\$15,000,000 in respect of Respondent's legal fees and out of pocket expenses and interest.<sup>2</sup>

25. The Award (para. 1) introduced the dispute between the parties as follows:

“This arbitration concerns a claim brought by the Claimant, Libananco Holdings Co. Limited (“Claimant” or “Libananco”), a Cypriot company, against the Republic of Turkey (“Respondent” or “Turkey”), in respect of a number of alleged breaches of the Energy Charter Treaty (“ECT”), to which both the Republic of Cyprus (“Cyprus”) and Turkey are Contracting Parties. The dispute concerns the seizure of two Turkish utility companies, Cukurova Elektrik Anonim Sirketi (“ÇEAŞ”) and Kepez Elektrik Turk Anonim Sirketi (“Kepez”), in respect of which Libananco holds shares and the cancellation of concession agreements between the latter two entities and the Respondent on 12 June 2003. The Claimant invoked the dispute resolution provisions contained in Article 26 of the ECT and submitted the dispute to the International Centre for Settlement of Investment Disputes (“ICSID”), pursuant to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).”

26. The procedural history leading up to the Award is described in its paragraphs 9 to 87, which reflect a long and complex proceeding during which both parties made numerous procedural and substantive requests and filed a significant amount of supporting documentation. Following Respondent's preliminary objections to jurisdiction and request for bifurcation of the proceeding, on December 17, 2008, the Tribunal selected certain issues to be heard as preliminary questions pursuant to Arbitration Rule 41(4). The relevant part of the order on bifurcation was quoted in para. 33 of the Award:

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<sup>2</sup> The full operative part of the Award is contained in its para. 570.

“2. The issues which have been selected by the Tribunal for preliminary hearing ... from the Respondent’s Preliminary Objections (R.PO) are:

- a. Issue V.B (Libananco is not an Investor within the meaning of the ICSID Convention and the ECT);
- b. Issue V.E (Libananco’s Claims do not satisfy express conditions on Turkey’s Consent to Arbitration);
- c. Issue VI.A (Libananco is not entitled to the benefits under Art. 17 of the ECT).

3. These issues have been selected on the basis that they are:

- a. genuinely preliminary;
- b. discrete; and
- c. capable of bringing the proceedings to an end;

and can be properly disposed of in summary proceedings without causing undue delay to the substantive disposal of the case if none of the objections was upheld.”

27. The bifurcated issues were described further in paras. 105.1-105.4 of the Award:

“105.1 First, whether Libananco in fact owned ÇEAŞ and Kepez shares before 12 June 2003 (the date of the alleged expropriation). This is the key issue in the present case. It is common ground between the Parties that Libananco would have no standing to prosecute the present arbitration if it did not own shares in ÇEAŞ and Kepez on or before 12 June 2003. The Claimant’s position is that Libananco owned the shares in question before 12 June 2003. The Respondent’s position is that Libananco did not acquire the shares in question on or before 12 June 2003, and that the Claimant has failed to prove the facts which it asserts to be true.

105.2 Second, whether Libananco is an “Investor” within the meaning of the ICSID Convention and the ECT. The difference between the Parties here is whether Libananco has any real corporate existence of its own, or if it is merely an *alter ego* of the Uzan family, and therefore does not qualify as a foreign investor entitled to maintain claims under the ICSID Convention and the ECT. The Respondent submits that Libananco’s corporate veil should be pierced for the reason given above. The Claimant’s position, on the other hand, is that Libananco is plainly an “Investor” within the meaning of the ECT and the ICSID Convention by virtue of its place of incorporation and hence its nationality. The Claimant argues, among other things, that the Respondent has not shown the existence of any rule of corporate nationality that would override the plain definition of “Investor” for the purposes of the ECT and ICSID Convention, or that there is any international law doctrine of “veil-piercing” that would take precedence in the present circumstances.

105.3 Third, whether Libananco's claims satisfy express conditions of Turkey's consent to arbitration. Here, the Respondent relies principally on Article 26(3)(b)(i) of the ECT which states that:

*“Contracting Parties listed in Annex ID do not give ... unconditional consent [to international arbitration] where the Investor has previously submitted the dispute [to the courts or administrative tribunals of the Contracting Party to the dispute]”.*

105.4 Turkey is a Contracting Party listed in Annex ID to the ECT. The Respondent's position is that the subject matter of the present dispute has already been submitted to the Turkish courts by the Uzan family and related entities, and that the latter were unsuccessful in their litigation. For that reason, the Respondent has not consented to arbitrate the present dispute. The Claimant's response is that Libananco itself has never submitted itself to the jurisdiction of the Turkish courts, and therefore has never been a party in any Turkish litigation; further, the disputes before the Turkish courts referred to by the Respondent are not the same as the present dispute before this Tribunal.

105.5 Fourth, whether Libananco is entitled to the benefits of the ECT under its Article 17. The Respondent relies on Articles 17(1) and 17(2) of the ECT to argue that Libananco is not entitled to the benefits of the ECT. In broad terms, these provisions deny the benefits of the ECT to: (i) a legal entity which has 'no substantial business activities' in the country in which it is organised, and is owned by citizens or nationals of a 'third state' (Article 17(1) of the ECT); and (ii) an investment which is one belonging to an 'Investor of a third state' in respect of which the denying Contracting Party does not maintain a diplomatic relationship (Article 17(2)(a) of the ECT). The Respondent has accordingly submitted that: (i) Libananco has never had any substantial business activities in Cyprus; (ii) Libananco is owned or controlled by citizens or nationals of a 'third state'; and (iii) that Turkey and Cyprus do not maintain diplomatic relations. The crux of the Claimant's position is simply that both Cyprus and Turkey are Contracting Parties to the ECT, and consequently neither is a 'third state.'”

28. The Award addressed the first issue, namely whether Claimant had proved that it owned ÇEAŞ and Kepez shares before June 12, 2003, over 140 pages. It noted in regard to this issue that it was common ground between the parties that Claimant had the burden of proof (para. 121 of the Award) and concluded as follows:

“536. For all the foregoing reasons, the Tribunal considers that the Claimant has failed to meet its burden of proof when all the evidence is viewed as a whole. Although some of the evidence submitted by the Claimant tends to support certain aspects of its case, the Tribunal finds

that, in the light of the various inconsistencies, conflicts and changes in the Claimant's account of the events that occurred, its final description and account of how it came to own shares in ÇEAŞ and Kepez is not persuasive. The Claimant has therefore not discharged its burden to show positively that it had acquired, by 12 June 2003, ownership of any of the large quantity of shares in issue in the manner alleged, or at all. Accordingly, the Tribunal finds that the Claimant has not proved that it owned the shares in ÇEAŞ and Kepez, which represent the "Investment" in this arbitration, by the critical date of 12 June 2003."

29. As the Award found that Claimant could not be regarded as the owner of the claimed investment at the relevant time, it stated that it became without object to consider "whether or not Libananco comes within the class of potential investors under either the ICSID Convention or the ECT, since without an 'investment' there can be no 'Investor'" (para. 537 of the Award). With regard to the third issue, whether the Claimant's claims satisfied express conditions of Turkey's consent to arbitrate as provided in Article 26(3) of the ECT and its Annex ID, the Award stated:

"546. [...] It therefore seems to the Tribunal plain, simply on the way in which Article 26(3) is drafted, both that the limited consent is foreseen and understood to take effect automatically, on the giving by the State in question of its "consent to be bound" by the Treaty, and (on the other hand) that the States covered by this provision are definitively identified, once and for all, by Annex ID itself as established at the time the ECT was concluded and opened for signature. It would then follow that the limiting effect cannot be conditional on the statement required by sub-paragraph (ii), either as to the fact of the limitation, or as to its extent; and that is indeed reinforced by the wording of sub-paragraph (ii) itself, with its express indication that the requirement is merely 'for the sake of transparency'. It seems rather to be the case that listing under Annex ID has the automatic effect of registering that the original consent of the Negotiating State in question is limited as precisely described in Article 26(3)(b), sub-paragraph (i)." (footnote omitted)

30. Finally, with regard to the fourth issue whether Claimant was entitled to the benefits of Article 17 of the ECT, the Award stated that the term "third state" in Article 17 of the ECT meant "state not party to the treaty in question" (para. 553) and that "the denying Contracting Party has to 'establish' the ultimate third state nature of the Investor/Investment in order to be entitled to deny him/it the advantages of Part III of the ECT" (para. 556, emphasis in original).

31. The determining conclusion upon which Claimant's case failed therefore concerned the issue of its ownership of the shares in ÇEAŞ and Kepez before June 12, 2003, based on the Tribunal's assessment and analysis of the factual assertions and legal arguments of the parties.

### **III. ISSUES OF ADMISSIBILITY**

#### **1. The Parties' Positions**

##### ***A. The Application***

32. [...]

33. [...]

34. [...]

35. [...]

36. [...]

37. [...]

38. [...]

##### ***B. Memorial***

39. [...]

40. [...]

##### ***C. Counter-Memorial***

41. [...]

42. [...]

43. [...]

##### ***D. Reply***

44. [...]

45. [...]

46. [...]

47. [...]

## **2. The Committee's Analysis**

48. As noted by the parties, the requirements for an application for annulment are set out in Article 52 of the ICSID Convention, which is implemented by Rule 50(1) of the Arbitration Rules. These provisions read in relevant parts as follows:

### **Article 52**

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

### **Rule 50**

#### **The Application**

(1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:

- (a) identify the award to which it relates;
- (b) indicate the date of the application;
- (c) state *in detail*:

[...]



- (iii) in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following:
  - that the Tribunal was not properly constituted;
  - that the Tribunal has manifestly exceeded its powers;
  - that there was corruption on the part of a member of the Tribunal;
  - that there has been a serious departure from a fundamental rule of procedure;
  - that the award has failed to state the reasons on which it is based;
- (d) be accompanied by the payment of a fee for lodging the application.

(emphasis added)

49. While the ICSID Convention only provides that annulment may be requested on one or more of the grounds set out in Article 52(1) and that the application shall be made within 120 days after the date on which the award was rendered (with the exception of the ground of corruption), Rule 50(1) specifies certain formal requirements, including that the application shall “state in detail” the grounds on which it is based. The question is what the wording “in detail” entails, whether it is sufficient to simply specify one or more of the grounds in Article 52(1) of the Convention on which annulment is sought, or whether there should be some additional degree of detail linking the grounds invoked to sections of the award or actions by the tribunal complained of.

50. The *Klöckner II* Committee noted that the ICSID Convention and the Arbitration Rules speak only of “grounds” and not of “reasons,” indicating that there is no requirement that the reasons in respect of the grounds be explained in the application for annulment.<sup>6</sup> It recalled that the drafting history of Rule 50(1) of the Arbitration Rules shows that the provision originally contained a requirement that the application contain the grounds for annulment “together with a detailed statement of the reasons therefore.” Because the term “reasons” was deleted from the text of the provision, it seemed clear to the *Klöckner II* Committee that reasons in support of the grounds are not required in the application.<sup>7</sup> The *Klöckner II* Committee thus concluded that an application for annulment only needs to recite in a detailed manner (i.e. word-by-word) the ground or grounds in Article 52 of the Convention on which the application is based. The *Wena*

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<sup>6</sup> *Klöckner II*, supra note 4, para. 4.40.

<sup>7</sup> *Id.*, para. 4.34 and 4.41.

and *Togo Electricité* Decisions appear to support this conclusion, stating that new arguments in support of the grounds for annulment may be raised later in the proceeding.<sup>8</sup>

51. On the other hand, *Amco I* did not consider a mere recital of the specific subparagraphs of Article 52(1) of the Convention as adequate compliance with Arbitration Rule 50(1)(c).<sup>9</sup> According to *Amco I*, the procedure set out in Arbitration Rule 50 should be analogous to that for filing a request for arbitration pursuant to the ICSID Institution Rules.<sup>10</sup> The Institution Rules require that the request for arbitration contain information concerning the issues in dispute, which would analogously mean that the application for annulment should contain more than just a reference to the grounds in Article 52 of the Convention. It therefore proceeded to examine the time-bar objections, and to verify whether the “claims for annulment” could reasonably be considered as covered by the statements in the application for annulment.<sup>11</sup> The *Amco I* Committee ultimately found that the grounds objected to were not really new grounds in the Memorial, “but were either in fact referred to in the Application or reasonably implicit in the Application.”<sup>12</sup>

52. This Committee agrees with the *Klöckner II* Committee that the text of Arbitration Rule 50 does not specify the degree of detail required for an annulment application. It finds it difficult to accept, however, that it would be sufficient to quote verbatim the text of Article 52 of Convention or of specific subparagraphs of that Article, such as Article 52(1)(b), 1(d) or 1(e), or simply to refer to such subparagraphs.<sup>13</sup> The purpose of the provision, in the Committee’s view, is to provide a basic indication of the substantive grounds for the actual complaint. It should as a minimum refer to a specific defect in the award or in the procedure, e.g. that the Tribunal manifestly exceeded its powers because it concluded that it had no jurisdiction when in fact it

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<sup>8</sup> *Wena*, supra note 4, para. 19, *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo* (ICSID Case No. ARB/06/7), Decision on Annulment, September 6, 2011, available at <http://www.worldbank.org/icsid>, paras. 88-90.

<sup>9</sup> *Amco I*, supra note 3, para. 46.

<sup>10</sup> *Id.*, para. 50. The *Amco I* Decision refers to the Annotated ICSID Arbitration Rules, Doc. ICSID/4/Rev. 1 (which accompanied the first version of the Rules), Note B to Arbitration Rule 50: “The procedure pertaining to the filing and registration of an application in accordance with this Rule is roughly analogous to that for the filing and registration of an original request for arbitration in accordance with the Institution Rules. It is, however, especially important that the application adequately identify the award to which it relates and state in detail the grounds on which the particular remedy is sought.”

<sup>11</sup> *Id.*, para. 51.

<sup>12</sup> *Id.*, para. 53.

<sup>13</sup> *Klöckner II*, supra note 4, para. 4.25.

had jurisdiction, or that the Tribunal seriously departed from the fundamental rule of procedure that the parties should be given the opportunity to be heard. The statements do not need to be supported by evidence, arguments or reasons, but the gist of the complaint concerning the award or the procedure must, as a minimum, appear, explicitly or at least implicitly, from the application.

53. In this case, paragraph 58 of the Application alone would not suffice to satisfy the conditions of Arbitration Rule 50(1) in so far as it indicates that the Application includes, but is not necessarily limited to, the grounds enumerated in Article 52(1)(b) and (d) of the Convention, reserving the right to amend or supplement the Application. It is not possible to determine from this wording which grounds the Applicant relies on. It is true, however, that the paragraph also refers to grounds set out in other parts of the Application and that to this extent it may satisfy the requirements of Rule 50(1).

54. Indeed, as shown above (see paragraphs 35 to 38), the Application does provide some context for the grounds on which it is based. It makes clear that the Applicant complains about (i) the Tribunal's finding that there was no jurisdiction; (ii) a purported failure of the Tribunal to address Respondent's alleged continued violations of fundamental rules of procedure; (iii) a failure of the Award to mention Respondent's alleged continued misconduct; (iv) the Tribunal's evaluation of the evidence leading to its conclusion that there was no jurisdiction; and (v) the Tribunal's assessment of the burden of proof. Although the claims were later reformulated and developed in the Memorial, the Committee finds that it is implicit in the Application, coupled with its paragraph 58, that they relate to three grounds in Article 52(1) of the Convention: manifest excess of powers (52(1)(b)), serious departure from a fundamental rule of procedure (52(1)(d)), and failure to state the reasons on which the award is based (52(1)(e)).

55. Sir Franklin Berman's alleged failure to disclose a conflict of interest was not formulated as a complaint in the Application, which merely described the fact that Applicant had noted the non-disclosure of Sir Franklin's appointment in another arbitration also involving one of Respondent's counsel as arbitrator, as well as Sir Franklin's statement that the non-disclosure was a regrettable oversight but that it raised no issue as to the independence of his judgment. Since the only relevance of mentioning these facts (which occurred after the Award was

rendered) was to use it in support of the Application, the Committee finds that there was an implicit complaint concerning a serious breach of a fundamental rule of procedure in this respect.

56. Respondent objected to the admissibility of three complaints contained in the Memorial:

- a. That the Tribunal failed to apply the proper law (Turkish law);
- b. That the Tribunal should have examined, *sua sponte*, other possible grounds for establishing jurisdiction (in particular an alleged equitable interest in the ÇEAŞ and Kepez shares); and
- c. That the Award was issued too late.

Applying the above principles, the Committee finds that Applicant's claims concerning the Tribunal's alleged failure to apply the proper law in relation to the timely legal interest in ÇEAŞ and Kepez and the issue of timely equitable interest fall under the broad umbrella of an alleged failure to exercise an existing jurisdiction over the dispute and are therefore admissible.

57. This leaves the issue of the Tribunal's alleged failure to render the Award within the prescribed time period pursuant to Arbitration Rule 46, leading to a serious departure from a fundamental rule of procedure. The Application, in its section entitled "Procedural History," states: "Finally, over a year after the close of the proceedings, the Tribunal rendered its Award on 2 September 2011." The Memorial adds the following argument:

"The proceedings in the original arbitration were not officially closed by the Tribunal. This was a serious abrogation from Rule 38 which requires that the proceedings shall be declared closed when the presentation of the case by the parties is completed. To leave the proceeding open would be to render Rules 38 and 46 meaningless."

58. The Committee does not see how this could be an express, let alone an implicit, complaint in the Application, since the Memorial concedes that the proceedings were not closed pursuant to Arbitration Rule 38, and therefore the time limit in Arbitration Rule 46 was not triggered. Rather, the Memorial seems to suggest that the complaint relates to the non-closure of the proceedings by the Tribunal. The Committee does not consider that this alleged departure is capable of falling under any of the complaints in the Application.

59. Even if the claim were admissible, it would be rejected by the Committee. Arbitration Rule 38 provides that the proceeding shall be declared closed "when the presentation of the case

by the parties is completed.” In this case, the proceeding on the merits was suspended since the Tribunal decided to bifurcate the proceeding and deal with its jurisdiction as a preliminary question. The parties’ presentation of their case as a whole was therefore not completed. If the Tribunal would have upheld jurisdiction, the proceeding would have continued and would have eventually been declared closed. However, in the circumstances of this case, the Tribunal was not required to close the proceedings.

60. In any event, Arbitration Rule 38 does not specify when the presentation of the case is completed, which is a matter that must be left to the discretion of each tribunal and *ad hoc* committee. It is not unusual that, after written and oral proceedings are completed, during the course of deliberations tribunals discover issues that require further presentations by the parties. In the Committee’s view, the Rule was not meant to require an immediate closure of the proceeding upon the last filing or hearing. Rather, each tribunal or committee must be assured, after proper deliberations, that it has all necessary arguments and evidence upon which it has reached or will reach a determination concerning all issues in the case. Closing the proceeding while deliberations are still underway may in fact interfere with the deliberations. This is particularly so when the deliberations concern the question whether or not the case should proceed to the merits, since the tribunal may not have made up its mind about its jurisdiction immediately upon the last presentation in the jurisdictional phase and it cannot close the proceeding if it decides to continue on the merits.

## **IV. ANNULMENT STANDARDS**

### **1. The Parties' Positions**

#### ***A. Memorial***

61. [...]

62. [...]

63. [...]

#### ***B. Counter-Memorial***

64. [...]

65. [...]

66. [...]

67. [...]

68. [...]

69. [...]

70. [...]

71. [...]

#### ***C. Reply***

72. [...]

73. [...]

74. [...]

75. [...]

#### ***D. Rejoinder***

76. [...]

### **2. The Committee's Analysis**

#### ***A. Preliminary Considerations***

77. The Tribunal notes that the issue of whether Applicant has waived its rights is a matter to be considered later in this Decision. The parties do not disagree on whether a waiver is possible under the Arbitration Rules; the disagreement is rather on whether an actual waiver occurred.

78. The parties disagree on whether, if a committee decides that grounds for annulment exist, the Committee has discretion to annul the Award. The Committee will not have to address this question unless it first has found that the conditions for annulment are fulfilled.

79. The Committee will now set forth its understanding of Article 52 to the extent necessary to decide on the Application and, in particular, in respect of matters controversial between the parties.

#### ***B. Scope of the Review***

80. The parties disagree on the scope of the review. Respondent has emphasized the limited scope of the remedy of annulment and even more so in the case of a review of a decision on jurisdiction. Respondent agrees with the *Azurix* decision on annulment which in the context of the excess of powers stated that “by virtue of Article 41, in cases where there is any uncertainty or doubt as to whether or not a tribunal has jurisdiction, that question falls to be settled by the tribunal itself in exercise of its compétence-compétence under that provision.”<sup>37</sup> Respondent submits that this holding applies to all grounds of annulment: “If the tribunal’s decision on

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<sup>37</sup> See supra note 21.

jurisdiction was a possible one, it should not be annulled, as it is within the tribunal’s rightful discretion pursuant to Article 41 of the ICSID Convention.”<sup>38</sup>

81. On the other hand, Applicant asserts that “[t]he debate has moved beyond simplistic distinctions between annulment and appeal and questions concerning whether ‘annulment is only available in very limited circumstances.’”<sup>39</sup> For Applicant the question is:

“whether annulment is available in the present case. The specific question is whether an international tribunal’s failure to maintain or restore equality of arms between the parties, in the presence of on-going admitted illicit espionage by a State to undermine those proceedings, in addition to the other fundamental errors of the Tribunal, means that annulment is available in the present case.”<sup>40</sup>

82. The Committee does not consider it necessary to decide whether the holding by the *Azurix* Committee in its annulment decision quoted above is applicable to all grounds for annulment. The Committee will only observe that the adjective “manifest” applies to excess of powers and that “manifest” means “[...] ‘self-evident,’ ‘clear,’ ‘plain on its face’ or ‘certain’ as distinct from ‘the product of elaborate interpretations one way or the other’ or ‘susceptible of argument one way or the other’ or ‘... being ... necessary to engage in elaborate analyses [...]’.”<sup>41</sup>

83. The Committee concurs with the statement of the *Rumeli* Committee on the scope of review:

“An *ad hoc* committee should not be concerned with upholding the finality of an award or ensuring that the review of the award is as extensive as possible given that the annulment proceeding is the only possibility open to the parties, but should simply act within the confines of the task devolved upon it by the ICSID Convention. It may annul the award if, but only if it deems that one or more of the grounds for annulment set out in Article 52(1) of the ICSID Convention obtain.”<sup>42</sup>

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<sup>38</sup> Counter-Memorial, para. 176.

<sup>39</sup> Reply, para. 124.

<sup>40</sup> *Id.*, para. 127.

<sup>41</sup> *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25), The Tribunal’s Decision on the Respondent’s Objection under Rules 41(5) of the ICSID Arbitration Rules, May 12, 2008, para. 84.

<sup>42</sup> *Rumeli*, supra note 17, para. 73.



### *C. Serious Departure from a Fundamental Rule of Procedure*

84. For an award to be annulled on this ground, it must meet two tests: (i) there must be a violation of a “fundamental rule of procedure”; and (ii) the departure from that rule must be “serious.”<sup>43</sup> As is clear on the face of this provision, both criteria are mandatory.<sup>44</sup>

85. By referring to a “fundamental rule of procedure,” the drafters of the Convention intended to restrict annulment on this ground to violations of those principles that are essential to a fair hearing.<sup>45</sup> The *Wena* Committee interpreted the requirement that the procedural rule in question be “fundamental” as referring “to a set of minimal standards of procedure to be respected as a matter of international law.”<sup>46</sup> Thus, the key question in annulment proceedings with respect to this ground is whether the procedure allegedly violated falls within the category of fundamental rules necessary to ensure a full and fair hearing.

86. The second requirement for an award to be annulled due to a “departure from a fundamental rule of procedure” is that the violation be considered “serious.”<sup>47</sup> The *ad hoc* Committee in *MINE* stated:

“In order to constitute a ground for annulment the departure from a ‘fundamental rule of procedure’ must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.”<sup>48</sup>

87. Relying on this definition, the *Wena ad hoc* Committee further concluded:

“In order to be a ‘serious’ departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.”<sup>49</sup>

88. The Committee notes that the parties agree that, as pleaded by Applicant in the Memorial, equality of arms is a fundamental rule of procedure as defined by the *Wena* Committee: “the

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<sup>43</sup> ICSID Convention Art. 52(1)(d).

<sup>44</sup> See Schreuer et al, *supra* note 5, p. 980.

<sup>45</sup> *Id.*

<sup>46</sup> *Wena*, *supra* note 4, para. 57.

<sup>47</sup> ICSID Convention Art. 52(1)(d).

<sup>48</sup> *MINE*, *supra* note 15, para. 5.05.

<sup>49</sup> *Wena*, *supra* note 4, para. 58.

right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it.”<sup>50</sup> However, Respondent questioned in the Rejoinder the stretched definition contained in the Tribunal’s Decision on Preliminary Issues of June 23, 2008 and quoted by Applicant in the Reply:

“basic procedural fairness, respect for confidentiality, and legal privilege (and indeed for the immunities accorded to parties, their counsel, and witnesses under Articles 21 and 22 of the ICSID Convention); the right of parties both to seek advice and to advance their respective cases freely and without interference; and no doubt others as well.”<sup>51</sup>

89. In its Decision on Preliminary Issues, the Tribunal extended the list of “principles affected”: “For its own part, the Tribunal would add to the list respect for the Tribunal itself, as the organ freely chosen by the Parties for the binding settlement of their dispute in accordance with the ICSID Convention. It requires no further recital by the Tribunal to establish that these are indeed fundamental principles, or why they are.”<sup>52</sup> The Committee concurs with the Tribunal in its summary of principles that lie at the very heart of the ICSID arbitral process.

#### ***D. Failure to State Reasons***

90. This ground for annulment is rooted in the understanding that “[a] statement of the reasons for a judicial decision is widely regarded to be a pre-requisite for an orderly administration of justice.”<sup>53</sup> This requirement is so fundamental that it cannot be waived:

“A statement of reasons is a valuable element of the arbitration process. The Committee has noted that the Committee of Legal Experts, which was to advise the Executive Directors of the World Bank on the draft Convention, by a vote of 28 to 3 rejected a proposal which would allow the Parties to dispense with the requirement of a reasoned award (History of the Convention, Vol. 11, p. 816). A waiver of the requirement in an arbitration agreement would therefore not bar a party from seeking an annulment for failure of an award to state reasons.”<sup>54</sup>

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<sup>50</sup> *Id.*, para. 57, quoted in Memorial, para. 64.

<sup>51</sup> Reply, para. 85, quoted by Respondent in the Rejoinder, para. 91.

<sup>52</sup> Decision on Preliminary Issues, para. 78.

<sup>53</sup> Schreuer et al., *supra* note 5, p. 996.

<sup>54</sup> *MINE*, *supra* note 15, para. 5.10. *See also* Schreuer et al., *supra* note 5, p. 996.

91. The fundamental nature of this requirement does not mean, however, that it is an onerous one. In fact, “[t]he duty to state reasons refers only to a minimum requirement.”<sup>55</sup> As stated by the *ad hoc* Committee in *MINE*:

“In the Committee's view, 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. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.”<sup>56</sup>

92. Relying on this reasoning, the *Wena* Committee added:

“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 decisions were appropriate or not, convincing or not. As stated by the *ad hoc* Committee in *MINE*, this ground for annulment refers to a ‘minimum requirement’ only. This requirement is based on the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision. If such sequence of reasons has been given by the Tribunal, there is no room left for a request for annulment under Article 52(1)(e).”<sup>57</sup>

93. In the present case, Applicant claims that the Tribunal failed to state reasons because it failed to ensure that the equality of arms was respected by not considering in the Award the evidence submitted in Annex I to the Rejoinder on the Preliminary Jurisdictional Objections (“Annex I”).<sup>58</sup> Respondent has argued that the remedy for Applicant’s claim was to request the Tribunal to decide any question that it omitted to decide under Article 49(2) of the ICSID Convention.

94. The Committee concurs with the practice of the committees reviewed above and is of the view that failure to deal with a question that would make the award unintelligible may be a ground for annulment. As stated by the *Vivendi I* Committee quoted with approval by Applicant:

“[...] annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed

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<sup>55</sup> Schreuer et al., *supra* note 5, p. 997.

<sup>56</sup> *MINE*, *supra* note 15, para. 5.09.

<sup>57</sup> *Wena*, *supra* note 4, para. 79.

<sup>58</sup> “The newly discovered evidence of Respondent’s continuing violations of the Tribunal’s Orders, submitted with Claimant’s Rejoinder on the Preliminary Jurisdictional Objections, August 3, 2009, Exh. C-301.

rationale; and second, that point must itself be necessary to the tribunal's decision."<sup>59</sup>

95. The Committee will consider this question more fully later in this Decision.

### *E. Manifest Excess of Powers*

96. Applicant's third ground for seeking annulment is that the Tribunal allegedly exceeded its powers. An arbitral award may be annulled if a tribunal "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."<sup>60</sup> This is because "[i]t is not within the tribunal's powers to refuse to decide a dispute or part of a dispute that meets all jurisdictional requirements of Art. 25."<sup>61</sup>

97. Moreover, "[t]here is widespread agreement that a failure to apply the proper law may amount to an excess of powers by the tribunal."<sup>62</sup> Incorrect interpretation of the law, however, does not normally rise to that level.<sup>63</sup> As the *Soufraki ad hoc* Committee noted, "ICSID *ad hoc* committees have commonly been quite clear . . . that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment."<sup>64</sup> Allowing annulment committees to overturn incorrect applications of the law was specifically rejected by the drafters of the ICSID Convention because some delegates feared that this would call into question the finality of awards.<sup>65</sup> Incorrect application of the law is thus not a basis for annulment except in the most egregious cases where such misapplication "is of such a nature or degree as to constitute objectively (regardless of the Tribunal's actual or presumed intentions) its effective non-application."<sup>66</sup>

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<sup>59</sup> *Vivendi I*, supra note 18, para. 65, quoted in Memorial, para. 73.

<sup>60</sup> *Id.*, para. 86.

<sup>61</sup> Schreuer et al, supra note 5, p. 947.

<sup>62</sup> *Id.*, p. 955.

<sup>63</sup> *Id.*, pp. 956, 959-964.

<sup>64</sup> *Soufraki*, supra note 19, para. 85.

<sup>65</sup> See Antonio R. Parra, THE HISTORY OF ICSID (Oxford Univ. Press, 2012), p. 87.

<sup>66</sup> *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, December 17, 1992 ("*Amco II*"), para. 7.19.

98. The ICSID Convention requires that an excess of power be “manifest” in order to qualify for annulment. Annulment committees have differed somewhat in interpreting the meaning of this term.

99. Some committees, such as the *Repsol ad hoc* Committee, have found that “exceeding one’s powers is ‘manifest’ when it is ‘obvious by itself’ simply by reading the Award, that is, even prior to a detailed examination of its contents.”<sup>67</sup> The *Wena* and the *CDC ad hoc* Committees likewise understood “manifest” to imply that the excess should be obvious or evident:

“The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.”<sup>68</sup>

“[I]f a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal’s conduct, if susceptible of argument ‘one way or the other’, is not manifest.”<sup>69</sup>

100. Others, such as *Vivendi I*, have concluded that a tribunal has manifestly exceeded its powers if the excess of powers has clear and serious consequences:

“[T]he Committee concludes that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims. Given the clear and serious implications of that decision for Claimants in terms of Article 8(2) of the BIT, and the surrounding circumstances, the Committee can only conclude that that excess of powers was manifest.”<sup>70</sup>

101. The *Soufraki ad hoc* Committee found that both approaches had merit and should apply:

“[A] strict opposition between two different meanings of ‘manifest’ – either ‘obvious’ or ‘serious’ – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.”<sup>71</sup>

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<sup>67</sup> *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*(ICSID Case No. ARB/01/10), Decision on the Application for Annulment, January 8, 2007 (“*Repsol*”), para. 36.

<sup>68</sup> *Wena*, supra note 4, para. 25.

<sup>69</sup> *CDC*, supra note 28, para. 41.

<sup>70</sup> *Vivendi I*, supra note 18, para. 115.

<sup>71</sup> *Soufraki*, supra note 19, para. 40.

102. The Committee concurs with the *Soufraki* annulment decision in understanding Article 52(1)(b) to mean that annulment should not occur unless a tribunal has exceeded its power in a clear manner and with serious consequences. While the term “manifest” would in itself seem to correspond to “obvious” or “evident,” it follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal’s act or its failure to act has had, or at least may have had, serious consequences for a party.

103. Failure to apply the proper law is one instance of the tribunal exceeding its powers by acting outside of the scope of the parties’ agreement to arbitrate. In their interpretation of this ground for annulment, *ad hoc* committees concur in that “a Tribunal’s complete failure to apply the proper law or acting *ex aequo et bono* without agreement of the Parties to do so as required by the ICSID Convention could constitute a manifest excess of powers.”<sup>72</sup> In the words of the *Soufraki ad hoc* committee:

“[O]ne must also consider that a tribunal goes beyond the scope of its power if it does not respect the law applicable to the substance of the arbitration under the ICSID Convention. It is widely recognized in ICSID jurisprudence that failure to apply the applicable law constitutes an excess of power. The relevant provisions of the applicable law are constitutive elements of the Parties’ agreement to arbitrate and constitute part of the definition of the tribunal’s mandate.”<sup>73</sup>

104. The parties agree in general terms that the excess of power must be manifest in the sense of evident and that the Committee is not entitled to re-evaluate the evidence on the basis of which the Tribunal reached its decision, but they disagree on the application of these principles to the instant case and the matter will be more appropriately discussed later in this Decision.

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<sup>72</sup> Background Paper on Annulment for the Administrative Council of ICSID (August 10, 2012), para. 94. *See also* Schreuer et al, *supra* note 5, p. 938.

<sup>73</sup> *Soufraki*, *supra* note 19, para. 45.

## V. GROUNDS FOR ANNULMENT

### 1. Serious Departure from a Fundamental Rule of Procedure

#### A. *The Parties' Positions*

##### (i) *Memorial*

105. [...]

106. [...]

107. [...]

##### (ii) *Counter-Memorial*

108. [...]

109. [...]

110. [...]

111. [...]

112. [...]

##### (iii) *Reply*

113. [...]

114. [...]

115. [...]

116. [...]

*(iv) Rejoinder*

117. [...]

118. [...]

119. [...]

120. [...]

121. [...]

122. [...]

123. [...]

124. [...]

125. [...]

***B. The Committee's Analysis***

*(i) Annex I*

126. Applicant relies mainly on Annex I to the Rejoinder on the Preliminary Jurisdictional Objections. As a consequence, it will be useful to start the analysis by reviewing what Annex I says. The very first paragraph of the introduction reads as follows:

“Claimant has recently obtained documents which conclusively establish that the ‘rules of separation’ between the ‘criminal investigators’ and ‘any person having a role in the defence of this arbitration’ has not only been breached, but was never followed in the first instance. Claimant respectfully requests that the Tribunal exercise ‘the inherent powers required to preserve the integrity of its own process,’ in order to thwart Respondent’s efforts to derail these proceedings.”<sup>87</sup>

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<sup>87</sup> Annex I, para. 1, quoting the Tribunal’s Decision on Preliminary Issues of June 23, 2008.



127. In the same vein, we read: “With this newly discovered evidence, it is time for the Tribunal to rectify this gross imbalance in the relative positions of the parties in this case.”<sup>88</sup> The Introduction to Annex I concludes: “The only question before the Tribunal then is to determine the consequences for Respondent’s egregious conduct. In that regard Claimant submits this Annex to the Tribunal with the confidence that it will trigger appropriate procedures and action.”<sup>89</sup>

128. Annex I ends with the following statement:

“As a first step, Claimant suggests that the Tribunal direct Respondent, including its counsel and agency representatives, to promptly respond to this submission. Thereafter, the Tribunal may conduct further inquiry on these serious issues, evaluate the submissions of the parties and consider appropriate remedies. ‘With that, justice will also be seen to be done.’”<sup>90</sup>

129. It will also be useful to place Annex I in the context of the arbitration proceedings. Annex I was part of the Applicant’s Rejoinder on the Preliminary Jurisdictional Objections. It was preceded by the Decision on Preliminary Issues of June 23, 2008, which appended the May 1 Orders, and was followed by the hearing on Preliminary Objections to Jurisdiction in November 2009, the Post-Hearing Memorials filed on July 1, 2010 and the Award. At the same time as the Rejoinder and Annex I, Applicant filed two requests with the Tribunal. First, Applicant requested that the Tribunal direct Respondent to cause certain witnesses to appear at the hearing (“the Witnesses Request”).<sup>91</sup> Second, Applicant requested the Tribunal to modify the Procedural Orders of April 6, 2007 and December 17, 2008 for the purpose of joining the quantum with the liability phase of the proceedings (“the Quantum-Liability Request”).<sup>92</sup>

***How is Annex I linked to the Rejoinder, the two requests and other submissions?***

130. The Rejoinder on the Preliminary Jurisdictional Objections refers to Annex I in connection with the statement that “Respondent’s retaliatory measures against [...] – refusing to renew and return his passport, obtaining asset freezing orders because he supports Claimant’s

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<sup>88</sup> *Id.*, para. 5.

<sup>89</sup> *Id.*, para. 9.

<sup>90</sup> *Id.*, para. 54, quoting the Tribunal’s Decision on Preliminary Issues of June 23, 2008.

<sup>91</sup> Award, para. 56; R-1109.

<sup>92</sup> Award, para. 55; R-1110.

prosecution of this claim, causing him to be placed on the Interpol Red Bulletin list after the arbitration was filed, *e.g.* – clearly are part of its overall pattern of illegal and inappropriate conduct in the course of this case.”<sup>93</sup>

131. Here a footnote is inserted (footnote 294) simply saying “*See Annex I.*” There is no other reference to Annex I in the main body of the Rejoinder on the Preliminary Jurisdictional Objections, including no reference in the relief requested to any remedial action that the Tribunal might take in view of the alleged “overall pattern of illegal and inappropriate conduct” of Respondent. The Table of Contents also ignores the existence of Annex I.

132. As to the link of Annex I to the two requests, the Witnesses Request is in part justified by the need:

“[...] to inform the Tribunal of the most serious threat to the integrity of these proceedings – the lack of ethical separation between those wielding Respondent’s police powers and those running this arbitration. As set forth more fully in Annex I to today’s Rejoinder, it is now beyond doubt that the purported ‘wall of separation’ between the [...] and the [...] was a fiction, and that these two arms of the state apparatus have coordinated closely on the defense of this case. Worse yet, they have done so in conjunction with Turkish legal counsel in this case [...].”<sup>94</sup>

133. Reference to Annex I is also made in support of the Quantum-Liability Request. As a reason to justify this request, Applicant considers that joining the quantum and liability phases:

“would to some degree compensate for the prejudice Claimant has suffered due to the time that has been lost as a result of Respondent’s illicit surveillance of Claimant and its counsel, necessitating critical intervention from the Tribunal, not to mention Respondent’s refusal to submit its jurisdictional objections until the very last minute. Moreover, as set forth more fully in Annex I of Claimant’s Rejoinder filed this same date, it is now clear that Respondent has violated the Tribunal’s comprehensive Orders of last year regarding the surveillance and interception program, and indeed has misrepresented to the Tribunal the purported ‘wall of separation between the security services and those persons handling the defense of this case.’”<sup>95</sup>

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<sup>93</sup> Rejoinder on the Preliminary Jurisdictional Objections, para. 246, Exh. R-1108.

<sup>94</sup> Exh. R-1109, para. 11.

<sup>95</sup> Exh. R-1110, para. 4.

134. The Committee also notes that Applicant’s Rejoinder on the Preliminary Jurisdictional Objections of August 3, 2009 was accompanied by a binder of annexes.<sup>96</sup> There was no specific reference to Annex I in these annexes.

135. Applicant did not raise the issue of the surveillance and the evidence submitted in Annex I in its Post-Hearing Memorial or in the List of Issues Submitted to the Tribunal for Decision filed with it. In the Petition for Costs filed with the Post-Hearing Memorial on July 1, 2010, Applicant reviews the surveillance activities that led to the May 1, 2008 Orders and, under the title of “Electronic Surveillance of Counsel and Claimant – Part 2,” Applicant refers in detail to the contents of Annex I. Applicant concludes by requesting the Tribunal to make an award of costs for the arbitration to date in favor of Applicant.

***Did Applicant request the Tribunal to take further action beyond the two requests filed with the Rejoinder on the Preliminary Jurisdictional Objections on August 3, 2009?***

136. The answer to this question depends on whether requests filed as part of an annex can be considered a complaint that a tribunal should address. The expert of Respondent has opined that

“The annexes to any filing as a matter of practice are viewed as vehicles for subsidiary materials in support of the content of the rejoinder. In other words, to make a request or motion and introduce new evidence within an annex to any filing is to my knowledge and in my limited experience both inappropriate and unheard of.”<sup>97</sup>

137. The Committee does not disagree in general terms with this statement, but it is of the view that the terms of the document override considerations of form or of nomenclature. While it is unusual that counsel would not seek relief in the Rejoinder in reference to the evidence in Annex I or in a separate request to the Tribunal in the terms expressed substantively in Annex I, the Committee is of the view that the terms of Annex I constitute a request to the Tribunal. Therefore, there is no basis for Respondent’s argument that Applicant had waived its right to raise its complaint in this proceeding. The Committee also considers that the request required a decision or a reply in some other form from the Tribunal.

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<sup>96</sup> Award, para. 54.

<sup>97</sup> Expert Opinion of [...] of July 20, 2012, para. 72(3).

138. The Committee understands that the underlying arbitration proceedings were complex and agrees that Applicant's request, as a matter of form, could have been presented more explicitly. At the same time, the matter was brought to the attention of the Tribunal in other contexts. During the hearing in November 2010, Applicant reminded the Tribunal that, in addition to the request to join liability and quantum, Applicant had made other filings and Applicant's Petition for Costs of July 1, 2010 retold the story of the surveillance issue as grounds for the petition.

*What did the Tribunal do?*

139. On learning first about the surveillance, the Tribunal held a hearing in April 2008. The Tribunal issued immediately afterwards the May 1, 2008 Orders and a reasoned decision appending the orders on June 23, 2008 – the Decision on Preliminary Issues. It is pertinent here to review what the Tribunal said in that decision.

140. As already noted, the Tribunal listed the following principles as being affected by the allegations and counter-allegations of the parties:

“basic procedural fairness, respect for confidentiality and legal privilege (and indeed for the immunities accorded to parties, their counsel, and witnesses under Articles 21 and 22 of the ICSID Convention); the right of parties both to seek advice and to advance their respective cases freely and without interference; and no doubt others as well. For its own part, the Tribunal would add to the list respect for the Tribunal itself, as the organ freely chosen by the Parties for the binding settlement of their dispute in accordance with the ICSID Convention.”<sup>98</sup>

141. The Tribunal recognized the right and duty of a sovereign State to pursue criminal investigations but it also held that such right and duty needed to be balanced by other considerations. In this respect, the Tribunal recalled:

“the well-known saying, very frequently repeated in legal discussion, that it is not enough that justice should be done, it must also manifestly be seen to be done. From that it must follow that, even if Turkey can be excused for not previously having taken steps to ensure the strict separation of its

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<sup>98</sup> Decision on Preliminary Issues, para. 78.

criminal investigations, on the one hand, from the prosecution of this arbitration, on the other, that will not be sufficient for the future. The right and duty to investigate crime, accepted by the Tribunal above, cannot mean that the investigative power may be exercised without regard to other rights and duties, or that, by starting a criminal investigation, a State may balk an ICSID arbitration.”<sup>99</sup>

142. As to prejudice, the Tribunal noted:

“that some of the documents attached to the reports from the [...] and included in Respondent’s submissions to the Tribunal clearly and without any doubt were capable of causing prejudice of the kind Libananco alleges, and that some other such documents were included in a redacted form (presumably designed to counter any supposition of prejudice) though it remained unclear even at the end of the hearing by whom or on what basis the redaction had been undertaken.”<sup>100</sup>

143. In addition the Tribunal affirmed that:

“like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID Member State. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).”<sup>101</sup>

144. At the time of the Decision on Preliminary Issues, the Tribunal considered that whether Applicant had suffered prejudice was a matter of allegation and counter-allegation and it believed that the matter did not need to be decided at that point. The Tribunal declared:

“Libananco’s entitlement to future protection for its agents, counsel and witnesses is clearly not conditional on proof that it has actually been prejudiced in the conduct of its case. As to the future, the Tribunal prefers to leave the matter open, relying expressly on both Parties to do their utmost to give effect in good faith, to the present Orders.”<sup>102</sup>

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<sup>99</sup> *Id.*, para. 79.

<sup>100</sup> *Id.*, para. 76.

<sup>101</sup> *Id.*, para. 78.

<sup>102</sup> *Id.*, para. 80. Emphasis in the original.

145. The Tribunal expressly refers to paragraphs 1.1.6 and 1.1.7 of the May 1, 2008 Orders as foreshadowing the exclusion from future proceedings of any privileged documents or information or any evidence derived therefrom. The Tribunal explains that that exclusion “will naturally depend on proof of privilege in whatever manner seems to be appropriate in accordance with the particular circumstances, once it is claimed that protected material has in fact been submitted.”<sup>103</sup>

146. The Tribunal added:

“If, as the arbitration progresses, it turns out that the Respondent has used, in any way, privileged or confidential information obtained during the surveillance, the Claimant will be at liberty to bring an appropriate application to the Tribunal. The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises, the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information.”<sup>104</sup>

147. On August 11, 2008, the Tribunal issued an Order on several matters including a section on “Compliance with Orders 1.1.3, 1.1.4 and 1.2 dated 1 May 2008.” Under this new Order the Tribunal, in order to secure compliance with the requirements laid down by the Tribunal in its Orders of May 1, 2008, directed Respondent to ensure that the [...] identified and destroyed documents “which derive from interception and which the [...] has retained as ‘related to the investigated crime or any other crime,’ but which nevertheless also relate to this arbitration.”<sup>105</sup> The Tribunal further directed Respondent to inform the Tribunal that that had been done within 30 days of the Order.<sup>106</sup>

148. The same Order also covered “The Continuing Activities of the [...]” related to [...] who acted as the Claimant’s agent or representative and as such enjoyed the immunities laid down in Articles 21 and 22 of the Convention. The Tribunal concluded the Order stating:

“The Tribunal is in no position on the material before it to determine whether any surveillance that may have taken place of Claimant’s

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, para. 80.

<sup>105</sup> Procedural Order of August 11, 2008, para. 22.

<sup>106</sup> *Id.*

representatives went beyond what is appropriate in the circumstances, or whether current criminal investigations with respect to information properly placed before the Tribunal by the Claimant may raise questions of a breach of Articles 21 and 22 of the ICSID Convention. The Tribunal is determined however to maintain the integrity of the present proceedings, and to protect the rights of both Parties. The Tribunal accordingly invites the Parties to bring before it promptly, in the spirit of its Orders of 1 May 2008, any well-founded information touching on the status or protection of persons covered by Article 22.”<sup>107</sup>

149. The Tribunal issued an Order on August 31, 2009 on the Witnesses Request. The Tribunal referred to the issues identified by Libananco in the request and then expressed the view that “the surveillance/interception of the communications, the way Turkey has chosen to conduct itself in meetings with [...], strategies that the Respondent have allegedly adopted after the alleged expropriation and the coordination between the [...] and the [...] are not relevant to the issues to be heard in the 2 November hearing.”<sup>108</sup>

150. The Tribunal also denied the request in respect of three witnesses, considered unnecessary to make any order in respect of a witness whose statement had in the meantime been produced and treated as withdrawn the request in respect of two other witnesses.<sup>109</sup>

151. As to the Quantum-Liability Request, the parties were informed on September 10, 2009 that the Tribunal was of “the view that it would be more appropriate to deal with the Claimant’s Request after the November hearing.”<sup>110</sup> On the fifth day of the hearing, the Tribunal President stated:

“And the question of the further bifurcation of the hearing in terms of separating merits and quantum, we think it is a little bit further removed in the distance because that can only be dealt with after we have dealt with this phase of the arbitration.”<sup>111</sup>

152. Counsel to the Applicant on this point said:

“Lastly, on the--I don't know if it's lastly, but on the quantum issue, I hear you about the prematurity issue, and I don't disagree with that, but I just

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<sup>108</sup> Procedural Order of August 31, 2009, para. 4, Exh. C-341.

<sup>108</sup> Procedural Order of August 31, 2009, para. 4, Exh. C-341.

<sup>109</sup> *Id.*, para. 6.

<sup>110</sup> Letter from the Tribunal to the Parties, September 10, 2009, Exh. R-1111.

<sup>111</sup> Exh. R-1086(5), Transcript, Day 5, p. 1668, lines 6-11.

want to emphasize in the Request that we submitted to the Tribunal on this, that we noted that it was also tied to some of the other filings we have given to the Tribunal recently, including the Annex 1, which was the more recent evidence we had obtained about the surveillance activities and who was responsible for it. I'm not going to argue it now. We obviously feel very strongly about those things.

I will also note for the record, no one has ever challenged it. No one has ever raised the issue about the authenticity of the evidence that we submitted to the Tribunal several months ago [...]”<sup>112</sup>

153. In the chapter on procedural history of the Award (“Arbitration Proceedings”), the Tribunal notes that it dismissed “the Claimant’s Application for Summary Relief and addressed the Claimant’s concerns concerning intercepts and surveillance through certain protective orders made pursuant to Article 22 of the ICSID Convention, while recognizing the Respondent’s sovereign powers to conduct criminal investigations.”<sup>113</sup>

154. The other instance in the Award where the Tribunal refers to the surveillance issue is in the context of costs. Here the Tribunal decided to apply the principle that “costs follow the event” with exceptions in relation to particular issues which were not won by the ultimately prevailing party. Thus the Tribunal awarded costs to Respondent with the exception, *inter alia*, of “[c]osts and expenses arising from complaints to the Tribunal by the Claimant relating to the alleged covert surveillance of the Claimant’s representatives, Counsel and witnesses which led to the Tribunal’s order of 1 May 2008 after an oral hearing.”<sup>114</sup>

***Was it necessary for the Tribunal to take further action in view of the evidence in Annex I?***

155. The Committee finds it useful to consider this question in a proper perspective by first recalling the actions taken by the Tribunal on May 1 and June 23, 2008.

156. In its Orders of May 1, 2008, the Tribunal decided, *inter alia*, that:

“1.1.6) All privileged documents and information which have been tendered or disclosed to the Tribunal in connection with Claimant’s application of February 29, 2008 will be excluded from the evidence to be received in this arbitration.

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<sup>112</sup> *Id.*, p. 1679.

<sup>113</sup> Award, para. 22.

<sup>114</sup> *Id.*, para. 564(a).



1.1.7) Any privileged documents or information which may be introduced into evidence in future proceedings of this arbitration will be excluded as well as any evidence derived from possession of privileged documents or information.”

157. The May 1, 2008 Orders were subsequently supplemented and expanded by the Decision on Preliminary Issues of June 23, 2008 in which the Tribunal emphasized the importance of the issues dealt with in these Orders of May 1 and pointed out that they affected principles lying at the very heart of the ICSID arbitral process. The Committee fully endorses the Tribunal’s views on the fundamental importance of these issues and reaffirms the need to proceed effectively against any action by a party which could affect the enjoyment of the right to a fair hearing based on equality of arms between the parties.

158. In its Decision of June 23, 2008, the Tribunal issued further detailed instructions regarding the measures Respondent had to take in order to ensure the fairness of the proceedings. Moreover, the Tribunal indicated that, if a need should arise at a later stage of the proceedings, it would be ready to consider further remedies apart from the exclusion of improperly obtained evidence or information from the proceedings.

159. The Committee considers that on May 1 and June 23, 2008, the Tribunal acted forcefully and effectively by issuing well-balanced orders and instructions to deal with the serious situation that had arisen and eliminate any negative repercussions on the further proceedings. The Tribunal also made it clear that it would be prepared to react strongly to any continued surveillance or interception in the future. As a result, the Committee does not see what else the Tribunal could have done to preserve the integrity of the arbitral process in the circumstances.

160. In Annex I to the Rejoinder of August 3, 2009, Applicant made a new request to the Tribunal for action against surveillance and interception. As stated above, the Committee considers that this was a clear request to the Tribunal which, although it was included in an Annex to a submission, would have required a decision or a reply in some other form from the Tribunal. However, the question which the Committee now has to consider is whether the Tribunal’s failure to react to the request is to be considered a serious departure from a fundamental rule of procedure which should lead to annulment of the Award.

161. The answer to this question will depend on an assessment of the situation as a whole, but there are a few elements to which the Committee attaches particular weight.

162. First, the Committee finds it relevant to establish whether Annex I contained new information of such importance that a need had arisen for the Tribunal to consider remedies in addition to those already provided for on May 1 and June 23, 2008 in order to preserve the integrity and fairness of the proceedings.

163. Secondly, it should also be examined whether Applicant established in this annulment proceeding with a reasonable degree of likelihood that the facts of which it complained in Annex I somehow affected the conclusion reached by the Tribunal in regard to the narrow ground on which the Tribunal, in its Award, decided that it had no jurisdiction in the case.

164. Thirdly, the Committee, having regard to the fact that the subsequent proceedings were limited to the examination of a few preliminary issues, attaches some weight to the manner in which Applicant itself, at this stage of the proceedings, dealt with the issues it had raised in Annex I.

165. As regards the first point, the Committee notes that the gist of Annex I was that Applicant had become aware of new evidence of surveillance and interception of communications. On this basis, Applicant alleged that Respondent had violated the Tribunal's orders and requested further action from the Tribunal to thwart Respondent's efforts to derail the proceedings.

166. Although Applicant alleged in Annex I that Respondent had breached the Orders of May 1, 2008 and the Decision on Preliminary Issues of June 23, 2008, it is noteworthy that the facts referred to by Applicant in Annex I mainly concerned events prior to June 23, 2008. While some of these facts had allegedly been discovered after that date, the Committee finds it clear that events that occurred before June 23, 2008 could not be breaches of the Decision on Preliminary Issues and would therefore not necessarily require the Tribunal to consider any remedies in addition to those set out in the Decision of June 23, 2008.

167. However, there was one document referred to in Annex I which related to occurrences after June 23, 2008. The document is a letter dated July 4, 2008, sent on behalf of the [...] by [...], [...], to the [...]. In this letter, reference is made to the Libananco arbitration, and it is

stated that a preliminary preparation meeting had been held in Istanbul on June 26, 2008 and that, in line with the topics discussed at that meeting, photocopies of documents held in the archives of the [...], which could be utilized in the defense, had been made and were attached to the letter. However, there is no information in the letter about the character of the meeting held on June 26, which moreover was only three days after the Tribunal's Decision, or about the contents and origin of the documents transmitted to the [...]. The Committee therefore does not find it possible to draw any conclusions from this scarce and unclear information.

168. The second element of importance for the evaluation of the Tribunal's failure to react to Annex I is the fact that the Tribunal, in its Award, decided the case on a specific and narrow issue, *i.e.* whether Applicant had proved that it had owned shares in ÇEAŞ and Kepez before June 12, 2003. The Tribunal found that, in the absence of such proof, it had no jurisdiction.

169. In the Award (para. 121), the Tribunal noted that it was common ground between the parties that Applicant (at that time Claimant) had the burden of proof in relation to the issue of whether it had acquired timely ownership of the share certificates in question. The outcome of the case therefore depended on whether Applicant had fulfilled this burden of proof. The Committee finds that Applicant did not establish in the course of this annulment proceeding that it was in any way hampered by Respondent's actions in its efforts to present arguments and adduce evidence on the particular issue of the ownership of the shares at the critical time. Conversely, Applicant based its annulment claim because of the espionage actions on general, unspecified allegations which do not permit the Committee to identify if and how Respondent could rely on more procedural arms than Applicant in respect of the ownership of the shares. The Committee also notes that the Tribunal's conclusion on this matter was based on a very thorough and detailed examination of the evidence adduced by the parties.

170. On the third point, *i.e.* Applicant's own procedural behavior, the Committee finds indications that Applicant itself, during the latter part of the proceedings before the Tribunal, did not consider the issue of Respondent's surveillance and interception of communications to be of particular relevance to the jurisdictional issues then under examination. The Committee notes, in particular, the following facts.

171. On August 5, 2009 the Tribunal requested comments from Respondent on the Witnesses Request of August 3, 2009. On August 14, 2009, Respondent commented as regards the issue of surveillance:

“The second topic, namely Libananco’s conspiracy theory about the former [...], the [...] and the Republic’s counsel, hardly warrants a response. The Tribunal has dealt with the surveillance issue, which has nothing to do with the preliminary objections bifurcated for the November 2009 hearing [...]”<sup>115</sup>

172. In its August 31, 2009 Procedural Order, barely a month after receiving Annex I, the Tribunal decided that the issue of surveillance was not relevant to the questions to be considered at the hearing in November. On September 10, 2009, the Tribunal decided further to consider the Quantum-Liability Request later on in the arbitration. At the November hearing counsel to Applicant recalled:

“[...] we have given to the Tribunal recently, including the Annex 1, which was the more recent evidence we had obtained about the surveillance activities and who was responsible for it. *I’m not going to argue it now.* We obviously feel very strongly about those things. I will also note for the record, no one has ever challenged it. No one has ever raised the issue about the authenticity of the evidence that we submitted to the Tribunal several months ago, and it’s not something that Claimant or its counsel has forgotten about or decided is not important. *I know it is very important to the Tribunal based on its prior rulings, and we take it very seriously even today. That’s one of the bases for the quantum addition request [the Quantum-Liability Request].* I just wanted to make that clear for the record.”<sup>116</sup>

173. Applicant thus seems to have accepted that the issue of surveillance was not of particular relevance at this point of the proceedings and that no immediate action was required from the Tribunal. Applicant rather wished for the record to insist that it was not a forgotten issue, but a matter that the Tribunal would need to consider in the future as part of the remaining proceedings. Because the Tribunal decided that it had no jurisdiction, the proceedings never reached the next stage. Applicant did not raise further the issue of surveillance except as a justification for its Petition on Costs of July 1, 2010.

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<sup>115</sup> Letter to the Tribunal dated August 14, 2009, Exh. R-1112, para. 11.

<sup>116</sup> Exh. R-1086(5), Transcript, Day 5, p. 1668, lines 6-11. Emphasis added by the Committee.

174. On the basis of the preceding considerations, the Committee cannot find that the Tribunal's failure to respond to Applicant's request in Annex I to the Rejoinder on the Preliminary Jurisdictional Objections and to address the further evidence submitted by Applicant together with that submission constituted a serious departure from a fundamental rule of procedure. Applicant's claim on this matter must therefore be dismissed.

*(ii) The Appointment of Sir Franklin Berman*

175. Months after the hearing and before the Award was issued, Sir Franklin Berman, member of the Tribunal, and Mr. Jan Paulsson, counsel to Respondent, were appointed to a seven-member arbitration panel in a dispute between India and Pakistan. The appointments to that panel were in the public domain. After the Award was issued, Applicant inquired with ICSID whether Sir Franklin had disclosed his appointment during the arbitration. The Secretary-General requested information from Sir Franklin who replied that he had neglected to inform the parties and ICSID due to a "regrettable oversight."

176. Under Arbitration Rule 6(2), arbitrators are required to sign a declaration which reads in part as follows: "I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship [i.e. professional, business and other relationships with the parties] or circumstance [i.e. circumstance that may cause the arbitrator's reliability for independent judgment to be questioned by a party] that subsequently arises during this proceeding." Under this continuing obligation Sir Franklin might have been required to notify the Secretary-General promptly of his appointment as he recognized in his letter to the Secretary-General.<sup>117</sup>

177. Applicant contends that "Sir Franklin's non-disclosure of his appointment with counsel for the Respondent and the Tribunal's subsequent failure to address the matter raised justifiable doubts as to the fairness of the underlying arbitration proceedings."<sup>118</sup> However, Applicant fails to show that the undisclosed information belatedly impinged on the fairness of the underlying proceedings.

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<sup>117</sup> Exh. C-290.

<sup>118</sup> Memorial, para. 137.

178. Both parties have referred in their submissions to the IBA Guidelines on Conflicts of Interest in International Arbitration. The Committee observes that the situation of an arbitrator and counsel in one arbitration serving as arbitrators in another unrelated arbitration is not in any of the lists in “Part II: Practical Application of the General Standards.” A somewhat similar situation is that “[t]he arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.” (Section 4.4.2) This situation is included in the Green List, which “contains a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List.” (Part II, para. 6)

179. Even if a failure to disclose occurred, the Guidelines provide that “a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.” (Part II, para. 5)

180. In the instant case, Applicant has relied exclusively on the fact of non-disclosure and has failed to show that the facts or circumstances relied on by Applicant made Sir Franklin “partial or lacking independence.”

181. Accordingly, Applicant has not demonstrated that Sir Franklin’s lack of disclosure amounted to a serious breach of a fundamental rule of procedure and, as a result, the Committee dismisses the Applicant’s argument in this respect.

## **2. The Award’s Failure to State the Reasons on Which It is Based**

### ***A. The Parties’ Positions***

#### *(i) Memorial*

182. [...]

*(ii) Counter-Memorial*

183. [...]

184. [...]

*(iii) Reply*

185. [...]

186. [...]

187. [...]

*(iv) Rejoinder*

188. [...]

***B. The Committee's Analysis***

189. The Committee observes that, as stated by Applicant, the grounds for annulment under Article 52(1)(d) and (e) require different analyses and legal tests, but it also observes that Applicant's own analysis does not differentiate between the two grounds. Applicant has failed in its Reply to explain what these tests are. Applicant adduces the fact that the Tribunal did not take action on the surveillance issue to restore the equilibrium between the parties and then characterizes this lack of action as a failure to state reasons.

190. Applicant's own submission and examples of the determinations that were required from the Tribunal<sup>126</sup> show that Applicant complains about lack of decision of the Tribunal on the evidence submitted with Annex I rather than a failure to state reasons. Respondent has argued that the remedy for such lack of decision is to request a decision on the omitted question under Article 49(2) of the Convention and not an application for annulment of the Award.

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<sup>126</sup> See Memorial, para. 143.

191. In the practice of *ad hoc* committees failure to state reasons under Article 52(1)(e) has been linked with varying degrees of intensity to the duty of the tribunal “to deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based” under Article 48(3) of the ICSID Convention. The leading commentary on the ICSID Convention concludes the review of the relationship between Articles 48(3) and 52(1)(e) by saying:

“Failure to deal with a question, according to *MINE* and *Wena*, is not automatically tantamount to a failure to state reasons. This would be the case only if the failure to deal with a particular question rendered the award unintelligible. For other shortcomings in breach of Article 48(3), the remedy in Article 49(2) is available. The mechanical requirement that every argument put forward by a party must be addressed is replaced by the requirement that the reasoning must be coherent.”<sup>127</sup>

192. In the view of the Committee, lack of consideration of a question submitted to a tribunal could amount to a failure to state reasons if no reasons are given by the tribunal for not addressing the question and such question would be determinant for understanding the reasoning of the award. The Committee shares the view expressed by the *Vivendi I ad hoc* Committee that:

“[...] annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision.”<sup>128</sup>

193. To the extent that the Tribunal failed to address the question of surveillance in the Award it was of no consequence for the coherence in the reasoning of the Tribunal. It was a matter that had been previously and substantially addressed by the Tribunal after a hearing in April 2008. It was not listed among the issues identified on the Applicant’s Witnesses Request to be considered by the Tribunal at the hearing on jurisdiction in November 2009.<sup>129</sup> The Tribunal had been explicit in stating in its Order of August 31, 2009 that in its view,

“the surveillance/interception of the communications, the way Turkey has chosen to conduct itself in meetings with [...], strategies that the Respondent have allegedly adopted after the alleged expropriation and the

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<sup>127</sup> Schreuer et al., *supra* note 5, p. 1017.

<sup>128</sup> *Vivendi I*, *supra* note 18, para. 65.

<sup>129</sup> *See* para. 23 of Applicant’s request to examine witnesses.



coordination between the [...] and the [...] are not relevant to the issues to be heard in the 2 November hearing.”<sup>130</sup>

194. The hearing was on the jurisdiction of the Tribunal. In the view of the Committee, once the Tribunal decided that it had no jurisdiction, there was no purpose in considering other issues except to decide on the apportionment of costs. That the Tribunal took into account the question of surveillance is demonstrated by the fact that it decided that a costs order should be made in favor of Respondent minus certain items, including:

“(a) Costs and expenses arising from complaints to the Tribunal by the Claimant relating to the alleged covert surveillance of the Claimant’s representatives, Counsel and witnesses, which led to the Tribunal’s order of 1 May 2008 after an oral hearing. The reasons for the Tribunal’s decision in this regard may be gleaned from its order of 1 May 2008.”<sup>131</sup>

195. While it is understandable that the Tribunal would not delve further on other matters which became irrelevant once the Tribunal decided that it had no jurisdiction, the Committee cannot fail to point out that no explanation has been given in this proceeding as to why there is no relevant reference to Annex I in the body of the Rejoinder on the Preliminary Jurisdictional Objections, or why no mention of this issue is made in the list of questions to be addressed by the Tribunal in the Award, or why no reference to the issue is made in the Post-Hearing Memorial. This by itself is a strong indication that Applicant accepted the irrelevance of the surveillance issue at that stage of the arbitration proceedings and it is inconsistent with the allegations of Applicant before the Committee.

### **3. The Tribunal’s Manifest Excess of Powers Relating to Failure to Exercise Jurisdiction**

#### ***A. The Parties’ Positions***

##### *(i) Memorial*

196. [...]

197. [...]

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<sup>130</sup> Procedural Order of August 31, 2009, para. 4. Exhibit C-341.

<sup>131</sup> Award, para. 564(a).

198. [...]

199. [...]

200. [...]

201. [...]

*(ii) Counter-Memorial*

202. [...]

203. [...]

204. [...]

205. [...]

*(iii) Reply*

206. [...]

207. [...]

208. [...]

*(iv) Rejoinder*

209. [...]

210. [...]

211. [...]

212. [...]

## ***B. The Committee's Analysis***

### *(i) Failure to Provide Appropriate Remedies for the Destruction of Equality of Arms Between the Parties*

213. Applicant's premise ignores that the Tribunal provided remedies through the Tribunal's Orders of May 1, 2008, the Decision on Preliminary Issues of June 23, 2008, and the Order of August 11, 2008. The Tribunal dealt swiftly with the surveillance issue; it held hearings in April, 2008 and issued promptly the May 1 Orders. These actions of the Tribunal are recorded in the "Arbitration Proceedings" section of the Award. The Award also deals with the apportionment of costs, in respect of which Applicant had made a specific petition on July 1, 2010. It is noteworthy that this petition was grounded on the issue of surveillance, including the material in Annex I. The Award does not deal with the new evidence presented in Annex 1 except to the extent that the Tribunal took into consideration the surveillance issue in its decision on costs. Applicant has not complained about the measures that the Tribunal ordered in 2008. The issue of surveillance was not to be discussed at the hearing on jurisdiction as the Tribunal had decided in its Procedural Order of August 31, 2009. Thus Applicant was aware and had ample notice that the Tribunal would not consider the surveillance issue at the hearing on jurisdiction because it was not relevant. Once the Tribunal decided that it had no jurisdiction, there was nothing else that the Tribunal could do.

### *(ii) Failure to Exercise Jurisdiction Established by Forensically-Tested Documentary Evidence*

214. Applicant has insisted that the flaw is not in the Tribunal's evaluation of evidence but in its decision to deny jurisdiction notwithstanding that jurisdiction had been established through forensically tested documentary evidence as evaluated by the Tribunal. Applicant explains that its argument refers to the decision-making process of the Tribunal and not to its evaluation of evidence.

215. The distinction made by Applicant is not convincing in the context in which it is made. The Tribunal evaluated documentary evidence and also witnesses' testimony. The Tribunal determined that the forensic experts were "unable to provide any concrete forensic evidence to substantiate the allegations of backdating."<sup>143</sup> When it came to evaluation of the fact witnesses'

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<sup>143</sup> Award, para. 369.

testimony, the Tribunal found that “the Claimant’s case based on the evidence of its factual witnesses [was] highly strained and thus unpersuasive overall.”<sup>144</sup> The Tribunal evaluated all the evidence and reached a conclusion. Notwithstanding the efforts of Applicant to frame the argument as an argument of the Tribunal’s flawed decision-making, the argument remains an argument that contests the result of the evaluation of evidence by the Tribunal. Thus it is beyond the brief of this Committee.

216. Applicant has also argued that the Tribunal reversed the burden of proof. The Committee will consider this argument in the next section.

*(iii) Failure to Apply the Applicable Law which Established Applicant’s Timely Ownership in ÇEAŞ and Kepez*

217. In the Award the Tribunal stated that “it is common ground between the Parties that Turkish law applies to the issue of whether (and when) Libananco acquired the shares in question and thus had an “Investment” under Article 26(1) of the ECT and Article 25(1) of the ICSID Convention.”<sup>145</sup> The Tribunal added: “Accordingly, in this Award, the Tribunal will apply the provisions of the ECT and the ICSID Convention. The Tribunal will also apply Turkish law (evidence of which has been given by both Parties) to determine whether there has been a valid transfer of the shares in question to Libananco as this is a question of domestic law.”<sup>146</sup>

218. The flaw in Applicant’s argument is that it is based on the premise that evidence has to be assessed in accordance with Turkish law. Turkish law applied to the substance of the transaction in question as the Tribunal correctly stated, but the proof of documents and witnesses’ testimony needed to be appreciated by the Tribunal not in accordance with Turkish law but in accordance with Arbitration Rule 34(1). This rule empowers the Tribunal to be “the judge of the admissibility of any evidence adduced and of its probative value.” In the exercise of this power the Tribunal found that the evidence submitted did not prove the timely ownership of Libananco in ÇEAŞ and Kepez. The Tribunal went at great length to examine the evidence submitted. Because of Applicant’s reliance in its arguments on the “forensically tested” documentary

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<sup>144</sup> *Id.*, para. 530.

<sup>145</sup> *Id.*, para. 112.

<sup>146</sup> *Id.*, para. 113.

evidence, the Committee has selected two paragraphs from the conclusions of the Tribunal on whether Libananco acquired ownership of shares in ÇEAŞ and Kepez. They show how the Tribunal appreciated the documentary evidence or lack thereof beyond the issue of back-dating:

“One striking feature of this case, underscored by the nature and magnitude of the transaction and investment in question, is the absence (even in the context of a family investment) of any form of orderly procedure designed to produce an adequate written record and compliance with the legal requirements that had to be met in order to achieve the desired factual result. Indeed, the evidence shows that even basic corporate and legal documents (many of which would be likely to exist if the facts alleged by the Claimant are true) were neither created nor retained by the persons responsible for managing or otherwise involved in Libananco’s corporate affairs.”<sup>147</sup>

219. The Tribunal further stated:

“A further weakness in the Claimant’s case is that there is a substantial body of unrebutted evidence that brings into question the dates of creation and/or accuracy of the key documents on which the Claimant has relied to establish the jurisdiction of the Tribunal. For the reasons given above [...], the Tribunal is unable to accept that the STAs and Libananco’s minutes establish (either in part or in whole) the Claimant’s case that Libananco acquired ownership of the shares in question before 12 May 2003.”<sup>148</sup>

220. The evidence failed to convince the Tribunal. It is not within the bounds of the Committee to analyze the probative value of the evidence produced by the parties.<sup>149</sup>

221. Applicant has also argued that the Tribunal reversed the order of proof. In the Award the Tribunal took note that “in relation to the issue of whether Libananco acquired timely ownership of the share certificates in question [...], it is now common ground between the Parties that the Claimant has the burden of proof.”<sup>150</sup> Applicant claimed that it made an investment under the ECT and the ICSID Convention. It was for Applicant to prove it. There is nothing unfair or unusual in the way that the Tribunal within its discretion established the burden of proof.

*(iv) Failure to Exercise Jurisdiction under the ECT Established Through Applicant’s Equitable Interest in ÇEAŞ and Kepez*

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<sup>147</sup> *Id.*, para. 531.

<sup>148</sup> *Id.*, para. 534.

<sup>149</sup> *See Rumeli*, supra note 17, para. 96.

<sup>150</sup> Award, para. 121.

222. Applicant's argument is based on a misunderstanding of the Tribunal's power to determine its own jurisdiction. Applicant assumes that the Tribunal's power extends to searching for grounds of jurisdiction not pleaded by the parties. In fact, the power of the Tribunal is rather the reverse. The Tribunal at its own initiative had to make sure that it had jurisdiction on grounds pleaded by the parties.

223. Applicant had not pleaded that the Tribunal had jurisdiction based on an equitable interest in ÇEAŞ and Kepez and, therefore, it was not the duty of the Tribunal to search for other grounds on which it could base its jurisdiction. Not only would such conduct elicit claims of the Tribunal exceeding its powers, but it would also imply that the Tribunal could decide on new grounds of jurisdiction without the benefit of the parties' views. The Committee does not need to say anything further on this matter.

## VI. COSTS

224. Each Party has pleaded that the fees and expenses of its legal representation, those of the Committee members and the charges for the use of the facilities of the Centre be borne by the other Party. Under Article 61(2) of the ICSID Convention and Arbitration Rule 47(1)(j) read together with Article 52(4) of the ICSID Convention and Arbitration Rule 53, the Committee has discretion in deciding the apportionment of fees and expenses of the parties, the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre.

225. As regards the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre, the Committee notes that the recent tendency in the practice of annulment committees is for the party whose application is rejected to bear these costs. The *Azurix* and *MCI Power* committees grounded their decision in this respect on the difference of treatment of the advances for costs made in the Administrative and Financial Regulations.<sup>151</sup> While Regulation 14(3)(e) requires the applicant in annulment proceedings to make the whole advance payment to ICSID for the costs referred to in Regulation 14(2), Regulation 14(3)(d) requires each of the parties in an arbitration to advance half of such costs. Following the same logic and since the Committee has rejected the Application, Applicant shall be responsible for the fees and expenses of the Committee members and the charges for the use of ICSID's facilities.

226. On the other hand, an *ad hoc* Committee has a wide discretion to assess whether or not to order the unsuccessful party to compensate the other party for its costs for legal representation and expenses in the annulment proceeding. In the present case, the Committee pays special attention to the fact that annulment was sought on the basis of allegations which raised questions of observance of fundamental procedural rights, including the right to a fair hearing and equality of arms between the parties. Although the Committee, after analyzing the facts of the case, found that there was no ground for annulment, it nevertheless considers that the character and importance of the issues involved were such as to justify the conclusion that each party should bear its own costs for legal representation and expenses.

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<sup>151</sup> *Azurix*, supra note 21, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on the Application for Annulment, October 19, 2009.

## VII. DECISION

227. For the reasons given above, the Committee decides:

- (a) The Application is dismissed in its entirety.
- (b) Applicant shall bear all expenses incurred by the Centre in connection with this proceeding and the fees and expenses of the members of the Committee.
- (c) Each party shall bear its own litigation costs and expenses incurred with respect to this annulment proceeding.
- (d) Pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3), the continued stay of enforcement of the Award ordered by the Committee in its decision of May 7, 2012 is terminated.

[signed]

[signed]

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Judge Hans Danelius  
Member

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Dr. Eduardo Silva Romero  
Member

Date:

Date:

[signed]

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Dr. Andrés Rigo Sureda  
President

Date: