INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TULIP REAL ESTATE AND DEVELOPMENT NETHERLANDS B.V.
Applicant

v.

REPUBLIC OF TURKEY
Respondent

ICSID Case No. ARB/11/28
ANNULMENT PROCEEDING

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
H.E. Judge Peter Tomka, President
Ms. Cherie Booth QC
Mr. Christoph Schreuer

Secretary of the *ad hoc* Committee
Ms. Martina Polasek

Representing Applicant

Mr. Stuart Newberger, Esq.
Mr. George D. Ruttinger
Mr. Ian A. Laird
Mr. James J. Saulino
Crowell & Moring LLP
Washington, DC

Prof. Dr. Dr. Rudolf Dolzer
Heidelberg, Germany

Representing Respondent

Mr. Michael E. Schneider
Dr. Veijo Heiskanen
Mr. Matthias Scherer
Mr. Joachim Knoll
Mr. Christophe Guibert de Bruet
Ms. Laura Halonen
LALIVE
Geneva, Switzerland

Date of dispatch to the Parties: December 30, 2015

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ABBREVIATIONS

App. Exh. C-[number]	Applicant's Exhibit
App. Mem. Annul.	Applicant's Memorial on Annulment
App. Rep. Annul.	Applicant's Reply on Annulment
Applicant/Claimant/Tulip	Tulip Real Estate and Development Netherlands B.V.
Application	Application for Annulment, dated August 3, 2014
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	Award of the Arbitral Tribunal rendered on March 10, 2014
BIT	Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated March 27, 1986
Committee	The *ad hoc* Committee
Contract	Tulip JV and Emlak contract for the development of the Ispartakule III project
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
Emlak	Emlak Konut Gayrimenkul Yatirim Ortakligi A.S.
FMS	FMS Mimarlik Ltd Sti.
IACHR	Inter-American Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICSID/the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention/Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ILC	International Law Commission
ILC Articles/ILC Articles on State Responsibility	ILC Articles on the Responsibility of States for Internationally Wrongful Acts
ILC Commentary/Commentary	ILC Commentary to the Articles on State Responsibility
Ilci	Ilci Insaat A.S.
Institution Rules	ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
Majority	The majority of the members of the Tribunal
Mertkan	Mertkan Insaat Ltd Sti.
NAFTA	North American Free Trade Agreement

Respondent/Turkey	The Republic of Turkey
Resp. C-Mem. Annul.	Respondent's Counter-Memorial on Annulment
Resp. Exh. R-[number]	Respondent's Exhibit
Resp. Rej. Annul.	Respondent's Rejoinder on Annulment
Separate Opinion	The Separate Opinion of Mr. Michael Evan Jaffe, which forms part of the Award rendered on March 10, 2014
Tribunal	Arbitral Tribunal which rendered the award of March 10, 2014, consisting of Dr. Gavan Griffith, Mr. Michael Evan Jaffe and Prof. Rolf Knieper
Tulip I	Tulip Gayrimenkul Gelistirme ve Yatirim Sanayi ve Ticaret A.S.
Tulip II	Tulip Gayrimenkul Yatirim A.S.
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

I. PROCEDURAL HISTORY

1. On July 3, 2014, Tulip Real Estate and Development Netherlands B.V. ("Applicant" or "Claimant" or "Tulip") 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 March 10, 2014 ("Award") in the case between the Applicant (the Claimant in the original proceedings) and the Republic of Turkey ("Respondent" or "Turkey"). 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"). Tulip sought annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention.

2. On July 14, 2014, the Secretary-General informed the parties that the Application had been registered on that date and that the Chairman of the Administrative Council of ICSID would proceed to appoint an *ad hoc* committee pursuant to Article 52(3) of the ICSID Convention.

3. By letter of August 26, 2014, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the parties that the *ad hoc* Committee ("Committee") had been constituted – composed of H.E. Judge Peter Tomka (a national of Slovakia) as President, and Ms. Cherie Booth QC (a national of the United Kingdom) and Mr. Christoph Schreuer (a national of Austria) as Members – and that the annulment proceeding was deemed to have begun on that date. The parties were also informed that Ms. Martina Polasek, Team Leader/Legal Counsel, ICSID, would serve as Secretary of the Committee.

4. The first session of the Committee was held by teleconference on September 29, 2014. In addition to the Committee and its Secretary, participating in the conference were:

<u>On behalf of the Applicant</u>

Mr. Stuart H. Newberger	Crowell & Moring
Mr. Ian A. Laird	Crowell & Moring
Mr. James J. Saulino	Crowell & Moring
Ms. Derya Tokdemir	Crowell & Moring

Ms. Meriam Alrashid	Crowell & Moring
Ms. Staci Gellman	Crowell & Moring

On behalf of the Respondent

Mr. Michael E. Schneider	Lalive
Dr. Veijo Heiskanen	Lalive
Mr. Matthias Scherer	Lalive
Ms. Laura Halonen	Lalive
Mr. Julian Wyatt	Lalive
Mr. Alptuğ Tokeser	Lalive
Mr. Manu Thadikkaran	Lalive
Mr. Sami Arslan Aşkin	Chief Legal Counsel from the Prime Ministry

Observers

Mr. Ilker Çetin	Treasury Lawyer from the Ministry of Finance
Mr. Nurettin Şam	Chief Legal Counsel from Emlak

5. On September 30, 2014, the Committee issued Procedural Order No. 1, signed by the President of the Committee. Among other things, the parties agreed that the applicable arbitration rules would be the ICSID Arbitration Rules in force as of April 10, 2006, that Paris would be the place of the proceeding and that English would be the procedural language.

6. On November 21, 2014, the Applicant filed its Memorial on Annulment ("Memorial"), accompanied by 33 factual exhibits (CE-329 to CE-356, H-946, RE-73, RE-75 and RE-93) and 87 legal authorities (CLA_A-22 to CLA_A-108).

7. On February 27, 2015, the Respondent filed its Counter-Memorial on Annulment ("Counter-Memorial"), accompanied by 13 factual exhibits (RE-73 and RE-104 to RE-115) and 17 legal authorities (RLA-01 to RLA-17).

8. On April 1, 2015, the Applicant filed a Reply on Annulment ("Reply"), accompanied by 25 legal authorities (CLA_A-109 to CLA_A-133).

9. On May 4, 2015, the Respondent filed its Rejoinder on Annulment ("Rejoinder"), accompanied by 9 legal authorities (RLA-18 to RLA-26).

10. On May 14, 2015, the parties submitted a joint proposal concerning the conduct of the hearing on annulment, which was adopted by the Committee on May 18, 2015.

11. The hearing on annulment was held at the World Bank facilities in Paris on June 15 and 16, 2015. Present at hearing were:

Attending on behalf of the Applicant

Mr. Stuart H. Newberger	Crowell & Moring
Mr. Ian A. Laird	Crowell & Moring
Mr. George D. Ruttinger	Crowell & Moring
Mr. James J. Saulino	Crowell & Moring
Ms. Staci E. Gellman	Crowell & Moring
Prof. Dr. Dr. Rudolf Dolzer	McNair Chambers
Mr. Avi Avraham	Menachem, Avraham & Co.
Mr. Elez Menachem	Menachem, Avraham & Co.
Mr. Dirk Knottenbelt	Houthoff Buruma
Prof. Frederic G. Sourgens	Washburn University School of Law
Mr. Meyer Benitah	Tulip Real Estate and Development Netherlands B.V.
Mr. Erik Esveld	Tulip Real Estate and Development Netherlands B.V.

Attending on behalf of the Respondent

Mr. Michael E. Schneider	Lalive
Dr. Veijo Heiskanen	Lalive
Mr. Matthias Scherer	Lalive
Ms. Laura Halonen	Lalive
Mr. Julian Wyatt	Lalive
Mr. Alptuğ Tokeser	Lalive
Mr. Sami Arslan Aşkin	Republic of Turkey, Prime Minister's Office
Mr. İlker Çetín	Republic of Turkey, Prime Minister's Office
Mr. Nurettin Şam	Emlak Konut Gayrimenkul Yatirim Ortakligi A.S., Legal Department

Other Attendees

Ms. Claire Hill	English-Language Court Reporter
Ms. Laura Edwards	Omnia Strategy LLP

12. There were two rounds of oral arguments. At the end of the hearing, it was agreed that the parties would have the opportunity to file Cost Submissions by July 15, 2015. These submissions were duly filed by the parties.

13. In accordance with Arbitration Rules 38(1) and 53, the proceedings were declared closed on December 15, 2015.

II. THE AWARD AND THE SEPARATE OPINION

14. The Award was rendered by a Tribunal composed of Dr. Gavan Griffith (President, appointed by the parties), Mr. Michael Evan Jaffe (appointed by the Claimant in the original proceedings) and Prof. Rolf Knieper (appointed by the Respondent). Attached to the Award was the separate opinion of Mr. Jaffe ("Separate Opinion") on the question of attribution under Article 8 of the International Law Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles" or "ILC Articles on State Responsibility"). While Mr. Jaffe partially dissented from the Award, the outcome of the Award was unanimous in that the Claimant's claims based on alleged breaches of the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated March 27, 1986 ("BIT") were dismissed.

15. Sections I and II of the Award introduce the parties to the dispute, and provide an overview of the procedural history. On November 2, 2012, the Tribunal had bifurcated the proceeding to address one of the three objections to jurisdiction raised by the Respondent as a preliminary question. The Award incorporates the Tribunal's Decision on the Bifurcated Jurisdictional Issue dated March 5, 2013, in which the Tribunal rejected the third objection to its jurisdiction and proceeded to the next phase of the proceeding.

16. Section III provides a factual overview of the dispute. The facts in that section can be summarized as follows.

17. The dispute relates to the Claimant's involvement in a mixed-use real estate development project in Istanbul, known as Ispartakule III. In 2006, Tulip JV, an unincorporated joint venture, was awarded a tender to complete the project by a Turkish real estate investment trust, Emlak Konut Gayrimenkul Yatirim Ortakligi A.S. ("Emlak"). Emlak was at the time 39% owned by TOKI, a State organ responsible for Turkey's public housing, and TOKI controlled over 99.9% of Emlak's shares.

18. The lead partner in Tulip JV – Tulip Gayrimenkul Gelistirme ve Yatirim Sanayi ve Ticaret A.S. ("Tulip I") – was established as a local investment vehicle by the Van Herk Group and

Mr. Meyer Benitah, a national of the Netherlands. The other members of Tulip JV were three local Turkish partners: FMS Mimarlik Ltd Sti. ("FMS"), Mertkan Insaat Ltd Sti. ("Mertkan"), and Ilci Insaat A.S. ("Ilci"). Pursuant to a Joint Venture Agreement dated August 2, 2006, Tulip I was allocated a 74.8% interest in the joint venture, FMS 25% and Mertkan and Ilci 0.1% each.

19. Tulip JV and Emlak executed a contract for the development of the Ispartakule III project on August 3, 2006 ("Contract"), and the project site was delivered later that month to Tulip JV. The key terms of the Contract are set out in paragraphs 75-89 of the Award.

20. The Claimant was incorporated in the Netherlands in 2007. Shortly thereafter, Tulip Gayrimenkul Yatirim A.S. ("Tulip II**"**) was incorporated under Turkish law, and all of the obligations of Tulip JV under the Contract were assigned to Tulip II. In August 2008, the Claimant acquired 65% of the shares in Tulip I. In March 2008 and February 2009, the Claimant also entered into two loan facility agreements with Tulip I and Tulip II in order to finance the development of the project.

21. There were a number of issues relating to the development of the project, which are described in the Award. These included conflicts among the joint venture members (including attempts to forcibly remove certain members from the joint venture), zoning changes impacting the project, construction delays and failure to meet certain milestones in the Contract.

22. On May 18, 2010, Emlak's Board passed a unanimous resolution to terminate the Contract. On May 26, 2010, Emlak further drew the full amount of a performance bond (EUR 8,716,981.05) that had been provided by Fortis Bank. Steps taken by the Tulip JV and its members to revise and continue the project were unsuccessful, and the project was re-tendered by Emlak.

23. Following the termination of the Contract, Tulip I and Tulip JV commenced domestic court proceedings against Emlak in Turkey for improper termination of the Contract. At the time of the Award, one of the proceedings had been rejected and the other was pending.

24. In October 2011, the Claimant filed the ICSID case. Paragraph 60 of the Award summarizes the Claimant's claims as follows:

> The Claimant asserts that the Respondent, acting through various alleged state actors and/or entities operating under State control, engaged in a pattern of conduct that interfered with the construction of Ispartakule III in breach of the BIT and ultimately terminated the Contract in a manner that amounts to wrongful expropriation that deprived the Claimant and Mr Benitah of the entire value of their real estate development projects throughout Turkey.[1]

25. As a result, the Claimant claimed that the Respondent had: (i) failed to comply with the "fair and equitable treatment" obligation in Article 3(1) of the BIT; (ii) expropriated the investment in breach of Article 5 of the BIT; and (iii) failed to "observe any obligation it may have entered into with regard to investments" and to afford "full protection and security" to the investment, in breach of Article 3(2) of the BIT.

26. Section IV of the Award describes the relevant provisions of the BIT, including the dispute settlement clause in Article 8 of the BIT. It also contains the Tribunal's determination on the applicable law:

> The Tribunal observes that although the parties have not expressly agreed [on] the applicable law, the Claimant has presented its claims (and matters concerning jurisdiction) on the basis of the provisions of the BIT, and the Respondent has proceeded to present its defence on the same basis. Therefore, the Tribunal considers that the applicable law consists, for the most part, of the BIT, as interpreted in accordance with international law, as well as the ICSID Convention. The Tribunal further observes that, in addition to applying the provisions of the BIT and the ICSID Convention, aspects of Turkish municipal law are also invoked, in particular as the Claimant asserts that Emlak is a "state organ" and entities designated as "state organs" under domestic law will enjoy that status under international law.[2]

27. Section V of the Award, "Jurisdiction and Admissibility," addresses two questions: (i) whether the Claimant had an investment under the BIT and the ICSID Convention; and (ii) whether the claims asserted on behalf of Mr. Benitah (who was not formally a party in the proceeding) were admissible. The Award summarizes the parties' arguments with respect to these questions, and provided the Tribunal's determination that: i) the Claimant had an investment for the purposes of Article 1(b) of the BIT and Article 25 of the ICSID Convention; and ii) Mr. Benitah's claims were not admissible.

[1] Claimant's Memorial in the Original Proceeding, para. 3.
[2] Award, para. 171.

28. Section VI of the Award, "Attribution," addresses the parties' arguments and the Tribunal's conclusion on whether Emlak's actions were attributable to the Respondent under Articles 4, 5 and 8 of the ILC Articles on State Responsibility.

29. The Tribunal described its general approach to the question of attribution as follows:

> 276. The issue of attribution relates both to the Tribunal's jurisdiction and to the merits of this dispute. Attribution is relevant in the present context to ascertaining whether there is a dispute with a Contracting State, here Turkey, for the purposes of the BIT and Article 25 of the ICSID Convention. At the same time, the claims presented in this investment arbitration (particularly with respect to the conduct of Emlak) may only succeed if they are attributable to the State. In that sense, the issue of attribution is also relevant to the merits of the dispute. Finally, purely contractual conduct *per se* does not amount to (wrongful) action of the State.
>
> […]
>
> 280. As the Tribunal has not accepted bifurcation with respect to questions of jurisdiction (other than the question of compliance with the Art 8(2) notice requirement), and has joined those jurisdictional objections to the merits, it now has the benefit of the Parties' full pleadings. In those circumstances, and taking into account that the question of attribution is also relevant to the merits, the Tribunal may not limit its enquiry to a *prima facie* standard and must, instead, make an informed and dispositive ruling on the question of attribution.[3]

30. The Tribunal unanimously concluded that Emlak's actions were not attributable to the Respondent under either Articles 4 or 5 of the ILC Articles. By majority, the Tribunal also found that the acts of Emlak were not attributable to the State under Article 8 of the ILC Articles. The Tribunal concluded in that regard:

> 326. Accordingly, the Tribunal concludes that while Emlak was subject to TOKI's corporate and managerial control, Emlak's conduct with respect to the execution, maintenance and termination of the Contract is not attributable to the State under Art 8 of the ILC Articles due to an absence of proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests.
>
> 327. In conclusion, the Tribunal therefore determines by majority that Emlak's conduct with respect to the Contract and the Ispartakule III Project is not

[3] The Tribunal referenced, and adopted, the approach to the issue of attribution taken by the Tribunal in *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, June 18, 2010, paras. 143-145 ("*Hamester v. Ghana*").

attributable to the Turkish State and is, on that basis, outside the remit of the Tribunal.

31. Section VII of the Award, "Treaty Versus Contract Claims," addresses the Respondent's argument that the Tribunal's jurisdiction extended only to treaty-based claims and not claims arising under a contract. The Award summarizes the parties' arguments and provides the Tribunal's determination on this question. The Tribunal concluded that purely contractual claims are not covered by the BIT. It further found that the claims relating to Emlak's actions were contractual in nature, stating that:

> 361. [T]here is no persuasive evidence before the Tribunal that Emlak went beyond acting as an ordinary contractual party in pursuit of its commercial best interests. For example, the Claimant's claims regarding Emlak's failure to grant reasonable extensions of time is, essentially, a claim arising out of the contractual relationship between Emlak and Tulip JV and Emlak's exercise of rights in reference to the Contract. Similarly, the termination of the Contract was, as discussed above, an exercise of perceived contractual rights consistent with promoting Emlak's commercial best interests. Indeed, none of the claims presented by the Claimant with respect to the conduct of Emlak are amenable to be characterised by the Tribunal as arising out of the BIT. Accordingly, they fall outside the scope of the Tribunal's jurisdiction.

32. The Tribunal held that it had jurisdiction over the independent actions of TOKI, the Supreme Audit Board, the Prime Ministry and the police, as claims with respect to those actors were not substantially connected to contractual issues between Emlak and Turkey and were assertions about the conduct of State organs in the performance of their State functions.

33. Section VIII of the Award, "The Claimant's Claims," sets out the parties' positions and the Tribunal's rulings on the merits of the dispute with regard to the questions outlined by the Tribunal in paragraphs 367-368 of the Award:

> 367. Nevertheless, the Tribunal will turn to consider whether the claims presented by the Claimant in respect of Emlak could amount to any violations of the BIT if the Tribunal were to assume that they could be characterised as treaty claims attributable to the Respondent.
>
> 368. The Tribunal will also consider the Claimant's claims asserted by the Claimant with respect to State actors such as TOKI, the Prime Ministry, the Supreme Audit Board and the Turkish police which are, in any event, properly within the Tribunal's jurisdiction and admissible before it.

34. The Award continued:

> 369. In deciding on the different claims put forward by the Claimant, the Tribunal has examined the evidence put before it and has concentrated on assessing the extent to which, if any, the evidence supports a finding of a violation of the BIT. It has found unanimously that no such violation occurred. To the extent that any question is not discussed, it is because the Tribunal considers that the resolution of the question would not affect its decision, even if the question were resolved in favour of the Claimant.

35. Even assuming that Emlak's conduct could be attributed to the government of Turkey, the Tribunal thus unanimously concluded that the challenged actions, including those of TOKI, the Supreme Audit Board, the Prime Ministry and the police, did not constitute breaches of the BIT.

36. Section IX of the Award, "Costs," sets out the Tribunal's determination on the allocation of the parties' legal fees and expenses, and the costs of arbitration. The Tribunal ordered the Claimant to pay to the Respondent USD 750,000 to reimburse advances paid to ICSID and other costs associated with the proceedings.

37. Finally, Section X of the Award is the *dispositif*:

> The Tribunal determines as follows:
>
> 1. The Claimant has made an investment into Turkey within the terms of the BIT and the ICSID Convention.
> 2. The claims of Mr Benitah are inadmissible.
> 3. By majority, the acts of Emlak are not attributable to Turkey.
> 4. Unanimously, and in any event, the acts of Emlak do not constitute breaches of the BIT.
> 5. Also unanimously, the acts of TOKI, the Supreme Audit Board, the Turkish police and Turkish government officials are attributable to Turkey but do not constitute breaches of the BIT.
>
> Accordingly, the Claimant's claims are dismissed.
>
> Costs:
>
> The Claimant is ordered to pay the Respondent USD 750,000, constituted by:

(a) USD 450,000 in part reimbursement of the advances paid by the Respondent to ICSID; and

(b) USD 300,000 for its other costs.

38. Mr. Jaffe's Separate Opinion expressed his view on Article 8 of the ILC Articles. He found that Emlak's decision to terminate the Contract was taken at the direction of TOKI. The Separate Opinion concluded as follows:

> 11. [B]ecause there is at least a credible basis for finding that Emlak's termination decision was taken under the direction and control of TOKI, an organ of the Turkish State, I would treat the attribution question under Art 8 as provisionally addressed in favor of attribution and focus on the question of whether there was state action amounting to a violation of the BIT. On that question, I join my colleagues in concluding that the proof offered was not sufficient to find a violation of the BIT.

III. THE APPLICABLE LEGAL STANDARDS FOR ANNULMENT

1. General Observation

A. *The Function of Annulment under the ICSID Convention*

39. Under the ICSID Convention, annulment provides relief for egregious violations of certain basic principles. Article 52(1) of the Convention circumscribes the reasons for annulment.

40. In any review process, two potentially conflicting principles are at work: the principle of finality and the principle of correctness. Finality serves the purpose of efficiency in terms of an expeditious and economical settlement of disputes. Correctness is an elusive goal that takes time and effort, and may involve several layers of control, a phenomenon that is familiar from proceedings in domestic courts. In arbitration, the principle of finality typically takes precedence over the principle of correctness.

41. Article 52 of the ICSID Convention follows the model of a limited review. It represents a control mechanism that ensures that a decision has remained within the framework of the parties' agreement to arbitrate and is the result of a process that was in accord with basic requirements of fair procedure. The main function of annulment is to provide a limited form of review of awards in order to safeguard the integrity of ICSID proceedings. The *ad hoc* Committee in *CDC v. Seychelles* described this review in the following terms:

> This mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID Convention's drafters' desire that Awards be final and binding, which is an expression of "customary law based on the concepts of *pacta sunt servanda* and *res judicata*," and is in keeping with the object and purpose of the Convention. Parties use ICSID arbitration (at least in part) because they wish a more efficient way of resolving disputes than is possible in a national court system with its various levels of trial and appeal, or even in non-ICSID Convention arbitrations (which may be subject to national courts' review under local laws and whose enforcement may also be subject to defenses available under, for example, the New York Convention). Procedural protections are, however, all the more necessary in order to ensure that the resulting award is truly an "award," *i.e.*, a result arrived at fairly, under due process and with transparency, and hence in the basic justice of which parties will have faith.[4]

[4] *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, June 29, 2005, para. 36 ("*CDC v. Seychelles*"). Footnotes omitted.

42. Annulment is fundamentally different from appeal. The result of a successful application for annulment is the invalidation of the original decision. The result of a successful appeal is its modification. A decision-maker exercising the power to annul only has the choice between leaving the original decision intact or annulling it in whole or in part. An appeals body may substitute its own decision for the decision that it has found to be deficient. Under the ICSID Convention, an *ad hoc* committee only has the power to annul the award. The *ad hoc* committee may not amend or replace the award by its own decision on the merits. Article 53(1) of the Convention explicitly rules out any appeal.

43. Annulment is concerned only with the legitimacy of the process of a decision: it is not concerned with its substantive correctness. Appeal is concerned with both. Annulment is possible on a very limited number of grounds. In the case of the ICSID Convention, these are listed exhaustively in Article 52(1). Appeal is possible on a much broader variety of reasons including those going to the merits of the decision.[5]

44. ICSID *ad hoc* committees have adamantly stressed the distinction between annulment and appeal. They have stated consistently that their functions are limited and that they do not have the powers of a court of appeal.[6] A decision to annul has to be based on one of the five

[5] The distinction between annulment and appeal has been aptly described by *D. Caron*, Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal, 7 ICSID Review—Foreign Investment Law Journal (1992) 21.

[6] See e.g.: *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment, May 3, 1985, paras. 3, 83, 118, 128, 177 ("*Klöckner v. Cameroon*"); *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, May 16, 1986, paras. 43, 110 ("*Amco I v. Indonesia*"); *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, December 22, 1989, paras. 5.08, 6.55 ("*MINE v. Guinea*"); *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002, para. 18 ("*Wena v. Egypt*"); *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002, para. 62 ("*Vivendi v. Argentina*"); *CDC* v. *Seychelles*, Decision on Annulment, June 29, 2005, paras. 35, 36; *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on Annulment, January 8, 2007, para. 38 ("*Repsol v. Petroecuador*"); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, March 21, 2007, para. 52 ("*MTD v. Chile*"); *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, September 25, 2007, paras. 43, 44 ("*CMS v. Argentina*"); *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, June 5, 2007, paras. 20, 24 ("*Soufraki v. UAE*").

reasons listed in Article 52(1).[7] *Ad hoc* committees cannot review an award's findings for errors of fact or law.[8]

B. *Discretion to Annul*

45. Article 52(3) of the ICSID Convention provides in part that "[t]he Committee shall have the authority to annul the award […]." Under the ordinary meaning of this provision, an *ad hoc* committee has some discretion and is not under an obligation to annul even if it finds that there is a ground for annulment listed in Article 52(1).[9] Decisions on applications for annulment confirm that, even if a ground listed in Article 52(1) exists, annulment will ensue only if the flaw has had a serious adverse impact on one of the parties.

46. The *ad hoc* Committee in *Wena v. Egypt* stressed that a ground for annulment must have had an effect on the outcome of the award and must have led to a substantially different result in order to actually lead to annulment.[10] The *ad hoc* Committee in *Vivendi v. Argentina* cautioned that it "must guard against the annulment of awards for trivial cause."[11] It stressed the discretion of committees and the practical significance of any error.[12]

47. It follows that, even in the presence of one of the grounds listed in Article 52(1) of the ICSID Convention, annulment does not follow automatically. An *ad hoc* Committee must decide whether the fault is grave enough to warrant annulment, especially whether it has made a material impact on one of the parties.

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[7] *Klöckner v. Cameroon*, Decision on Annulment, May 3, 1985, para. 3; *Wena v. Egypt*, Decision on Annulment, February 5, 2002, para. 17; *Vivendi v. Argentina*, Decision on Annulment, July 3, 2002, para. 62.

[8] *Klöckner v. Cameroon*, Decision on Annulment, May 3, 1985, paras. 61, 128; *Amco I v. Indonesia*, Decision on Annulment, May 16, 1986, para. 23; *CDC v. Seychelles* Decision on Annulment, June 29, 2005, para. 45; *CMS v. Argentina*, Decision on Annulment, September 25, 2007, paras. 85, 136.

[9] For the discussion of this principle in early ICSID cases see: *Klöckner v. Cameroon*, Decision on Annulment, May 3, 1985, paras. 151, 179; *Amco Asia Corporation and others v. Republic of Indonesia*, Decision on Annulment, December 3, 1992, para. 1.20 ("*Amco II v. Indonesia*"); *MINE v. Guinea*, Decision on Annulment, December 22, 1989, paras. 4.09-4.10.

[10] See *Wena v. Egypt*, Decision on Annulment, February 5, 2002, paras. 58, 105.

[11] *Vivendi v. Argentina*, Decision on Annulment, July 3, 2002, para. 63.

[12] *Ibid.*, para. 66. In the same sense: *Soufraki v. UAE*, Decision on Annulment, June 5, 2007, paras. 24, 27; *CDC v. Seychelles*, Decision on Annulment, June 29, 2005, para. 37.

C. *Principles Governing Annulment*

48. The Background Paper on Annulment For the Administrative Council of ICSID[13] lists the following six broad principles that *ad hoc* committees have affirmed:

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

D. *The Present Case*

49. Article 52(1) of the ICSID Convention lists the following five grounds on which an award may be annulled:

> (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;
>
> (e) that the award has failed to state the reasons on which it is based.

In the present case, the Applicant seeks annulment based on grounds (b), (d) and (e).

[13] Background Paper on Annulment For the Administrative Council of ICSID, August 10, 2012, 27 ICSID Review – FILJ (2012) 443, 470.

50. The parties in the case-at-hand agree that annulment is an extraordinary remedy that can only be granted in matters of fundamental importance and cannot amount to an appeal of an ICSID award. However, they diverge as to the interpretation of the three grounds raised by the Applicant under Article 52 of the ICSID Convention.

2. Manifest Excess of Powers

A. *Applicant's Position*

51. The Applicant points out that a tribunal exceeds its powers in three situations. First, if it exercises jurisdiction it does not possess. Second, if it fails to exercise jurisdiction with which it is vested. Third, if it acts outside the terms of reference set by the parties, such as when it fails to apply the applicable law to the dispute or otherwise fails to make a tenable determination of jurisdiction or merits.[14]

52. The Applicant identifies three positions in practice with respect to the requirement that an excess of powers must be manifest: (1) this can refer to the seriousness of the excess of powers; (2) it can refer to the obviousness or ease with which the excess of powers is perceived; and (3) it can refer to the tenability of the tribunal's exercise of its powers.[15] Specifically, the exercise by a tribunal of jurisdiction, after it finds it does not have jurisdiction, is manifestly an excess of powers.[16]

B. *Respondent's Position*

53. The Respondent agrees with the Applicant's legal test for "manifest excess of powers." It points to the Tribunal's power under Article 41(1) of the Convention to determine its own competence.[17] Based on the jurisprudence of other *ad hoc* committees, the Respondent argues that the term "manifest" means that the excess of powers must be both apparent or obvious, and at the same time, substantial or serious. In the Respondent's view, there is a heavy burden on the Applicant to establish manifest excess of powers.[18]

[14] Application, paras. 128, 129; App. Mem. Annul., para. 211.
[15] App. Mem. Annul., para. 212.
[16] App. Mem. Annul., para. 214; App. Rep. Annul., paras. 163-164.
[17] Resp. C-Mem. Annul., para. 34.
[18] Resp. Rej. Annul., para. 21; Transcript, Day 1, pp. 153-155.

54. With respect to the argument that the Tribunal failed to apply the ILC Articles on State Responsibility, the Respondent points out that this is a question of evaluation of evidence rather than a matter of excess of powers. Moreover, even if the Tribunal had failed to apply the ILC Articles, this would at most amount to a failure to apply the proper rule of the applicable law, rather than the proper law (international law).[19]

C. *Committee's Analysis*

55. An excess of powers occurs when a tribunal deviates from the parties' agreement to arbitrate. This would be the case if a tribunal makes a decision on the merits although it does not have jurisdiction or if it exceeds its jurisdiction. Failure to exercise an existing jurisdiction also constitutes an excess of powers. Failure to apply the proper law may also amount to an excess of powers.

(i) Manifest Nature of the Excess of Powers

56. The requirement that an excess of powers must be "manifest" in order to constitute a ground for annulment means that the excess must be obvious, clear or easily recognizable.[20] Some *ad hoc* committees have interpreted the term "manifest" to mean that the excess must also be serious or material to the outcome of the case.[21]

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[19] Resp. C-Mem. Annul., para. 100.

[20] *Wena v. Egypt*, Decision on Annulment, February 5, 2002, para. 25; *CDC v. Seychelles*, Decision on Annulment, June 29, 2005, para. 41; *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, November 1, 2006, para. 20, FN 2 ("*Mitchell v. DRC*"); *Repsol* v. *Petroecuador*, Decision on Annulment, January 8, 2007, para. 36; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Annulment, September 1, 2009, para. 68 ("*Azurix v. Argentina*"); *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on Annulment, October 19, 2009, para. 49 ("*M.C.I. Power v. Ecuador*"); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Decision on Annulment, March 25, 2010, paras. 78, 96 ("*Rumeli v. Kazakhstan*"); *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Annulment, June 14, 2010, para. 55; *Sempra Energy International v. Argentine Republic* (ICSID ARB/02/16), Decision on Annulment, June 29, 2010, para. 213 ("*Sempra v. Argentina*"); *AES Summit Generation Limited v. Republic of Hungary* (ICSID Case No. ARB/07/22), Decision on Annulment, June 29, 2012, para. 31 ("*AES Summit v. Hungary*"); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision on Annulment, February 21, 2014, para. 84 ("*Caratube v. Kazakhstan*"); *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment, January 7, 2015, para. 186 ("*Daimler v. Argentina*").

[21] *Vivendi v. Argentina*, Decision on Annulment, July 3, 2002, para. 115; *Soufraki v. UAE*, Decision on Annulment, June 5, 2007, para. 40; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Decision on Annulment, January 24, 2014, paras. 127-128 ("*Impregilo v. Argentina*"); *El Paso International Energy Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Annulment, September 22, 2014, para. 142 ("*El Paso v. Argentina*").

57. As pointed out in paragraph 47 above, it follows from Article 52(3) that an *ad hoc* committee must decide whether a fault is grave enough to warrant annulment, especially whether it has made a material difference to the position of one of the parties. Therefore, it is unnecessary to interpret the term "manifest" in Article 52(1)(b) as adding a requirement that the excess must be serious or material.[22]

(ii) Failure to Apply the Proper Law

58. The provisions on applicable law are an essential element of the parties' agreement to arbitrate. The application of a law other than that agreed to by the parties may constitute an excess of powers and can be a ground for annulment. An error in the application of the proper law, even if it leads to an incorrect decision, is not a ground for annulment. Therefore, the misapplication of a particular rule, which is part of the correctly identified applicable law, does not amount to an excess of powers.[23]

59. Some *ad hoc* committees have admitted the possibility that "[m]isinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law."[24] However, in none of these cases

[22] The *ad hoc* Committee in *Kılıç v. Turkmenistan* commented upon the discussion surrounding the meaning of "manifest" in the following terms: "The Committee concurs in that it is unnecessary to consider the two approaches as alternatives. The term 'manifest' would by itself seem to correspond to 'obvious' or 'evident,' but it follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal's excess had serious consequences for a party." *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/01), Decision on Annulment, July 14, 2015, para. 53 ("*Kılıç v. Turkmenistan*").

[23] *Klöckner v. Cameroon,* Decision on Annulment, May 3, 1985, paras. 60-61; *Amco I v. Indonesia,* Decision on Annulment, May 16, 1986, paras. 21-28; *MINE v. Guinea*, Decision on Annulment, December 22, 1989, paras. 5.02-5.04; *Wena v. Egypt*, Decision on Annulment, February 5, 2002, paras. 26-53; *CDC v. Seychelles*, Decision on Annulment, June 29, 2005, para. 46; *MTD v. Chile*, Decision on Annulment, March 21, 2007, paras. 44-48, 58-77; *Soufraki v. UAE*, Decision on Annulment, June 5, 2007, paras. 85-102; *CMS v. Argentina*, Decision on Annulment, September 25, 2007, paras. 128-136; *Azurix v. Argentina*, Decision on Annulment, September 1, 2009, paras. 46-48, 131-177, 314-329; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Annulment, March 1, 2011, para. 212 ("*Duke Energy v. Peru*"); *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Annulment, September 16, 2011, paras. 91-94 ("*Continental Casualty v. Argentina*"); *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Decision on Annulment, July 3, 2013, paras. 154-155; *Impregilo v. Argentina*, Decision on Annulment, January 24, 2014, paras. 129-132.

[24] *Soufraki v. UAE*, Decision on Annulment, June 5, 2007, para. 86; *Sempra v. Argentina*, Decision on Annulment, June 29, 2010, paras. 164, 205-209*; M.C.I. Power v. Ecuador*, Decision on Annulment, October 19, 2009, paras. 43, 51; *AES Summit v. Hungary*, Decision on Annulment, June 29, 2012, paras. 33, 34; *Caratube v. Kazakhstan*, Decision on Annulment, February 21, 2014, para. 81.

was there an actual finding of a gross misinterpretation amounting to a failure to apply the proper law.

3. Serious Departure from a Fundamental Rule of Procedure

A. *Applicant's Position*

60. The Applicant submits that "serious departure from a fundamental rule of procedure" has two elements: the departure must (i) concern a fundamental rule of procedure and (ii) be serious. The Applicant states that fundamental rules of procedure concern principles of natural justice, which unquestionably include the right to be heard and the principle of equal treatment of the parties. These principles require not just formal compliance but also substantive adherence.[25]

61. With regard to the requirement that a violation be "serious," the Applicant notes that a violation is serious if it deprives the party of the protection the rule is intended to provide, or if the tribunal, had it observed the rule of procedure, could have reached a decision that is substantially different from its actual decision. The Applicant refers to the reasoning adopted in *Pey Casado v. Chile*,[26] which held that the seriousness of the departure must be analysed in view of the impact that the issue may have had on the award, *i.e.* an applicant is not required to prove that the tribunal would necessarily have changed its conclusion if the rule had been observed.[27]

62. The Applicant further submits that an *ad hoc* committee does not have the discretion to decline to annul an award once it has found a serious departure from a fundamental rule of procedure. It relies on the proposition in *Pey Casado v. Chile* that discretion is exercised in determining whether the departure was serious.[28] Once a serious departure is established, it requires an annulment *ipso facto* of the award.[29]

[25] App. Mem. Annul., paras. 36-38.
[26] *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, December 18, 2012, paras. 77-80 ("*Pey Casado v. Chile*").
[27] App. Mem. Annul., paras. 64-67.
[28] *Pey Casado v. Chile*, Decision on Annulment, December 18, 2012, paras. 79-80.
[29] App. Mem. Annul., paras. 68-69; App. Rep. Annul., para. 88.

63. With respect to the right to be heard, the Applicant states that it is not the same as the right to speak but requires a tribunal to listen.[30] Moreover, arbitrators are required to consider all of the evidence presented by the parties.[31] This means that it is not sufficient to admit materials into evidence, but requires a tribunal to engage with the materials submitted to it. A tribunal may not render a decision which exhibits willful blindness to the record. Although a tribunal need not address every piece of evidence, any implication that a piece of evidence has been dispensed with as being irrelevant and immaterial may be foreclosed by the tribunal's own rulings. This would be the case if a tribunal's ruling in a procedural order has indicated that evidence is relevant and material to the dispute. The tribunal's discretion in determining the probative weight of evidence does not entitle the tribunal to dispose of the dispute without exercising that discretion.[32]

64. The Applicant also relies on the principle of equality of the parties. Apart from formal equality, a tribunal must also ensure equality of arms.[33] The principle of equality of the parties requires that a tribunal consider all evidence presented to it equally and that the evidentiary burdens of proof be applied equally.[34]

65. The Applicant urges the Committee to take into account human rights instruments and decisions in interpreting Article 52(1)(d) of the ICSID Convention, such as the jurisprudence on the right to a fair trial interpreting Article 6 of the European Convention on Human Rights ("ECHR"). In view of Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), the *ad hoc* Committee should seek guidance from the jurisprudence of the European Court of Human Rights ("ECtHR").[35]

B. *Respondent's Position*

66. The Respondent agrees with the Applicant that the test for what is a "serious departure from a fundamental rule of procedure" is two-fold, emphasizing that the standard is thus doubly

[30] Application, paras. 28 *et seq.*; App. Mem. Annul., para. 46.
[31] Application, paras. 31-32; App. Mem. Annul., para. 49.
[32] App. Mem. Annul., paras. 51-56; App. Rep. Annul., paras. 95-101, 136.
[33] App. Mem. Annul., paras. 58-60.
[34] Application, paras. 76 *et seq.*; App. Mem. Annul., paras. 61-62; App. Rep. Annul., paras. 133-135.
[35] App. Mem. Annul., paras. 38-41; App. Rep. Annul., paras. 37- 46.

high. The Respondent does not deny that the right to be heard and the principle of equality of the parties constitute fundamental rules of procedure.[36]

67. With respect to the seriousness of a departure from a fundamental rule of procedure, the Respondent argues that departure will be serious if it has caused actual, proven prejudice, either substantive (by causing the tribunal to reach a result substantially different from what it would have awarded had such a rule been observed) or procedural (by depriving a party of the benefit or protection which the rule was intended to provide). The Respondent's position on the requirement of seriousness is that the applicant must show that the departure was outcome-determinative. This means the applicant must prove that the departure caused actual prejudice.[37]

68. The Respondent stresses that *ad hoc* committees do not have the authority to review an ICSID tribunal's evaluation of evidence. There is no right to have any particular piece of evidence cited or examined in the award. Specifically, there is no rule to the effect that a procedural order indicating that evidence is relevant and material forecloses the possibility that a tribunal subsequently finds that same evidence irrelevant or immaterial in the award.[38]

69. In the Respondent's view, the jurisprudence under the ECHR is irrelevant for ascertaining the meaning of a fundamental rule of procedure in the sense of Article 52(1)(d) of the ICSID Convention. Article 6 of the ECHR on the right to a fair trial and Article 52(1)(d) of the ICSID Convention, dealing with a fundamental rule of procedure, refer to different concepts in different regimes.[39]

C. *Committee's Analysis*

70. Under Article 52(1)(d) of the ICSID Convention, a violation of a rule of procedure is a ground for annulment if two requirements are met: the rule concerned must be fundamental and the departure from the rule must be serious. Even a serious violation of a rule of procedure does

[36] Resp. C-M. Annul., para. 19.
[37] Resp. C-M. Annul., paras. 21-23; Resp. Rej. Annul., para. 11.
[38] Resp. C-M. Annul., paras. 13-18; Resp. Rej. Annul., para. 9.
[39] Resp. C-M. Annul., paras. 24-29; Resp. Rej. Annul., paras. 12-14.

not constitute a ground for annulment unless the particular rule is fundamental. The violation of even a fundamental rule cannot lead to annulment unless the violation was serious.

(i) Fundamental Rule

71. The preparatory works to the Convention make it clear that only procedural principles of special importance qualify as "fundamental rules" and that a simple violation of the arbitration rules is not, by itself, a ground for annulment. The fundamental rules of procedure that might furnish a ground for annulment, if violated, would be restricted to the principles of natural justice.[40] In other words, fundamental rules of procedure are principles that are essential to a fair hearing.[41]

72. There is no disagreement between the parties that the right to be heard and the principle of equal treatment are fundamental rules of procedure. But the parties disagree on the precise meaning of these principles.

(ii) Serious Departure

73. The chief disagreement between the parties concerns the meaning of "serious" in Article 52(1)(d) of the ICSID Convention. The Applicant argues that it is enough that the departure from the fundamental rule of procedure had the potential to lead to a different decision. The Respondent argues that the departure must have caused actual prejudice, which must be proven.

74. The *ad hoc* Committee in *MINE v. Guinea* pointed out that the term "serious" means that "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."[42]

[40] History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Vol. II, (Washington, D.C. 1970) 271, 423, 480, 517. Curiously the Spanish version of the ICSID Convention omits reference to the requirement that the rule of procedure must be fundamental and merely refers to "una norma de procedimiento." See also *Repsol v. Petroecuador*, Decision on Annulment, January 8, 2007, para. 81.
[41] *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Annulment, May 22, 2013, para. 85 ("*Libananco v. Turkey*").
[42] *MINE v. Guinea*, Decision on Annulment, December 22, 1989, para. 5.05.

75. In some decisions, *ad hoc* committees have examined the existence of actual material prejudice.[43] In *Wena v. Egypt*, the *ad hoc* Committee stated that "[i]n 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."[44] Similarly, in *El Paso v. Argentina*, the *ad hoc* Committee said that it agreed with what other committees have stated, that "in order to be grounds for annulment, the departure has to have a material impact on the outcome of the award."[45] These cases suggest that "serious" means that prejudice, as a consequence of the departure from a fundamental rule of procedure, must actually be established as a fact.

76. Other *ad hoc* committees have adopted a more flexible position.[46] In *Pey Casado v. Chile*, the *ad hoc* Committee found a potential effect on the award sufficient. The Committee said:

> The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected.[47]
>
> […]
>
> [T]he Committee does not consider, […], that an applicant is required to prove that the tribunal would necessarily have changed its conclusion if the rule had been observed. This requires a committee to enter into the realm of speculation which it should not do.[48]

[43] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, December 23, 2010, paras. 245-246 ("*Fraport v. Philippines")*; *Impregilo v. Argentina*, Decision on Annulment, January 24, 2014, para. 164.
[44] *Wena Hotels v. Egypt*, Decision on Annulment, February 5, 2002, para. 58. Quoted with approval in: *CDC v. Seychelles*, Decision on Annulment, June 29, 2005, para. 49; *Repsol v. Petroecuador*, Decision on Annulment, January 8, 2007, para. 81; *Azurix v. Argentina*, Decision on Annulment, September 1, 2009, paras. 51, 234; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, Decision on Annulment, July 30, 2010, para. 71; *Continental Casualty v. Argentina*, Decision on Annulment, September 16, 2011, para. 96; *Libananco v. Turkey*, Decision on Annulment, May 22, 2013, para. 87.
[45] *El Paso v. Argentina*, Decision on Annulment, September 22, 2014, para. 269.
[46] See also *Caratube v. Kazakhstan*, Decision on Annulment, February 21, 2014, para. 99.
[47] *Pey Casado v. Chile*, Decision on Annulment, December 18, 2012, para. 78.
[48] *Ibid*., para. 80.

77. In applying this method, the Committee examined whether "the Award might have been substantially different," but "the applicant is not required to prove that the end result would have been different had the rule been observed."[49]

78. This *ad hoc* Committee considers the approach adopted in *Pey Casado* reasonable. To require an applicant to prove that the award would actually have been different, had the rule of procedure been observed, may impose an unrealistically high burden of proof. Where a complex decision depends on a number of factors, it is almost impossible to prove with certainty whether the change of one parameter would have altered the outcome. Therefore, an applicant must demonstrate that the observance of the rule had the *potential* of causing the tribunal to render an award substantially different from what it actually decided. In addition, in order to be serious, the departure must be more than minimal. It must be substantial. It must have deprived the affected party of the benefit of the rule in question.

79. A number of *ad hoc* committees have pointed out that once an *ad hoc* committee has established that a departure from a fundamental rule of procedure is serious, it no longer has the discretion not to annul. The serious adverse impact upon the affected party, which is a condition for the exercise of an *ad hoc* committee's discretion to annul under Article 52(3), is implicit in a finding that the departure from a fundamental rule of procedure has been serious. In *Pey Casado v. Chile*, the *ad hoc* Committee said:

> In the Committee's view, it has no discretion not to annul an award if a serious departure from a fundamental rule is established. The Committee exercises its discretion when it determines whether or not the departure was serious.[50]

(iii) The Right to Be Heard

80. The parties agree that the right to be heard is a fundamental rule of procedure. The ICSID Arbitration Rules reflect this right throughout.[51] The right to be heard affords the parties the opportunity to present all the arguments and all the evidence that they deem relevant and to

[49] *Ibid*., para. 269. The *ad hoc* Committee in *Kılıç v. Turkmenistan* endorsed the position that a potential effect on the outcome of the case would be sufficient to make the departure from the fundamental rule of procedure serious. *Kılıç v. Turkmenistan*, Decision on Annulment, July 14, 2015, para. 70.
[50] *Pey Casado v. Chile*, Decision on Annulment, December 18, 2012, para. 80. To the same effect: *CDC v. Seychelles*, Decision on Annulment, June 29, 2005, para. 49, fn. 71.
[51] See especially ICSID Arbitration Rules 20-21, 31-32, 37, 39-42, 44, 49-50, 54.

respond to arguments and evidence submitted by their opponent. In particular, each party must have the opportunity to address every formal motion before the tribunal and every legal issue raised by the case. The principal human rights instruments also accept the right to present one's case as an essential element of a fair hearing.[52]

81. While the right to be heard is uncontested in principle, its implications are sometimes disputed. For instance, *ad hoc* committees have had to deal with the question of whether there was a violation of a party's right to be heard if the tribunal had based its decision on a theory that the parties had not fully discussed.[53]

82. The right to be heard refers to the opportunity given to the parties to present their position. It does not relate to the manner in which tribunals deal with the arguments and evidence presented to them. In particular, the fact that an award does not explicitly mention an argument or piece of evidence does not allow the conclusion that a tribunal has not listened to the argument or evidence in question. A refusal to listen, amounting to a violation of the right to be heard, can only exist where a tribunal has refused to allow the presentation of an argument or a piece of evidence. Therefore, absence in an award of a discussion of an argument or piece of evidence put forward by a party does not mean that a tribunal has violated the right to be heard.

83. An indication through a procedural order that a tribunal regards a piece of evidence, that has yet to be submitted, as relevant and material can only be provisional. Whether the evidence is indeed relevant and material can only be determined once the tribunal has heard it. A tribunal that has called for the submission of particular evidence should normally explain what it thinks of it once it has heard it. Failure to do so may be unwise, but does not amount to a violation of the right to be heard.

[52] Article 10 of the Universal Declaration of Human Rights (UDHR); Article 14 of the International Covenant on Civil and Political Rights (ICCPR); Article 6 of the ECHR.

[53] *Klöckner v. Cameroon*, Decision on Annulment, May 3, 1985, paras. 89-91; *Wena Hotels v. Egypt*, Decision on Annulment, February 5, 2002, paras. 66-70; *Vivendi v. Argentina*, Decision on Annulment, July 3, 2002, paras. 82-85; *Caratube v. Kazakhstan*, Decision on Annulment, February 21, 2014, paras. 90-96; *El Paso v. Argentina*, Decision on Annulment, September 22, 2014, paras. 278-286.

(iv) Equality of the Parties

84. Unequal treatment of the parties may be a sign of lack of impartiality and may amount to a serious violation of a fundamental rule of procedure. However, a finding of this nature would require clear and incontrovertible substantiation. ICSID Arbitration Rule 34(1) states that the tribunal shall be the judge of the admissibility as well as of the probative value of any evidence. A clear violation of a rule of evidence, such as the reversal of the burden of proof, may amount to a serious violation of a fundamental rule of procedure.[54] On the other hand, the evaluation of evidence is within the discretion of the tribunal. In the words of the *ad hoc* Committee in *Wena v. Egypt*:

> [I]rrespective whether the matter is one of substance or procedure, it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party. Arbitration Rule 34(1) recalls that the Tribunal is the judge of the probative value of the evidence produced.[55]

85. Therefore, an applicant's dissatisfaction with the way a tribunal has exercised its discretion in evaluating evidence cannot be a basis for a finding that there has been unequal treatment and hence a serious violation of a fundamental rule of procedure necessitating annulment. The *ad hoc* Committee in *Impregilo v. Argentina* explained this principle as follows:

> There is no requirement whatsoever for arbitral tribunals to indicate in an award the reasons why some types of evidence are more credible than others. Discretionary authority that is reasonable and reasoned is the rule in this regard, and it is clearly not within the purview of Annulment Committees, which do not have direct and immediate access to the evidence submitted by both parties, to determine whether the determinations made in an award were correct. Attempting to do so would involve a subsequent assessment of the conclusions of arbitral tribunals, which would destroy the basic principles of the institution of arbitration and [would be] outside the power of *ad hoc* Committees.[56]

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[54] *Klöckner v. Cameroon*, Resubmitted Case: Decision on Annulment, May 17, 1990, para. 6.80; *Caratube v. Kazakhstan*, Decision on Annulment, February 21, 2014, para. 97.

[55] *Wena Hotels v. Egypt*, Decision on Annulment, February 5, 2002, para. 65. See also: *CDC v. Seychelles*, Decision on Annulment, June 29, 2005, paras. 59-61; *Azurix v. Argentina*, Decision on Annulment, September 1, 2009, paras. 207-217; *Continental Casualty v. Argentina*, Decision on Annulment, September 16, 2011, para. 97; *Pey Casado v. Chile*, Decision on Annulment, December 18, 2012, paras. 199, 223; *Kılıç v. Turkmenistan*, Decision on Annulment, July 14, 2015, para. 154.

[56] *Impregilo v. Argentina*, Decision on Annulment, January 24, 2014, para. 176.

(v) The Relevance of Human Rights

86. The parties disagree on the relevance of human rights instruments and decisions in interpreting Article 52(1)(d) of the ICSID Convention. The influence on international investment arbitration of human rights and of the multilateral treaties reflecting their current status has attracted much attention. There is a widespread sentiment that the integration of the law of human rights into international investment law is an important concern.[57]

87. Article 31(3)(c) of the VCLT directs that, in the interpretation of treaties, "any relevant rules of international law applicable in the relations between the parties" are to be taken into account.[58] The relevant rules of international law cover all sources of international law. The only requirements of Article 31(3)(c) are that the rules are relevant and that they are applicable as between the States parties to the treaty to be interpreted.

88. The ILC has discussed Article 31(3)(c) of the VCLT extensively in its Fragmentation Report.[59] In doing so, its Study Group has referred to that provision as a "master key" to the house of international law.[60] It has described the function of that provision as follows:

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[57] For extensive treatment see: Human Rights in International Investment Law and Arbitration (*F. Francioni, E.-U. Petersmann, P.-M. Dupuy*, eds.), Oxford University Press (2009); *M. Hirsch*, Interactions between Investment and Non-investment Obligations, in: The Oxford Handbook of International Investment Law (*P. Muchlinski, F. Ortino, C. Schreuer*, eds.), Oxford University Press, 154 (2008); *E.-U. Petersmann*, Human Rights, Constitutionalism, and 'Public Reason' in Investor-State Arbitration, in: International Investment Law for the 21st Century (*C. Binder, U. Kriebaum, A. Reinisch, S. Wittich*, eds.), Oxford University Press, 877 (2009); *C. Booth*, Is there a Place for Human Rights Considerations in International Arbitration?, 24 ICSID Review–Foreign Investment Law Journal 109 (2009); *U. Kriebaum*, Human Rights of the Population of the Host State in International Investment Arbitration, 10 The Journal of World Investment & Trade 653 (2009); *T. Nelson*, Human Rights Law and BIT Protection: Areas of Convergence, 12 The Journal of World Investment & Trade 27 (2011); *P. Dumberry* & *G. Dumas-Aubin*, When and How Allegations of Human Rights Violations Can be Raised in Investor-State Arbitration, 13 The Journal of World Investment & Trade 349 (2012).

[58] For detailed treatment see *C. McLachlan*, The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention, 54 Intl & Comparative LQ 279 (2005); *R. Gardiner*, Treaty Interpretation, 2nd ed., Oxford University Press, pp. 289-343 (2015); *B. Simma & T. Kill*, Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology, in: International Investment Law for the 21st Century (*C. Binder, U. Kriebaum, A. Reinisch, S. Wittich*, eds.), Oxford University Press, 678 (2009); *J.R. Weeramantry*, Treaty Interpretation in Investment Arbitration, Oxford University Press, pp. 88-95 (2012).

[59] ILC, Report of a study group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.682, paras. 410-480 (April 13, 2006).

[60] *Ibid*., para. 420.

> [I]f it is indeed the point of international law to coordinate the relations between States, then it follows that specific norms must be read against other norms bearing upon those same facts as the treaty under interpretation.[61]

89. The ILC Study Group has rejected any suggestion that tribunals should restrict themselves to the treaty upon which their jurisdiction is based and which constitutes the treaty under dispute. It said:

> It is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes "beyond" the four corners of the constituting instrument or that when arbitral bodies deliberate the award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant *compromis*. But if, […], all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment - that is to say "other" international law. This is the principle of systemic integration to which article 31(3)(c) VCLT gives expression.[62]

90. *Simma* and *Kill* describe the practice of systemic integration in the following terms:

> Under customary principles of treaty interpretation, tribunals routinely resort to rules of international law whose normative validity is grounded in a source outside of the treaty that is the subject of interpretation.[63]

91. In investment cases involving parties to the ECHR, some tribunals have relied on the Convention and its case law.[64] In other cases involving non-parties, that case law was used as authority on a number of points concerning individual rights.[65] In a similar way,

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[61] *Ibid*., para. 416.
[62] *Ibid*., para. 423. Footnotes omitted. Italics original.
[63] *B. Simma & T. Kill*, *supra* note 58, at 681.
[64] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award, September 3, 2001, para. 200; *ADC Affiliate Limited and ADC & ADMC Management Linited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, October 2, 2006, para. 497; *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on the Participation of a Counsel, January 14, 2010, para. 20. In *Frontier Petroleum v. Czech Republic*, the Tribunal indicated that the ECHR was applicable but had not been pleaded properly by the parties. *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, para. 338.
[65] *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, October 11, 2002, para. 143; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Award, May 29, 2003, para. 122 ("*Tecmed v. Mexico*"); *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction, March 21, 2007, paras. 130, 132; *Azurix v. Argentina*, Award, July 14, 2006, para. 311; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, Dissenting Opinion Wälde, January 26, 2006, para. 27; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora*

investment tribunals have relied on the Inter-American Convention on Human Rights (IACHR) and on the practice of its Court.[66] In one case, the tribunal was "mindful" of the Universal Declaration of Human Rights (UDHR).[67] One tribunal undertook an extensive examination of the right to a fair trial in international human rights instruments, especially the International Covenant on Civil and Political Rights (ICCPR), for purposes of interpreting a treaty provision on fair and equitable treatment.[68]

92. Provisions in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention. This is not to add obligations extraneous to the ICSID Convention. Rather, resort to authorities stemming from the field of human rights for this purpose is a legitimate method of treaty interpretation.

4. Failure to State Reasons

A. *Applicant's Position*

93. The Applicant concedes that reasons supplied by a tribunal need not be persuasive or correct. However, it is a tribunal's duty to supply reasons for all parts of its award. An *ad hoc* committee may reconstruct reasoning but may not add pertinent facts that were overlooked by the tribunal.[69]

94. The Applicant complains about an inadequate and incomplete analysis of attribution.[70] The Applicant also complains about the failure of the majority of the Tribunal ("Majority") to

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de Electricidad del Este, S.A. v. Dominican Republic (LCIA Case No. UN 7927), Award on Jurisdiction, September 19, 2008, para. 93; *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, May 8, 2009, para. 70; *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, December 27, 2010, para. 129; *El Paso v. Argentina*, Award, October 31, 2011, para. 598. In *Fireman's Fund* v. *Mexico*, the Tribunal questioned whether the case law under the ECHR is a viable source to interpreting Article 1110 of the North American Free Trade Agreement (NAFTA). *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB/02/1), Award, July 17, 2006, fn. 161.

[66] *IBM World Trade Corp. v. Republic of Ecuador* (ICSID Case No. ARB/02/10), Decision on Jurisdiction, December 22, 2003, para. 72; *El Paso v. Argentina*, Award, October 31, 2011, para. 598.

[67] *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Decision on Jurisdiction and Admissibility, September 24, 2008, para. 88.

[68] *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, December 15, 2014, paras. 556-621.

[69] App. Mem. Annul., paras. 167-170, 184; App. Rep. Annul., paras. 148-149.

[70] Application, paras. 92-104; App. Mem. Annul., paras. 171-185.

address evidence that the Tribunal itself requested be submitted.[71] For the Applicant, the Majority's treatment of the parties' evidence is incomprehensible.[72] Moreover, the Applicant finds a contradiction in the Tribunal's examination of the merits after it had found that the acts in question were not attributable to Turkey.[73]

B. *Respondent's Position*

95. The Respondent argues that reasons must be given for an award, not for each specific determination along the way. It is sufficient if the committee can understand the tribunal's reasoning and conclusions based on the articulated premises, but it need not agree with them. The Respondent rejects the existence of a rule to the effect that overlooking pertinent facts amounts to a failure to state reasons. Rather, it is for the Tribunal to establish which facts are pertinent. If the Tribunal has not specifically mentioned facts, this is because it has found them not to have been proven, or determined within its discretion that they were not pertinent. A failure to refer to a particular argument or piece of evidence cannot amount to a failure to state reasons. The evaluation of evidence is beyond the supervisory authority of an annulment committee.[74]

96. The Respondent states that it is for the Tribunal to make the findings of fact and not for the Committee to second-guess them. The obligation to state reasons in the Award merely requires that the Tribunal set out what the pertinent facts are, and then draw comprehensible conclusions from them and the applicable law. There is a difference between setting out the pertinent facts and setting out the evaluation of any given piece of evidence.[75]

C. *Committee's Analysis*

97. Under Article 48(3) of the ICSID Convention, a tribunal is under an obligation to state the reasons upon which its award is based.[76] Failure to comply with this duty is a ground for annulment under Article 52(1)(e).

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[71] Application, paras. 105-109; App. Mem. Annul., paras. 186-190.
[72] Application, paras. 110-116; App. Mem. Annul., paras. 191-198.
[73] Application, paras. 117-126; App. Mem. Annul., paras. 199-207; App. Rep. Annul., para. 152.
[74] Resp. C-M. Annul., paras. 30-33.
[75] Resp. Rep. Annul., paras. 15-20.
[76] This requirement is restated in ICSID Arbitration Rule 47(1)(i).

(i) The Standard of Reasoning

98. The purpose of a statement of reasons is to explain to the reader of the award, especially to the parties, how and why the tribunal reached its decision. Since the parties are the award's primary addressees, it is not necessary for a tribunal to restate all their arguments and evidence. The parties will be familiar with the main issues before the tribunal, with the evidence that was before it and with the main legal arguments presented to it. Moreover, Article 48(3) does not require discussion of arguments without impact on the award.[77]

99. Explaining to the parties the motives that have induced the tribunal to adopt its decision is not the same as convincing the losing party that the decision was right. A party that has not prevailed in litigation is inclined to regard the decision as incomprehensible and to feel that the decision-maker has not explained adequately why it rejected its arguments.

100. Early *ad hoc* committees operating under the ICSID Convention have stated that reasons would have to be "sufficiently relevant" or "appropriate."[78] The most widely accepted formula for the requirements of reasons, which the parties in the present annulment proceedings have endorsed, stems from *MINE v. Guinea*:

> 5.08. The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.
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> 5.09. 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.[79]

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[77] *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award, November 2, 2012, paras. 273-275.
[78] *Klöckner v. Cameroon*, Decision on Annulment, May 3, 1985, para. 130; *Amco I v. Indonesia*, Decision on Annulment, 16 May 1986, para. 43.
[79] *MINE v. Guinea*, Decision on Annulment, December 22, 1989, paras. 5.08, 5.09.

101. Therefore, the *ad hoc* Committee in *MINE* dismissed the concept of the adequacy of reasons except for the rejection of contradictory or frivolous reasons. It held that the standard merely requires that the reader can understand what motivated the tribunal. As long as an *ad hoc* committee can follow the reasons, it is irrelevant what it thinks of their quality.

102. The *ad hoc* Committee in *Wena v. Egypt* endorsed this position and said:

> 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).[80]

103. The limited role of a failure to state reasons as a ground for annulment is also apparent in the Decision on Annulment in *Vivendi*. The *ad hoc* Committee said:

> [I]t is well accepted both in the cases and the literature that Article 52 (1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.[81]

104. Subsequent *ad hoc* committees have since adopted this standard.[82] Therefore, an *ad hoc* committee does not need to be persuaded that the reasons given by the tribunal are correct or

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[80] *Wena v. Egypt*, Decision on Annulment, February 5, 2002, para. 79.
[81] *Vivendi v. Argentina*, Decision on Annulment, July 3, 2002, para. 64 (emphasis in original). Footnote omitted.
[82] *CDC v. Seychelles*, Decision on Annulment, June 29, 2005, paras. 66-75; *Mitchell v. DRC*, Decision on Annulment, November 1, 2006, para. 21; *MTD v. Chile*, Decision on Annulment, March 21, 2007, para. 92; *Soufraki v. UAE*, Decision on Annulment, June 5, 2007, para. 134; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, September 5, 2007, paras. 127, 128; *Azurix v. Argentina*, Decision on Annulment, September 1, 2009, paras. 53-56, 178 ("*Lucchetti v. Peru*"); *M.C.I. Power v. Ecuador*, Decision on Annulment, October 19, 2009, paras. 82, 86; *Fraport v. Philippines*, Decision on Annulment, December 23, 2010, paras. 272, 277; *Continental Casualty v. Argentina*, Decision on Annulment, September 16, 2011, para. 100; *Libananco v. Turkey*, Decision on Annulment, May 22, 2013, paras. 90-94; *Impregilo v. Argentina*, Decision on Annulment, January 24, 2014, paras. 180-181; *Caratube v. Kazakhstan*, Decision on Annulment, February 21, 2014, paras. 101-102; *Alapli Elektrik B.V.*

convincing. The function of reasons is to enable the reader to understand what motivated the tribunal. *Ad hoc* committees have consistently confirmed that ICSID Convention Article 52(1)(e) does not permit any inquiry into the quality or persuasiveness of reasons. *Ad hoc* committees may be dissatisfied with the adequacy of reasons, but provided the reasons meet the conditions set out in *MINE*, and confirmed in *Wena* and *Vivendi*, this will not be a ground for annulment.

105. It follows that reasons may be terse, summarizing a tribunal's overall impression of evidence without evaluating it in detail. In particular, a finding that the record does not support a particular proposition may not require detailed reasoning. Absence of convincing evidence on a particular point is not a matter that needs discursive substantiation by a tribunal.

(ii) Implicit Reasons

106. Even where reasons on a particular point are missing, an *ad hoc* committee may reconstruct missing reasons. The *ad hoc* Committee in *Wena v. Egypt* said in this respect:

> Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.[83]

107. Other *ad hoc* committees have confirmed the possibility of reconstructing missing reasons.[84] The task of reconstructing reasons includes looking at the record before the tribunal. In the words of the *ad hoc* Committee in *Rumeli v. Kazakhstan*:

> The Committee is not limited in its review of the Award under Article 52(1)(e) of the ICSID Convention to the text of the Award alone, but rather should seek to

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v. Republic of Turkey (ICSID Case No. ARB/08/13), Decision on Annulment, July 10, 2014, paras. 197-199 ("*Alapli v. Turkey*"); *El Paso v. Argentina*, Decision on Annulment, September 22, 2014, paras. 217, 235; *Kılıç v. Turkmenistan*, Decision on Annulment, July 14, 2015, paras. 59-64.

[83] *Wena v. Egypt*, Decision on Annulment, February 5, 2002, para. 81.

[84] *MINE v. Guinea*, Decision on Annulment, December 22, 1989, para. 6.104; *CDC v. Seychelles*, Decision on Annulment, June 29, 2005, para. 87; *Soufraki v. UAE*, Decision on Annulment, June 5, 2007, paras. 63-64; *CMS v. Argentina*, Decision on Annulment, September 25, 2007, paras. 125-127; *Azurix v. Argentina*, Decision on Annulment, September 1, 2009, para. 360; *Rumeli v. Kazakhstan*, Decision on Annulment, March 25, 2010, paras. 83, 138; *Fraport v. Philippines*, Decision on Annulment, December 23, 2010, paras. 264-266; *Continental Casualty v. Argentina*, Decision on Annulment, September 16, 2011, para. 101.

> understand the motivation of the Award in the light of the record before the Tribunal.[85]

108. Therefore, an award is not subject to annulment if the reasons for a decision, though not stated explicitly, are readily apparent to the *ad hoc* committee. Implicit reasoning is sufficient as long as the committee can infer them reasonably from the terms and conclusions of the award as well as from the record before the tribunal. If the *ad hoc* committee can explain an award by clarifying reasons that may be only implicit, it may do so and need not annul.

(iii) Contradictory Reasons

109. Contradictory reasons will not enable the reader to understand a tribunal's motives and may amount to a failure to state reasons.[86] On the other hand, discussion of conflicting or competing considerations should not lead an *ad hoc* committee lightly to assume contradiction. In *Vivendi v. Argentina*, the *ad hoc* Committee warned against a hasty finding of contradiction in an award:

> [T]ribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be a reflection of such conflicting considerations.[87]

110. Other *ad hoc* committees have also held that a finding of contradiction would have to be compelling.[88] In *Continental Casualty v. Argentina*, the *ad hoc* Committee said:

> The Committee adds that for genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision. An example might be where the basis for a tribunal's decision on one question is the existence of fact A, when the basis for its decision on another question is the *non-existence* of fact A. In cases where it is merely arguable whether there is a contradiction or inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument. Nor is it

[85] *Rumeli v. Kazakhstan*, Decision on Annulment, March 25, 2010, para. 179. In the same sense: *Duke Energy v. Peru*, Decision on Annulment, March 1, 2011, para. 205.

[86] *Klöckner v. Cameroon*, Decision on Annulment, May 3, 1985, para. 116; *Amco I v. Indonesia*, Decision on Annulment, May 16, 1986, paras. 97-98; *MINE v. Guinea*, Decision on Annulment, December 22, 1989, paras. 6.105, 6.107; *Pey Casado v. Chile*, Decision on Annulment, December 18, 2012, paras. 281-287.

[87] *Vivendi v. Argentina*, Decision on Annulment, July 3, 2002, para. 65.

[88] *Azurix v. Argentina*, Decision on Annulment, September 1, 2009, paras. 364-365; *Rumeli v. Kazakhstan*, Decision on Annulment, March 25, 2010, para. 82; *Fraport v. Philippines*, Decision on Annulment, December 23, 2010, para. 274; *Duke Energy v. Peru*, Decision on Annulment, March 1, 2011, para. 166; *Alapli v. Turkey*, Decision on Annulment, July 10, 2014, paras. 200-201; *Daimler v. Argentina*, Decision on Annulment, January 7, 2015, para. 78.

> the role of an annulment committee to express its own view on whether or not the reasons given by the tribunal are logical or rational or correct.[89]

111. In particular, reasoning that explores alternatives to a tribunal's decision should not be regarded as contradictory even if the alternative seems ruled out by the tribunal's primary finding. Reasoning based on "even if" arguments is not contradictory but demonstrates that the tribunal has looked also at other avenues of reasoning. For instance, if the tribunal finds that a claim must fail as a matter of jurisdiction or admissibility, it is not contradictory to add that the claim would have failed on the merits.

112. The *ad hoc* Committee in *Daimler v. Argentina* described this situation as follows:

> [I]f after having stated its reasons and deciding a given point, the Tribunal, in an excess of caution or otherwise, analyses the other arguments made by the parties, such additional – and perhaps unnecessary – analysis cannot be compared with the reasons for the decision of the Tribunal to determine whether the two sets of reasons are contradictory, for even if they are they will not cancel one another. In such cases, the reasons for the decision are already in the Award, and the additional reasons can have no impact on the decision of the Tribunal.[90]

(iv) Alternative Remedies

113. Open questions as to the meaning of an award do not find their remedy in annulment for failure to state reasons but, rather, in Article 50 of the ICSID Convention. That Article provides for the interpretation of an award in case there is a dispute between the parties about its meaning or scope. The possibility of an interpretation under Article 50 would make annulment under Article 52 a disproportionate remedy to deal with ambiguities left by the tribunal's reasoning. Nor is annulment the appropriate remedy in case of omissions and technical errors in the award. Under Article 49(2) of the ICSID Convention a tribunal may, upon the request of a party, supplement omissions in the award and rectify any clerical, arithmetical or similar error.[91]

[89] *Continental Casualty v. Argentina*, Decision on Annulment, September 16, 2011, para. 103.
[90] *Daimler v. Argentina*, Decision on Annulment, January 7, 2015, para. 135.
[91] *Wena v. Egypt*, Decision on Annulment, February 5, 2002, para. 80.

IV. GROUNDS FOR ANNULMENT INVOKED BY THE APPLICANT

114. The Applicant invokes three grounds for annulment under Article 52 of the ICSID Convention:

(i) that the Tribunal manifestly exceeded its powers (Article 52(1)(b));

(ii) that there was a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and

(iii) that the Award failed to state the reasons upon which it was based (Article 52(1)(e)).

115. The Applicant's complaints center around the Tribunal's findings on attribution. It summarizes the defects in the Award as follows:

> - The Tribunal ruled that Tulip's claims "fall outside the scope of the Tribunal's jurisdiction." It nevertheless proceeded to address the merits. "A decision on the merits by a tribunal that lacks competence is the most obvious example of an excess of powers." In this case, the excess is plainly stated within the four corners of the [Award].
>
> - The Tribunal made itself willfully blind to evidence it itself had previously determined to be material and relevant to the outcome of the dispute—the testimony of Mr. Erdogan Bayraktar. The Tribunal gave the parties no indication that it would derogate from its own procedural directives. It thus deprived the parties of their right to be heard with regard to the evidence to which the Tribunal rendered itself willfully blind.
>
> - The first part of the Award dealing with attribution logically contradicts the second part of the Award dealing with the merits. The merits discussion assumes *arguendo* that the relevant actions in dispute were attributable to Turkey. The attribution discussion concludes that the actions of Tulip's contractual counterparty Emlak were not attributable to the state because Turkey's actions did not render Emlak's stated reasons for termination a mere pretext. The merits decision nevertheless concludes that Turkey's conduct did not violate the BIT because Turkey did not introduce itself into Emlak's commercial decision-making process. This conclusion is precisely foreclosed by the premise–assumed *arguendo* by the Tribunal–that the termination of the contract in question was attributable to Turkey. [92]

[92] App. Mem. Annul., para. 7. Footnotes omitted.

116. The Applicant states that these defects can be challenged under more than one of the three grounds raised. As a result of these deficiencies, it seeks annulment of the entire Award.

117. The Committee will deal with the Applicant's complaints by each category of defect pleaded: (1) the Tribunal's treatment of evidence relating to attribution; (2) the Tribunal's determination on the merits despite lack of jurisdiction; and (3) the Award's contradictory and incomplete reasons concerning attribution.

1. The Tribunal's Treatment of Evidence Relating to Attribution

A. *Applicant's Position*

118. According to the Applicant, the Tribunal consciously and deliberately disregarded critical evidence on the record and therefore violated the Applicant's right to be heard and the principle of equality of arms. This is shown by the Award's lack of citation to the evidence in question and prior decisions of the Tribunal during the arbitration. The relevant evidence is the witness testimony of Minister Erdogan Bayraktar and Emlak officials at the hearing, as well as new documentary evidence produced following a request made by the Tribunal at the hearing. The evidence was of a dispositive nature and, had the majority of the Tribunal considered it, the conclusion on attribution in the Award would have been different, which would have affected both the Tribunal's jurisdiction and the merits of the claim. Furthermore, by failing to consider the evidence, the Tribunal also failed to apply the ILC Articles on State Responsibility, which formed part of the applicable law.

(i) Hearing Testimony

119. Mr. Erdogan Bayraktar was at all relevant times of the dispute the head of TOKI and at the same time the Chairman of the Board of Emlak during the Applicant's investment project in Turkey, and later became a minister in the Turkish government. He thus had firsthand knowledge of the project and the relationship between Emlak and TOKI. Following the Tribunal's order to call Mr. Bayraktar for examination at the hearing as the Tribunal's witness, Mr. Bayraktar provided oral testimony which went "directly to the issue of attribution."[93] He corroborated a statement made in a newspaper article showing that TOKI

[93] Transcript, Day 1, p. 50.

exercised its control over Emlak to terminate the Contract for the public good. He further developed on TOKI's actions with regard to Emlak's contractual counterparties.

120. However, although the testimony was clearly relevant to the matter of attribution, as indicated in the Separate Opinion, the Majority does not discuss this evidence in the Award. According to the Applicant, "the Tribunal turned itself willfully deaf to evidence the Tribunal knew existed precisely because the Tribunal had to concede that addressing the evidence would entail altering the outcome predetermined for the case before the evidence was presented for a hearing."[94] The Award confirms that this evidence was ignored because it states at paragraph 322 that "there is no evidence of any specific and disproportionate influence by Mr. Bayraktar or any instructions from TOKI to make a particular decision for an ulterior sovereign purpose," despite the fact that such evidence was adduced during his testimony. The Separate Opinion also confirms this, as Mr. Jaffe stated that the Majority "all but ignores the very evidence that they say would be probative, namely the evidence found in the testimony of Erdogan Bayraktar."[95]

121. According to the Applicant, there are only three possible valid reasons for disregarding the evidence: (i) that the Majority found Mr. Bayraktar's testimony on attribution to be irrelevant; (ii) that the Majority found his testimony to be immaterial; or (iii) that the Majority deemed that Mr. Bayraktar was not a credible witness. However, no such implications can plausibly be drawn in this case. The Tribunal itself admitted that Mr. Bayraktar's testimony was relevant and material to the outcome by calling him to testify over the objections of the Respondent, following a series of written and oral statements made by the Tribunal in the course of the arbitration. Several procedural orders (Nos. 2-5) dealt with Mr. Bayraktar's examination as the Tribunal's witness at the hearing pursuant to ICSID Arbitration Rule 34(2)(a). According to the Applicant, the Tribunal "would not have called Mr. Bayraktar unless it thought that he would likely have meaningful testimony to give and that this testimony would be relevant to the matters in dispute."[96] The directions in the orders included topics of examination, *e.g.* the relationship between TOKI and Emlak, and the Emlak Board's

[94] App. Rep. Annul., para. 36.
[95] Transcript, Day 1, p. 61, quoting Separate Opinion, para. 6.
[96] App. Rep. Annul., para. 113.

decision to terminate the Contract. The Tribunal also found that Mr. Bayraktar was a credible witness because it accepted his testimony in connection with another matter addressed in the Award. Although the Separate Opinion pointed out the importance of the testimony to the Majority, the Majority chose to disregard the evidence without giving reasons why and without addressing the Separate Opinion.

122. In the Applicant's submission, the Tribunal also failed to consider the testimony of Emlak officials at the hearing. This testimony concerned whether or not the Emlak Board's termination decision was pretextual. The Award states that the evidentiary record did not establish that Emlak had invoked contractual breaches as a pretext for termination of the Contract; however, it contains no indication that the testimonies of Messrs. Keskin, Yetim and Kurum were considered by the Tribunal.

(ii) New Documentary Evidence

123. The Applicant states that the Tribunal also failed to consider new documentary evidence produced at the hearing, as well as testimony given on that evidence. The existence of the documents was disclosed during an oral testimony at the hearing, and the Tribunal decided to order the production of these documents. According to the Applicant, one of the documents – an Emlak memorandum of February 11, 2010 – showed that the termination of the Contract was pretextual. It showed that Emlak had no good-faith commercial reason for reversing its recommendation to grant a further project extension. The document was therefore relevant to the attribution analysis. However, the document and the ensuing testimony about it went entirely unacknowledged in the Award, demonstrating "an apparent pattern of [the Tribunal] in ignoring evidence in its deliberative process."[97]

124. The Tribunal clearly considered the document relevant and material as it had exceptionally ordered its production, and the Award indicates that the witness who testified about it (Mr. Kurum) was a credible witness. Yet the Tribunal deliberately chose not to consider the document and the related oral testimony, thus violating the Applicant's right to be heard.

[97] Transcript, Day 1, p. 13.

(iii) Other Defects in the Treatment of Evidence

125. The Applicant argues that the Tribunal also breached the principle of equality of the parties in several ways: (i) by impermissibly privileging the proceeding's written phase over its oral phase, thereby advantaging the Respondent; (ii) by failing to restore the imbalance in the equality of arms caused by the Respondent's failure to cooperate in the production of evidence; and (iii) by failing to apply evidentiary burdens consistently.

126. Both parties must have an equal opportunity to present their arguments and evidence, and the right to expect that a tribunal will give equal attention to their respective submissions as to the legal import of the evidence. In the Applicant's submission, the Award appears to have privileged the pre-hearing written submissions over the parties' oral closing submissions. Since there was new evidence in favor of the Claimant's case at the hearing, this meant that the Tribunal unfairly favored the Respondent.

127. The Respondent violated its obligation to produce three documents in its possession or even to mention their existence prior to the hearing. The Tribunal ordered the production of these documents at the hearing. Due to the Respondent's violation, the Claimant was forced to rely to a greater degree on evidence adduced at the hearing. The Tribunal did not wish to discuss the Respondent's violation and instead assured the Claimant that it could make its case on the newly disclosed documents. These measures taken by the Tribunal at the hearing were nevertheless insufficient, as it did not even acknowledge in the Award its finding of exceptional circumstances necessitating an order that the Respondent produce the documents, and as the Tribunal ultimately ignored the evidence produced. Therefore, the Tribunal failed to restore the equality of arms between the parties.

128. The Award also demonstrates that the Majority of the Tribunal failed to apply the evidentiary burdens of proof equally and appropriately to each party with respect to attribution.

(iv) Consequences of the Treatment of Evidence

129. According to the Applicant, the Tribunal's jurisdictional determination must be annulled because the Tribunal committed two serious departures from a fundamental rule of procedure. First, the Tribunal failed to afford the Claimant the right to be heard with respect to evidence

presented at the hearing. Second, the Tribunal's failure to hear the Claimant's evidence at the hearing also violated the principle of equality of the parties.

130. The right to be heard goes beyond a party's right to present its case, but also requires that the tribunal listen to the party's argument, that the tribunal take such argument into account in its deliberations, and, in connection with the obligation to state reasons under ICSID Convention Article 52(1)(e), also requires that the award reflect the manner in which the tribunal assessed the argument and the evidence in question.[98] This requires "the right to have the possibility to present your case to be heard in an effective manner."[99]

131. In this case, these fundamental rights have not been observed because the Award, including the Separate Opinion, demonstrate that testimony of Mr. Bayraktar, evidence that "went to the heart of Claimant's case,"[100] was deliberately ignored by the Majority. If the Tribunal changed its mind about the importance of the evidence of Mr. Bayraktar, it should have given notice to the parties to allow them the opportunity to make further submissions about the change in approach.[101] That was required as part of the right to a fair hearing, which has been confirmed by the Committee in *Fraport v. Philippines* and the ECtHR.[102] The Tribunal's decision to ignore certain evidence presented during the hearing is "a serious departure from the right to be heard" because the "evidence would have provided a critical counterweight to evidence cited on the dispositive issues before the Tribunal."[103]

132. In addition, the fundamental procedural requirement of equality of arms was violated when the Tribunal disregarded certain evidence presented during the hearing. The principle of equality of arms requires that one party be given the same tools available to the other party to prove their respective cases, such that the parties are on an even playing field.[104] It is a tribunal's responsibility to preserve this equality of arms, and to ensure that there are consequences where one party materially derogates from its duty of cooperation. In this case,

[98] Transcript, Day 1, pp. 31-32.
[99] Transcript, Day 1, p. 31.
[100] Transcript, Day 1, p. 32.
[101] Transcript, Day 1, p. 90.
[102] Transcript, Day 2, pp. 34-36. The Applicant refers to: *Fraport v. Philippines*, Decision on Annulment, December 23, 2010, paras. 200, 202, 227, 229; and Article 6 of the ECHR.
[103] Transcript, Day 1, p. 83.
[104] App. Mem. Annul., para 60.

the Applicant did not have access to certain documentary and testimonial evidence that was highly relevant to the question of attribution until the hearing. By ignoring new evidence adduced during the hearing, the Tribunal privileged the written phase over the oral phase, which created an imbalance between the parties. Furthermore, the Tribunal applied evidentiary burdens differently between the parties on the question of attribution and did not make any effort to account for the Respondent's failure to cooperate in the production and presentation of evidence.

133. The Tribunal's treatment of the evidence also led to a manifest excess of powers. The Tribunal's findings on attribution led to the dismissal of the Emlak claims on jurisdictional grounds, which is apparent from paragraph 361 of the Award concluding that the claims "fall outside the scope of the Tribunal's jurisdiction." It is well accepted by *ad hoc* committees that the non-exercise of a jurisdiction that a tribunal has can lead to an excess of powers. In this case, it is clear that the Tribunal committed an excess of power in its finding that it had no jurisdiction over the claims arising from the conduct of Emlak.

134. The excess of powers must be considered manifest under any standard of manifestness, because the willful disregard of the hearing testimony of Mr. Bayraktar was: (i) serious; (ii) self-evident; and (iii) "no tribunal could tenably reach the conclusion that Emlak's acts were not attributable to the State after hearing and considering *all* of the evidence presented by the parties."[105] Therefore, the Applicant argues that the attribution and jurisdiction decision of the Tribunal must be annulled as a manifest excess of powers.

135. Furthermore, the Tribunal also failed to apply the applicable international law to its determination of attribution. The ILC Articles would have compelled the Tribunal to conclude, based on the available evidence, that the acts of Emlak in terminating the Contract were attributable to the Respondent. The question before the Tribunal as per Article 8 of the ILC Articles was "whether Emlak was being directed, instructed or controlled by TOKI with respect to the specific activity of administering the Contract with Tulip JV in the sense of sovereign direction, instruction or control rather than the ordinary control exercised by a

[105] App. Mem. Annul., para. 218 (emphasis in original).

majority shareholder acting in the company's perceived commercial best interest."[106] Mr. Bayraktar provided the evidence addressing this question, yet the Tribunal failed to consider it. By disregarding the evidence, the Tribunal thus failed to apply the proper law. The excess is manifest, as it is patently obvious that the Tribunal did not apply the ILC Articles.

B. *Respondent's Position*

136. According to the Respondent, the Applicant seeks to annul the Tribunal's factual findings on attribution. Although the Applicant is labeling the defect as one that concerns the process of the Tribunal's decision, it is really a claim that the Tribunal erred in its evaluation of the evidence. This is not a permissible ground for annulment, as annulment committees have no authority to review an ICSID tribunal's evaluation of evidence. Pursuant to ICSID Arbitration Rule 34(1), it is for a tribunal to evaluate the admissibility and probative value of the evidence, and it need not comment in the award on every piece of evidence. According to the Respondent, "[t]here are no objectively pertinent facts. There are the Tribunal's pertinent findings and it is within the Tribunal's discretion to decide what its pertinent facts are, as the Tribunal is the one and the only trier of facts."[107]

(i) Hearing Testimony

137. The Respondent submits that the Tribunal went out of its way to accommodate the Claimant by calling Mr. Bayraktar as a witness. The Respondent agrees with the Applicant that it was an unusual step to compel a sitting Government Minister to give oral evidence where no such evidence had been proffered by the State. However, if anything, this only demonstrated that the Tribunal was procedurally generous to Tulip and respected its right to be heard. The Tribunal's decision to order the examination of Mr. Bayraktar did not create any "heightened expectation" regarding his testimony.[108] The Tribunal could not have predetermined that the evidence was relevant and material before the hearing, as it had yet to hear the evidence. Instead, it gave the Claimant the opportunity to present the evidence that the Claimant considered important on an issue that the Tribunal acknowledged was relevant and material.

[106] Award, para. 309 (emphasis in original).
[107] Transcript, Day 1, p. 174.
[108] Transcript, Day 1, p. 161.

138. Under the legal test prescribed by Article 8 of the ILC Articles, the Claimant needed to show that Emlak was acting on the instructions of, or under the directions or effective control of, the State (in this case TOKI) in terminating the Contract. It is clear from Mr. Bayraktar's testimony that the Tribunal was well aware of Mr. Bayraktar's two hats (his roles in TOKI and Emlak) and that it was attentive to this evidence in connection with the issue of attribution during his testimony.[109] The questions posed to Mr. Bayraktar by the counsel for the Claimant were general and did not address, *e.g.*, meetings at TOKI concerning the termination of the Contract. In fact, Mr. Bayraktar's testimony did not show that the lines of separateness between TOKI and Emlak were all but non-existent, nor did it show any evidence of interference by TOKI in the termination decision. It showed the contrary.[110] The Separate Opinion quotes the passages in Mr. Bayraktar's testimony concerning the general relationship between TOKI and Emlak and does not speak to the specific decision to terminate the Contract.[111] As a consequence, the Majority was correct that there was no evidence supporting attribution of Emlak's acts to the State.

139. In addition, it is clear from the conclusion in the Separate Opinion that the Tribunal did consider the evidence on attribution as a whole. The Separate Opinion quotes extensively from Mr. Bayraktar's testimony and disagrees with the Majority on the issue of attribution on that basis. It is implausible to suggest that this evidence would not have been brought up by Mr. Jaffe during the Tribunal's deliberations, and the "Tribunal must have considered it if for no other reason to determine whether it agreed with Mr. Jaffe or not."[112] The Majority thus likely concluded that Mr. Bayraktar's oral evidence did not add anything to what was already before it on the issue of attribution and therefore did not discuss it in regard to each specific issue of attribution. The Tribunal had discretion to evaluate the evidence as it best saw fit, and that discretion cannot be subject to review.

140. In any event, the Claimant itself did not rely on Mr. Bayraktar's testimony for its case on attribution in its closing submission at the hearing. According to the Respondent, the Claimant likely did not believe that the testimony was important for its case on attribution

[109] Transcript, Day 2, pp. 40-51.
[110] *Ibid.*, pp. 47-48.
[111] *Ibid.*
[112] Transcript, Day 1, p. 164.

and cannot now put forward in the annulment proceeding an argument that it should have pleaded during the arbitration. The Applicant's conspiracy theory that the Tribunal deliberately aimed to defeat the Applicant's meritorious claim is therefore highly implausible and fails for complete lack of evidence.

(ii) New Documentary Evidence

141. The Tribunal gave the Claimant ample opportunity to adduce evidence and make submissions in relation to the three documents produced and translated during the course of the hearing, including recalling two witnesses to testify about the additional documents. The fact that the Tribunal did not specifically mention one of the documents in the Award does not signify that the Tribunal did not consider the evidence, but, even if that were the case, there is no obligation on the Tribunal to cite every piece of evidence on the record. In any event, failure by a tribunal to consider any one piece of evidence is insufficient to amount to an annullable error.

142. Moreover, there is no evidence that the Respondent violated its disclosure obligations by withholding the three documents during the document production phase. This oversight, which was rectified during the hearing, cannot come close to a serious departure from a fundamental rule of procedure.

(iii) Other Defects in the Treatment of Evidence

143. According to the Respondent, the procedural history as described by the Applicant itself shows that the Tribunal went out of its way to accommodate the Claimant and hear its case, both before and at the hearing. Therefore, the Applicant's argument that there was an imbalance in the equality of arms between the parties that the Tribunal failed to restore is spurious. Even if the Tribunal had privileged the written phase over the oral phase of the proceeding, such "privileging" could not amount to a departure from a fundamental rule of procedure. However, even if it did, a tribunal has the discretion to evaluate the evidence in whichever format it is presented, whether written or oral.

(iv) Consequences of the Treatment of Evidence

144. The Respondent argues that there cannot be either full or partial annulment under any of the grounds for annulment invoked with regard to the treatment of evidence in the proceedings. The Respondent also refutes the Applicant's argument that the grounds could be cumulated. This is not permissible under Article 52 of the ICSID Convention, which provides alternative grounds for annulment. According to the Respondent, "[a] committee cannot find that the complaint has some merit under one ground and a bit more merit under another ground and therefore arrive at a fully justified complete ground of annulment."[113] Even if the Committee decided to annul the Tribunal's findings on attribution, the decision on the merits would stand because Mr. Bayraktar's testimony was of no relevance to the Tribunal's decision on the merits.[114]

C. *Committee's Analysis*

145. It is common ground between the parties that a breach of the fundamental right to be heard in the proceedings would be a ground for annulment.[115] The Committee accepts that the lack of a fair hearing would be a serious breach of a fundamental rule of procedure under the ICSID Convention. The right to a fair hearing encompasses a number of matters. In the present case, the focus is on three particular aspects of a fair hearing, namely, the right to be heard, the principle of equality of arms and the duty to give reasons.

146. The disagreement between the parties concerns the content of the right to be heard in the factual circumstance of this case. The ECtHR has recognized "equality of arms" as an important component of the right to a fair trial. The requirement is that "each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[116]

147. Initially, when the Claimant wanted to cross examine Mr. Bayraktar, it wanted the Respondent to produce him as a witness. It was only because the Respondent declined to do

[113] Transcript, Day 2, p. 60.
[114] Transcript, Day 2, p. 64.
[115] *Fraport v. Philippines*, Decision on Annulment, December 23, 2010, paras. 197 *et seq*.
[116] *Dombo Beheer BV v. Netherlands*, ECtHR, App. No. 1448/88, Merits and Just Satisfaction, October 27, 1993, para. 33.

so that the Tribunal, in order to allow the Claimant to advance its case, decided in its Procedural Order No. 2 to treat him as the Tribunal's own witness. The Committee rejects the suggestion that, in admitting the evidence of Mr. Bayraktar in this way, the Tribunal was making any indication at all of the relevance or importance of this evidence. It was simply ensuring equality of arms and holding the ring between the parties. Moreover, this Committee cannot conclude merely from the fact that fairness led the Tribunal to admit Mr. Bayraktar's evidence that, having heard his evidence and his thorough cross examination by the Claimant, the Tribunal was then obliged to conclude that his evidence was material to the Tribunal's decision. The Majority had the discretion to determine that the evidence was not material and, although it might have been helpful had they expressly said so, the Committee does not consider that the failure to do so is itself grounds to annul the Award.

148. The Tribunal is required to consider all the evidence before it and reach its own conclusions as to which evidence is material to the findings it has to make and which is not. The Tribunal heard evidence from a total of 17 witnesses, including Mr. Bayraktar, but it referred only to the oral evidence of two of the Claimant's witnesses and two of the Respondent's witnesses in its ruling, as set out in the table below:

Name	**Affiliation**	**Dealt with in the Award?**
Minister Erdoğan Bayraktar	Called by the Tribunal	**Yes** – his oral evidence is referred to in the majority decision at para. 406 but in relation to the zoning issue. His oral evidence is considered in the Separate Opinion at paras. 4,6 and 8.
Mr. Meyer Benitah	Claimant's Representative and Witness	**Yes** – Section D: Claims asserted on behalf of Mr. Benitah; and para. 399(3).
Mr. Burak Erten	Claimant's Witness	**No** – reference is made to witness statement (paras. 241, 384(4)) but <u>not</u> oral testimony.
Mr. Erik Esveld	Claimant's Witness	**No –** reference is made to witness statement (paras. 73, 126, 185, 186, 443) but <u>not</u> oral testimony.
Mr. John Anderson	Claimant's Expert	**No** – no mention at all, except briefly on procedural history (para. 32). No treatment of evidence, oral or written, whatsoever.
Dr. Jose Alberro	Claimant's Expert	**No** – again no mention at all, except briefly on procedural history (paras. 21,

		32, 50). No treatment of evidence – oral or written – whatsoever.
Prof. Metin Gunday	Claimant's Expert	**Yes** – para. 260 only briefly. Reference to Legal Opinion (paras. 235(3), 238, 308).
Mr. Ertan Yetim	Respondent's Witness	**No** – reference to witness statement only (paras. 97, 114, 272, 406).
Mr. Murat Kurum	Respondent's Witness	**Yes** – paras. 143, 160, 319, 322.
Mr. İbrahim Keskin	Respondent's Witness	**Yes** – para. 165; also reference to witness statements (paras. 63, 96).
Mr. Ekim Alptekin	Respondent's Witness	**No –** no treatment of evidence, oral or written, whatsoever.
Mr. Enver Bulut	Respondent's Witness	**No** – no treatment of evidence, oral or written, whatsoever.
Mr. Ender Ethem Atay	Respondent's Expert	**No –** reference only to Joint Legal Expert Report (para. 288); Legal Opinion (para. 406).
Mr. Nicolas Barsalou	Respondent's Expert	**No –** no treatment of evidence, oral or written, whatsoever.
Mr. Erik van Duijvenvoorde	Respondent's Expert	**No –** no treatment of evidence, oral or written, whatsoever.
Mr. Hervé de Trogoff	Respondent's Expert	**No –** no treatment of evidence, oral or written, whatsoever.
Mr. Chris Ives	Respondent's Expert	**No** – no treatment of evidence, oral or written, whatsoever.

149. The Committee considers that the lack of reference to the oral evidence of both parties is not a dereliction of the Tribunal's duty to act fairly by respecting the right to be heard and ensuring equality of arms, but is in fact an illustration of exercising its judicial function of choosing which evidence it finds relevant and which it does not. The Committee cannot accept the Applicant's allegation that the Tribunal ignored the oral testimony of Emlak officials that the Emlak Board's decision to terminate the Contract was pretextual. This allegation rather reveals the disagreement of the Applicant with the Tribunal's evaluation of evidence and its conclusion that "[i]t is not established by the evidentiary record that Emlak invoked alleged breaches as a pretext"[117] for termination of the Contract in the pursuit of State interest. Accordingly, the Committee rejects the Applicant's argument that the failure

[117] Award, para. 318.

to address all the factual matters dealt with in oral evidence must in itself lead to the Award being annulled as a breach of the obligation to ensure a fair hearing.

150. Similar considerations also apply to the fact that the Tribunal has not referred in its reasoning to one of the three documents it ordered the Respondent at the hearing to produce, namely, an Emlak Memorandum of February 11, 2010. When a tribunal orders the production of a document, it does so on the assumption that it *may* be relevant to the issues in dispute. It is only after having received it, and having heard the arguments of the parties, that, in the exercise of its discretionary power under ICSID Arbitration Rule 34(1), it evaluates its probative value. The Tribunal received the February 11, 2010 Memorandum during the hearing. There is no doubt that it was aware of it and its content, as it had been discussed during the cross-examination of Mr. Kurum. The fact that the Tribunal does not refer to it specifically in its reasoning implies that it did not consider it to be material. As mentioned in paragraph 83 above, failure to explain what the Tribunal thinks about that document may be unwise, but does not amount to a violation of the right to be heard.

151. The second criticism directed at the Tribunal in relation to the oral evidence of Mr. Bayraktar is that the Tribunal, by failing to refer to it, failed in its duty to give reasons for its Award. A contrast is made with the Separate Opinion, which does address Mr. Bayraktar's evidence.

152. The obligation for tribunals to give reasons for their decisions arises out of the overriding duty to afford the parties a fair hearing, guaranteed in Article 48(3) of the ICSID Convention and ICSID Arbitration Rule 47(1)(i), and reiterated in numerous decisions of ICSID *ad hoc* committees. In *Ruiz Torija v. Spain*, the ECtHR stated:

> The Court reiterates that Article 6(1) [of the ECHR] obliges the Courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the Courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a Court has failed

> to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.[118]

153. It is the opinion of the Committee that these broad parameters apply equally to international tribunals constituted under the ICSID Convention. The depth and extent of the duty to give reasons will inevitably vary from one case to another. The duty is contextually sensitive and a tribunal's reasons need not be extensive as long as its decision makes sense and enables the parties to know the strengths and weaknesses of their respective cases.

154. Mr. Jaffe, in his Separate Opinion, formed the view that, as a "practical matter," the decision to terminate the Ispartakule III Contract was taken at the direction of TOKI, and hence the State, for the purposes of Article 8 of the ILC Articles. He refers to Mr. Bayraktar's oral evidence at the hearing, particularly the fact that, throughout his oral evidence, Mr. Bayraktar spoke not about Emlak's interest and purpose, but about TOKI's.[119] He then concludes that Mr. Bayraktar's testimony shows that TOKI's sovereign interests drove the termination.[120]

155. It is regrettable that the Majority does not address this divergence of view in terms, but it does make findings on the issue at paragraphs 324 to 326 of the Award.

156. This disagreement between the Tribunal Members is a disagreement about evaluating the evidence, and about the logic applied in answering the question of attribution and in the reasoning of the conclusion reached by the Majority, as is shown in paragraphs 9 to 11 of the Separate Opinion. Mr. Jaffe criticises the Majority's conclusion made in paragraphs 324 to 326 of the Award that, because there were commercially viable grounds for the termination, there was no basis for attributing the acts of Emlak to the State.

157. Mr. Jaffe states:

> That approach answers the first question (whether the acts of Emlak are to be attributed to the State) by answering the second question (whether the decision to terminate was based on commercially viable grounds).[121]

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[118] *Ruiz Torija v. Spain*, ECtHR App. No. 18390/91, A/303-A, Merits and Just Satisfaction, December 9, 1994, para. 29.
[119] Separate Opinion, paras. 4, 6, citing Transcript, Day 3, pp. 25, 34, 52 -53.
[120] Separate Opinion, para. 8.
[121] Separate Opinion, para. 9.

158. However, he goes on to conclude that, although he would answer the first question differently from his colleagues, he agrees with their conclusion on the second question and therefore there was not sufficient proof offered to find a violation of the BIT.[122]

159. The Committee will further address below the disagreement between the Majority and the Separate Opinion as a matter of law, but in relation to the separate criticism that the Majority's failure to address Mr. Bayraktar's evidence – and Mr. Jaffe's findings based upon such failure – in the Award itself is a breach of the obligation to give reasons, the Committee concludes that the Award gives sufficient reasons for the parties, and particularly the Applicant, to be able to understand why the Majority reached the decision it did on attribution. Accordingly, the Committee rejects this criticism of the Award as well.

160. The Committee thus concludes that it cannot uphold the Applicant's request that it annul the Award under Article 52(1)(d) of the ICSID Convention, as there has been no serious departure from a fundamental rule of procedure by the Tribunal in the original proceeding.

2. Tribunal's Determination on the Merits Despite Alleged Lack of Jurisdiction

A. *Applicant's Position*

161. According to the Applicant, the parties agree that the Tribunal's core holding concerned attribution and that "the Tribunal could have exercised judicial economy and ended its reasoning after paragraph 327 of the Award, but only as far as the acts of Emlak were concerned."[123] The central issue therefore concerns how the Award addresses jurisdiction and the merits. If a tribunal dismisses a case on jurisdictional grounds, the natural consequence is that any following decision on the merits is either *obiter dicta* or a clear excess of powers.[124] A tribunal's exercise of a jurisdiction that does not exist has been recognized as the "most obvious example" of a manifest excess of powers.[125]

162. In this case, it is clear from paragraph 327 of the Award that Section VI, entitled "Attribution," dismissed claims arising from the conduct of Emlak on jurisdictional grounds

[122] Separate Opinion, para. 11.
[123] Transcript, Day 1, p. 72, quoting Resp. C-Mem. Annul., para. 55.
[124] Transcript, Day 1, p. 74.
[125] App. Rep. Annul., para. 159, citing *C. Schreuer with L. Malintoppi, A. Reinisch, A. Sinclair*, The ICSID Convention: A Commentary, 2nd ed., Cambridge University Press, p. 943, para. 155 (2009).

because the Majority had determined that Emlak's conduct was not attributable to the State. According to Applicant, it is also apparent from paragraphs 358 and 361 of the Award that Section VII of the Award, entitled "Treaty Versus Contract Claims," dismissed claims relating to Emlak's conduct on jurisdictional grounds, because of the close link with the attribution decision in Section VI.[126] Having decided that the Tribunal had no jurisdiction over the Emlak claims, the Tribunal nevertheless proceeded to analyze the merits of these claims in Section VIII, entitled "Claimant's Claims," and dismissed the claims on the merits. In doing so, the Tribunal exercised a power that it did not have over the treaty claims that were based on the acts of Emlak, and therefore committed an annullable error.

163. Alternatively, the Tribunal's determinations in Section VIII must be considered to be merely *obiter dicta* without any legal effect. The Applicant states that, in such case, this portion of the Award "cannot be given any kind of residual legal effect in this or any other proceeding, and must be disregarded by the annulment committee in its entirety."[127] In other words, Section VIII could not amount to a separate and independent ground for dismissal of the claims.[128]

164. The Applicant argues that Sections VI, VII and VIII of the Award are inexorably linked, meaning that, if the Committee decides to annul the Tribunal's decision on attribution, it must proceed to annul the entirety of the Award.

B. *Respondent's Position*

165. The Respondent takes issue with the Applicant's characterization of the findings on attribution as pertaining only to the Tribunal's jurisdiction. According to the Respondent, the Award indicates that the conclusion on attribution not only affected jurisdiction, but also supported the dismissal of the claims on the merits.

166. The Tribunal dismissed the Emlak claims on three independent grounds in Sections VI-VII and was fully entitled to do so. There were many reasons why it made sense for the Tribunal to consider all of the alternative arguments advanced by the parties, as is shown by the

[126] Transcript, Day 1, pp. 76-77.
[127] App. Rep. Annul., para. 166.
[128] Transcript, Day 1, p. 77.

structure of the Award. The first reason is that the parties' arguments were linked. The second reason is that the Tribunal needed to consider claims of BIT breaches of actors other than Emlak, which it did in Section VIII. Third, the questions of attribution and treaty versus contract claims, were, as admitted by the Tribunal, intimately linked with the merits.[129] Fourth, it was clear that the Award was structured with the desire to achieve a unanimous decision.[130] The Respondent states that, although the Tribunal could have stopped at paragraph 327 with regard to the acts of Emlak, there was a clear logic and aptness of the Award's structure, and judicial propriety in this case militated in favor of addressing all three independent grounds for dismissing the Emlak claims.

167. Even though the question of attribution was linked to the merits, the Respondent submits that lack of attribution was a finding relevant to both jurisdiction and merits. The issue affects the competence of a tribunal as well as whether a State is responsible for an internationally wrongful act (*i.e.* whether the claim has merit). The Tribunal's determination that the Emlak claims were outside of its jurisdiction was therefore not the end of the matter. Indeed, "[t]he finding of no attribution of the acts constituting the alleged breaches was in and of itself a finding on the merits."[131] Previous tribunals faced with similar situations have all concluded that the issue of attribution is one also pertaining to the merits and have structured their awards as the Tribunal did in this case.[132] In four cases, the tribunals also considered whether there would have been a treaty breach if the acts had been attributable to the State.[133] The Tribunal in this case thus followed a line of consistent jurisprudence on this matter.

168. For the above reasons, the Respondent submits that the Tribunal did not manifestly exceed its power by exercising a jurisdiction that it did not have. The Applicant has failed to show

[129] Resp. C-Mem. Annul., para. 58.
[130] Resp. Rej. Annul., para. 48.
[131] Resp. Rej. Annul., para. 36.
[132] Resp. Rej. Annul., paras. 51-55, referring *to Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24), Award, August 27, 2008*; Hamester v. Ghana*, Award, June 18, 2010; *Bosh International, Inc. And B&P, LTD Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, October 25, 2013 ("*Bosh v. Ukraine*"); *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Award, June 12, 2012 ("*Ulysseas v. Ecuador*"); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V (064/2008)), Partial Award on Jurisdiction and Liability, September 2, 2009.
[133] *Ibid.*, para. 53.

both that there is an excess of powers, and that the excess is manifest, meaning that the "excess of power should at once be textually obvious and substantively serious."[134]

169. In any event, the Respondent submits that no matter what happens to the findings on attribution, the Award must stand. The principle of severability prescribes that only the parts of the Award which are tainted by an annullable error can be annulled. Even if the Committee annulled the Tribunal's findings on attribution with regard to the Emlak claims, the alternative grounds under which those claims were dismissed must stand. The Award's *dispositif* leaves no doubt that the claims would have been dismissed even if the Tribunal had found in favor of the Claimant on attribution. In other words, the Applicant can at most achieve a partial annulment of the Award.

170. The Applicant submits fundamentally contradictory grounds for annulment with regard to manifest excess of powers. On the one hand, the Applicant contends that the Tribunal failed to exercise a jurisdiction that it had when it disregarded evidence and, as a result, concluded that it had no jurisdiction over the Emlak claims. On the other hand, the Applicant also argues that the Tribunal exceeded its jurisdiction when it considered the merits. However, in order to succeed in annulling the full Award, the Applicant must show that both the jurisdictional and the merits findings amount to annullable errors.

C. *Committee's Analysis*

171. The Committee notes that the Tribunal devoted to the issue of attribution a separate chapter in its Award, Chapter VI, which follows Chapter V, titled "Jurisdiction and Admissibility." The latter chapter deals with the issue of whether the Claimant made an "investment" in Turkey for the purposes of Article 1(b) of the BIT and Article 25 of the ICSID Convention, concluding that the Tribunal was "satisfied that the Claimant's principal claim arises out of an 'investment' for the purposes of the BIT."[135] The other issue which the Tribunal considered in this chapter, namely whether the claims asserted on behalf of Mr. Benitah, and the conclusion reached therein that such claims were inadmissible in the proceedings

[134] Transcript, Day 1, p. 154, quoting *Soufraki v. UAE*, Decision on the Application for Annulment, June 5, 2007, para. 40.
[135] Award, para. 208.

instituted by Tulip,[136] are of no relevance in the context of this annulment proceeding, as the Tribunal's conclusion on this point was not challenged by the Applicant.

172. The Tribunal has not discussed the issue of attribution in the chapter on Jurisdiction and Admissibility, but rather dealt with it in a separate chapter. The Tribunal itself provides an explanation for this approach when it opines that "[t]he issue of attribution relates both to the Tribunal's jurisdiction and to the merits of the dispute."[137] The Tribunal was inspired by the approach to the question of attribution adopted by the Tribunal in *Hamester v. Ghana*, describing that approach as "appropriate"[138] and expressly agreeing with it.[139] The Tribunal in *Hamester* expressed the view that "[t]he question whether the issue of attribution is, in a given case, one of jurisdiction or of merits is not susceptible of a clear-cut answer."[140]

173. The Tribunal quoted in full three of the paragraphs of the *Hamester* Award.[141] It is worth noting that, in the quoted paragraphs, the *Hamester* Tribunal did not directly characterize the issue of attribution as one which goes to jurisdiction, despite considering that issue in the context of Ghana's second "jurisdictional objection" based on non-attribution, which rested on an analysis of the different acts complained of. The Tribunal in *Hamester* was more nuanced, stating that "the question of attribution looks more like a jurisdictional question."[142] It explained that "in many instances, questions of attribution and questions of legality are closely intermingled, and it is then difficult to deal with the question of attribution without a full enquiry into the merits."[143] In the end, the *Hamester* Tribunal adopted a pragmatic approach, as is apparent from its noting that "as a practical matter, this question is usually best dealt with at the merits stage, in order to allow for an in-depth analysis of all the parameters of the complex relationship between certain acts and the State."[144]

[136] *Ibid*., para. 231, point 2 of the *dispositif*.
[137] *Ibid*., para. 276.
[138] *Ibid.*, para. 277.
[139] *Ibid*., para. 279.
[140] *Hamester v. Ghana*, para. 140.
[141] Award, para. 277, quoting *Hamester v. Ghana*, Award, June 18, 2010, paras. 143-145.
[142] Award, para. 277, quoting *Hamester v. Ghana*, Award, June 18, 2010, para. 143.
[143] *Ibid*.
[144] *Ibid*., quoting *Hamester v. Ghana*, Award, June 18, 2010, para. 144.

174. This is thus the approach which inspired the Tribunal in the original *Tulip v. Turkey* proceeding and which has been adopted by a number of other tribunals, a trend identified by the Respondent when referring to, *inter alia*, *Bosh v. Ukraine* and *Ulysseas v. Ecuador*.[145]

175. The Tribunal expressed its view that attribution was relevant, in the context of the case it had to deal with, for two reasons: first, for "ascertaining whether there [was] a dispute with a Contracting State, here Turkey, for the purposes of the BIT and Art 25 of the ICSID Convention," and second, because in its view, "the claims presented in this investment arbitration (particularly with respect to the conduct of Emlak) may only succeed if they are attributable to the State." The Tribunal continued by stating that "[i]n that sense, the issue of attribution is also relevant to the merits of the dispute."[146]

176. The Committee questions whether attribution is really relevant to ascertaining the existence of a dispute between Tulip and Turkey. Article 8 of the BIT, which is about the settlement of disputes between investors of one Contracting Party and the other Contracting Party, defines an investment dispute:

> [A]s a dispute involving:
>
> (a) the interpretation or application of any investment authorization granted by a Contracting Party's foreign investment authority to an investor of the other Contracting Party; or
>
> (b) a breach of any right conferred or created by this [BIT] with respect to an investment.[147]

177. Thus, a dispute to which the dispute settlement procedures under Article 8 of the BIT apply must be one falling within the scope of this definition. There is nothing in that definition about attribution. Attribution may be relevant in the context of enquiring whether there was a breach of an obligation under the BIT, but that pertains to the merits of a case, as the

[145] Resp. C-Mem. Annul, para. 62, quoting *Bosh v. Ukraine*, Award, October 25, 2013 and *Ulysseas v. Ecuador*, UNCITRAL, Award, June 12, 2012.
[146] Award, para. 276.
[147] Art. 8(1) of the BIT.

Tribunal was fully aware when it stated that "the issue of attribution [was] also relevant to the merits of the dispute."[148]

178. Article 25 of the ICSID Convention, to which the Tribunal referred in its explanation as to why it was necessary to consider the issue of attribution for the purpose of ascertaining the existence of a dispute, opens Chapter II of the ICSID Convention, which is entitled "Jurisdiction of the Centre." It provides that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre.

179. Again, no specific mention is made of attribution in relation to disputes which may fall within the jurisdiction of the Centre. Such dispute shall be a legal dispute arising directly out of an investment and shall involve a national of a State Party to the ICSID Convention and another State (or its designated agency or constituent subdivision) which is a Party to the Convention.

180. There is no specific definition of the term "dispute" either in the BIT or in the ICSID Convention. When interpreting that term, in accordance with Article 31(3)(c) of the VCLT, "there shall be taken into account […] [a]ny relevant rules of international law applicable in the relations between the Parties." As the International Court of Justice ("ICJ") stated, there is:

> […] established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[149]

The ICJ, on several occasions, stressed that for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other."[150]

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[148] *Ibid.*

[149] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, *I.C.J. Reports 2011* (1), April 1, 2011, p. 84, para. 30, referencing the *Mavrommatis Palestine Concessions* case, *Judgment No. 2 1924, P.C.I.J. Series A, No. 2*, p. 11.

[150] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, *I.C.J. Reports 1962*, December 21, 1962, p. 328; *Armed Activities on the Territory of the Congo (New Application:*

181. There can be no doubt that the Tribunal was seised of the dispute in which Tulip's claim was positively opposed by Turkey. Tulip advanced the claim that Turkey breached several of its obligations under the BIT, the alleged breaches having been specified in the Request for Arbitration and then subsequently throughout the written and oral phases of the proceeding. The Tribunal, in its chapter on Jurisdiction and Admissibility, satisfied itself that "the Claimant's principal claim arises out of an 'investment' for the purposes of the BIT."[151]

182. The Committee notes that, although the Tribunal announced that its inquiry into the issue of attribution would be relevant in order to ascertain whether there is a dispute with Turkey for the purposes of the BIT and Article 25 of the ICSID Convention, it did not expressly state its conclusion on this question. Rather, it focused on attribution for purposes of determining whether the impugned conduct of Emlak was attributable to Turkey because, as it correctly stated, the claims with respect to Emlak's conduct "may only succeed if they are attributable to the State."[152]

183. Attribution is a concept elaborated upon in the context of State responsibility. The ILC considered it to be one of the elements of an internationally wrongful act of a State. Article 2 of the ILC Articles on State Responsibility, which codifies customary international law,[153] is entitled *Elements of an internationally wrongful act of a State* and provides that:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a breach of an international obligation of the State.

184. Both elements have to be established in order to reach a conclusion that an internationally wrongful act of a State has been committed. If one of the elements is missing, there is no international wrongful act, and responsibility of a State cannot be engaged. In the words of the ILC Commentary to the Articles on State Responsibility ("ILC Commentary" or

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2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 2006*, December 19, 2005, p. 40, para. 90.

[151] Award, para. 208.

[152] *Ibid*., para. 276.

[153] See e.g., *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States* (ICSID Case No. ARB (AF)/04/5), Award, November 21, 2007, para. 275.

"Commentary"), attribution of the conduct of a person, organ, institution or entity to the State under international law means that "conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State."[154] International law contains rules on attribution which the ILC codified and developed in Chapter II of its Articles on State Responsibility (Articles 4-11). The ILC Commentary explains, "[t]he attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality."[155] As the last Special Rapporteur of the ILC for State responsibility wrote, "[t]he process of attribution as stated in Article 2 reflects a conception of attribution that is essentially normative."[156] The term "attribution" refers "to the body of criteria of connection and the conditions which have to be fulfilled, according to the relevant principles of international law, in order to conclude that it is a State […] which has acted in the particular case."[157]

185. The Tribunal applied the relevant criteria for ascertaining whether the conduct of Emlak, which formed the basis of the Claimant's complaint in the original proceeding (in particular the termination of the Contract), was attributable to Turkey. The Tribunal analysed all three of the ILC Articles on which the Claimant relied, namely Articles 4 (conduct of organs of a State), 5 (conduct of persons or entities exercising elements of governmental authority) and 8 (conduct directed or controlled by a State). After a thorough analysis, the Tribunal reached the unanimous conclusion that "Emlak is not a 'state organ' within the meaning of Art 4 [of the] ILC Articles"[158] and therefore Emlak's conduct could not be attributed to Turkey on that basis. Likewise, the Tribunal reached the unanimous conclusion that "the evidence on the record does not show that Emlak exercises any governmental power within the meaning of Art 5 [of the] ILC Articles."[159] These conclusions are not challenged by the Applicant.

[154] Commentary to Chapter II, Yearbook of the ILC, 2001, Volume II, Part Two, p. 38, para. 1.
[155] *Ibid*., para. 4.
[156] *J. Crawford*, State Responsibility, The General Part, Cambridge University Press, p. 113 (2013).
[157] *L. Condorelli* & *C. Kress*, The Rules on Attribution: General Consideration, in: The Law of International Responsibility (*J. Crawford*, *A. Pellet*, *S. Olleson*, eds.), Oxford University Press, 221 (2010).
[158] Award, para. 291.
[159] *Ibid*., para. 300.

186. What is challenged is the Majority's conclusion on attribution under Article 8 of the ILC Articles. Mr. Jaffe attached his Separate Opinion on this question, which consisted of some 11 paragraphs, but noted expressly "that [his] separate views do not affect the outcome of the proceedings."[160]

187. The Tribunal devoted the major part of its analysis of attribution, some 26 paragraphs,[161] to Article 8. The Tribunal, in interpreting Article 8, took into account the ILC Commentary, as is demonstrated by a longer quote in paragraph 306 of the Award. The fact that a company or enterprise is State-owned or controlled is not sufficient to attribute its conduct to the State, as the quoted passage from the Commentary makes clear. Rather, the conduct of a corporate entity has been attributed to the State when "the State was using its ownership interest in or control of a corporation *specifically* in order to achieve a *particular* result."[162]

188. Relying thus on Article 8 and its Commentary, the Tribunal stated that:

> [T]he relevant enquiry remains whether Emlak was being directed, instructed or controlled by TOKI with respect to the specific activity of administering the Contract with Tulip JV in the sense of sovereign direction, instruction or control rather than the ordinary control exercised by a majority shareholder in the company's perceived commercial best interests.[163]

189. The Committee has no doubt that the Tribunal correctly interpreted Article 8 of the ILC Articles and applied the relevant test, that of effective control.[164] Whether the evidence adduced by the Claimant satisfied that test was for the Tribunal to evaluate. According to Rule 34(1) of the ICSID Arbitration Rules, "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." It is not for this Committee to re-evaluate the evidence presented in the original proceedings.

190. The Tribunal, having considered the evidence, reached the conclusion that:

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[160] Separate Opinion, p. 1.
[161] Award, paras. 301-326.
[162] ILC Commentary to Article 8, para. 6 (emphasis added), quoted in the Award, para. 306. The ILC referred to the jurisprudence of the Iran-United States Claims Tribunal. See *J. Crawford*, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary, Cambridge University Press, p. 113, fn. 174 (2002).
[163] Award, para. 309 (emphasis in the original).
[164] Mr. Jaffe also agreed that this was the relevant test. Separate Opinion, p. 1, point 2.

> […] while Emlak was subject to TOKI's corporate and managerial control, Emlak's conduct with respect to the execution, maintenance and termination of the Contract [was] not attributable to the State under Art. 8 of the ILC Articles due to an absence of proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests.[165]

191. In the subsequent paragraph, which perhaps could have been visually more clearly separated from the paragraphs on attribution under Article 8, the Tribunal summarized its overall conclusion on attribution – that is on attribution under all three Articles (4, 5 and 8) on which the Claimant relied – as follows: "the Tribunal therefore determines by majority that Emlak's conduct with respect to the Contract and the Ispartakule III Project is not attributable to the Turkish State."[166] The Tribunal continued with the following final statement, that Emlak's conduct was "on that basis, outside of the remit of the Tribunal."[167]

192. Neither the ICSID Convention nor the BIT uses the term "remit." The English Oxford Dictionary defines the term as "the referring or consignment of a matter to some other person or authority for settlement," "the transfer of a case from one Court or judge to another" or as "an area of authority" frequently used as part of the expression "within (also beyond, etc.) one's remit."[168]

193. It seems that the Tribunal meant "competence" or "jurisdiction" when using the term "remit." That impression is strengthened by considerations of the Tribunal in the following chapter, Chapter VII, entitled "Treaty versus Contract Claims."

194. The Tribunal expressed the view that "it is difficult in this case clearly to separate the issue of attribution from the question of whether the claims presented by the Claimant arise from the BIT."[169] Having recalled its conclusions on Articles 5 and 8 of the ILC Articles, it stated that "[t]he Tribunal's finding that Emlak's conduct is properly characterised as contractual in nature, in the context of attribution, informs its determination that the claims asserted by

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[165] Award, para. 326.
[166] Award, para. 327.
[167] *Ibid*. The same term "remit" is used by the Tribunal in paragraph 231 when concluding its consideration of whether the claims on behalf of Mr. Benitah were admissible. Having concluded that the Claimant cannot prosecute Mr. Benitah's claims as his attorney, it stated that "[t]here is no obvious bar to Mr. Benitah initiating his claims as an investor within Art. 25 of the ICSID Convention, but that possibility does not fall within the Tribunal's remit."
[168] The Oxford English Dictionary, 2nd ed., Oxford University Press (1989).
[169] Award, para. 358.

the Claimant with respect to Emlak's conduct may not properly be characterised as treaty claims."[170]

195. As the Tribunal was of the view that "none of the claims presented by the Claimant with respect to the conduct of Emlak are amenable to be characterised by the Tribunal as arising out of the BIT," it stated that "[a]ccordingly, they fall outside the scope of the Tribunal's jurisdiction."[171]

196. The Committee is thus fully aware that the Tribunal used the expressions that Emlak's conduct was "outside the remit of the Tribunal" or that the claims with respect to the conduct of Emlak "fall outside the scope of the Tribunal's jurisdiction." The Tribunal, however, in the dispositive part of the Award, did not rule that it was without jurisdiction to consider the Claimant's claims relating to Emlak's conduct. After ruling that, "[b]y majority, the acts of Emlak are not attributable to Turkey," the Tribunal decided "[u]nanimously" that, in any event, the acts of Emlak do not constitute breaches of the BIT."[172]

197. Article 53 of the ICSID Convention provides that "[t]he Award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention." In the view of the Committee, it is the dispositive part of the Award that is binding on the parties. This is a part in which a tribunal authoritatively rules on the submissions of the parties, either on jurisdictional or merits submissions, following its consideration of the parties' evidence and arguments in the reasoning part of its Decision/Award. The ICJ, in relation to its Judgments, stated that "[t]he operative part of a Judgment of the Court possesses the force of *res judicata*."[173]

198. The Committee notes that the Tribunal has made several findings, or, to use the Tribunal's terminology, "determinations," in the dispositive part, namely:

> 1. The Claimant has made an investment into Turkey within the terms of the BIT and the ICSID Convention.

[170] *Ibid*., para. 359.
[171] *Ibid*., para. 361.
[172] *Ibid*., p. 138.
[173] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, *I.C.J. Reports 2007*, February 26, 2007, p. 94, para. 123.

2. The claims of Mr Benitah are inadmissible.
3. By majority, the acts of Emlak are not attributable to Turkey.
4. Unanimously, and in any event, the acts of Emlak do not constitute breaches of the BIT.
5. Also unanimously, the acts of TOKI, the Supreme Audit Board, the Turkish police and Turkish government officials are attributable to Turkey but do not constitute breaches of the BIT.[174]

None of them constitutes a finding that the Tribunal is without jurisdiction to consider Tulip's claims. Therefore, in the Committee's view, one cannot conclude that when the Tribunal made the determination that "the Claimant's claims are dismissed," it would have exceeded its powers, even less so manifestly. This was not "a jurisdictional dismissal"[175] of the claims, but a dismissal after having considered the merits. The Tribunal was entitled to that course of action.

199. Moreover, Tulip alleged in the original arbitration proceeding that Turkey breached its obligations under the BIT by the conduct of "various state actors such as TOKI, the Prime Minister's Office, the police, and the Supreme Audit Board."[176] The Tribunal, noting agreement between the parties that "these allegations plainly involve action by State organs which would be attributable to the State,"[177] considered that "these [were] plainly assertions about the conduct of state entities in the performance of their state functions."[178] As these claims relating to the conduct of the above-mentioned State entities were "properly within the Tribunal's jurisdiction,"[179] the Tribunal was under a duty to consider these claims on the merits and to reach conclusions on them. This is what the Tribunal did in Chapter VIII of its Award titled "[t]he Claimant's Claims."

200. It is true that in that Chapter, the Tribunal also considered the claims based on Emlak's conduct which, as it earlier determined, was not attributable to Turkey.[180] As Tulip's claims were treaty claims alleging the breach of obligations under the BIT, such obligations could have been breached only by Turkey, through acts of its State organs or other entities the

[174] Award, p. 138.
[175] App. Rep. Annul., para. 157.
[176] Award, para. 334, referring to Claimant's Reply, para. 320.
[177] *Ibid*., para. 328.
[178] *Ibid*., para. 363.
[179] *Ibid*., para. 368.
[180] *Ibid*., para. 327.

conduct of which is attributable to it, as obligations under an inter-State treaty can be breached only by a Party to it.

201. The Tribunal was thus correct when it stated, in respect of the claims based on Emlak's conduct, that those claims "must fail."[181] Although economy in drafting would have justified the Tribunal to disregard these claims when it considered the claims on their merit, the Tribunal was under no duty to proceed in such manner. It proceeded to consider these claims on the assumption that Emlak's conduct was attributable to Turkey.[182] This approach allowed the Tribunal to "double-check" its conclusion resulting in the unanimous dismissal of Tulip's claims.

202. In view of the above, the Committee has to reject the Applicant's submission that the Award be annulled under Article 52(1)(b) of the ICSID Convention on the ground that the Tribunal manifestly exceeded its powers.

3. Award's Contradictory and Incomplete Reasons

A. *Applicant's Position*

203. The Applicant submits that the attribution portion of the Award fails to state the reasons upon which it is based. According to the Applicant, the Majority's conclusions that Emlak's conduct was not attributable to the State because TOKI did not "instruct' or "direct" Emlak is unmotivated. The Tribunal explained the relevant question before it as follows:

> [*W*]*hether TOKI exercised effective control* over Emlak and thereby enforced public policy in the administration and termination of the Contract *or whether any aspect* of the administration and termination of the Contract *was performed under the instructions or direction of TOKI* in an exercise of sovereign power.[183]

204. The Applicant complains that the Majority only analyzed the first of the questions and paid no attention to the "instructions" and "direction" elements. Resolution of these two issues was necessary in order to be able to reach a decision that attribution under Article 8 of the

[181] *Ibid*., para. 366.
[182] *Ibid*., para. 367. The Tribunal was rather imprecise when it formulated its assumption that these claims in respect of Emlak's conduct "could be characterised as treaty *claims attributable* to the Respondent" (emphasis added). It is the conduct which is attributable, not the claims.
[183] App. Mem. Annul., para. 174., quoting Award, para. 305, (emphasis added).

ILC Articles had not been established. The Award only includes cursory references concerning these elements in its paragraphs 311, 313 and 322. Because the standards for these elements were not defined, the Majority's conclusion that they were not established is wholly unmotivated.

205. The Applicant submits that the Tribunal's reasoning on the two elements of Article 8 of the ILC Articles on attribution is impossible to reconstruct. Although the Tribunal found that there was some evidence of "effective control,"[184] it went on to conclude that there was "no basis" to infer that the decision was taken under the control of TOKI and "no evidence" of any specific influence or instruction.[185] In the Applicant's view, the Award contradicts itself by stating that there was "some limited evidence" of effective control while at the same time stating that there was "no evidence" of influence or instruction. In addition, the basis for concluding that there was "no evidence" in regard to the other two elements of Article 8 of the ILC Articles is unknown. This insufficient reasoning in the Award amounts to a failure to state reasons.

206. The Applicant also submits that the Tribunal's findings on attribution in the jurisdiction portion of the Award contradict its findings in the merits section. The Tribunal made an assumption for the purposes of its determination on the merits that Emlak's conduct was attributable to the State. In doing so, it needed to assume that the commercial justifications for terminating the Contract were pretextual and that the termination was made as a result of a political directive handed down by TOKI. However, in the merits portion, the Tribunal found again that this assumption was incorrect. This contradiction is inherent in the reasons, and the Award is therefore annullable.

B. *Respondent's Position*

207. The Respondent stresses that reasons must be given for the award, not for each specific determination made along the way. A failure to refer to a particular argument, document or other piece of evidence cannot amount to a failure to state the reasons. According to the

[184] Award, para. 310.
[185] App. Mem. Annul., para. 179, quoting Award, paras. 313, 322.

Respondent, "[t]his would interfere with the evaluation of evidence which is beyond the supervisory authority of an annulment committee."[186]

208. The Respondent argues that the Majority's reasoning on attribution is clear and can be followed with ease. The Tribunal discussed the legal standard under all three claimed grounds for attribution (Articles 4, 5 and 8 of the ILC Articles) and considered the evidence for each of the grounds, concluding that the evidence did not support the Claimant's arguments that the Emlak claims were attributable to the State. For example, the Award devotes 17 paragraphs to the evaluation of evidence relating to arguments under Article 8 of the ILC Articles.[187] It is clear from the Award that the Tribunal applied the ILC Articles to the facts of the case to determine questions of attribution.

209. As far as evidence regarding the criteria of "control," "instructions" and "direction" are concerned, the Majority – in paragraphs 311, 313 and 322 of the Award, the very paragraphs quoted by the Applicant – specifically considered whether the evidence presented was sufficient to prove that Emlak acted "on the instructions" or "under the direction" of TOKI. The Majority's analysis was clear on these issues and no reader could struggle to follow it from the premise to the conclusion. In particular, the Respondent points out that paragraph 311 of the Award states:

> An analysis of the content and nature of key decisions taken by Emlak's Board with respect to the Contract, including minutes and agenda papers, *does not lead to the conclusion that Emlak acted under the governmental control, direction or instructions of TOKI with a view to achieving a certain State purpose*.[188]

210. The Respondent contends that the Applicant itself did not elaborate on the difference of the legal standards for "control," "instructions" and "direction" during its closing arguments at the hearing, or on how the evidence supported that those standards had been met in this case. According to the Respondent, because of the Separate Opinion's position concerning the evidence on attribution, the Applicant is now trying to advance an argument that it did not put forward during the arbitration.

[186] Resp. C-Mem. Annul., para. 33.
[187] Award, paras. 307-323.
[188] Resp. C-Mem. Annul., para. 103 (emphasis added).

C. *Committee's Analysis*

211. The Committee notes that the Applicant's request to annul the Award on the basis of the Tribunal's failure to state the reasons on which the Award is based (Article 52 (1)(e) of the ICSID Convention) is focused on the alleged failure of the Tribunal to state reasons in "[t]he attribution portion of the Award,"[189] namely for the conclusion that Emlak's conduct was not attributable to Turkey under Article 8 of the ILC Articles on State Responsibility because TOKI did not "instruct" or "direct" Emlak.

212. The Committee thus has to verify whether the Applicant's criticism of this part of the Award on the ground invoked is justified. The other conclusions reached by the Tribunal elsewhere in the Award seem to be sufficiently motivated, enabling the Applicant to follow how the Tribunal reached its conclusions.

213. The Committee observes that when the Tribunal analysed Article 8 of the ILC Articles on State Responsibility, it expressed the view that "[p]lainly, the words 'instructions,' 'direction' and 'control' in Art. 8 are to be read disjunctively."[190] The Tribunal was thus fully aware of the fact that it had to consider "whether any of the categories of 'instructions,' 'direction' or 'control' [were] met for the purposes of Art. 8."[191] This, however, does not imply that the Tribunal could not have considered in parallel whether on evidence one of these "categories" was met, but had to do it successively for each and every category separately.

214. While the Applicant disagrees with the Tribunal's conclusions that Emlak's "conduct" cannot be attributed to Turkey "due to an absence of proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests,"[192] it is not asserting that the Tribunal's analysis of attribution on the basis of control is not adequately motivated or reasoned. Therefore, the Committee need not dwell on this aspect of the reasoning on attribution.

[189] App. Mem. Annul., p. 80, title of Section B.
[190] Award, para. 303.
[191] *Ibid.*
[192] Award, para. 326.

215. It is the Tribunal's conclusion that Emlak's conduct was not attributable to Turkey on the basis of either "instruction" or "direction," as they were not been proven, which, in the view of the Applicant, is unmotivated.

216. The Committee cannot agree with the Applicant that the Tribunal, while defining the standard for "control," made "no similar effort […] to define the standards for 'instructions' or 'direction.'"[193] It is beyond any doubt that the Tribunal looked not only at the text of Article 8 of the ILC Articles on State Responsibility, but also at the authoritative ILC Commentary that accompanies these Articles.[194] Having been inspired by the Commentary, the Tribunal formulated the required standard. It stated that "the relevant enquiry remains whether Emlak was being directed, instructed or controlled by TOKI with respect to the specific activity of administering the Contract with Tulip JV in the sense of *sovereign* direction, instruction or control."[195] Thus, in the view of the Tribunal, the standard for attribution was the same for all three possible bases of attribution, namely, instruction, direction, or control. The Tribunal made clear that the question before it was "whether any aspect of the administration of the Contract was performed under the instruction or direction of TOKI in exercise of sovereign power."[196]

217. The Tribunal was thus looking for evidence that the "specific activity of administering the Contract," namely, its termination by Emlak, was done on instruction of TOKI, or whether TOKI directed Emlak in reaching that decision with a view to achieving a certain State purpose.

218. In the view of the Committee, there was no need for the Tribunal to define the terms "instruction" or "direction," as their ordinary meaning is rather clear. "Instruction" can be understood as "making known to a person what he is required to do" or to give "an order."[197] "Direction" is defined as an "authoritative guidance, instruction," as "instructing how to proceed or act aright."[198] What the Tribunal needed was the evidence that State officials told,

[193] App. Mem. Annul., para. 176.
[194] See Award, para. 306, quoting extensively from the ILC Commentary to Article 8.
[195] Award, para. 309 (first emphasis in original, second emphasis added).
[196] *Ibid*., para. 305.
[197] The Oxford English Dictionary, 2nd ed., Oxford University Press (1989).
[198] *Ibid*.

or gave orders or authoritative guidance to, Emlak that it had to terminate the Contract with Tulip in the State interest.

219. While the Tribunal admitted that "[t]here [was] some limited evidence supporting the Claimant's contention that the decision to terminate the Ispartakule III Contract was connected to TOKI and the exercise of its public power,"[199] it, however, having looked at the evidence, "consider[ed] that [its] weight […] is strongly to the contrary," showing "that the decision to terminate the Contract with Tulip JV was made by the Board of Emlak *independently*, in the pursuit of Emlak's commercial interests, and not as a result of the exercise of sovereign power by TOKI."[200] In the Committee's view, the quoted passages do not reveal "a conceptual flaw in the Tribunal's reasoning," as asserted by the Applicant.[201] It is not unusual that in the exercise of judicial or arbitral functions a court or a tribunal finds some elements of the evidentiary record indicating one possible direction/conclusion, but other elements indicating a different direction/conclusion. It is for a court or a tribunal to weigh the evidence in accordance with the principle of free assessment of evidence[202] in order to reach, on the balance of that evidence, its conclusions.

220. This is what the Tribunal did in this case. It is not difficult to follow its reasoning, including that relating to attribution on the basis of instruction or direction. The Tribunal explains that it "analys[ed] the content and nature of key decisions taken by Emlak's Board with respect to the Contract, including minutes and agenda papers."[203] The Tribunal explicitly refers in footnotes 336-340 to specific documents on the basis of which it reached its conclusion. In relation to, as the Tribunal called it, "[t]he central act […] with respect to which the Claimant [sought] compensation,"[204] namely, the termination of the Contract, the Tribunal again refers

[199] Award, para. 310.
[200] *Ibid*., para. 311.
[201] App. Mem. Annul., para. 181.
[202] *R. Kolb*, The International Court of Justice, Hart Publishing, p. 930 (2013). As the ICJ stated "within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved." *Military and Paramilitary Activities in and against Nicaragua*, *Judgment (Nicaragua v. United States)*, Judgment on the Merits, *I.C.J. Reports 1986*, June 27, 1986, p. 40, para. 60. For ICSID arbitral proceedings see Rule 34(1) of the ICSID Arbitration Rules.
[203] Award, paras. 311-314.
[204] *Ibid*., para. 315.

to a number of documents (including quoting one of them).[205] In light of the above, the Committee is satisfied that the Tribunal's finding on the lack of attribution of Emlak's conduct in terminating the Contract to the Respondent on the basis of an alleged instruction or direction is sufficiently reasoned.

221. The Committee thus concludes that it cannot uphold the Applicant's request to annul the Award under Article 52(1)(e) of the ICSID Convention on the ground that the Award has failed to state reasons on which it is based.

[205] *Ibid*., paras. 316, 319, 320, fns. 341-342, 344-345.

V. COSTS

A. *Applicant's Position*

222. The parties submitted their claims for costs on July 15, 2015. The Applicant's legal costs total USD 1,119,955.28 and its expenses total USD 332,769.25. The expenses include the advance payment to ICSID in the amount of USD 200,000.00, which was covered solely by the Applicant in accordance with Regulation 14(3)(e) of the Administrative and Financial Regulations, as well as the lodging fee of USD 25,000. The Applicant subsequently made a further advance in the amount of USD 75,000 following a request made by ICSID on August 7, 2015. Accordingly, the Applicant's total costs and expenses in the annulment proceeding amount to USD 1,527,724.53.

223. The Applicant notes that under Articles 61(2) and 52(4) of the ICSID Convention, *ad hoc* committees have the discretion to examine the expenses incurred by the parties and to determine how and by whom such expenses and costs shall be borne. The Applicant requests that, in the event the Award is annulled, the Committee direct the Respondent to bear the costs of the proceeding in full, in line with the *ad hoc* Committees in *Sempra v. Argentina*[206] and *MHS v. Malaysia*.[207] If the Award is not annulled, the Applicant requests that, "at most, the costs of the proceeding be divided equally between the parties,"[208] and that each party bear its own legal expenses and fees, in line with the approach by, amongst others, the *ad hoc* Committees in *Continental Casualty v. Argentina*,[209] *Lucchetti v. Peru*[210] and *Soufraki v. UAE*.[211]

B. *Respondent's Position*

224. The Respondent claims that it incurred legal fees and expenses to the amount of USD 718,347.81 in this annulment proceeding (including USD 100,000 in legal fees which is contingent upon a favorable result of the annulment proceeding in the Respondent's favor).

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[206] *Sempra v. Argentina*, Decision on Annulment, June 29, 2010.
[207] *Malaysian Historical Salvors SDN BHD v. Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, April 16, 2009.
[208] App. Letter on Costs, July 15, 2015, p. 2.
[209] *Continental Casualty v. Argentina*, Decision on Annulment, September 15, 2011.
[210] *Lucchetti v. Peru*, Decision on Annulment, August 13, 2007.
[211] *Soufraki v. UAE*, Decision on Annulment, June 5, 2007.

225. The Respondent requests that the Committee order the Applicant to pay the Respondent's legal fees and expenses, with interest at a compounded, commercial rate. The Respondent argues that it was forced to incur these costs by defending itself in a proceeding that was "destined to fail and indeed frivolous."[212] The Respondent contends that, if the Award is upheld, an order of costs may be made under either the "costs follow the event" standard or the "fundamentally lacking in merit" approach. According to the Respondent, Tulip is using the annulment proceedings to delay its payment under the Award, which is a circumstance that should be considered by the Committee in line with recent jurisprudence.[213] Further, *ad hoc* committees have ordered that the unsuccessful applicant pay the other party's costs if the application was fundamentally lacking in merit. In any event, in line with jurisprudence during the last five years, the Respondent should not be required to contribute to the costs of the proceeding as "no *ad hoc* committee that distinguished between the Costs of the Proceeding and Party Costs has required a successful respondent to reimburse the applicant for any of the Costs of the Proceeding."[214] This is supported by the text of the ICSID Convention and the exceptional nature of annulment proceedings as recognized by the Committee in *M.C.I. Power v. Ecuador*.[215]

C. *Committee's Analysis*

226. Article 61(2) of the ICSID Convention, which is contained in its Chapter VI titled "Cost of Proceedings," provides:

> [T]he Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the Award.

[212] Resp. Submission for the Costs of the Annul. Proceeding, July 15, 2015, para. 3.
[213] Resp. Submission for the Costs of the Annul. Proceeding, July 15, 2015, paras. 12-15. Citing *AES Summit v. Hungary*, Decision on Annulment, June 29, 2012, para. 181; *Alapli v. Turkey*, Decision on Annulment, July 10, 2014, para. 263.
[214] Resp. Submission for the Costs of the Annul. Proceeding, July 15, 2015, para. 8, citing *Continental Casualty v. Argentina*, Decision on Annulment, September 16, 2011, para. 285; *Iberdrola Energia, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Decision on Annulment, January 13, 2015, paras. 145-147; *Tza Zap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6), Decision on Annulment, February 12, 2015, para. 207.
[215] *M.C.I. Power v. Ecuador*, Decision on Annulment, October 19, 2009, para. 88.

Rule 47(1)(j) of the ICSID Arbitration Rules implementing Article 61(2) states that "[t]he award shall be in writing and shall contain […] any decision of the Tribunal regarding the cost of the proceeding."

227. In accordance with Article 52(4) of the ICSID Convention, Article 61(2) being part of Chapter VI "shall apply *mutatis mutandis* to proceedings before the Committee." Rule 53 of the ICSID Arbitration Rules specify that these Rules "shall apply *mutatis mutandis* to any procedure relating to the […] annulment of an award and to the decision of the […] Committee."

228. Both parties recognize that under the above-mentioned provisions the Committee enjoys discretion in allocating the costs.

229. In accordance with Regulation 14(3)(e), the Applicant made the advance payments requested by ICSID to cover the costs of the annulment proceeding (i.e. the costs and expenses of the Centre and fees and expenses of the Members of the Committee) ("ICSID Costs"). The ICSID Costs amount to USD 247,874.98.[216]

230. The Committee has rejected the Application. The Applicant has, however, requested that in case the Award is not annulled, the Committee divides the ICSID Costs equally between the parties. Although Regulation 14(3)(e) – stating that the Applicant shall be solely responsible for making the advance payment – is without prejudice to the right of the Committee in accordance with Article 52(4) of the ICSID Convention to decide how and by whom the ICSID Costs shall be paid, the Committee does not see any compelling reason to divide these costs equally between the parties. As the *ad hoc* Committee in *M.C.I. Power v. Ecuador* stated, "[a] consequence of this rule [Regulation 14(3)(e)], which imposes on the party who applies for annulment the financial burden of advancing the costs, should normally be that the Applicant, when annulment is refused, remains responsible for these costs."[217] The Committee therefore decides that Tulip has to bear all of the ICSID Costs.

[216] The amount includes estimated charges (courier, printing and copying) relating to the dispatch of this Decision. The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account as soon as all invoices are received and the account is final. The remaining balance will be reimbursed to the Applicant.
[217] *M.C.I. Power v. Ecuador*, Decision on Annulment, October 19, 2009, para. 89.

231. The Committee does not share the Respondent's view that the "annulment application […] was always destined to fail, and indeed frivolous."[218] The Applicant raised a number of worthwhile points that required the Committee's detailed consideration. The Committee also has to acknowledge that the Applicant and its Counsel pursued the annulment proceeding in a professional and courteous way. In view of these factors, the Committee decides that each party shall bear its own costs for legal representation and expenses incurred in this annulment proceeding.

VI. DECISION

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

(1) Tulip's Application for Annulment is dismissed in its entirety;

(2) Tulip shall bear all ICSID Costs incurred in connection with this annulment proceeding; and

(3) Each Party shall bear its own costs for legal representation and expenses in the annulment proceeding.

[218] Resp. Submission for the Costs of the Annul. Proceeding, July 15, 2015, para. 3.

Ms. Cherie Booth QC
Member

Date: 17 December 2015

Mr. Christoph Schreuer
Member

Date: 17 December 2015

H.E. Judge Peter Tomka
President

Date: 16 December 2015