INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

IOAN MICULA, VIOREL MICULA AND OTHERS

v.

ROMANIA

(ICSID CASE NO. ARB/05/20)

ANNULMENT PROCEEDING

I hereby certify that the attached document is a true copy of the *ad hoc* Committee's Decision on Annulment dated February 26, 2016.

Meg Kinnear
Secretary-General

Washington, D.C., February 26, 2016

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IOAN MICULA, VIOREL MICULA AND OTHERS

(Respondents on Annulment) (Claimants)

v.

ROMANIA

(Applicant on Annulment) (Respondent)

ICSID Case No. ARB/05/20

ANNULMENT PROCEEDING

DECISION ON ANNULMENT

Members of the *ad hoc* Committee

Dr. Claus von Wobeser, President
Dr. Bernardo M. Cremades, Member
Judge Abdulqawi A. Yusuf, Member

Secretary of the *ad hoc* Committee

Ms. Martina Polasek

Date of dispatch to the Parties: February 26, 2016

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ABBREVIATIONS

Appl. Exh. R-[number]	Applicant's Exhibit
Appl. Mem.	Applicant's Memorial on Annulment
Appl. Opening Presentation	Opening Presentation of the Applicant at the hearing on annulment
Appl. Rep.	Applicant's Reply on Annulment
Applicant	Romania
Application	Application for Annulment dated April 9, 2014
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	Award of the Arbitral Tribunal rendered on December 11, 2013
BIT	Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments dated May 29, 2002
Cl. C-Mem.	Claimants'/Respondents on Annulment's Counter-Memorial on Annulment
Cl. Exh. C-[number]	Claimants'/Respondents on Annulment's Exhibit
Cl. Opening Presentation	Opening Presentation of the Claimants/Respondents on Annulment at the hearing on annulment
Cl. Rej.	Claimants'/Respondents on Annulment's Rejoinder on Annulment
Committee	The *ad hoc* Committee
Corporate Claimants	S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L.
EC	European Commission
EC Exh. EC-[number]	EC Non-Disputing Party Exhibit
EC Submission	EC Non-Disputing Party Submission
ECJ	European Court of Justice
EDFC	European Food and Drinks Companies
EDFG	European Food and Drinks Group
EGO 24	Romanian Emergency Government Ordinance No. 24/1998
EGO 75	Romanian Emergency Government Ordinance No. 75/2000
EU	European Union

EU Treaties	Treaties on which the European Union was founded
FET	Fair and equitable treatment
Final Decision	EC Final Decision on State Aid of March 30, 2015
GO 27	Romanian Government Ordinance No. 27/1996
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	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
Law 35	Romanian Law No. 35/1991
Majority	The majority of the Members of the Tribunal
Non-Disputing Party	Commission of the European Union
Non-Party Company	Five companies in the EFDG group which allegedly suffered loss
Original Proceeding	The arbitration proceeding between Mr. Ioan Micula, Mr. Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. and Romania
PIC	Permanent investment certificate
Preliminary Objections	Claimants' Preliminary Objections
Respondents on Annulment/Claimants	Mr. Ioan Micula, Mr. Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L.
Separate Opinion	The Separate Opinion of Prof. Georges Abi-Saab, which forms part of the Award rendered on December 11, 2013
VCLT/Vienna Convention	Vienna Convention on the Law of Treaties of May 23, 1969

REPRESENTATION OF THE PARTIES

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Representing the Respondents on Annulment:

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I. PROCEDURAL HISTORY

1. APPLICATION FOR ANNULMENT, REGISTRATION AND CONSTITUTION OF THE *AD HOC* COMMITTEE

1. On April 9, 2014, Romania ("Applicant") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") an application requesting the annulment of the Award rendered on December 11, 2013 ("Award") in the case ("Original Proceeding") between Mr. Ioan Micula, Mr. Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. ("Individual Claimants" for the first two, "Corporate Claimants" for the latter three, and "Respondents on Annulment" or "Claimants" for all Claimants combined) and Romania. The Application on Annulment ("Application") was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), and was accompanied by five exhibits (RA-1 to RA-5). Romania sought annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention.

2. Romania also requested a stay of enforcement of the Award ("Stay Request") under Rule 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules, concerning the amount of RON 376,433,229 and interest in favor of the Claimants in the Original Proceeding.

3. On April 18, 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 ("Committee") pursuant to Article 52(3) of the ICSID Convention. The Parties were also notified that, pursuant to Arbitration Rule 54(2), enforcement of the Award was provisionally stayed.

4. By letter of May 12, 2014, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the Parties that a Committee had been constituted – composed of Dr. Claus von Wobeser (Mexican) as President, and Dr. Bernardo M. Cremades (Spanish) and Judge Abdulqawi A. Yusuf (Somali) 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.

5. On May 16, 2014, the Centre was notified that Mr. Ioan Micula and the Corporate Claimants had retained new counsel and was provided with powers of attorney for the law firm of Mannheimer Swartling, Stockholm, Sweden.

2. FIRST SESSION, PROCEDURAL ORDER NO. 1 AND PRELIMINARY OBJECTIONS BASED ON MANIFEST LACK OF LEGAL MERIT

6. On June 2, 2014, the ICSID Secretariat circulated a draft Procedural Order No. 1, and invited the Parties to consult and revert to the Committee with their joint proposals and/or any separate proposals on items on which they were unable to reach agreement.

7. On June 11, 2014, the Respondents on Annulment filed preliminary objections pursuant to the 2006 ICSID Arbitration Rules 41(5) and 53 ("Preliminary Objections"), requesting the dismissal of the Application for manifest lack of legal merit. The Preliminary Objections were accompanied by 11 factual exhibits (CA-10 to CA-20) and 38 legal authorities (CAL-17 to CAL-54).

8. On June 13, 2014, the Committee invited the Respondents on Annulment to file a rejoinder by July 27, 2014.

9. By letter of June 16, 2014, accompanied by Exhibit RA-11, the Applicant requested the dismissal of the Preliminary Objections. According to the Applicant, because the applicable arbitration rules to the annulment proceeding are the 2003 Arbitration Rules, Rule 41(5) of the 2006 Arbitration Rules does not apply. The Committee invited the Parties to comment on this matter by June 19, 2014.

10. On June 19, 2014, the Parties submitted their positions on the applicable rules and other procedural matters in the form of a mark-up of draft Procedural Order No. 1. In addition, on the same date, the Respondents on Annulment filed their comments on the Applicant's letter of June 16, 2014.

11. By letter of June 23, 2014, upon leave granted by the Committee, the Respondents on Annulment filed their further response to the request to dismiss the Preliminary Objections.

12. On June 23, 2014, the Committee held its first session by telephone conference. Those participating in the session were:

Participating on behalf of Applicant

Mr. D. Brian King, Freshfields Bruckhaus Deringer US LLP

Dr. Boris Kasolowsky, Freshfields Bruckhaus Deringer US LLP

Ms. Manuela Nestor, Nestor Nestor Diculescu Kingston Petersen

Ms. Dana Stan, Ministry of Public Finance, Romania

Mr. Radu Palan, Ministry of Public Finance, Romania

Mr. Victor Strâmbeanu, Ministry of Public Finance, Romania

Participating on behalf of Mr. Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L.

Prof. Kaj Hobér, Mannheimer Swartling

Mr. Jakob Ragnwaldh, Mannheimer Swartling

Mr. Ioan Micula, Respondent on Annulment

Ms. Oana Popa, Legal Adviser at European Food S.A.

Participating on behalf of Mr. Viorel Micula

Dr. Yas Banifatemi, Shearman & Sterling LLP

Dr. Veronika Korom, Shearman & Sterling LLP

Mr. Viorel Micula, Respondent on Annulment

Ms. Ioana Aron Blahuta, Legal Adviser at European Drinks S.A.

13. On June 25, 2014, the Committee issued Procedural Order No. 1 concerning procedural matters discussed at the first session. Among other things, it was decided that the place of

proceedings would be Paris, France, and that the language of the proceedings would be English.

14. On the same date, the Committee issued a separate Decision on Applicable Arbitration Rules and on Preliminary Objections. The issue was whether the Preliminary Objections advanced by the Claimants were admissible: while Rule 41(5) of the 2006 Arbitration Rules allow a party to make a preliminary objection that a claim is manifestly without legal merit, there is no equivalent under the 2003 ICSID Arbitration Rules.

15. The Applicant argued that the 2006 Arbitration Rules, which provide for an expedited process for preliminary objections (Rule 41(5)), are not applicable in the present case. The Applicant noted that the Parties agreed in 2006 at the First Session in the Original Proceeding that the proceeding would be governed by the 2003 Rules. Second, it argued that, under Article 44 of the ICSID Convention, the applicable rules are those in force at the time of the parties' consent to arbitration. Under Article 52(4) of the Convention, Article 44 applies *mutatis mutandis* to annulment proceedings. According to the Applicant, the date of consent for arbitration (July 28, 2005, the date the Claimants accepted Romania's offer to arbitrate by filing the request for arbitration), is the same for the purposes of the annulment phase, as it is part of the same arbitration proceeding.

16. The Respondents on Annulment contended that an annulment proceeding is an entirely new procedure, which is not a continuation of the arbitration proceeding and which is governed by the rules in force at the time when the annulment proceeding is initiated, in this case the 2006 Rules since the Application for Annulment was filed in 2014.

17. Having considered the relevant provisions of the ICSID Convention (Articles 44 and 52(4)) and the Arbitration Rules (Arbitration Rules 19 and 53), the Committee noted that the parties are permitted to reach new agreements on procedural matters in the annulment phase, but that, if the parties do not agree, the Committee must apply the relevant provisions of the ICSID Convention.

18. Under Articles 44 and 52(4) of the ICSID Convention, the arbitration rules applicable to the annulment proceeding are those in force as of the disputing parties' consent to ICSID

arbitration, which in this instance was given in 2005 at the time of the applicability of the 2003 Arbitration Rules.[1] In concluding that the 2003 Arbitration Rules apply, the Committee stated:

> First, as noted by the Applicant, the idea of Article 44 of the Convention was to freeze the applicable rules so as not to impose on parties consenting to ICSID arbitration provisions that they are not aware of and might not approve. Second, the filing of an application for annulment cannot be viewed, *mutatis mutandis*, as equivalent to the parties' consent to ICSID arbitration. Annulment is a remedy available within the framework of an arbitration and is thus dependent on the consent given in the original proceeding. The only relevance of the date of filing of the annulment application is in respect of the time limit to apply for annulment.[2]

19. The Committee noted that it had "taken due note of the urgency of certain matters raised by the Respondents on Annulment" and had "adopted a procedural calendar which takes into account both parties' interests and which the Committee believes will expedite the annulment proceeding."[3] The Committee further undertook to "make its best effort to issue a timely decision on annulment" and other decisions.[4]

20. As a result of its decision on the applicable arbitration rules, the Committee thus rejected the Preliminary Objections, without prejudice for these objections to be heard on the merits of the Application.

3. APPLICANT'S REQUEST FOR A CONTINUED STAY OF ENFORCEMENT

21. On May 14, 2014, the Committee, pursuant to Arbitration Rules 54(1) and (4), invited Romania to file its reasons for the Stay Request by May 22, 2014, and the Respondents on Annulment to file their observations on the Stay Request by May 30, 2014.

22. The Parties were also informed that the provisional stay of enforcement of the Award would remain in place while the Committee considered the Applicant's request and were invited to

[1] Decision on Applicable Arbitration Rules and on Preliminary Objections, June 25, 2014, paras. 21-22.
[2] *Id*., para. 28.
[3] *Id*., para. 29.
[4] *Ibid*.

notify the Committee as soon as possible should either Party wish to invoke the expedited procedure envisaged in Arbitration Rule 54(2).

23. On May 22, 2014, Romania filed its Stay Request, accompanied by five factual exhibits (RA-6 to RA-10) and 13 legal authorities (RAL-1 to RAL-13).

24. On June 10, 2014, after an extension, the Respondents on Annulment submitted their observations on the Stay Request. These were accompanied by nine factual exhibits (CA-1 to CA-9) and 16 legal authorities (CAL-1 to CAL-16).

25. On June 20, 2014, the Applicant filed a Reply to the Stay Request, accompanied by seven factual exhibits (RA-12 to RA-18) and 20 legal authorities (RAL-14 to RAL-33).

26. On June 27, 2014, the Respondents on Annulment filed a Rejoinder to the Stay Request, accompanied by eight factual exhibits (CA-21 to CA-28).

27. On July 2, 2014, the Applicant requested leave from the Committee to address "new factual and legal allegations" filed by the Respondents on Annulment in their Reply to the Stay Request. On July 3, 2014, the Committee granted the requested leave until July 9, 2014.

28. The Applicant sought to stay paragraph 1329 of the Award until the Committee rendered a decision on the Application. The Applicant argued that enforcement of the Award would cause Romania to breach its obligations under Article 107 of the Treaty on the Functioning of the European Union ("TFEU"), which might lead to infringement proceedings against Romania before the European Court of Justice ("ECJ"). If the stay of enforcement were not continued, it would cause Romania to be in the position of having to choose between violating the ICSID Convention or violating EU law.

29. In addition, the Applicant contended that it was unable to comply with the terms of compensation as set out in the Award because the Tribunal had failed to specify how the payment of damages to each Claimant should be allocated.[5] Allowing enforcement would thus put Romania at risk of over-compensating the Claimants. The Applicant contended that

[5] Stay Request, paras. 16-17.

this danger could already be seen by the enforcement actions that were currently pending, in which Mr. Viorel Micula was seeking compensation to the full amount of the Award, and Mr. Ioan Micula and the Corporate Claimants were seeking enforcement of 80% of the full sum of the Award. If enforcement were not stayed and the Claimants were successful in enforcing the Award, Romania would be liable to pay amounts that substantially exceeded the total sum awarded. It argued that such payment would be nearly impossible to recoup if the Application were upheld, since the Corporate Claimants were on the brink of bankruptcy, and recovering assets from individual claimants is challenging.

30. Romania further argued that if the Committee were to decide to grant a stay of enforcement, the stay should not be conditional, as such requirements are usually only placed upon countries that are in continuous breach of the ICSID Convention, which Romania is not.

31. The Respondents on Annulment opposed the Stay Request on the grounds that Romania failed to show exceptional circumstances for the Stay. They alleged that Romania was already actively refusing to comply with the Award, e.g. by challenging domestic enforcement proceedings, and that it had given no reasonable assurance that it would comply with the Award if the Application were unsuccessful. According to the Respondents on Annulment, the delayed enforcement of the Award would risk the financial ruin of the Corporate Claimants. They requested that, if granted, the stay should be conditioned upon security deposited into an escrow account.

32. On August 7, 2014, the Committee issued a Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award, granting the stay of enforcement on the condition that the Applicant provide a written assurance to comply with the Award if it were upheld.

33. In its decision, the Committee noted that there is no presumption of an automatic stay of enforcement nor a presumption that a stay of enforcement is an exceptional measure. It further stated:

> Article 52(5) does not indicate that one particular party bears the burden of establishing circumstances requiring a stay. It rather seems that establishing the existence of such circumstances is part of the Committee's discretionary power,

> and that Article 54(4) requires the applicant to specify the circumstances requiring the stay.[6]

34. According to the Committee, the analysis of whether or not a stay should be granted is very much fact driven based on the circumstances of each case. The Committee found that the continued stay of enforcement of the Award was justified in this case because, among other factors, the risk of non-recoupment for Romania was significant. The Committee dismissed the assertion that the Corporate Claimants would be in the position to reimburse Romania should the annulment be successful because the Claimants themselves had indicated that a delayed enforcement of the Award might lead to adverse economic consequences. The Committee also concluded that there had not been adequate evidence showing that the Individual Claimants' properties and assets were sufficient to reimburse Romania.

35. At the same time, the Committee was not convinced that Romania would comply with the Award following a decision on annulment dismissing the Application in view of its ambiguous positions, which, on the one hand, conditioned the enforcement on the European Commission's ("EC") interpretation of European Union ("EU") law and, on the other hand, insisted on setting off a portion of the amounts due under the Award against the Corporate Claimants' tax debts in Romania. The Committee concluded that this militated in favor of a conditional stay of enforcement, as there was a "probable risk" that the payment obligations would not be complied with by the Applicant.[7]

36. The Committee found that an appropriate condition, in this case, was a written undertaking by Romania confirming its obligation to enforce the Award under Article 53 of the Convention, which, according to the Committee, "is as important as the right to pursue annulment under Article 52 of the Convention."[8] The Committee thus instructed the Applicant to provide the following statement within 30 days of notification of the Decision on the Stay Request:

> Romania commits itself subject to no conditions whatsoever (including those related to EC law or decisions) to effect the full payment of its pecuniary

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[6] Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award, August 7, 2014, para. 37.
[7] *Id*., para. 60.
[8] *Id*., para. 63.

> obligation imposed by the Award in ICSID Case No. ARB/05/20- and owed to Claimants- to the extent that the Award is not annulled- following the notification of the Decision on annulment.[9]

37. Romania subsequently declined to provide such written undertaking and, on September 7, 2014, the stay of enforcement of the Award was therefore automatically revoked (see below).

4. CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES

38. On June 10, 2014, the Respondents on Annulment filed a Request for Provisional Measures accompanied by nine factual exhibits (CA-1 to CA-9) and 16 legal authorities (CAL-1 to CAL-16).

39. The Respondents on Annulment requested provisional measures to prevent Romania from taking "enforcement measures against the European Food and Drinks Companies ("EFDC"), which may result in the bankruptcy of these companies before the Committee renders its decision on the Application."[10] Specifically, the Claimants requested that the Committee order the Applicant to:

> [C]ease and desist from implementing any seizure order against any of the EFDC (as defined above), and to refrain from taking any other measures against any of the EFDC that would risk jeopardizing the continuation of the business of the EFDC, or the enforcement of the award, until Romania has satisfied the terms of the Award in full […].[11]

40. The Claimants argued that the Committee has the power to order provisional measures under Arbitration Rules 39 and 53. According to the Claimants, under Arbitration Rule 53, Rules 39 and 40 apply *mutandis mutatis* to annulment proceedings. In the alternative, the Claimants argued that the Committee has the power to order provisional measures under Article 52(5) of the ICSID Convention.

41. The Claimants submitted that they have a right to the preservation of the *status quo* and the non-aggravation of the dispute, which includes the right to remain in business without

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[9] *Id*., para. 66.
[10] Decision on the Request for Provisional Measures Filed by the Respondents on Annulment, August 18, 2014, para. 16.
[11] *Ibid*.

permitting Romania to bankrupt the EFDC before the Committee issues a decision on annulment. The requirements of necessity and urgency have been met as there is a risk that the EFDC would otherwise go out of business well before the decision on annulment is issued. The Claimants stated that there is thus a direct link between the harm they seek to avoid and the annulment proceeding.

42. The Claimants noted that the Tribunal had granted provisional measures arising from the same circumstances in the Original Proceeding in regard to all of the EFDC, recognizing their link with Messrs. Ioan and Viorel Micula, who directly and indirectly own the companies.

43. On June 20, 2014, pursuant to the Tribunal's directions, the Applicant filed its observations on the Request for Provisional Measures, accompanied by seven factual exhibits (RA-12 to RA-18) and 20 legal authorities (RAL-14 to RAL-33).

44. The Applicant argued that neither the ICSID Convention nor the ICSID Arbitration Rules give *ad hoc* committees the power to grant provisional measures, even when the requesting party seeks continuation or reinstatement of provisional measures recommended by a tribunal in a prior arbitration proceeding. This is apparent from ICSID Convention Article 52(4), which explicitly states that Article 47 providing for provisional measures does not apply to annulment proceedings.

45. The Applicant further argued that, even if the Committee were to find that it has the competence to grant provisional measures, the request fails on the merits. Provisional measures cannot be granted to non-parties, and several of the EFDC are non-Parties. In any event, the conditions for granting provisional measures have not been met because the Claimants have not shown that their right derives from a specific issue in question in the annulment proceeding, they have not shown that Romania's actions would cause irreparable prejudice to the EFDC companies, and they have not shown that there is any urgency. The previously granted provisional measures have expired and Romania is thus entitled to seek to enforce the tax debts of the EFDC under Romanian law.

46. On June 27, 2014, the Respondents on Annulment filed a Reply, accompanied by eight factual exhibits (CA-21 to CA-28), and on July 9, 2014, the Applicant filed a Rejoinder, accompanied by 18 factual exhibits (RA-19 to RA-36) and one legal authority (RAL-34).

47. On August 18, 2014, the Committee dismissed the request in its Decision on the Claimants' Request for Provisional Measures. The Committee stated:

> 36. The Committee considers that the annulment proceeding, by its very nature, has a limited scope and function, established under Article 52 of the Convention, with respect to the award of the tribunal and its possible annulment on one of the specified grounds listed in Article 52(1). Also, the Committee notes that an *ad hoc* committee is not a court of appeal and cannot consider the substance of a dispute, nor can it entertain again the arguments of the parties relating to their respective rights in the dispute adjudicated by the tribunal.
>
> 37. Taking into consideration the limited scope of the annulment proceeding, at this stage of the annulment proceeding, as distinguished from the proceedings before the Tribunal, the rights of the Respondents on annulment relate mainly to the enforcement of the Award.[12]

48. The Committee determined that, since it had already granted a conditional stay of enforcement of the Award, the Claimants' rights in the annulment proceeding had already been protected. It further stated:

> 39. The Claimants also appear to be seeking the protection of their rights to the preservation of the "*status quo*" between the parties, but that is neither the purpose for which provisional measures should be granted nor does it fall within the scope and functions of the annulment proceedings as foreseen in Article 52 of the Convention.
>
> 40. Moreover, the Committee considers it has not been clearly demonstrated by the Claimants that there is a risk of irreparable damage to rights relating to this stage of the proceedings before the decision of the Committee on the annulment application is issued. Indeed, the conditional stay of enforcement protects the rights of the Claimants in these proceedings.
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> 41. Assuming that the Committee was competent to issue provisional measures at this stage of the proceeding, there would have to be a direct link between the provisional measures sought and the rights which form the subject of the

[12] *Id*., paras. 36-37.

annulment proceedings, and not the rights in dispute between the parties on the merits of the case on which the Award has already been issued.[13]

49. The Committee concluded that the rights for which protection was sought in this case did not relate to the annulment proceedings, noting that there was a difference between the issues and rights in dispute in an arbitration proceeding and in an annulment proceeding.

5. REVOCATION OF THE STAY OF ENFORCEMENT

50. By letter of September 8, 2014, the Applicant requested an extension of time to file an assurance for the continued stay of enforcement of the Award in light of the EC's injunction of May 26, 2014 against Romania pending the EC's final decision on whether the execution of the Award constitutes unlawful State aid. The Applicant's request for an extension was accompanied by an annex, a letter from the EC to Romania dated September 4, 2014 (Annex 1), in which the EC stated that Romania could not provide any assurance that was contrary to EU law. The same day, the Committee invited the Claimants to file any comments on the letter by September 11, 2014.

51. On September 11, 2014, the Claimants submitted their comments, contending that the stay of enforcement had already automatically expired as of midnight September 6, 2014 under paragraphs 67 and 69 of the Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award.

52. By letter of September 15, 2014, the Committee confirmed that, pursuant to the terms of the Committee's Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award of August 7, 2014, the stay of enforcement of the Award was automatically revoked as of September 7, 2014.

6. EC'S APPLICATION FOR LEAVE TO INTERVENE AS A NON-DISPUTING PARTY

53. On October 15, 2014, the EC ("non-disputing Party"), represented by Mr. Davide Grespan, Mr. Tim Maxian Rusche and Mr. Paul-John Loewenthal, members of its Legal Service, as agents, filed an Application for Leave to Intervene as a Non-disputing Party ("EC's

[13] *Id.*, paras. 39-41.

Application"). The EC requested to file a written *amicus curiae* submission in support of the annulment of the Award, to be granted access to documents filed in the annulment proceeding and to provide oral testimony at hearings.

54. The EC argued that it was able to intervene as a non-disputing Party under Rules 37(2) and 53 of the ICSID Arbitration Rules (2006). The EC also stated that Article 23(a)(2) of Regulation (EC) No. 659/1999, which is applicable to all EU Member States, supports its claim that it has a significant interest in arbitration proceedings in which EU State aid rules may be discussed. As a guardian of the treaties relating to investment protection within the EU, and as it has a central role in the interpretation and application of the rules on State aid under the TFEU, the EC claimed that it had a particular interest in the annulment proceedings and could assist the Committee in the determination of a factual or legal issue related to the proceeding by bringing perspective, particular knowledge and/or insight that differs from that of the disputing Parties. In addition, the EC noted that it had been allowed to participate as a non-disputing Party in the Original Proceeding.

55. The Committee invited both Parties to submit observations on the EC's Application by October 23, 2014. The Claimants filed their observations accordingly, accompanied by eight annexes (Annex A to Annex H). Concurrently, the Applicant informed the Committee that it had no objections to the EC's Application. The Parties were subsequently invited to file follow-up comments. On November 5, 2014, the Applicant filed its Reply to the Claimants' observations, accompanied by seven annexes (Annex A to Annex G), and, on November 12, 2014, the Claimants filed their response to the Reply, accompanied by one annex (Annex I).

56. The Claimants contended that the Committee did not have the power to allow the EC to intervene in the proceedings under the applicable 2003 Arbitration Rules, as these do not provide for non-disputing party participation. Furthermore, according to the Claimants, there has never been a successful application for intervention by a non-disputing party in an

annulment proceeding. In *Iberdrola v. Guatemala*, the Committee had rejected such applications because of the "narrow nature of annulment proceedings."[14]

57. The Claimants argued that, in any event, the Application must be denied because it does not meet the requirements. The circumstances in the annulment proceeding are very different from those in the Original Proceeding in which the Tribunal allowed the EC to participate, and the EC cannot re-argue issues which have already been decided by the Tribunal and which are irrelevant for the purposes of the annulment. The EC, therefore, cannot have a significant interest in the proceeding and cannot provide the Committee with the relevant expertise relating to Article 52(1) of the ICSID Convention.

58. Additionally, the Claimants submitted that the EC's participation would cause them unfair prejudice because it would prolong the proceedings and enable the EC to pursue a policy objective aligned with that of the Applicant, in effect acting as an advocate for Romania.

59. The Applicant was in favor of allowing the EC to intervene as non-disputing Party. It proffered that there is an established practice of permitting non-disputing party participation under the 2003 Arbitration Rules and argued that this was possible under the general power in Article 44 of the ICSID Convention, applied *mutatis mutandis* to the annulment proceedings. The Applicant rejected the Claimants' argument that there has never been non-disputing party participation permitted in an annulment proceeding, citing *Siemens v. Argentina* and *Iberdrola v. Guatemala*, clarifying that in the latter case, the Committee considered that it had the power to allow *amicus curiae* submissions but dismissed the application due to untimeliness.[15]

60. Romania argued that the EC's Application meets the requirements established by the jurisprudence at the time of the application of the 2003 Rules. It stated that the Committee would be assisted by the EC's expertise on EU State aid rules and the interaction between EU law and public international law, which are matters of the public interest since they

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[14] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), unpublished decision by the *ad hoc* Committee, February 12, 2014, as reported in Investment Arbitration Reporter on July 9, 2014 (Claimants' Letter of October 23, 2014, Annex A).

[15] Decision on the Application of the EC to Intervene as a Non-Disputing Party, December 3, 2014, para. 25, citing the Applicant's Reply to the Claimants' Observations on the EC's Application, p. 2.

impact other EU Member States. Romania noted that tribunals have consistently allowed the EC to participate in investment arbitration cases and that it is not aware of any cases in which the EC was not permitted to participate as a non-disputing party due to perceived lack of independence in relation to the parties.

61. On December 3, 2014, the Committee issued a Decision on the EC's Application to file a Written Submission, granting leave to the EC to participate as a non-disputing Party.

62. The Committee held that it "has the authority to permit a non-disputing party to file a written submission in the context of the annulment proceeding pursuant to the inherent powers recognized in Article 44 of the ICSID Convention, applicable *mutatis mutandis* to annulment proceedings under Article 52(4) of the ICSID Convention."[16] The Committee noted that, in line with *Vivendi v. Argentina*, three criteria must be met to allow a non-disputing party to participate in the proceedings: (i) the subject matter of the application must be appropriate; (ii) the applicant must be suitable to act as *amicus curiae*; and (iii) procedural fairness must be respected.[17]

63. The Committee noted that, due to the limited scope of annulment proceedings, a request for leave by a non-disputing party must be dealt with in a more restrictive and circumscribed manner. However, as long as that limited scope is fully observed, a non-disputing party may be allowed to file an *amicus curiae* submission limited to matters directly related to the grounds for annulment. The Committee accepted the EC's position that it had an interest in acting as a non-disputing Party and found that the EC had satisfactorily established that it had the "expertise, experience and independence to be of assistance" in the annulment proceeding. It also found that an intervention by the EC would not be prejudicial to the Parties or prolong the proceedings, as long as its submission adhered to certain conditions: (i) the submission must be limited to the grounds for annulment under Article 52(1) of the ICSID Convention; (ii) the EC would not be granted access to the documents filed by the Parties in the annulment proceeding; and (iii) the EC would not be permitted to attend the

[16] *Id*., para. 30.
[17] *Aguas Argentinas, Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Order in Response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005, para. 17 *et seq* (Claimants' Letter of October 23, 2014, Annex D).

hearings as the Claimants had opposed such attendance. The Committee stated that the EC's role in the annulment proceeding was different than in the Original Proceeding, and was limited to its knowledge and perspective directly related to the grounds for annulment.

64. Therefore, on December 3, 2014, the Committee informed the EC that it was granted leave to file a single submission as *amicus curiae* by January 2, 2015. Following the EC's request for an extension of time until January 16, 2015, and the Parties' comments on such request, the Committee granted an extension to file the submission by January 9, 2015. On that date, the EC filed its written submission (the "EC Submission"), accompanied by 21 factual exhibits (EC-001 to EC-021).

65. On March 9, 2015, the Applicant filed its Reply on Annulment, which contained its observations on the EC Submission. The Claimants' observations on the EC Submission were included in their Rejoinder on Annulment.

7. WRITTEN PROCEDURE AND CORRESPONDENCE RELATED TO ENFORCEMENT OF THE AWARD AND THE EC "FINAL DECISION"

66. On July 16, 2014, the Applicant requested leave to file an expert report with its Memorial on Annulment, further to Item 14.2 of Procedural Order No. 1, in regard to expert testimony on the question of the applicable law (including EU law) and its consequences as raised in the Application for Annulment, which the Claimants objected to by letter of July 21, 2014. By letter of July 28, 2014, the Committee rejected the Applicant's request because it considered that Romania had not established that such an expert report was relevant for the consideration of the grounds for annulment as required by Item 14.2 of the Procedural Order, but stated that the Applicant would be free to request to submit an expert report at a later stage.

67. On September 8, 2014, the Applicant filed its Memorial on Annulment, accompanied by eight factual exhibits (RA-37 to RA-44) and 37 legal authorities (RAL-35 to RAL-71), as well as 11 factual exhibits from the original proceeding (C-49, C-52, R-10, R-27, R-37, R-65, R-68, R-86, R-91, R-94 and EC-2).

68. On December 2, 2014, after an extension and subsequent modification of the procedural calendar, the Respondents on Annulment filed a Counter-Memorial on Annulment,

accompanied by 11 factual exhibits (CA-28 to CA-38), 26 legal authorities (CAL-55 to CAL-80) and one annex (Annex 1), as well as ten factual exhibits and legal authorities from the original proceeding (C-38, C-62, C-312, C-565, C-592, R-3, R-5, R-10, RL-8 and RL-34).

69. By letter of January 26, 2015, a revised procedural calendar was dispatched to the Parties to reflect their agreement regarding the filing of submissions and the hearing on annulment.

70. On February 3, 2015, Counsel for Mr. Viorel Micula informed ICSID that their client had commenced enforcement proceedings before the Bucharest Tribunal in Romania and had been instructed by that tribunal to produce an apostille stamp or other certification that would authenticate or certify the Award. Counsel therefore requested an attestation from the Secretary-General of ICSID that no such apostille stamp or other certification of the Award was required. On the same date, the Secretary-General confirmed that no formal requirements were necessary for the purposes of recognition or enforcement of an Award under the ICSID Convention other than a copy of the Award certified by the Secretary-General pursuant to the Convention.

71. On March 9, 2015, the Applicant filed a Reply on Annulment, accompanied by 65 factual exhibits (RA-45 to RA-109) and 23 legal authorities (RAL-72 to RAL-94), as well as 12 factual exhibits from the Original Proceeding (C-42, C-43, C-44, C-318, EC-5, R-73, R-75, R-77, R-78, R-79, R-85 and R-87).

72. On March 16, 2015, due to Romania's actions in domestic enforcement proceedings initiated by the Claimants, the Claimants requested the Committee to order the Applicant to:

> (i) comply with its obligations under Articles 53 and 54 of the ICSID Convention and cease all actions against the enforcement of the Award in reliance of EU law or Romanian law, including any actions before domestic or foreign courts, and (ii) effect full payment of the pecuniary obligation imposed in the Award, subject to no conditions whatsoever.[18]

73. Romania had sought and been granted a stay of enforcement of the Award by the Bucharest Court of Appeal, following an appeal of a ruling by the Bucharest Tribunal rejecting such

[18] Letter from Counsel for the Claimants to the *ad hoc* Committee, March 16, 2015, p. 5 (accompanied by Annexes A-J).

stay. The Bucharest Court of Appeal had found in favor of the Applicant's argument that the enforcement should be stayed pending the appeal concerning the enforceability of the Award, based on Romania's argument that it was manifestly contrary to the TFEU. In addition, because of the EC's investigation into the legality of the Award, on March 6, 2015, Romania passed Law No. 20/2015, which suspended all of the enforcement actions initiated by the Claimants as of March 9, 2015. According to Romania, Law No. 20/2015 is aimed at reconciling the two competing international obligations under the ICSID Convention and EU law. The Applicant had therefore placed the outstanding amount due under the Award in an escrow account in the Claimants' names, to be released to them if it were permitted by the EC in its forthcoming decision.

74. The Committee addressed the Claimants' request by letter of March 26, 2015. It recalled its letter of September 15, 2014 confirming that the stay of enforcement of the Award had been revoked as of September 7, 2014. It reconfirmed that the stay was revoked and that it had dealt with the issue of the stay of enforcement of the Award to the extent it fell within the competence of the Committee.

75. By letter of May 6, 2015, the Applicant informed the Committee that the EC had handed down its final decision on State aid on March 30, 2015 ("Final Decision"), in which "the EC found that any payment under the Award constitutes State aid that is incompatible with the internal market within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union."[19] According to Romania, since the Final Decision had been rendered, the Applicant had to recover the amounts paid under the Award or face infringement proceedings before the ECJ. As a result, this placed Romania in an impossible predicament of conflicting international obligations. By agreement of the Parties, the Final Decision was subsequently admitted into the record of the annulment proceeding and assigned Exhibit No. RA-110.

76. The Claimants requested and were granted leave to address the Applicant's letter of May 6, 2015 in their Rejoinder.

[19] *Id.*, p. 1.

77. On June 9, 2015, the Respondents on Annulment filed a Rejoinder on Annulment, accompanied by 31 factual exhibits (CA-39 to CA-69) and 14 legal exhibits (CAL-81 to CAL-94), as well as one exhibit from the original proceeding (C-271).

78. On September 9, 2015, the Respondents on Annulment filed a letter accompanied by eight factual exhibits (CA-70 to CA-77) concerning various enforcement proceedings. As leave had not been granted to file the submission, the Applicant was invited to comment. By communication of September 11, 2015, the Applicant objected to the admissibility of the Claimants' submission. On September 13, 2015, the Claimants requested the opportunity to respond to the Applicant's objection and commented on the merits of the submission. The Applicant objected to the introduction of those comments. The Parties submitted further views on the admissibility of the new evidence by letters of September 15, 2015 (Claimants) and September 17, 2015 (Applicant).

79. On September 21, 2015, the first day of the Hearing on Annulment, the Committee issued Procedural Order No. 2 denying admission into the record of the Claimants' new submissions and documents. The Committee found that the new evidence was not directly relevant to the grounds for annulment pleaded by the Applicant.

8. THE HEARING ON ANNULMENT

80. A pre-hearing organizational meeting was held by telephone conference on August 21, 2015, to discuss the arrangements for the Hearing on Annulment. The Parties and the Committee agreed on the schedule for the hearing and other logistical matters.

81. The Hearing on Annulment was held in Paris on September 21 and 22, 2015. In addition to the Committee and its Secretary, present at the Hearing were (in order of appearance on the List of Participants):

Participating on behalf of the Applicant

Mr. D. Brian King, Freshfields Bruckhaus Deringer US LLP

Dr. Boris Kasolowsky, Freshfields Bruckhaus Deringer US LLP

Mr. Ben Juratowitch, Freshfields Bruckhaus Deringer US LLP

Dr. Moritz Keller, Freshfields Bruckhaus Deringer US LLP

Mr. Carsten Wendler, Freshfields Bruckhaus Deringer US LLP

Ms. Smaranda Miron, Freshfields Bruckhaus Deringer US LLP

Ms. Mrinalini Singh, Freshfields Bruckhaus Deringer US LLP

Ms. Natasha McNamara, Freshfields Bruckhaus Deringer US LLP

Ms. Madeline Kelly, Freshfields Bruckhaus Deringer US LLP

Ms. Georgeta Dinu, Nestor Nestor Diculescu Kingston Petersen

Mr. Eugene-Orlando Teodorovici, Ministry of Public Finance, Romania

Mr. Ciprian Sebastian Badea, Ministry of Public Finance, Romania

Mr. Victor Strâmbeanu, Ministry of Public Finance, Romania

Ms. Monica Negruțiu, National Authority for Fiscal Administration

Participating on behalf of Mr. Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L.

Prof. Dr. Kaj Hobér, 3 Veralum Buildings

Mr. Jakob Ragnwaldh, Mannheimer Swartling

Mr. Robin Rylander, Mannheimer Swartling

Mr. Brian Kotick, Mannheimer Swartling

Mr. Ioan Micula, Respondent on Annulment

Ms. Olivia Micula, Representative of Mr. Ioan Micula and the Corporate Claimants

Ms. Nathalie Micula, Representative of Mr. Ioan Micula and the Corporate Claimants

Ms. Oana Popa, Legal Adviser at European Food S.A.

Ms. Diana Radu, Legal Adviser at European Food S.A.

Mr. Horia Ciurtin, Legal Adviser at European Food S.A.

Participating on behalf of Mr. Viorel Micula

Prof. Emamnuel Gaillard, Shearman & Sterling LLP

Dr. Yas Banifatemi, Shearman & Sterling LLP

Dr. Veronika Korom, Shearman & Sterling LLP

Mr. Georgios Andriotis, Shearman & Sterling LLP

Mr. Viorel Micula, Respondent on Annulment

Mr. Victor Micula, Representative of Mr. Viorel Micula and the Corporate Claimants

Ms. Ioana Aron Blahuta, Legal Adviser at European Drinks S.A.

Ms. Medora Purle, Legal Adviser at European Drinks S.A.

82. Mr. Eugene-Orlando Teodorovici, Minister of Public Finance of Romania, made opening remarks on behalf of the Applicant. Dr. Boris Kasolowsky and Messrs. Brian King and Ben Juratowich subsequently addressed the Committee on behalf of the Applicant. Prof. Emmanuel Gaillard, Dr. Kaj Hobér and Mr. Jakob Ragnwaldh addressed the Committee on behalf of the Claimants. There were no witnesses or experts.

83. Following a request made by the Committee before the hearing, the Parties produced the following documents from the Original Proceeding:

(i) The Claimants' Revised Request for Relief of December 20, 2010;

(ii) The Tribunal's letters and questions of May 6, 2011;

(iii) The Parties' answers to the Procedural Order dated April 6, 2011, and to the letters of May 6, 2011; and

(iv) EGO No. 75/2000 ("EGO 75") (Exhibit C-45).

84. At the close of the hearing, it was decided that the Parties would submit brief submissions on costs within three weeks of the hearing.

9. THE POST-HEARING PHASE

85. On October 13, 2015, the Parties simultaneously filed their submissions on costs.

86. On January 13, 2016, the Committee declared the proceedings closed in accordance with Arbitration Rules 38(1) and 53.

II. THE AWARD AND THE SEPARATE OPINION

87. A Tribunal composed of Dr. Laurent Lévy, (President, appointed by the Parties), Dr. Stanimir A. Alexandrov (appointed by the Claimants) and Prof. Georges Abi-Saab (appointed by Respondent following the resignation of Prof. Dr. Claus-Dieter Ehlermann) rendered the Award. Attached to the Award was the separate opinion of Prof. Abi-Saab ("Separate Opinion"). The Tribunal unanimously held that Romania had breached the Agreement Between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments ("BIT") and awarded damages to the Claimants.

88. Section I of the Award (paras. 1-9) introduced the Claimants and the dispute. Section II (paras. 10-129) described the procedural history. The Award incorporated the Tribunal's September 25, 2008 Decision on Jurisdiction and Admissibility, which included a description of the procedural steps in the jurisdictional phase. Section III (paras. 130-249) provided a factual overview of the dispute divided into three parts: (i) Romania's efforts to attract investment and the framework for disfavored regions; (ii) the Claimants' investments in Romania; and (iii) Romania's accession process to join the EU. The facts in that section are summarized concisely below:

Legal Framework for Disfavored Regions (paras. 137-155)

89. In the 1990s, Romania enacted several reforms directed at transforming it into a market economy with the goal of obtaining EU accession. On March 14, 1990, it issued Decree Law No. 96/1990, granting certain tax benefits to foreign investors. It was replaced by Law No. 35/1991 ("Law 35"), enacted on April 3, 1991, which offered incentives for new foreign investments including: (i) exemption from customs duties for importing certain machinery and equipment; (ii) a two-year exemption from customs duties on raw materials; (iii) a profit-tax exemption ranging from two to five years, investment dependent; and (iv) a profit-tax reduction following the expiration of the exemption. Government Ordinance No. 27/1996 ("GO 27") was issued on August 5, 1996, offering benefits to parties from certain regions, including a corporate profit tax incentive for a limited period.

90. Romania began promoting regional development within the framework of its efforts to accede to the EU. It passed Law No. 151/1998 on Regional Development on July 16, 1998, the objectives of which included reducing regional imbalances. The Law purported to have EU support.

91. In the context of these initiatives, the Government issued Emergency Government Ordinance No. 24/1998 ("EGO 24") on September 30, 1998, establishing a framework of governmental incentives for investments in "disfavored" regions for periods of three to ten years.

92. The benefits of EGO 24 were granted to businesses whose investments created new jobs for the unemployed or benefited their families living in the region. EGO 24 required that investors remain in a disadvantaged area for twice as long as they received such incentives, otherwise the investor must compensate the Government for the value of any benefit it received.

93. Government Decision No. 194/1999, dated March 25, 1999, designated the region of Ştei-Nucet as a disfavored region for a period of ten years starting on April 1, 1999, and granted all of the incentives listed in EGO 24 to investors in that region. Government Decision No. 525/1999 of June 29, 1999 set out the norms for the application of EGO 24 incentives and provided that businesses must obtain a permanent investment certificate ("PIC") showing that they meet the relevant requirements.

The Claimants' Investment in Romania (paras. 156-177)

94. The Individual Claimants are majority shareholders of a group of companies, European Food and Drinks Group ("EFDG"), of which the Corporate Claimants are members. EFDG engaged in food and beverage production in Ştei-Nucet-Drăgăneşti, Bihor County. The Individual Claimants asserted that their investments in the EFDG were made in reliance on Law 35 and GO 27, the predecessors to EGO 24. After GO 27 was introduced in 1996, the Claimants relocated certain projects to Drăgăneşti (in the Apuseni region of Bihor County, which was covered by GO 27 and made part of the Ştei-Nucet disfavored region by Government decision of November 29, 2000) to take advantage of the regional investment program. The Claimants claimed that, following the adoption of EGO 24, they built a large-

scale food production operation as part of a ten-year business plan that relied on the incentives.

95. The EFDG companies obtained investment certificates in order to participate in EGO 24. Each Corporate Claimant obtained a PIC.

Romania's Accession Process (paras. 178-249)

96. Throughout this time, Romania pursued EU accession. On February 1, 1993, Romania signed the Europe Agreement with the EC, which entered into force on February 1, 1995.

97. After the Europe Agreement entered into force, Romania presented its application for EU membership. The EC's Opinion on Romania's Application for Membership of the European Union of July 15, 1997 concluded that Romania had not yet satisfied certain criteria and was not ready to initiate accession talks.

98. On March 10, 1998, the EC issued guidelines on whether to allow regional aid. On March 22, 1999, the EC Council issued Council Regulation (EC) No. 659/1999, which set out rules for the application of the EC Treaty with respect to State aid measures and recovery of unlawful State aid. The Regulation provided that the Commission could issue a recommendation for incompatible State aid schemes and initiate formal investigations. Shortly thereafter, Romania passed Law No. 142/1999 on State aid, granting its Competition Council power to regulate State aid.

99. The EU commenced formal accession negotiations with Romania in February 2000. In May 2000, the Romanian Competition Council held that certain incentives available under EGO 24 distorted competition and recommended their elimination. In June 2000, Romania passed EGO No. 75/2000, which amended the EGO 24 incentives but did not eliminate them. There were further amendments to the incentive regime during the ongoing accession process in late 2000-2002.

100. In 2002, the Sweden-Romania BIT was signed and ratified. From 2002-2003, the EU and the accession negotiations placed continued emphasis on the non-conformity of Romania's State aid policy with EU standards, particularly the policy regarding disfavored regions. In January 2004, the Romanian Prime Minister stated that EGO 24 incentives might be

terminated due to EC requirements, but that the Government would negotiate with each investor and that it was examining whether certain incentives could remain in place until 2007.

101. On August 31, 2004, by means of Government Ordinance No. 94/2004, Romania revoked most of the tax incentives contained in EGO 24, effective February 22, 2005. The Accession Treaty with the EU was signed on April 25, 2005, and Romania became a full Member State on January 1, 2007.

102. Section IV of the Award (paras. 250-283) provided an overview of the Parties' positions regarding the alleged treaty breaches (these are expressed in detail in Section VI of the Award).

103. Section V, "Preliminary Matters" (paras. 284-341), considered: (i) jurisdiction; (ii) the applicable law; and (iii) the enforcement of the award and EU law.

Jurisdiction (paras. 284-285)

104. The Tribunal summarized its rulings rejecting the Respondent's objections on jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*.

Applicable Law (paras. 286-329)

105. The Tribunal noted that, in accordance with Article 42(1) of the Convention, international law should take precedence over Romanian law in case of conflict. It further found that the relevant rules of international law were the Europe Agreement and the BIT, and that EU law was not directly applicable to Romania. It nevertheless held that EU law was part of the "factual matrix" of the case and that it may be relevant in the determination of whether Romania had observed the fair and equitable treatment ("FET") obligation contained in the BIT.[20]

[20] Award, para. 328 (Appl. Exh. RA-3).

Enforceability of an Award under EU Law (paras. 330-341)

106. The Tribunal indicated that it would not address the Parties' arguments regarding the enforceability of an award of compensation against Romania within the EU. The Tribunal stated that "it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters"[21] and that it was inappropriate to base its decisions on hypothetical future EU law.

107. Section VI, "Analysis of the Claimants' Treaty Claims" (paras. 342-874), considered the alleged treaty breaches: (i) umbrella clause (Article 2(4) of the BIT); (ii) FET (Article 2(3)); (iii) unreasonable and discriminatory measures (Article 2(3)); and (iv) expropriation (Article 4(1)).

Umbrella Clause (paras. 343-459)

108. By a majority, the Tribunal dismissed the umbrella clause claim (i.e. whether Romania had observed "any obligation" entered into with regard to an investment) because, although it found that a commitment and specific entitlement existed under the applicable Romanian law with respect to the Claimants as a result of EGO 24 and the PICs until April 1, 2009, the Claimants had not provided sufficient evidence that they had a "vested right," and "the existence of an obligation protected by the umbrella clause."[22]

FET (paras. 460-872)

109. The Tribunal held that Romania had breached the FET obligation in the BIT. First, by majority, it held that the totality of Romania's actions amounted to a promise or assurance of regulatory stability that had given the Claimants a legitimate expectation that the incentives were compatible with EU law from 1998-2003 and would be maintained in substantially the same form for the full ten-year period (or that they would be compensated in the event they were revoked).[23] The Tribunal found that these expectations reasonably led the Claimants to invest in the region in the scale and manner in which they did. Second,

[21] *Id*., para. 340.
[22] *Id*., para. 459.
[23] *Id*., para. 677.

the majority of the Tribunal ("the Majority") held that the Government had not acted with transparency and consistency in its conduct toward the Claimants because it should have informed them reasonably soon after it knew the EGO 24 framework would be abolished. Third, the Tribunal considered that it was not fair and equitable of Romania to have obliged the investors to fulfill their obligations under the incentives but to have revoked the benefits thereof. Although the Tribunal found that the measures were narrowly tailored for a rational public policy and that Romania had not acted in bad faith or unreasonably in light of its aim at EU accession, this did not overcome the breach of the Claimants' legitimate expectations.

Other Treaty Claims (paras. 873-874)

110. In view of its holding on FET, the Tribunal considered it unnecessary to rule on the claims regarding unreasonable and discriminatory treatment or expropriation.

Damages (paras. 875-1248)

111. Section VII addressed damages. The Tribunal first found that it could make an award for damages incurred by non-disputing parties (the other EFDG companies) as long as the Individual Claimants could prove their ownership of the non-disputing companies in the EFDG for which claims were made and that they had been affected by Romania's breach of the BIT.

112. The Tribunal then determined the amount of damages for the FET breach using an expectation damages computation method (which quantifies the increased cost and the Claimants' lost profits) because it was the primary scenario advanced by the Claimants and the most thoroughly scrutinized and examined in the written and oral phases.

113. The Tribunal awarded the Claimants RON 376.4 million in damages (excluding interest) representing losses resulting from the increased cost of sugar and other raw materials (RON 120.7 million), as well as lost profits on the sale of finished food products (RON 255.7 million), but not including lost profits on the sale of sugar-containing products or lost profits incurred as a result of the Claimants' inability to complete the planned investments because the Claimants had not proven these losses with sufficient certainty. The Tribunal also rejected the Claimants' request that the damages be awarded net of taxes because it found

that the Claimants had possessed sufficient funds available to pay their outstanding debts (taxes) but made a strategic business decision not to.

Allocation of Damages (paras. 1184-1248)

114. Lastly, under the heading "To Whom Should the Award be Made?", the Tribunal discussed the allocation of damages. The Tribunal rejected the Claimants' request that the entirety of the damages be divided equally between the Individual Claimants, as that would amount to a loss to the Corporate Claimants in favor of their shareholders. It also found that it could not award the entirety of the damages to the Corporate Claimants because a portion of the damages was associated with other EFDG companies, which were not party to the proceeding. The Tribunal therefore held that it "shall not allocate the damages but shall award the entirety of the damages to the five Claimants collectively."[24] Because the Individual Claimants owned 99.96% of the shares in the EFDG, of which the Corporate Claimants form part, the Tribunal was satisfied that the damages were suffered by all Claimants and found that "the Claimants' failure to specify and prove the exact quantum of damages suffered by each of the five Claimants"[25] was not a sufficient reason to deny damages that had been quantified. The Tribunal noted that this conclusion was appropriate since neither Party had argued for a specific allocation of damages as among the five Claimants.

115. In Section VIII, "Interest" (paras. 1249-1276), the Tribunal ordered the Respondent to pay pre- and post- award interest (as it saw no reason to differentiate between the two) at the rate of 3-month ROBOR plus 5%, compounded on a quarterly basis, noting that the trend in investment arbitration was to award compound interest.

116. Section IX (paras. 1277-1322) addressed non-pecuniary requests for relief, particularly a set-off of the amount awarded against tax debts and post-award injunctive relief. The Tribunal dismissed both requests on the basis that the requests were procedurally improper under ICSID Convention Article 46 and Arbitration Rule 40 and, on the merits, as the right to set-off tax debts was primarily a question of Romanian law. The Tribunal further rejected the

[24] *Id*., para. 1240.
[25] *Id*., para. 1245.

Claimants' request to enjoin Romania from any further tax collection efforts with respect to the Claimants as untimely, and because the Claimants' claims regarding the tax debts had been dismissed, held that there was no justification to award injunctive relief in relation thereto.

117. In Section X, "Costs" (paras. 1323-1328), the Tribunal determined that the Parties share the costs of the arbitration and that they bear their own legal expenses.

118. Finally, Section XI (para. 1329) contained the *dispositif*.

119. In his Separate Opinion, Prof. Abi-Saab agreed with the *dispositif*, but did not join the Majority's conclusion that Romania had breached the Claimants' legitimate expectations because an expectation "must be based on some kind of legal commitment," and, in order for behavior or conduct to rise to that level, it must be "sufficiently concrete and specifically directed to the particular investor to constitute an objective 'representation' of a legal commitment."[26] He felt that the EGO 24 scheme did not amount to such a commitment, but that the PIC issuance did. Furthermore, he disagreed with the Majority's finding that the Government had acted with a lack of transparency amounting to a FET breach. Although he joined the decision on damages, he noted that where a State has acted in "pursuit of legitimate overriding national interests,"[27] damages should not include lost profits.

[26] Separate Opinion, para. 5 (Appl. Exh. RA-3).
[27] *Id*., para. 15.

III. THE APPLICABLE LEGAL STANDARDS OF ANNULMENT

120. The legal framework governing annulment proceedings is set out in Article 52 of the ICSID Convention and Chapter VII of the ICSID Arbitration Rules. Article 52(1) of the Convention sets out five grounds for annulment. The Applicant invokes three of those grounds in this case:

(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)).

121. Although the Parties agree that annulment is an extraordinary remedy and cannot amount to an appeal, they differ on how the standards under the grounds for annulment invoked in this case apply to the alleged defects in the Award. Before analyzing each of those grounds in the context of the Application, the Committee wishes to comment generally on the applicable standards under those grounds.

122. The Committee notes that ICSID *ad hoc* committees have repeatedly held that the annulment mechanism is an exceptional and narrowly circumscribed remedy, and that it is not a remedy against an incorrect decision.[28] As a result, committees have stressed the distinction between annulment and appeal, and stated that they cannot review the correctness of an award's findings on facts or law.[29] The Committee agrees with *CMS v. Argentina* that a committee "has only limited jurisdiction under Article 52 of the Convention" and "cannot simply substitute its own view of the law and its own appreciation of the facts for those of the

[28] Background Paper on Annulment For the Administrative Council of ICSID, 27 ICSID Review – FILJ (2012) 443, 470, August 10, 2012 (Appl. Exh. RAL-74).
[29] *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, June 29, 2005 ("*CDC v. Seychelles*"), paras. 36 and 45 (Appl. Exh. RAL-42); *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, September 25, 2007 ("*CMS v. Argentina*"), para. 85 (Cl. Exh. CAL-31).

Tribunal."[30] The Committee will apply these general standards when considering each of the grounds for annulment pleaded in this case.

1. MANIFEST EXCESS OF POWERS

123. Article 52(1)(b) of the Convention entails a dual requirement: there must be an excess of powers, and that excess must be manifest in terms of being evident, obvious, clear or easily recognizable.[31]

124. An arbitral tribunal derives its power from the parties' agreement. The agreement to arbitrate constitutes both the basis and the outer limit of a tribunal's power.

125. Excess of powers primarily refers to situations where a tribunal adjudicates disputes not included in the powers granted by the parties. Thus, the most important form of excess of powers occurs when a tribunal exceeds the limits of its jurisdiction.[32] In ICSID arbitration, jurisdiction is determined by Article 25 of the Convention and the parties' agreement on consent. Hence, lack of jurisdiction may relate to any of the mandatory requirements listed in Article 25(1) of the Convention and the relevant instrument of consent. This includes a lack of jurisdiction *ratione personae*, *ratione materiae* or *ratione voluntatis*.[33] Thus, there is an excess of power if the tribunal: (i) asserts its jurisdiction over a legal or natural person or a State in regard to whom it does not have jurisdiction; (ii) asserts its jurisdiction over a

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[30] *CMS v. Argentina*, para. 136.

[31] *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment, January 7, 2015 *(*"*Daimler v. Argentina*"), para. 186 (Cl. Exh. CAL-83); *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision on Annulment, February 21, 2014 ("*Caratube v. Kazakhstan*"), para. 84 (Appl. Exh. RAL-47; Cl. Exh. CAL-43); *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Decision on Annulment, July 10, 2014 ("*Alapli v. Turkey*"), para. 230 (Cl. Exh. CAL-59); *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002 ("*Wena v. Egypt*"), para. 25 (Appl. Exh. RAL-55); *CDC v. Seychelles*, para. 41; *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 ("*Rumeli v. Kazakhstan*"), paras. 78 and 96 (Appl. Exh. RAL-56); *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 ("*M.C.I. v. Ecuador*"), para. 49 (Appl. Exh. RAL-41); *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Annulment, June 14, 2010 ("*Helnan v. Egypt*"), para. 55 (Appl. Exh. RAL-58); *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22), Decision on Annulment, June 29, 2012 ("*AES v. Hungary*"), para. 31 (Appl. Exh. RAL-75; Cl. Exh. CAL-41).

[32] *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, November 1, 2006 ("*Mitchell v. Congo*"), para 20 (Appl. Exh. RAL-53).

[33] *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, June 5, 2007 ("*Soufraki v. UAE*"), para 42 (Appl. Exh. RAL-44; Cl. Exh. CAL-29).

subject-matter which does not fall within the ambit of the jurisdiction of the tribunal; or (iii) asserts its jurisdiction over an issue that is not encompassed in the consent of the parties. A deficiency in meeting any of these requirements would mean that there is no jurisdiction, which may constitute a manifest excess of powers if the excess of jurisdiction is manifest.[34]

126. Excess of powers can be committed both by overreach and by default. Awards can be annulled if tribunals either assume powers to which they are not entitled by way of a decision which is *ultra petita* (e.g. by an excess of jurisdiction), or fail to exercise an existing jurisdiction by way of *infra petita* (e.g. by omitting to decide over a head of a claim raised by the parties). In this context, a manifest shortfall in the exercise of jurisdiction may constitute a manifest excess of power.[35] Therefore, it is not within the tribunal´s powers to refuse to decide a dispute or part of a dispute that meets all jurisdictional requirements of Article 25.

Failure to Apply the Applicable Law

127. Excess of powers may exist not only in cases where tribunals wrongly assume jurisdiction, but also in the case of tribunals which, having jurisdiction, fail to apply the applicable law.[36] Article 42(1) of the Convention deals with the law applicable to the dispute. It provides that the tribunal shall decide a dispute in accordance with such rules as may be agreed to by the parties. In the absence of such an agreement, it shall apply the law of the host State and applicable rules of international law. Article 52(1) does not expressly provide for annulment in case of a failure to apply the applicable law. Nevertheless, the provisions on applicable law are essential elements of the parties' agreement to arbitrate and constitute part of the

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[34] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, March 21, 2007 ("*MTD v. Chile*"), para. 54 (Appl. Exh. RAL-48; Cl. Exh. CAL-28); *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Annulment, September 1, 2009 ("*Azurix v. Argentina*"), paras. 64-66 (Appl. Exh. RAL-62; Cl. Exh. CAL-36); *Soufraki v. UAE*, paras. 118-119; *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 ("*Lucchetti v. Peru*"), para. 101 (Appl. Exh. RAL-52; Cl. Exh. CAL-30); *Rumeli v. Kazakhstan*, para. 96; *SGS Société Générale de Surveillance S.A v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Annulment, May 19, 2014 ("*SGS v. Paraguay*"), para. 114 (Cl. Exh. CAL-75).

[35] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002 ("*Vivendi v. Argentina*"), para. 115 (Appl. Exh. RAL-45).

[36] *MTD v. Chile*, para. 44; *Daimler v. Argentina*, para. 189; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Annulment, July 30, 2010 ("*Enron v. Argentina*"), para. 218 (Appl. Exh. RAL-43).

parameters for the tribunal's activity. Non-application of the law agreed to by the parties or of the law determined by the residual rule in Article 42(1) goes against the parties' agreement to arbitrate and may constitute an excess of powers.

128. As stated by the *Daimler* annulment Committee:

> Therefore, when an allegation is made that there was a manifest excess of powers for failure to apply the applicable law, it is not the role of an *ad hoc* committee to verify whether the interpretation of the law by the tribunal was correct, or whether it correctly ascertained the facts or whether it correctly appreciated the evidence. These are issues relevant to an appeal, but not for annulment proceedings in view of the limited grounds provided for under the ICSID Convention.[37]

129. *Ad hoc* committees have made it clear that an error in the interpretation of the applicable law does not constitute a manifest excess of powers.[38]

130. Misinterpretation or misapplication of the applicable law to be applied to the merits, even if serious, does not justify annulment. In exceptional circumstances, however, a gross or egregious error of law could be construed to amount to a failure to apply the proper law, and could give rise to the possibility of annulment.[39] However, the threshold for applying this exceptional rule must be set very high.[40]

2. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

131. Violation of a rule of procedure will be a ground for annulment only if two requirements are met:[41]

(i) The departure from the rule of procedure must be serious; and

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[37] *Daimler v. Argentina*, para. 189.
[38] *Caratube v. Kazakhstan*, para. 81; *Azurix v. Argentina*, para. 137; *M.C.I. v. Ecuador*, para. 42; *Enron v. Argentina*, para. 219.
[39] *Soufraki v. UAE*, para. 86; *Caratube v. Kazakhstan*, para. 81; *M.C.I. v. Ecuador*, para. 43; *AES v. Hungary*, paras. 33-34.
[40] *Caratube v. Kazakhstan*, para. 81; *AES v. Hungary*, para. 33.
[41] *Daimler v. Argentina*, para 262; *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, December 22, 1989 ("*MINE* v. *Guinea*"), para. 4.06 (Appl. Exh. RAL-49; Cl. Exh. CAL-25); *Wena v. Egypt*, para 56; *CDC v. Seychelles*, para. 48.

(ii) The rule concerned must be fundamental.

132. In this respect, this Committee follows the reasoning of *MINE v. Guinea*:

> 5.05 A first comment on this provision concerns the term "serious". In order to constitute a ground for annulment the departure from a "fundamental rule of procedure" must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.
>
> 5.06 A second comment concerns the term "fundamental"; even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is "fundamental." The Committee considers that a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, which provides:
>
> > "The parties shall be treated with equality and each party shall be given full opportunity of presenting his case."
>
> The term "fundamental rule of procedure" is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.[42]

133. Moreover, the *CDC v. Seychelles* Committee rightly pointed out that only rules of natural justice, which concern the essential fairness of the proceeding, could be considered fundamental:

> A departure is serious where it is "substantial and [is] such as to deprive the party of the benefit or protection which the rule was intended to provide." In other words, "the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed." As for what rules of procedure are fundamental, the drafters of the Convention refrained from attempting to enumerate them, but the consensus seems to be that only rules of natural justice – rules concerned with the essential fairness of the proceeding – are fundamental. Not all ICSID Arbitration Rules are fundamental in this sense.[43]

[42] *MINE v. Guinea*, paras. 5.05-5.06.
[43] *CDC v. Seychelles*, para. 49.

134. Therefore, the threshold for finding that a rule of procedure is fundamental is very high.[44] As stated in *Alapli v. Turkey*, "[t]he Applicant bears the burden of proving both that (i) the Tribunal committed a serious departure from a procedural rule; and (ii) that the said rule was fundamental."[45] In addition, the Committee agrees with annulment decisions that have required that the departure have a material impact on the outcome of the award for the annulment to succeed.[46]

3. FAILURE TO STATE REASONS

135. The obligation to state reasons stems from the wording of Article 48(3) of the Convention, which requires tribunals to "deal with every question submitted to the Tribunal" and to "state the reasons upon which [the award] is based." Unreasoned awards can be annulled, because parties should be able to ascertain to what extent a tribunal's findings are based on a correct interpretation of the law and on a proper evaluation of the facts. However, as long as reasons have been stated, even if incorrect, unconvincing or non-exhaustive, the award cannot be annulled on this ground.[47] Article 52(1)(e) does not permit any enquiry into the quality or persuasiveness of reasons.[48] As it was stated in *MINE*:

> [T]he requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or of law.[49]

136. In other words, under Article 52(1)(e) of the ICSID Convention, a committee is only authorized to verify whether the sequence of arguments within an award evidences a logical

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[44] *Alapli v. Turkey*, para. 133; *Caratube v. Kazakhstan*, para. 87.
[45] *Alapli v. Turkey*, para. 134.
[46] *Wena v. Egypt*, para. 58; *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on Annulment, January 8, 2007 ("*Repsol v. Petroecuador*"), para. 81 (Cl. Exh. CAL-72); *CDC v. Seychelles*, para. 49; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, December 23, 2010 ("*Fraport v. Philippines*"), para. 246 (Appl. Exh. RAL-70); *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Decision on Annulment, January 24, 2014 ("*Impregilo v. Argentina*"), para. 164 (Appl. Exh. RAL-46); *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Annulment, September 22, 2014 ("*El Paso v. Argentina*"), para. 142 (Appl. Exh. RAL-76).
[47] *Impregilo v. Argentina*, para. 181.
[48] *Vivendi v. Argentina*, para. 64; *Impregilo v. Argentina*, para. 181.
[49] *MINE v. Guinea*, para. 5.09.

chain of reasoning that is apt to lead to the conclusion that was reached by the tribunal. This was also the view of the *Wena v. Egypt* Committee:

> 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).[50]

137. Although the Committee in *MINE* did consider that genuinely contradictory reasons cancel each other out and amount to no reasons at all, it also noted that annulment committees should not be quick to find a contradiction when in fact what is evident from the award is the compromise reached in an international collegiate adjudicative body.[51] In this respect, the *Vivendi* Committee observed:

> In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals 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 but a reflection of such conflicting considerations.[52]

138. Even where reasons on a particular point are missing, a committee may, in certain circumstances, reconstruct the reasons. In *Wena v. Egypt*, the Committee stated that "[t]he Tribunal's reasons may be implicit in the considerations and conclusions contained in the

[50] *Wena v. Egypt*, paras. 79 and 81.
[51] *Alapli v. Turkey*, para. 200.
[52] *Vivendi v. Argentina*, para. 65.

award, provided they can be reasonably inferred from the terms used in the decision."[53] This has been confirmed by other committees.[54]

139. The standard for annulment under Article 52(1)(e) of the ICSID Convention is, therefore, high. It does not permit an *ad hoc* committee to second-guess the reasoning of the tribunal. It imposes on the applicant the burden of proving that the reasoning of the tribunal on a point that is essential for the outcome of the case was either absent, unintelligible, contradictory or frivolous. In order to succeed, the Applicant must discharge this burden.[55]

[53] *Wena v. Egypt*, para. 81.
[54] *MINE v. Guinea*, para. 6.104; *CDC v. Seychelles*, para. 87; *Soufraki v. UAE*, paras. 63-64; *CMS v. Argentina*, paras. 125-127; *Azurix v. Argentina*, para. 360; *Rumeli v. Kazakhstan*, paras. 83 and 138; *Fraport v. Philippines*, paras. 264-266; *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Annulment, September 16, 2011 ("*Continental Casualty v. Argentina*"), para. 101 (Cl. Exh. CL-70).
[55] *Daimler v. Argentina*, para. 79; *Alapli v. Turkey*, para. 202.

IV. GROUNDS FOR ANNULMENT

140. The Applicant alleges that the Tribunal committed a number of annullable errors which relate to three main defects in the Award: (i) the failure to apply the law that the Tribunal had found was applicable to the dispute, the 1995 Europe Agreement; (ii) the failure to decide whether Romania was prohibited from paying compensation for the repeal of illegal State aid; and (iii) the failure to require each Claimant to prove that it suffered harm and to award compensation to each Claimant only for the harm it proved it had suffered. The Applicant states that these defects can be challenged under more than one of the three grounds raised.

141. According to the Applicant, the first two defects would lead to annulment of the Award in its entirety, while the third defect relating to damages, if upheld alone, would lead to partial annulment of the Award pursuant to Article 52(3) of the ICSID Convention.[56] The Applicant therefore seeks the following relief:

> 111. […]
>
> (a) ANNUL in its entirety the Award rendered by the Tribunal, or in the alternative, annul only the portion of the Award dealing with damages, namely paragraphs 875 to 1276 and decisions (c) and (d) in paragraph 1329; and
>
> (b) ORDER the Claimants to pay in their entirety the costs of these annulment proceedings, including the fees and expenses of the *ad hoc* Committee and the Centre, and all other reasonable fees and expenses incurred by Romania in relation to these annulment proceedings, including legal fees and disbursements.[57]

142. The Claimants, on the other hand, argue that Romania's Application is outside the limited scope of annulment and that it is a poorly disguised appeal on the merits that is being used as a delaying tactic in respect of the enforcement of the Award.[58] They therefore request that the Committee reject Romania's request for annulment and require it to bear all the costs and expenses incurred by the Claimants and the Centre in connection with the proceeding.[59]

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[56] Appl. Mem., para. 110.
[57] *Id*., para. 111.
[58] Cl. C-Mem., paras. 12-27.
[59] *Id*., para. 363.

143. The Committee will deal with the grounds and the alleged annullable errors in the order presented by the Applicant.

1. FAILURE TO APPLY THE APPLICABLE LAW

A. Applicant's Position

144. According to the Applicant, the Tribunal failed to apply the applicable law pursuant to Article 42(1) of the ICSID Convention. In paragraph 319 of the Award, the Tribunal found that the relevant rules of international law were the Europe Agreement, which entered into force in February 1995, and the BIT, which entered into force on April 1, 2003. It also found that EU law, with the exception of Romania's international obligations under the Europe Agreement, was not directly applicable to Romania:

> As a first step, the Tribunal notes that there is no real conflict of treaties. In the time period relevant to this dispute, the relevant rules of international law applicable to Romania and Sweden were the Europe Agreement (which entered into force on 1 February 1995) and the BIT (which entered into force on 1 April 2003). The Accession Treaty was not signed until 25 April 2005, and entered into force on 1 January 2007 (date on which the EC Treaty also entered into force with respect to Romania) (ER of F. Jacobs, ¶ 12). Thus, from 1 February 1995 to 1 January 2007, Romania was in a negotiating phase during which it declared that it accepted the *acquis* but it was not properly subject to EU law, with the exception of its international obligations under the Europe Agreement itself. As a result, EU law was not directly applicable to Romania.[60] (Emphasis added by the Applicant)

145. The Tribunal further stated in paragraph 692 of the Award that the Europe Agreement and EU State aid law were applicable to assess the EGO 24 regime:

> There seems to be no dispute that, throughout the period during which the Claimants received the EGO 24 incentives (that is, from receipt of European Food's TIC in 1999 until the incentives were abolished in February 2005), the EGO 24 scheme was subject to the state aid regime of the Europe Agreement (which was the operative pre-accession treaty; ER of A. Dashwood, ¶ 31). As explained by Prof. Dashwood (with no convincing rebuttal by Romania's experts), under the Europe Agreement regime, the substantive rules to assess the compatibility of the EGO 24 incentives with the common market were the

[60] Appl. Mem., para. 29.

> substantive rules of the EU state aid regime contained in Article 87 of the EC Treaty (through the operation of Article 64(2) of the Europe Agreement), as amplified by case law and Commission practice, and as subsequently clarified by the Implementing Rules that were annexed to Decision 4/2000 of the Romania-EU Association Committee (Exh. R-65; C-579). (Emphasis added by the Applicant)

146. The Europe Agreement thus imposed international obligations that were binding on Romania from its entry into force. Its Article 64, quoted in paragraphs 180 and 693 of the Award, provides in relevant part as follows:

> 1. The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and Romania: [...] (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.
>
> 2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86, and 92 of the Treaty establishing the European Economic Community.
>
> 3. The Association Council shall, within three years of the entry into force of the Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.
>
> 4. For the purposes of applying the provisions of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Romania shall be assessed taking into account the fact that Romania shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Romania, decide whether that period should be extended by further periods of five years.

147. According to the Applicant, the Europe Agreement thus specified that the State aid practices were to be assessed under Article 92 of the TFEU (which became Article 87 of the EC Treaty). This provision, quoted in footnote 9 of the Award, provides in relevant part as follows:

> 1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of

certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

[…]

3. The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

[…]

148. In accordance with Article 64(3) of the Europe Agreement, in 2001, the Romanian Association Council enacted Implementing Rules in respect of subsections (1) and (2) of Article 64, which form part of EU law as well as Romanian law.[61] By virtue of these rules, the whole body of European competition law, including the rules on prohibition of State aid, was applicable to Romania. However, although the Tribunal had identified these rules as the applicable source, it failed to apply them.

149. In fact, while the Tribunal found that the Europe Agreement was a "relevant rule" of international law, it also found in paragraph 319 of the Award that EU law was not "directly applicable," and, therefore, there was "no real conflict of treaties."[62] It went on to find that EU law formed part of the "factual matrix"[63] of the case and consequently did not enter into a legal analysis of Romania's obligations under the Europe Agreement, including the EU rules on State aid.

150. The Applicant contends that it is clear from the Tribunal's analysis of EGO 24 that the Tribunal failed to apply the rules that it had itself identified as the governing law. The Tribunal concluded that EGO 24 was not inconsistent with EU State aid law, and that there was no obligation on the part of Romania vis-à-vis other EU Member States (including Sweden), to repeal it. However, nowhere did it actually assess EGO 24 in the context of the

[61] *Id*., para. 27.
[62] *Id*., para. 30.
[63] Award, para. 328.

EU State aid rules. In particular, in paragraph 691 of the Award, the Tribunal came to the conclusion that "it was reasonable for the Claimants to believe that the EGO 24 incentives were compatible with EU law," but did not analyze whether the incentives actually were compatible with EU State aid law. Further, in paragraph 703 of the Award, after having concluded that it appeared that the EGO 24 incentives met most of the criteria for regional operating aid, the Tribunal stated that "[…] the EGO 24 incentives could have reasonably been thought (both by the Romanian government and the Claimants) to be valid regional operating aid under EU law." According to the Applicant:

> The Tribunal does not construe, in arriving at this conclusion, the applicable law; it does not construe what the applicable law actually permitted; and it doesn't even attempt anywhere in these pages to assess the compatibility of EGO 24 incentives by reference to the requirements of EU State aid law.[64]

151. The Applicant submits that it is clear from the above-referenced rules that the repeal of EGO 24 was mandated by the Europe Agreement and EU State aid law, and that the Tribunal's ultimate conclusion that the decision to repeal EGO 24 led to a violation of the FET standard under the BIT in effect meant an outright conflict of international treaties. On the one hand, Romania must repeal EGO 24 under the Europe Agreement and, on the other hand, the regime could be upheld under the BIT.

152. The Tribunal should have either found in favor of a harmonious interpretation of the Europe Agreement and the BIT, or concluded that there was a conflict of obligations under the two. In any event, at a minimum, it should have addressed the material legal issues.[65] This failure to apply the applicable law constitutes: (i) a manifest excess of powers; and (ii) a failure to state reasons.

(i) Manifest Excess of Powers

153. According to the Applicant, it follows from Article 42(1) of the ICSID Convention that the application of the proper law is an essential element of the parties' consent to arbitration, and a failure to apply that law may amount to an excess of powers by the tribunal. Numerous *ad*

[64] Transcript, Day 1, p. 35, lines 18-24.
[65] Appl. Mem., para. 37.

hoc committees have confirmed this principle and stated that, where the failure is manifest, it justifies annulment of the award.[66] *Ad hoc* committees have identified when such excess is manifest in this context. In *M.C.I. v. Ecuador*, the Committee stated that an annullable error would occur "where the Tribunal admitted a legal principle and then willfully decided to disregard it."[67] Similarly, in *Enron v. Argentina*, the Committee stated that the failure to address a number of essential questions under customary international law (as embodied in Article 25 of the International Law Commission's ("ILC") Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles" or "ILC Articles on State Responsibility"), which had been identified as the applicable legal standard in assessing Argentina's defense of necessity, amounted to a manifest excess of powers.[68] It follows that it is insufficient to identify the applicable law: a tribunal must also address issues essential to the question of whether the relevant legal requirements were met.[69]

154. As in *Enron*, the Tribunal in this case failed to apply the applicable law – the Europe Agreement – to the essential questions before it. Had it applied Articles 64 and 69 of the Europe Agreement (as well as the Implementing Rules and Article 87 of the TFEU), it would have reached a different result (that EGO 24 had to be repealed) or concluded that there was in effect a conflict between Romania's obligations under the Europe Agreement and those under the BIT.

155. In the Applicant's submission, the Tribunal's excess of powers is evident on the face of the Award. The Tribunal found that the Europe Agreement was applicable (paragraph 319), cited it at length (paragraph 692 ff) but did not apply it. Instead, the Tribunal relegated the Europe Agreement to "the factual matrix."[70] This was a "textually obvious and substantively serious" error that materially affected the outcome of the case.[71]

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[66] *Id*., para. 41.
[67] *M.C.I. v. Ecuador*, para. 51, quoted in Appl. Mem., para. 42.
[68] *Enron v. Argentina*, para. 368; Transcript, Day 1, pp. 38-39.
[69] Appl. Opening Presentation, slide 16.
[70] Appl. Mem., para. 47.
[71] *Id*., quoting *Soufraki v. UAE*, para. 40.

(ii) Failure to State Reasons

156. The Applicant is of the view that under Article 48(3) of the ICSID Convention, the Tribunal has an obligation to "deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." The failure to comply with this provision can amount to a failure to state the reasons. As explained in *Vivendi I*, the applicable test:

> [E]ntails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision.[72]

157. Reasons need to be understandable, adequate and sufficient, and must not be contradictory. Among other annulment case law, the Applicant refers to the statement made by the *ad hoc* Committee in *Lucchetti v. Peru*:

> The failure to state reasons according to Article 52(1)(e) […] aims at ensuring the parties' right to ascertain whether or to what extent a tribunal's findings are *sufficiently* based on the law and on a proper evaluation of relevant facts.[73] (Emphasis added by the Applicant)

158. In this case, the Tribunal failed to state reasons for its non-application of the Europe Agreement and its conclusion that there was no conflict of treaties.

159. The Applicant complains that the Tribunal provided no reasons for not applying the international obligations that it had identified in the Europe Agreement to the facts of the case. The only explanation provided by the Tribunal in this regard is contained in paragraph 328 of the Award:

> The Tribunal notes in this regard that the Parties appear to agree that EU law forms part of the "factual matrix" of the case. In particular, the Parties agree that the question of EU law may be relevant to determining whether Romania acted fairly and equitably with respect to the Claimants' investments in accordance with Article 2(3) of the BIT. The Tribunal concurs. The overall context of EU accession in general and the pertinent provisions of EU law in particular may be relevant to the determination of whether, *inter alia*, Romania's

[72] *Vivendi v. Argentina*, quoted in Appl. Mem., para. 51.
[73] *Lucchetti v. Peru*, para. 56.

actions were reasonable in light of all the circumstances, or whether Claimants' expectations were legitimate.

160. This statement ignores the fact that law is not a "fact" but a set of mandatory principles according to which the facts must be assessed.[74]

161. As a result, the Award makes it impossible for the reader to understand how the Tribunal reached its conclusions and thus suffers from "a total failure to state reasons for a particular point, which is material for the solution."[75] It is not possible to follow the reasoning of the Tribunal from Point A, i.e. that the Europe Agreement is applicable, to Point B, i.e. that EU law (including EU State aid law applicable under the Europe Agreement) is only part of the factual matrix and not applicable as law. As held in *MINE v. Guinea* and confirmed by numerous *ad hoc* committees, a tribunal is required to demonstrate how it proceeds from Point A to Point B and eventually to its conclusion.[76]

162. The Tribunal also failed to state reasons for its findings in paragraph 319 of the Award that there was no conflict of treaties. The Tribunal did deal with the question whether EU law played a role in the interpretation of the BIT, but the enquiry (paragraphs 320-326 of the Award) did not concern the application of EU State aid law.[77] The statement in paragraph 326 of the Award that the Tribunal "will interpret each of the various applicable treaties having due regard to the other applicable treaties" is no proof that it actually did so anywhere in the Award.[78] The Tribunal thus contradicted itself in paragraph 319, and this contradiction is tantamount to an absence of reasons.

B. Claimants' Position

163. The Claimants submit that the Tribunal applied the law that it identified as being applicable and that the Award does state the reasons on which it is based. They note that the Parties agree that there was no prior agreement on the applicable law pursuant to the first sentence of Article 42(1) of the ICSID Convention, and that the Tribunal therefore applied the second

[74] Appl. Mem., para. 61.
[75] *Id*., para. 62, quoting *Soufraki v. UAE*, para. 126.
[76] Transcript, Day 1, p. 52, lines 14-25.
[77] *Id*., pp. 55-56.
[78] *Id*., p. 57, lines 9-20.

sentence of that provision, finding that "Article 42(2) of the ICSID Convention directs the Tribunal to apply the host state's law (here, Romanian law) and 'such rules of international law as may be applicable.'"[79] The Tribunal noted in this respect that there was no dispute between the Parties that the primary source of law was the BIT itself, but that the Parties disagreed on the role of other rules of international law, "in particular rules arising from treaties established under EU law to which Romania and Sweden are parties."[80]

164. The Tribunal therefore proceeded to identify the sources: the Europe Agreement, the Accession Treaty and the EC Treaty. Next, it distinguished between the entry into force of these sources: on the one hand, the Europe Agreement, which entered into force in 1995, and, on the other hand, the Accession Treaty and the EC Treaty, which entered into force in 2007. The Tribunal concluded that, because of the temporal distinction, the Europe Agreement was the relevant body of law applicable to the dispute.[81]

165. The Tribunal further clearly identified the specific international obligations under the Europe Agreement in paragraphs 179-185 of the Award, including Romania's obligation to harmonize its existing and future domestic legislation with that of the Community in the area of competition law and State aid.[82] However, the Tribunal also found that Romania's obligations under the Europe Agreement did not "properly subject [Romania] to EU law."[83] It went on to determine that "the general context of EU accession must be taken into account when interpreting the BIT," but found that:

> That being said, the Tribunal cannot conclude in the abstract (as Romania seems to suggest) that the revocation of the incentives is fair and equitable solely because it was undertaken pursuant to Romania's obligation under the Europe Agreement to harmonize its law with EU law. As previously stated, whether the state's conduct is unfair and inequitable must be assessed in view of all the facts and surrounding circumstances.[84] (Emphasis added by the Claimants)

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[79] Award, para. 287, quoted in Cl. C-Mem., para. 111.
[80] Cl. C-Mem., paras. 109-110; Award, para. 318.
[81] *Id*., para. 116, quoting Award, para. 319.
[82] The caveat was that Romania was to be considered an area falling under the exception of Article 92(3)(a) of the EC Treaty for the first five years following signature, which could be extended for further periods of five years. Cl. C-Mem., para. 127, referring to Award, paras. 180-183.
[83] Cl. C-Mem., para. 128, quoting Award, para. 319.
[84] *Id*., para. 146, quoting Award, paras. 513-514.

166. In the Claimants' submission, it is therefore plain on the face of the Award that the Tribunal did apply the Europe Agreement. This is also evident from the Tribunal's analysis of Romania's conduct in light of the FET standard in the BIT. It took into consideration EU law in its findings that the Claimants had a legitimate expectation that the EGO 24 incentives would remain available and that it was reasonable for the Claimants to believe that the regime was compatible with EU law (paragraphs 677-707 of the Award).[85]

167. Romania's argument that the Tribunal failed to apply the applicable law to the question of the lawfulness of EGO 24 must fail because it is at odds with the Applicant's arguments before the Tribunal. The Tribunal did not decide the legality of EGO 24 because the question had not been presented to it. Romania had presented the issue as "whether Romania acted reasonably in amending EGO 24 in August 2004."[86] Romania had, in that connection, taken the position that the regime was compatible with the Europe Agreement and did not want the Tribunal to opine on its validity.[87] The Tribunal thus addressed the issue before it and found that both Romania and the Claimants could reasonably have thought that EGO 24 was lawful.[88] In any event, the question of the lawfulness of EGO 24 was irrelevant to the Tribunal's finding of a breach of the FET standard because the Tribunal found that Romania had created legitimate expectations through its actions by the fact that it had, e.g., reinstated EGO 24 in EGO 75.[89]

168. Romania's argument that the Tribunal failed to apply the applicable law to Romania's obligation to repeal EGO 24 must also fail because the Tribunal addressed the issue. Among other statements, the Tribunal indicated that "it is not evident to the Tribunal that the EU was requesting the revocation of the EGO 24 incentives, and the record shows that it was not

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[85] *Id*., paras. 150-152.
[86] *Id*., para. 175, quoting Award, para. 731; Transcript, Day 1, p. 161, lines 9-25, quoting a letter from Romania's Counsel dated November 16, 2009: "First, Romania wishes to stress that, whatever view one may take as to the ultimate conformity of EGO 24/1998 with European law, the relevant question in this arbitration is whether in 1998 Romania reasonably took the view that EGO 24/1998 was compliant with Romania's obligations under the Europe Agreement."
[87] *See* Letter from Romania's Counsel dated November 16, 2009: "Thus EGO 24/1998 was reasonably considered as falling within the exception in Article 87(3)(a) and 87(3)(c) EC Treaty." *See also* Expert Opinion of Prof. Dr. Rudolf Streinz, paras. 19 and 21; Award, para. 712.
[88] Award, paras. 703 and 706.
[89] Transcript, Day 1, pp. 165-166, quoting Award, paras. 688, 689, 706, 872.

evident to Romania either."[90] In addition, the question was irrelevant to the Tribunal's decision.

169. Similarly, the Tribunal found in paragraph 328 of the Award "that the Parties appear to agree that EU law forms part of the 'factual matrix' of the case," because both Parties had pleaded that it was to be taken into consideration as a factual circumstance.

170. Finally, the Tribunal applied the Vienna Convention on the Law of Treaties ("VCLT" or "Vienna Convention") and concluded that there was no conflict of treaties between the Europe Agreement and the BIT. The Tribunal found that the BIT did not refer to EU accession and that it could therefore not be assumed that the "EU sought to amend, modify or otherwise detract from the application of the BIT."[91] The Tribunal further applied the Vienna Convention to the interpretation of the BIT (paragraphs 322-325 of the Award), and finally assumed that Sweden and Romania entered into the BIT as well as into the Europe Agreement in full awareness of their legal obligations (paragraph 326 of the Award).

171. In the Claimants' submission, the Applicant is attempting to reinvent its case to claim that the whole body of EU competition law formed part of the Europe Agreement or should have been taken into account. This argument rests on a confusion between the Europe Agreement and the "whole of EU law (i.e. including EU State aid law)."[92] The Europe Agreement merely called for a gradual alignment with EU law, which became *per se* applicable as of the date of Romania's EU accession on January 1, 2007.

172. The Applicant raises arguments now that it did not raise in the Original Proceeding, e.g. that the Implementing Rules to the Europe Agreement also applied. In fact, Romania argued throughout the Original Proceeding that the Europe Agreement was to be treated as part of the "factual matrix" of the case.[93] In any event, the Tribunal has addressed in the Award why EU law was not applicable as such.

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[90] Award, para. 768.
[91] *Id*., para. 321.
[92] Cl. Opening Presentation, slide 181.
[93] Cl. C-Mem., paras. 163-164.

(i) Manifest Excess of Powers

173. The Claimants agree that a failure to apply the applicable law can amount to an excess of powers, but submit that an incorrect or erroneous application of that law cannot form the basis for annulment of an ICSID award. They also stress the distinction between a failure to apply the law and the application of the law to the facts of the case as determined by the tribunal.

174. In this case, Romania is not satisfied with the Tribunal's finding that the "whole body" of EU law, including EU State aid law, was not directly applicable by virtue of the Europe Agreement.[94] This criticism concerns the correctness of the application of the law rather than its application.[95] It is not the Committee's role to review whether the Tribunal correctly applied the Europe Agreement, but simply to verify that the Tribunal applied it. As in *M.C.I. v. Ecuador*, this "is not a case where the Tribunal admitted a legal principle and then willfully decided to disregard it."[96]

175. According to the Claimants, the legal standard to establish a manifest excess of powers is "a heavy burden upon the applicant"[97] and modern jurisprudence on ICSID annulment has set a "very high threshold" to show a non-application of the law rather than mere misapplication of the applicable law.[98] "Manifest" means that the excess must be "self-evident," as stated by the Committee in *Wena*.[99] It is not enough that a committee disagrees with the tribunal's decision or reasoning. Romania has failed to establish any excess of powers in this case, let alone manifest.

(ii) Failure to State Reasons

176. The Claimants do not take issue with the legal standard of the ground in Article 52(1)(e) of the ICSID Convention as articulated in *MINE*, referred to by the Applicant. However, they note that, in order to be successful, an applicant on annulment must show that there is a

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[94] *Id*., para. 129.
[95] *Ibid*.
[96] *M.C.I. v. Ecuador*, para. 51, quoted in Cl. C-Mem., para. 171.
[97] Cl. Opening Presentation, slide 129, quoting *Fraport v. Philippines*, para. 45.
[98] Transcript, Day 1, p. 159, lines 1-8, quoting *AES v. Hungary*, para. 33.
[99] *Id.*, quoting *Wena v. Egypt*, para. 25: "The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other."

complete lack of reasons or that it is impossible to follow or even infer the tribunal's reasoning on key findings. Committees may only verify the existence of reasons; they may not consider whether these are right or wrong. Disagreement with or misunderstanding of a tribunal's reasons may therefore not justify an annulment. As noted in *Vivendi I*, "[…] 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."[100]

177. In any event, since the Tribunal did in fact apply the applicable law, there can be no failure to provide reasons. The Claimants submit that the Tribunal provided detailed reasons for each of its findings, and that the Award is exhaustive and can be followed without any difficulty.

C. Committee's Analysis

178. The Award is not annullable under the grounds claimed by Romania.

(i) Manifest Excess of Powers

179. First, the Award is not annullable under Article 52(1)(b) of the Convention. In the Committee´s view, there was no failure to apply the law – which could amount to an excess of powers – let alone a manifest failure, justifying annulment of the Award.[101]

180. The Parties agreed that there was no prior agreement on the applicable law pursuant to the first sentence of Article 42(1) of the ICSID Convention, and that the Tribunal therefore was entitled to apply the second sentence of that provision, finding that: "Article 42(2) of the ICSID Convention directs the Tribunal to apply the host state's law and 'such rules of international law as may be applicable.'"[102]

181. The Tribunal noted in this respect that there was no dispute between the Parties that the primary source of law was the BIT itself. However, the Parties disagreed on the role of other

[100] Cl. Opening Presentation, slide 175, quoting *Vivendi v. Argentina*, para. 64 (emphasis added by the Claimants).
[101] Appl. Mem., para. 41.
[102] Award, para. 287.

rules of international law, "in particular rules arising from treaties established under EU law to which Romania and Sweden are parties."[103]

182. The Tribunal identified the sources of international law that would apply and determined that these were: (i) the Europe Agreement; (ii) the Accession Treaty; and (iii) the EC Treaty. The Europe Agreement entered into force in 1995 and therefore was determined to be the relevant body of law applicable to the dispute.[104]

183. In this case, the Tribunal applied the law determined by the residual rule in Article 42(1). In doing so, the Tribunal found that the Europe Agreement was applicable,[105] cited it[106] and applied it to the essential questions before it.

184. The Committee considers that this case is different from the cases referred to by Romania: *M.C.I. v. Ecuador*, where the Committee stated that an annullable error would occur "where the Tribunal admitted a legal principle and then willfully decided to disregard it"[107]; and *Enron v. Argentina*, where the Committee stated that the failure to address a number of essential questions under customary international law which had been identified as the applicable legal standard amounted to a failure to apply the applicable law.[108] In the present case, the Tribunal identified the applicable law and addressed issues essential to the question of whether the relevant legal requirements were met.[109]

185. Specifically, Romania has argued that the Tribunal failed to apply the Europe Agreement (i) to the question of the lawfulness of EGO 24 and (ii) to Romania's obligation to repeal EGO 24.

186. In this case, Romania contests the Tribunal's finding that the "whole body" of EU law, including EU State aid law, was not directly applicable by virtue of the Europe Agreement.[110]

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[103] *Id*., para. 318.
[104] *Id*., para. 319.
[105] *Ibid*.
[106] *Id*., paras. 692-696.
[107] *M.C.I. v. Ecuador*, para. 51, quoted in Appl. Mem., para. 42.
[108] *Enron v. Argentina*, para. 368, referred to in Transcript, Day 1, pp. 38-39.
[109] Appl. Opening Presentation, slide 16.
[110] Appl. Mem., paras. 21, 27, 30.

In the Committee's view, this criticism concerns the correctness of the application of the law rather than its application. It is not the Committee's role to review whether the Tribunal correctly applied the Europe Agreement, but simply to verify that the Tribunal applied it.[111]

187. Relevant to this case is Article 64 of the Europe Agreement, quoted in paragraphs 180 and 693 of the Award, which provides that:

> 1. The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and Romania: [...] (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.
>
> 2. Any practices contrary to this Article shall be assessed *on the basis of criteria arising from the application* of the rules of Articles 85, 86, and 92 of the Treaty establishing the European Economic Community.
>
> 3. The Association Council shall, within three years of the entry into force of the Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.
>
> 4. For the purposes of applying the provisions of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Romania shall be assessed taking into account the fact that Romania shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Romania, decide whether that period should be extended by further periods of five years. [...]. (Emphasis added)

188. The Tribunal interpreted this provision and applied the Europe Agreement to the questions posed by Romania, as is evidenced from the following reasoning:

(i) First, the Tribunal identified the specific international obligations under the Europe Agreement in paragraphs 179-185 of the Award, including Romania's obligation to

[111] *M.C.I. v. Ecuador*, para. 51, quoted in Cl. C-Mem., para. 171.

harmonize its existing and future domestic legislation with that of the Community in the area of competition law and State aid.[112]

(ii) The Tribunal also found that Romania's obligations under the Europe Agreement did not "properly subject [Romania] to EU law."[113]

(iii) It went on to determine that "the general context of EU accession must be taken into account when interpreting the BIT," finding that: "the Tribunal cannot conclude in the abstract (as Romania seems to suggest) that the revocation of the incentives is fair and equitable solely because it was undertaken pursuant to Romania's obligation under the Europe Agreement to harmonize its law with EU law. As previously stated, whether the state's conduct is unfair and inequitable must be assessed in view of all the facts and surrounding circumstances."[114] (Emphasis added)

189. Thus, from a reading of the Award, this Committee concludes that the Tribunal did apply the law it had determined as the applicable law – the Europe Agreement – to the questions posed by Romania.

190. In applying the Europe Agreement, the Tribunal noted that the Europe Agreement contained certain obligations under EU law, but did not consider as applicable the whole body of EU competition law, which it noted did not form part of the Europe Agreement and, therefore, gave an explanation for not having considered these regulations.

191. The Committee notes that the Award clearly distinguished between the Europe Agreement and the "whole of EU law (i.e. including EU State aid law)."[115] The Tribunal considered that the Europe Agreement called for a gradual alignment with EU law, which in its reasoning became *per se* applicable as of the date of Romania's EU accession on January 1, 2007.

[112] The caveat was that Romania was to be considered an area falling under the exception of Article 92(3)(a) of the EC Treaty for the first five years following signature, which could be extended for further periods of five years. *See* Award, paras. 180-183.
[113] *Id.*, para. 319.
[114] *Id.*, paras. 513-514.
[115] Cl. Opening Presentation, slide 181.

Thus, the Tribunal has addressed in the Award why EU law was not considered applicable by virtue of the Europe Agreement.

192. The Committee is not convinced by the Applicant's arguments that:

(i) The Tribunal concluded in paragraph 692 of the Award that the Europe Agreement and EU State aid law were applicable to assess the EGO 24 regime and that the Europe Agreement imposed international obligations that were binding on Romania from its entry into force.

(ii) In accordance with Article 64(3) of the Europe Agreement, in 2001, the Romanian Association Council enacted Implementing Rules in respect of subsections (1) and (2) of Article 64, which form part of EU law as well as Romanian law,[116] or that these rules, the whole body of European competition law, including the rules on prohibition of State aid, were applicable to Romania.

(iii) The Europe Agreement specified that the State aid practices were to be assessed "under Article 92" of the TFEU[117] (which became Article 87 of the EC Treaty).

(iv) The repeal of EGO 24 was mandated by the Europe Agreement and EU State aid law, and that the Tribunal's conclusion that the decision to repeal EGO 24 led to a violation of the FET standard under the BIT meant a conflict of international treaties. On the one hand, Romania must repeal EGO 24 under the Europe Agreement and, on the other hand, the regime could be upheld under the BIT.

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[116] Appl. Mem., para. 27.

[117] Article 92 reads:

> 1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.
> 2. The following shall be compatible with the common market:
> […]
> 3. The following may be considered to be compatible with the common market:
> (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; […]

193. In the Committee's view, *Romania's argument that the Tribunal failed to apply the applicable law to the question of the lawfulness of EGO 24* fails because such question was not before the Tribunal. The Tribunal did not decide the legality of EGO 24 because the question had not been presented to it. Romania had presented the issue as "whether Romania acted reasonably in amending EGO 24 in August 2004."[118] The Tribunal addressed the issue before it and found that both Romania and the Claimants could reasonably have thought that EGO 24 was lawful.[119] Moreover, the Committee is of the view that the question of the lawfulness of EGO 24 was not necessary to the Tribunal's finding of a breach of the FET standard because the Tribunal found that Romania had created legitimate expectations through its actions by the fact that it had, e.g., reinstated EGO 24 in EGO 75.[120]

194. Romania's argument that the Tribunal failed to apply the applicable law to Romania's obligation to repeal EGO 24 must also fail because the Tribunal addressed the issue. Among other statements, the Tribunal indicated that "it is not evident to the Tribunal that the EU was requesting the revocation of the EGO 24 incentives, and the record shows that it was not evident to Romania either."[121] Also, the question was irrelevant to the Tribunal's decision. The Tribunal found in paragraph 328 of the Award "that the Parties appear to agree that EU law forms part of the 'factual matrix' of the case," because both Parties had pleaded that it was to be taken into consideration as a factual circumstance.

195. In addition, in the Committee's view, the Tribunal applied the VCLT and concluded that there was no conflict of treaties between the Europe Agreement and the BIT. The Tribunal found that the BIT did not refer to EU accession and that it could therefore not be assumed that the "EU sought to amend, modify or otherwise detract from the application of the BIT."[122] The Tribunal further applied the Vienna Convention to the interpretation of the

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[118] Cl. C-Mem., para. 175, quoting Award, para. 731; Transcript, Day 1, p. 161, lines 9-25, quoting a letter from Romania's Counsel dated November 16, 2009: "First, Romania wishes to stress that, whatever view one may take as to the ultimate conformity of EGO 24/1998 with European law, the relevant question in this arbitration is whether in 1998 Romania reasonably took the view that EGO 24/1998 was compliant with Romania's obligations under the Europe Agreement."
[119] Award, paras. 703 and 706.
[120] Transcript, Day 1, pp. 165-166, quoting Award paras. 688, 689, 706, 872.
[121] Award, para. 768.
[122] *Id*., para. 321.

BIT,[123] and assumed that Sweden and Romania entered into the BIT, as well as into the Europe Agreement, in full awareness of their legal obligations.[124]

(ii) Failure to State Reasons

196. Second, the Award is not annullable under Article 52(1)(e) of the ICSID Convention, because reasons have been stated, addressing the questions submitted to the Tribunal, irrespective of whether they are incorrect, unconvincing or non-exhaustive; therefore, the Award cannot be annulled on this ground.[125]

197. According to the Applicant, as explained in *Vivendi I*, the applicable test: "[E]ntails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision."[126] In the Committee's opinion, the Award complies with both conditions.

198. In the present case, as in *MINE*, the Award enables one to follow how the Tribunal proceeded from Point A to Point B and to its conclusions. Under Article 52(1)(e) of the ICSID Convention, a committee is only authorized to verify whether the sequence of arguments within an award evidences a logical chain of reasoning that is apt to lead to the conclusion that a tribunal reached.

199. Contrary to the Applicant's assertions,[127] the Committee considers that in this case, the Tribunal did not fail to apply the Europe Agreement, nor did it fail to provide reasons for not applying the international obligations that it had identified in the Europe Agreement to the facts of the case.

200. Paragraph 328 of the Award reads:

> The Tribunal notes in this regard that the Parties appear to agree that EU law forms part of the "factual matrix" of the case. In particular, the Parties agree that

[123] *Id*., paras. 322-325.
[124] *Id*., para. 326.
[125] *Impregilo v. Argentina*, para. 181.
[126] *Vivendi v. Argentina*, para. 65, quoted in Appl. Mem., para. 51.
[127] Appl. Mem., para. 61.

> the question of EU law may be relevant to determining whether Romania acted fairly and equitably with respect to the Claimants' investments in accordance with Article 2(3) of the BIT. The Tribunal concurs. The overall context of EU accession in general and the pertinent provisions of EU law in particular may be relevant to the determination of whether, *inter alia*, Romania's actions were reasonable in light of all the circumstances, or whether the Claimants' expectations were legitimate.[128]

201. Thus, the Committee does not share the view of the Applicant that the Award makes it impossible for the reader to understand how the Tribunal reached its conclusions and thus suffers from "a total failure to state reasons for a particular point, which is material for the solution."[129] According to the Applicant, it is not possible to follow the reasoning of the Tribunal from Point A, i.e. that the Europe Agreement is applicable, to Point B, i.e. that EU law (including EU State aid law applicable under the Europe Agreement) is only part of the factual matrix and not applicable as law. In the Committee's opinion, the Tribunal gave sufficient reasons to explain why EU law was not directly applicable by virtue of the Europe Agreement.

202. Moreover, the Committee does not share the view that the Tribunal failed to state reasons for its findings in paragraph 319 of the Award that there was no conflict of treaties. As stated above, it dealt with this issue in paragraphs 318-326 of the Award.

203. For the reasons given above, the Committee finds that the Tribunal did apply the applicable law, and that the Tribunal gave sufficient reasons for its decision.

2. FAILURE TO DECIDE ON THE ISSUE OF ENFORCEABILITY OF THE AWARD

A. Applicant's Position

204. The Applicant submits that the Tribunal failed to decide whether Romania was prohibited from paying compensation for repeal of State aid granted under EGO 24 because it would violate the treaties on which the European Union was founded ("EU Treaties"). According to the Applicant, both Romania and the EC contended that such compensation, whether voluntary or through enforcement of an award, would be prohibited and would itself

[128] Award, para. 319.
[129] *Id*., para. 62, quoting *Soufraki v. UAE*, para. 126.

constitute State aid. In addition, Romania had argued that the question of legality would affect the construction and application of the FET provision in the BIT. If the EGO 24 regime was illegal State aid, the Claimants could not have a legitimate expectation to benefit from it.[130] The Claimants, for their part, had argued that the enforceability of the Award was irrelevant and that an award of damages would not constitute illegal State aid.[131]

205. For the Applicant, the Tribunal deliberately declined to decide this issue and, as a result of the compensation awarded to the Claimants, created a conflict of Romania's obligations under the ICSID Convention, on the one hand, and Romania's international obligations under the TFEU, on the other hand. The question was "a crucial or decisive argument," and deciding it might, therefore, have led to a materially different outcome.[132] Had the enforceability issue been resolved in favor of Romania, would the Tribunal have construed the FET provision in the BIT as requiring Romania to violate EU State aid law? Would the Tribunal have been prepared to award compensation in the form of illegal State aid to the Claimants?[133] In the Applicant's submission, the Tribunal would not. However, even if this were not true, the determinative issue is that the outcome of the Award could have been different.

206. Instead of dealing with the question, the Tribunal stated:

> The Tribunal finds that it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties' and the Commission's arguments on enforceability of the Award.[134]

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[130] Transcript, Day 1, p. 61, lines 12-22.
[131] Claimants' Post-hearing Brief in the Original Proceeding, paras. 270-278 (Cl. Exh. CA-33).
[132] Appl. Mem., para. 71, quoting Ch. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention: A Commentary (2nd ed, 2009), Article 52, para. 426 (Appl. Exh. RAL-57).
[133] Transcript, Day 1, p. 66, lines 8-14.
[134] Appl. Mem., para. 72, quoting Award, para. 340.

207. The Tribunal went on to suggest that Articles 53 and 54 of the ICSID Convention on the recognition and enforcement of ICSID awards "apply in any event to the Award."[135] Thus, the Parties put the issue before the Tribunal, and the Tribunal acknowledged the issue but failed to decide it. This is evident from the text of paragraph 340 of the Award. Despite the Claimants' submission that the Tribunal addressed the issue and found that it was irrelevant, there was no determination on that point by the Tribunal, and so it obviously cannot have found that it was irrelevant.[136]

208. The Applicant thus contends that the Tribunal's failure to decide the issue provides two bases for annulment: (i) manifest excess of powers; and (ii) failure to state reasons.

(i) Manifest Excess of Powers

209. Where a tribunal fails to exercise its jurisdiction, that failure can require annulment under Article 52(1)(b). This includes circumstances where a tribunal violates its duty to deal with one or more questions presented to it by the parties. The Applicant lists three authorities for this proposition: *Amco I v. Indonesia*, *Helnan v. Egypt* and *Duke Energy v. Peru*.[137] While *Amco I* relied on Article 48(3) of the Convention as a predicate for its analysis, recent committees, such as *Helnan* and *Duke Energy*, have taken a broader view and relied on the tribunal's duty to "fulfil the mandate entrusted to it by virtue of the parties' agreement."[138]

210. In this case, the Tribunal expressly acknowledged the question put to it and expressly declined to answer it, thus failing to fulfil the mandate entrusted to the Tribunal and resulting in an excess of powers. The failure is "self-evident"[139] and "capable of making a difference to the result,"[140] thus amounting to a "manifest" excess of powers.

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[135] *Id.*, quoting Award, para. 341.
[136] Transcript, Day 1, p. 68, lines 9-13.
[137] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, May 16, 1986 ("*Amco I v. Indonesia*") (Appl. Exh. RAL-51); *Helnan v. Egypt*; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Annulment, March 1, 2011 ("*Duke Energy v. Peru*") (Cl. Exh. CAL-39).
[138] *Helnan v. Egypt*, para. 41. *See also Duke Energy v. Peru*, para. 97.
[139] *Wena v. Egypt*, para. 25.
[140] *Vivendi v. Argentina*, para. 86.

(ii) Failure to State Reasons

211. The Tribunal also failed to state the reasons for its decision not to decide the enforceability issue. It declined to rule on the Claimants' submission that the issue was irrelevant to the merits. Its remark that it did not wish to embark on predictions as to the future conduct of other persons or authorities is not a reasoning that addresses the Parties' arguments.[141] According to the Applicant:

> [A] mere reproduction by the Tribunal of Articles 53 and 54 – coupled with the self-evident statement that those provisions "apply" – was not a reason for failing to decide whether the application of those provisions at the same time as EU law on State aid should have affected the Tribunal's adjudication of Romania's obligations under the [BIT], and/or any remedy to be granted.[142]

212. As a result, the Tribunal's failure to state reasons on this point also requires annulment under Article 52(1)(e) of the ICSID Convention.

B. Claimants' Position

213. The Claimants submit that, although the Tribunal did not make an affirmative decision on the issue of enforceability of the Award, it is clear that it dealt with it.[143] The Tribunal considered the Parties' arguments as well as the EC's position, and ultimately held that it was not relevant to take a substantive decision on the issue for the purposes of this case. The Claimants had argued just that as their primary position: the irrelevance of the enforceability issue to the merits of the case.

214. According to the Claimants, Romania misrepresents that the question before the Tribunal was whether the Tribunal should predict possible conduct of various persons and authorities after the Award was rendered. They submit that it is evident from paragraph 330 of the Award that the question before the Tribunal was to determine whether it was useful for the Tribunal to decide if the Award would be unenforceable in the EU.[144] Paragraph 330 of the Award indicates that the Tribunal clearly envisaged that it was to determine whether the issue

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[141] Appl. Rep., para. 110.
[142] *Id.*, para. 111.
[143] Cl. Rej., para. 224.
[144] *Id*., para. 233.

in question was relevant to the issues before it. It stated that: "[p]rior to determining whether it is useful for the Tribunal to decide this question […] the Tribunal will set out the Parties' positions." Having set out those positions, the Tribunal came to the conclusion that:

> [I]t is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties' and the Commission's arguments on enforceability of the Award.[145]

215. Reading paragraph 330 together with paragraph 340, it is thus clear that the Tribunal dealt with the issue and found that it was not useful to determine whether the Award would be unenforceable. This is reinforced by paragraph 341 of the Award, in which the Tribunal noted Articles 53 and 54 of the ICSID Convention, observing that these provisions "apply in any event to the Award." The statement re-emphasizes the Tribunal's determination in paragraph 319 of the Award that EU law was not directly applicable, and that the ICSID Convention was controlling with respect to the enforceability of the Award.[146]

216. Even if the Tribunal had not dealt with Romania's unenforceability argument, it would not be a violation of Article 48(3) of the ICSID Convention. Article 48(3) does not require a tribunal to comment on all arguments, in particular arguments that the tribunal has already found to be irrelevant to the merits. As stated in *Rumeli v. Kazakhstan*:

> If the arguments of the parties have been correctly summarized and all the claims have been addressed, there is no need explicitly to address each and every one of the arguments raised in support of the particular claims, and it is in the discretion of the tribunal not to do so.[147]

217. Indeed, *ad hoc* committees have found that the "question[s]" that the tribunal must deal with refer to the parties' heads of claims.[148] In particular, the *Alapli v. Turkey* Committee stated that:

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[145] Transcript, Day 1, pp. 179-180, quoting Award, para. 340.
[146] *Id*., p. 181, lines 1-13.
[147] *Id*., p. 185, lines 19-25, quoting *Rumeli v. Kazakhstan*, para. 84.
[148] *Daimler v. Argentina*; *Alapli v. Turkey*.

> It is the *ad hoc* Committee's view that Article 48(3) of the ICSID Convention refers to the tribunal's obligation to deal with, either directly or indirectly, the parties' heads of claim within its award.[149]

218. An omission by a tribunal to decide a question can thus only amount to an annullable ground in limited circumstances where the defect meets the standard of a failure to state reasons under Article 52(1)(e) of the Convention. It cannot amount to a manifest excess of powers under Article 52(1)(b).

(i) Manifest Excess of Powers

219. The Claimants argue that, even if the Tribunal had violated Article 48(3) of the Convention, this would not have constituted an excess of power, let alone a *manifest* excess of power. Article 48(3) is not intended to be a ground for annulment. If a party is discontent that the tribunal has not addressed a question, the proper remedy is to request a supplementary decision or interpretation of the award.[150]

220. There is a distinction between an excess arising from the rejection of a jurisdiction that exists and a violation of Article 48(3). The Claimants agree that rejecting an existing jurisdiction may amount to an excess of powers, but contend that the authorities listed by the Applicant do not support the proposition that there is such non-exercise of jurisdiction when the tribunal fails to deal with a question put to it by the parties.[151] For example, in *Helnan v. Egypt*, the Committee found that:

> The analysis of Professor W. Michael Reisman […] to the effect that the requirements of Article 48(3) of the Convention are not to be carried into Article 52(1)(e) is accepted by this Committee as correct.[152]

221. Even if the Tribunal had failed to deal with a question and this somehow constituted an excess of powers, such excess would not be manifest. A manifest excess must be obvious and discernable without elaborate analysis of the award and must be material to the outcome of the case. The hypothetical excess in this case does not meet these criteria. It is plain from

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[149] Transcript, Day 1, pp. 183-184, quoting *Alapli v. Turkey*, para. 120.
[150] Cl. Rej., para. 241.
[151] *Id*., para. 245.
[152] *Id*., para. 246, quoting *Helnan v. Egypt*, para. 36, fn. 34.

the face of the Award that the Tribunal dealt with the issue of unenforceability. Moreover, such finding would have in any event not affected the outcome of the case because the repeal of EGO 24 incentives as such was not the basis for the Tribunal's finding that Romania breached the BIT.

(ii) Failure to State Reasons

222. As noted above, the Claimants agree that a violation of Article 48(3) of the ICSID Convention could amount to a failure to state reasons under Article 52(1)(e) of the Convention if the criteria for that ground are met. In the Claimants' submission, the requirement to state reasons is met as soon as there are reasons that enable the reader to understand what motivated the tribunal. The findings by the Committee in *Vivendi I v. Argentina* are instructive in this case. Among other things, the Committee ruled that an annullable error requires that the issue which has not been addressed as part of the tribunal's reasons must itself be necessary to the tribunal's decision.[153]

223. In this case, the Tribunal has stated reasons which can be followed and which enable the reader to understand what motivated the Tribunal. It simply decided that the enforcement issue was not necessary to its decision. The Tribunal noted that matters of EU law would only be relevant at the enforcement stage and stated that it did not wish to speculate what would happen in the post-award phase. Therefore, even if the Tribunal had failed to deal with a question and to provide reasons that met the applicable minimum standard, the alleged error has not affected the outcome of the Award.

224. The Claimants finally note that Romania may disagree with the Tribunal's conclusions and reasons, but such dissatisfaction cannot amount to a ground for annulment. *Ad hoc* committees cannot inquire into the quality or persuasiveness of reasons, meaning that the correctness of the reasons is beside the point in terms of Article 52(1)(e).

[153] Transcript, Day 1, p. 192, lines 15-21, referencing *Vivendi v. Argentina*, paras. 64-65.

C. Committee's Analysis

225. The Applicant has argued that the Tribunal's failure to decide the issue of unenforceability provides two bases for annulment: (i) manifest excess of powers; and (ii) failure to state reasons. The Committee addresses each of these grounds below and explains why they fail.

(i) Manifest Excess of Powers

226. It is plain from the face of the Award that the Tribunal dealt with the issue of unenforceability. Moreover, such finding would have in any event not affected the outcome of the case because the repeal of EGO 24 incentives as such was not the basis for the Tribunal's finding that Romania breached the BIT.

227. The Applicant submits that the Tribunal failed to decide whether Romania was prohibited from paying compensation for repeal of State aid granted under EGO 24 because it would violate the EU treaties. According to the Applicant, both Romania and the EC contended that such compensation, whether voluntary or through enforcement of an award, would be prohibited and would itself constitute State aid. In addition, Romania had argued that the question of legality would affect the construction and application of the FET provision in the BIT. If the EGO 24 regime was illegal State aid, the Claimants could not have legitimate expectations to benefit from it.[154]

228. The Claimants, for their part, argued that the enforceability of the Award was irrelevant and that an award of damages would not constitute illegal State aid.[155] The Claimants submit that, although the Tribunal did not make an affirmative decision on the issue of enforceability of the Award, it is clear that it dealt with it.[156] The Claimants state that the issue that the Tribunal determined is expressly set out in paragraph 330 of the Award.[157]

229. This Committee notes that the Tribunal dealt with the question of enforceability of the Award, as is evident from the following content:

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[154] Transcript, Day 1, p. 61, lines 12-22.
[155] Claimants' Post-hearing Brief in the Original Proceeding, paras. 270-278.
[156] Cl. Rej., para. 224.
[157] *Id*., para. 233.

(i) Paragraph 319 of the Award states that EU law was not directly applicable, and that the ICSID Convention was controlling with respect to the enforceability of the Award.

(ii) Paragraph 330 of the Award indicates that the Tribunal clearly envisaged that it was to determine whether the issue in question was relevant to the issues before it. It stated that: "[p]rior to determining whether it is useful for the Tribunal to decide this question […] the Tribunal will set out the Parties' positions."

(iii) In paragraphs 331-339 of the Award, the Tribunal sets forth the position of the Parties and of the EC. It states that the Respondent contends that an award of damages would constitute impermissible State aid. It refers to the Claimants' position that the issues regarding enforcement of an award are irrelevant to the decision on the substance of the claim. Also, it indicates that the Claimants deny that considerations relating to the enforcement of the Award should affect the interpretation of the BIT or the Tribunal's decision as to whether Romania has breached certain provisions of the BIT.

(iv) In paragraph 340 of the Award, the Tribunal comes to the conclusion that:

> [I]t is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. <u>It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties' and the Commission's arguments on enforceability of the Award</u>. (Emphasis added)

(v) In paragraph 341 of the Award, the Tribunal notes Articles 53 and 54 of the ICSID Convention, observing that these provisions "apply in any event to the Award."

230. In the Committee's view, from the reading of the above-referenced paragraphs and from an integral reading of the Award, it is clear that the Tribunal dealt with the issue posed by Romania. The Tribunal gave reasons for its conclusion that it was not useful to determine whether the Award would be unenforceable: it considered that this was not an issue before the Tribunal because it was not its duty to address the potential non-enforceability of the Award after it had been rendered.

231. The Applicant's arguments that the question was "a crucial or decisive argument," and that, had the Tribunal decided it, it might have led to a materially different outcome in the Award, do not convince this Committee.[158] This Committee is not vested with powers to speculate on the merits, which would be required to address some of the questions posed by Romania:

> [L]et me ask you to assume that the Tribunal had addressed the enforceability issue and had resolved it in Romania´s favour, deciding that an award of compensation based on the unpaid subsidies would constitute incompatible state aid. In that event, would the Tribunal have construed the FET provision in the investment treaty with another European Union State as requiring Romania to violate its obligations under EU state aid law? Would they have done that? Would the Tribunal have been prepared to award the Claimants compensation in the form of illegal State aid?[159]

232. This speculative reasoning and its impact on the merits of the case is outside the scope of the annulment proceeding.

(ii) Failure to State Reasons

233. The findings by the Committee in *Vivendi I v. Argentina* are in this case instructive. Among other things, the Committee ruled that an annullable error requires that the issue which has not been addressed as part of the tribunal's reasons must itself be necessary to the tribunal's decision.[160]

234. In this Committee's view, in the case-at-hand, the Tribunal has stated reasons which can be followed and which enable the reader to understand what motivated the Tribunal. The Tribunal simply decided that the enforcement issue was not necessary to the Tribunal's decision and that matters of EU law would only be relevant at the post-award phase.

235. In conclusion, this Committee considers that the Tribunal did not fail to exercise its jurisdiction and addressed the question put to it by determining it was not relevant to the merits of the case.

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[158] Appl. Mem., para. 71, quoting Ch. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention: A Commentary (2nd ed, 2009), Article 52, para. 426 (Appl. Exh. RAL-57).
[159] Transcript, Day 1, p. 66, lines 8-14.
[160] *Id*., p. 192, lines 15-21, referencing *Vivendi v. Argentina*, paras. 64-65.

3. FAILURE TO REQUIRE EACH CLAIMANT TO PROVE THAT IT SUFFERED HARM AND TO AWARD COMPENSATION TO EACH CLAIMANT ONLY FOR THE HARM IT PROVED

A. Applicant's Position

236. The Applicant contends that the Award must be annulled because the Tribunal "failed to require any of the five Claimants, or the Claimants collectively, to quantify and prove the amount of damages that it or they had suffered; and instead issued a 'collective award' in favor of all five Claimants for harm incurred by the EFDG as a whole."[161] The EFDG was a group of thirteen companies, only three of which were the Corporate Claimants and five of which were non-Party companies which had allegedly also suffered losses in this case ("Non-Party Companies").

237. The Tribunal rejected the Claimants' request to award all compensation to the Individual Claimants because the Corporate Claimants had sought the same relief and the Tribunal had to, therefore, decide the claims raised by all five Claimants.[162] Moreover, the Tribunal noted that awarding compensation to the Individual Claimants would only deprive the Corporate Claimants of the amounts owed to them in favor of their shareholders, and preclude them from paying their debts.[163] The Tribunal then concluded that it likewise could not award the entirety of the compensation to the Corporate Claimants because a portion of the damages were owed to the Non-Party Companies within the EFDG, and the Corporate Claimants were not entitled to such damages.[164]

238. However, having held that the Individual Claimants could not recover compensation for the Corporate Claimants' losses and that the Corporate Claimants could not recover compensation for the Non-Party Companies' losses, the Tribunal issued "an Award that has both of these consequences."[165] As a result, according to the Applicant, the Award:

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[161] Appl. Opening Presentation, p. 7.
[162] Award, para. 1236.
[163] *Id*., para. 1237.
[164] *Id*., paras. 1135 and 1321.
[165] Appl. Mem., para. 93.

(i) allows any Claimant to recover the entire amount of the compensation that Romania was ordered to pay, and allows the Claimants to allocate damages among themselves however they agree;

(ii) allows any Claimant, whether Corporate or Individual, to collect compensation arising from harm suffered by the Non-Party Companies despite the absence of evidence showing how such harm to a third party resulted in damage to a Claimant; and

(iii) allows the Claimants to organize distribution of their collective entitlement to the compensation payable under the Award in a manner that allows the Corporate Claimants to avoid paying their debts, including the significant taxation debts that the Tribunal acknowledged.

239. The Claimants' enforcement proceedings in respect of the Award show that these consequences pose real concerns, as, among other things, Mr. Viorel Micula seeks to enforce the total amount of the Award in the United States.[166]

240. As a result of the Tribunal's holdings on the proof and allocation of damages, the Award must be annulled due to a: (i) serious departure from a fundamental rule of procedure; and (ii) failure to state the reasons on which the Award was based.[167]

(i) Serious Departure from a Fundamental Rule of Procedure

241. According to the Applicant, rules on evidence and burden of proof are fundamental rules of procedure, and a serious departure from such rules may warrant an annulment under Article 52(1)(d) of the Convention. This has been confirmed by numerous annulment committees – *Impregilo S.p.A. v. Argentina*, *Azurix v. Argentina*, *Klöckner v. Cameroon II*, *Caratube v. Kazakhstan*, *Pey Casado v. Chile*, *Fraport v. Philippines*, and *MINE v. Guinea*[168] – as well as by the International Court of Justice.

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[166] *Id*., para. 95.
[167] The Application also raised the ground of manifest excess of powers in respect of this alleged flaw in the Award; however, that ground was not pleaded in the Applicant's subsequent submissions.
[168] Appl. Mem., para. 98, citing *Impregilo v. Argentina*, para. 165; Transcript, Day 2, p. 53, lines 1-14, referencing *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 17, 1990 ("*Klöckner v. Cameroon II*"), para. 6.8

242. A part of these rules is the principle "that the burden of proving a fact necessary to support an allegation lies with the party making that allegation."[169] The Applicant contends that this also applies to proving damages. A party is not required to show with certainty the damage it has suffered, but the assessment "cannot be based on conjecture or speculation."[170] An award of damages where a party has clearly not met the burden of proof to show damages, in effect reversing the burden of proof, thus constitutes a serious departure from this fundamental evidentiary rule.

243. In this case, although it was clear from paragraph 459 of the Award that the burden of proof was on the Claimants, the Tribunal did not require any Claimant to prove any loss suffered by that Claimant.[171] The Tribunal stated that:

> Thus, to the extent that the Individual Claimants can prove their ownership of the [Non-Party Companies] and can prove that they have been affected in this regard by the Respondent's breaches of the BIT, the Tribunal finds that claims for losses suffered by the Individual Claimants through those other companies are within the scope of permissible damages claims.[172]

244. Although the Applicant agrees with this statement, it stresses that there are two cumulative conditions that must be satisfied: (i) the Claimants must prove that the Individual Claimants owned the Non-Party Companies; and (ii) the Individual Claimants must prove that *they*

(Cl. Exh. CAL-78) ("a reversal of the burden of proof could well lead to a violation of a fundamental rule of procedure") and citing *Caratube v. Kazakhstan*, para. 97 ("a breach of the general principles on burden of proof can also lead to an infringement of Article 52(1)(d) of the Convention"). The Applicant also references *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, December 18, 2012, para. 73 (Cl. Exh. CAL-76) ("Fundamental rules of procedure are procedural rules that are essential to the integrity of the arbitral process and must be observed by all ICSID Tribunals. The parties agree that such rules include the right to be heard, the fair and equitable treatment of the parties, proper allocation of the burden of proof and absence of bias"); *Fraport v. Philippines*, paras. 185 and 187 ("The Commentary further confirms that 'the right to be heard, including due opportunity to present proofs and arguments' is one such fundamental rule of procedure. […] This context to the formulation in Article 52(1)(d) demonstrates that a 'fundamental rule of procedure' is intended to denote procedural rules which may properly be said to constitute 'general principles of law,' insofar as such rules concern international arbitral procedure"); *MINE v. Guinea*, para. 5.05 ("A first comment on this provision concerns the term 'serious.' In order to constitute a ground for annulment the departure from a 'fundamental rule of procedure' must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.").

[169] Appl. Mem., paras. 99-100.

[170] *Id*., para. 99, citing *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V (064/2008)), Final Award, June 8, 2010, para. 39 (Appl. Exh. RAL-68).

[171] Appl. Rep., para. 128.

[172] Award, para. 935.

suffered losses as a result of breaches of the BIT.[173] The Applicant argues that neither of these conditions was fulfilled. While the non-fulfillment of the first ground does not amount to an annullable ground, the failure to impose a burden of proof concerning the damages due to the Claimants does.

245. In this respect, the Tribunal concluded that "[t]he Individual Claimants can claim for damages that they have suffered by virtue of the harm to [the Non-Party Companies] as well as the harm to the Corporate Claimants."[174] According to the Applicant, the crucial words are "that they have suffered."[175] However, on that question, whether each of the Claimants had suffered harm, the Tribunal imposed no burden of proof at all.[176] It stated that:

> [N]either the Claimants nor their experts have provided a figure for the damages suffered by each Claimant, or stated in what proportion these damages should be distributed. Nor does the record contain clear elements that would allow the Tribunal to carry out such an allocation. There is, therefore, no evidentiary basis for allocating the damages.[177]

246. Nonetheless, the Tribunal awarded the collective compensation considering that 99.96% of the entire EFDG (including the Corporate Claimants) was completely owned by the Individual Claimants. According to the Applicant, such assertion did not abrogate the need for the Individual Claimants to prove two things: first, that the Non-Party Companies actually suffered harm, and what the amount of that harm was; and second, that harm to the Non-Party Companies and Corporate Claimants caused loss to the Individual Claimants as shareholders, through either loss of dividends or loss in value of the shares.[178]

247. Debts of the Non-Party Companies and the Corporate Claimants, as well as other factors, needed to be considered in order to establish the value of the shares of the Corporate Claimants, and, consequently, the harm suffered by their shareholders, the Individual Claimants. There was undisputed evidence of the Corporate Claimants' (and the Non-Party

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[173] Transcript, Day 1, pp. 91-92.
[174] Award, para. 943.
[175] Transcript, Day 1, p. 95.
[176] *Id.*, pp. 94-95.
[177] Award, para. 1243, cited in Appl. Rep., para. 138.
[178] Appl. Mem., para. 103; Transcript, Day 1, pp. 91-92.

Companies') substantial debts. Yet, given that the Individual Claimants own "virtually all" of the shareholding in the EFDG companies, the Tribunal awarded them (and collectively with them, the Corporate Claimants) substantial compensation arising from the harm suffered by the Non-Party Companies and the Corporate Claimants without being subjected to the burden of proving any of the relevant factors.[179]

248. The Applicant emphasizes that proof of ownership is not proof of harm.[180] On the question relevant to compensation, which is harm rather than ownership, no burden of proof was imposed; and there was no evidence that could satisfy it, because the Claimants did not even seek to show what, if any, harm had been suffered by them. Awarding the Claimants compensation for harm suffered by eight companies in the EFDG was not just a question of the merits of the dispute, nor was it just a question of methods of quantification of compensation. The shareholder losses were not the same as the companies' losses. A shareholder must prove that it has suffered harm and the quantum of such harm.

249. It was thus an error by the Tribunal that it did not impose on the Claimants any burden of proof as to whether they had suffered any harm. According to Romania, that is a departure from a fundamental rule of procedure and the departure is "serious" for the purposes of Article 52(1)(d), in the sense that it deprived Romania of the benefit or protection that the rule was intended to provide.

(ii) Failure to State Reasons

250. The Applicant argues that the Tribunal relied on contradictory reasons for its decision not to allocate compensation between the Claimants and, as a result, failed to state the reasons upon which the Award was based for the purposes of Article 52(1)(e) of the Convention.

251. According to Romania, the contradiction can be summarized as follows:

> The Tribunal refused to issue an award solely to the individual Claimants on the bases that such an award would allow them to circumvent the corporate Claimants' creditors; that's paragraph 1237. It refused to issue an award solely to the Corporate Claimants on the bases that the Corporate Claimants ought not

[179] Transcript, Day 1, p. 102, citing Award, para. 1245.
[180] Transcript, Day 1, pp. 96 and 102.

> to recover compensation associated with losses sustained by the Non-Party Companies – that's paragraph 1242 – and bearing in mind that it was not possible to determine how much had been suffered by any particular company or individual.
>
> But then – this is the contradiction – the Tribunal explained that it would issue a collective award which, at the discretion of the Claimants as to how to apportion their common entitlement, permits the Individual Claimants to recover ahead of the Corporate Claimants' creditors, and which permits the Corporate Claimants to recover for losses sustained by Non-Party Companies.[181]

252. Although Romania acknowledges that Article 52(1)(e) of the Convention does not permit an *ad hoc* committee to scrutinize the substance of a tribunal's reasoning, it argues that the purpose of the ground is to ensure that the tribunal has articulated reasons that are "reasonably sustainable and capable of providing a basis for the decision."[182] The reasons set out in an award must give its reader a basis for understanding the tribunal's conclusions.[183] Thus, if a tribunal's reasons are contradictory, they may justify annulment under Article 52(1)(e). Moreover, contradictory reasons will not enable a reader to understand the tribunal's motives. In strict logic, they are as useful as no reasons at all.[184]

253. For example, in *Amco I*,[185] the Award employed contradictory reasoning that led to its annulment. Indonesia's foreign investment law provided that only equity capital would qualify as a foreign investment. The Tribunal referred to this provision as "exclud[ing] loans from the foreign capital that the [investor] undertook to invest." Yet, when it came to calculating the amount of the investor's investment, the Tribunal referred to the investor's issued share capital as including a $1 million loan. In annulling the Award under Article 53(1)(e), the *ad hoc* Committee stated: "The *ad hoc* Committee acknowledges that the

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[181] Transcript, Day 1, p. 109, lines 3-21.
[182] *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 ("*Klöckner v. Cameroon I*"), para. 119 (Appl. Exh. RAL-50), cited in Appl. Mem., p. 21.
[183] *MINE v. Guinea*, para. 5.09.
[184] C. Schreuer with L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention: A Commentary (2nd ed. 2009), paras. 388-392 (2009) (Appl. Exh. RAL-54).
[185] *Amco I v. Indonesia*, paras. 43 and 110.

Tribunal was aware of the rule excluding loan funds from the foreign capital investment […] and therefore concludes that the Tribunal seems to have contradicted itself."[186]

254. Romania contends that the Tribunal made a similarly annullable error in this case. It expressly stated that the Corporate Claimants were not entitled to recover compensation arising from loss suffered by the Non-Party Companies. It also expressly stated that the Individual Claimants could not recover all of the losses sustained by the Corporate Claimants. Then, in the space of a couple of pages, the Tribunal declined to allocate compensation between the Claimants and issued a "collective" award enabling each Claimant to recover all of the collective losses of the EFDG, or to decide or compete among themselves with respect to allocation of the total amount of compensation.

255. In Romania's view, the Tribunal's reasoning is thus contradictory since: (a) the Tribunal's decision to award compensation collectively to all five Claimants has no discernible rationale and contradicts reasons that the Tribunal did give; and (b) if the Tribunal had required each Claimant to prove his or its own loss, then in the admitted absence of such proof, the Tribunal would not have ordered compensation to be paid to that Claimant.

256. Addressing the Claimants' defense that this ground is time barred, Romania states that the level of "detail" required by Rule 50(1) is far exceeded by Romania's Application, which sets out the Tribunal's contradictory reasons coupled with the applicable text of Article 52(1)(e). Section V of the Application, dealing with the Tribunal's failure to require each Claimant to prove the harm it suffered, sets out the reasons employed by the Tribunal that Romania alleges are contradictory. Specifically, Romania points out the contradiction between the Tribunal's twin conclusions that all the compensation could not be awarded to either the Individual or Corporate Claimants, and "nonetheless" that it would issue a "collective" award entitling any or all of the Individual or Corporate Claimants to recover the compensation.[187]

[186] *Id*., para. 97.
[187] *See* Application, para. 20; Appl. Rep., paras.142-152.

257. The phrase "in detail" in Rule 50(1)(c) has been interpreted by *ad hoc* committees to mean that there is sufficient detail to enable the grounds for annulment under Article 52(1) to be identified and understood.

B. Claimants' Position

258. The Claimants disagree with Romania's contention that the Tribunal found that it was unnecessary for any Claimant to prove that it had suffered any harm. According to them, it is clear in the Award that the Tribunal expressly "established that both the Corporate and Individual Claimants were harmed."[188]

259. The Tribunal established the burden and standard of proof in Section VII of the Award, stating: "Individual Claimants can claim for damages that they have suffered by virtue of the harm to those companies as well as the harm to the Corporate Claimants."[189] The Tribunal further found that the Claimants had proven two categories of damages – increased costs and lost profits – amounting to RON 376,433,229. It rejected Romania's contention that each Claimant must specify and prove its individual harm.

260. In any event, the Claimants purport that the alleged error cannot amount to a violation of a fundamental rule of procedure since there is no fundamental rule of procedure requiring each claimant to specify and prove its individual loss where several claimants appear jointly. In other words, there is no rule that claimants cannot be granted damages based on their combined loss.

261. The Claimants assert that Romania appears to be complaining that findings made by the Tribunal are at odds with *potential consequences* of the Award, not that different findings in the Award are irreconcilable.[190] The purported contradiction rests on a wholly unfounded assumption that the Individual Claimants would use the Award to "defraud the creditors" of the corporate entities.[191] Even if that had been possible and plausible, it is irrelevant when assessing whether or not the Award fails to include reasons. The Claimants also assert that

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[188] Award, para. 1245.
[189] *Id*., para. 943, quoted in the Claimants' Opening Presentation Handout entitled "The Collective Damages Issue," p. 2.
[190] Cl. C-Mem., para. 280.
[191] *Ibid.*

Romania is attempting to re-argue a substantive law issue, as rules on allocation of the burden of proof and assessment of evidence are substantive, not procedural, in nature. Therefore, both of the grounds for annulment raised by the Applicant must be rejected. In effect, Romania's grounds for annulment constitute an attempt at a disguised appeal to the Award.

(i) Serious Departure from a Fundamental Rule of Procedure

262. According to the Claimants, in order for Romania to succeed on the ground under Article 52(1)(d), it has to identify a fundamental rule of procedure and prove that there was a serious departure from such rule. Romania has failed on both of these requirements.

263. First, Romania has created and relies on an alleged fundamental rule of procedure that "the burden of proving a fact necessary to support an allegation lies with the party making that allegation," which Romania says "includes proof of loss."[192] ICSID Arbitration Rule 34(1) sets out that the Tribunal is the judge of the probative value of any evidence. As a result, the Claimants purport that "the Tribunal's assessment of evidence and its conclusions as to whether in a particular case the burden of proof has been met concern the merits and cannot constitute grounds for annulment."[193]

264. In any event, not every rule of procedure is fundamental in nature. Fundamental rules of procedure are principles of natural justice and involve the integrity and essential fairness of the process, or minimal standards of procedure as a matter of international law.[194] The Claimants point out that the text of ICSID Convention Article 52(1)(d) is taken without amendment from Article 35(c) of the ILC Model Rules on Arbitral Procedure, and that the official commentary thereto states that this annulment ground concerns errors that affect the fundamental characteristics of the arbitral process. The ILC enunciated the test for whether a procedural rule is fundamental as follows: "Does the departure constitute a deprivation of a fundamental right so as to cause the arbitration and the resulting award to lose its judicial

[192] *Id*., para. 312, quoting Appl. Mem., para. 99.
[193] *Ibid.*
[194] *Id*., paras. 299 and 302, referring to *CDC v. Seychelles*, para. 49, and *Wena v. Egypt*, para. 57.

character."[195] The commentary mentions as a fundamental rule of procedure "[t]he right to be heard, including due opportunity to present proof and arguments."[196]

265. The Claimants contend that the authorities submitted by Romania do not establish that there is a rule – let alone a fundamental rule – of procedure that joint claimants cannot be awarded damages on the basis of their collective losses. As a tribunal enjoys discretion on matters of evidence and the burden of proof, its assessment can only constitute a deviation from a fundamental rule of procedure if it violates the integrity of the procedure and the basic requirement of equal treatment relating to the right to be heard. In the present case, the Tribunal has not treated the Parties unequally nor reversed any burden of proof. The Parties agreed, and the Tribunal recognized, that the Claimants had the burden of proving their losses.

266. The Claimants further explain that Romania's argument concerning the rule it relies on:

> [r]ests on five words from *Impregilo* to which Romania attaches a connotation that is not supported by that case. Romania asserts that the *ad hoc* committee in *Impregilo v. Argentina* "*confirmed that rules as to* '*evidence and burden of proof*' *are fundamental rules of procedure*", where only the phrase "*evidence and burden of proof*" is cited from the case. Romania seeks to draw from this the conclusion that <u>all</u> rules "*as to*" evidence and burden of proof are fundamental rules of procedure. Romania then goes on to identify a rule relating to the burden of proof. However, the *ad hoc* committee in *Impregilo v. Argentina* did not state, or even imply, that all rules as to evidence and burden of proof are fundamental. [197] (Emphasis added by the Claimants)

267. The *Impregilo* Committee only listed procedural issues in relation to which other committees – *Amco I v. Indonesia*, *Klöckner v. Cameroon* and *Wena v. Egypt* – identified fundamental rules of procedure and did not define what is included in the phrase. The other cases also did not support that assertion.

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[195] *Id*., para. 300, quoting ILC, "Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat of the United Nations," pp.109-110 (Cl. Exh. CAL-77).
[196] *Id*., para. 110.
[197] *Id*., para. 321, quoting Appl. Mem., para 98, referring to *Impregilo v. Argentina*, para. 165.

268. According to the Claimants, *ad hoc* committees have only found a departure from a fundamental rule of procedure in exceptional circumstances when a party was not afforded the opportunity to present its case and do not delve into the nature of an erroneous reversal of a burden of proof.[198] While such reversal could, in theory, constitute a violation of a fundamental rule of procedure, it must be tied to a violation of the integrity of the procedure and the basic requirement of equal treatment and the right to be heard.[199]

269. According to the Claimants, even if there existed a fundamental rule of procedure of the kind alleged by the Applicant, it bears no relation to the error that Romania alleges the Tribunal has made. Romania argues that the Tribunal should not have been satisfied with the fact that the Claimants had actually proven the quantum of their losses, and should have required each Claimant to prove its *individual* loss.

270. If Romania's argument were correct, it would not fall under the supposedly fundamental rule relied on by Romania. The rule relied on by Romania is that a party making an allegation has the burden of proving that allegation. Romania's argument fails to take into account that the Claimants did not allege or claim compensation for individual losses in the arbitration. They did, however, allege – and prove – collective losses.[200]

271. In conclusion, neither the principle relied on by Romania, nor the principle that would need to exist to match the Tribunal's alleged deviation, constitutes a fundamental rule of procedure.

272. However, even if the Tribunal had departed from a fundamental rule of procedure, the departure would not have been "serious." For a departure to be "serious," the Applicant would need to show that it: (i) deprived the party of the benefit or protection which the rule was intended to provide; and (ii) caused the tribunal to reach a result substantially different from what it would have, had the rule been observed.[201] The Applicant has proven neither of these conditions. First, the benefit or protection that a party not be ordered to pay

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[198] *Id*., paras. 304-310.
[199] *Id*., para. 310; Transcript, Day 1, p. 213.
[200] Cl. C-Mem., para. 314.
[201] Cl. Rej., para. 301.

compensation unless the other party proves a loss is a substantive benefit rather than a procedural benefit. In this respect, the Tribunal noted that:

> Having established that both the Corporate and Individual Claimants were harmed, the Tribunal is not comfortable with declining to award damages to one group or the other simply because it lacks the information needed to allocate the damages among them.[202]

273. Second, the suggestions that the Tribunal would not have awarded any compensation to the Claimants had it assessed the burden of proof differently also goes to the merits. Moreover, the latter statement is incorrect. Even if each Claimant had been required to prove its individual loss, the Tribunal's findings show that the Individual Claimants would have each been awarded virtually 50% of the total damages.[203] In other words, this would hardly have led to a "substantially different" outcome.[204]

274. As a result, the Applicant has not established that the case-at-hand involved a "serious departure from a fundamental rule of procedure."

(ii) Failure to State Reasons

275. According to the Claimants, the Tribunal's reasons are not contradictory and this alleged ground for annulment has in any event been brought too late.

276. Romania did not assert in its Application that the Tribunal's reasons are contradictory; rather, it raised this ground for the first time in its Memorial. Therefore, the Applicant is barred from bringing this ground after the expiration of the 120-day time limit for annulment. The Application failed to "state in detail" the grounds on which it was based, as required by Arbitration Rule 50(1)(c). An applicant cannot merely rely on the legal grounds listed in Article 52(1) of the Convention, "it should also state which of the award's features exhibits flaws that constitute grounds for annulment."[205] As a result, the Committee can only

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[202] Award, para. 1245.
[203] Cl. Rej., para. 303; Cl. C-Mem., para. 332.
[204] Cl. Rej., para. 310.
[205] *Id.*, para. 338, quoting Ch. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention: A Commentary (2nd ed, 2009), p. 927, para. 87 (Cl. Exh. CAL-61).

consider those grounds that were raised within the 120-day time limit that were stated in detail in the Application.[206]

277. In any event, the Tribunal's reasons are not contradictory. Romania has not even asserted that there are contradictory reasons that cancel each other out.[207] Rather, the Applicant is asserting that some of the Tribunal's findings cannot be reconciled with what it believes that the Award is "enabling" or "entitles" the Claimants to do. Thus, Romania is setting *reasons* against *potential consequences*. According to the Claimants, there is no connection between the alleged contradictory reasons and what may happen to the Award at the enforcement stage, as those are two completely different matters.[208]

278. As to the first alleged contradiction relating to the Individual Claimants recovering losses suffered by the Corporate Claimants, the Tribunal explained that it denied the Claimants' request to award all damages to the Individual Claimants "for procedural reasons."[209] Since the Corporate Claimants had not discontinued their claims, the Tribunal found that it could not award damages to the Individual Claimants only. However, it did not hold that the Individual Claimants are not entitled to damages for losses suffered by the Corporate Claimants. On the contrary, the Tribunal held that the Individual Claimants are entitled to damages for losses suffered indirectly through their companies.[210] Paragraph 1237 of the Award explains that, had the Corporate Claimants raised no claims, or withdrawn them, there would have been no obstacle to awarding all of the damages to the Individual Claimants.[211]

279. As to the second alleged contradiction relating to the Corporate Claimants recovering losses suffered by Non-Party Companies, the Claimants note that they never requested that the Tribunal award the entirety of the damages to the Corporate Claimants. Therefore, the statement in the Award is *obiter dictum* and does not affect how the Tribunal reached its conclusions. In any event, the Tribunal was fully aware that the Corporate Claimants are not

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[206] Cl. Rej., para. 337; Transcript, Day 1, p. 219.
[207] Cl. Rej., para. 350.
[208] Transcript, Day 1, p. 219.
[209] Cl. Rej., para. 355, quoting Award, para. 1229.
[210] *Id*., para. 356, referring to Award, para. 943.
[211] Cl. Opening Presentation Handout entitled "The Collective Damages Issue," p. 5.

entitled to compensation for all the damages, as discussed in paragraph 1242 of the Award.[212] As a result, there can be no contradiction in this respect.

280. The Claimants argue that, for an award to be annulled on the ground of failure to state reasons because of contradictory reasons, the reasons must cancel each other out so as to amount to no reasons. The threshold is therefore very high.[213] This is confirmed by several *ad hoc* committees, including *Daimler v. Argentina* and *Rumeli v. Kazakhstan*.[214] In this case, the reasons for awarding the damages to all of the Claimants are clearly set out in paragraphs 1244-1248 of the Award. Allocation of the compensation as between the Claimants at the enforcement stage is irrelevant to understand this reasoning. The ground must therefore be rejected.

C. Committee's Analysis

281. The Award is not annullable under the grounds claimed by Romania.

(i) Serious Departure from a Fundamental Rule of Procedure

282. First, the Award is not annullable under Article 52(1)(d) for the reasons below.

283. The above-mentioned article states that an award can be annulled when there is a serious deviation from a fundamental rule of procedure. Therefore, two elements must be present in order to make the award annullable. First, there has to be a deviation from a fundamental rule of procedure, and second, that deviation must be serious. In this regard, Romania has failed to prove both elements: it did not demonstrate the existence of such fundamental rule nor that the alleged departure from this hypothetical rule was serious.

284. The Claimants made detailed submissions showing that the applicable case law and the historical background on ICSID annulment have uniformly understood that fundamental rules of procedure refer mainly to the parties' rights to be heard and present their case.[215] Such rights were fully granted to both Parties in the case-at-hand.

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[212] Transcript, Day 1, p. 219.
[213] *Id*., p. 218.
[214] *Daimler v. Argentina*, para. 77; *Rumeli v. Kazakhstan*, para. 82.
[215] Cl. C-Mem., paras. 276-297.

285. Romania's fundamental argument in this regard is that the "burden of proving damages" is a fundamental rule of procedure, and that this, in fact, has been litigated on many occasions.[216] Nevertheless, Romania does not give merit to the fact that *ad hoc* committees have never explicitly acknowledged this.[217]

286. The Claimants demonstrated that, even if the burden of proving damages were in fact a fundamental rule of procedure, the scope of such rule would only be to prove the existence of the damages and not to require a tribunal to allocate those damages to each claimant.

287. In summary, the Claimants argued that they successfully proved their damages collectively and the fact that the damages were "collective" does not mean that they were not proven. The Award followed the same reasoning.

288. In the Committee's opinion, there was no violation of the "burden of proving damages" rule alleged by the Respondent or to any other fundamental rule of procedure. From a reading of Section VII(B) of the Award, it is evident that the Tribunal imposed the burden of proving damages on the Claimants. It is also evident that the Tribunal reached the conclusion that such damages had been proven by the Claimants and therefore considered that the burden of proof had been met. The Tribunal explained in paragraph 1247 of the Award that damages were awarded collectively because that is what the Claimants asked for and that the Tribunal reached this conclusion after having reviewed the evidence presented by the Parties.

(ii) Failure to State Reasons

289. As a preliminary consideration, this Committee considers that the Claimants' arguments that the alleged ground for annulment has been brought too late must fail.

290. The Committee considers that the level of "detail" required by Rule 50(1)(c) has been complied with by Romania's Application, which refers to the Tribunal's contradictory reasons with a reference to the annulment ground in Article 52(1)(e).[218] In Romania's Memorial, these defects were explained in detail and accompanied by further arguments,

[216] Appl. Rep., paras. 133-138.
[217] Cl. C-Mem., paras. 298-310.
[218] *See* Application, paras. 19-21.

including a description of the applicable law concerning the use by tribunals of contradictory reasons (which could amount to a failure to state reasons in terms of Article 52(1)(e)).[219]

291. Moving to the next issue, the Award is not annullable under Article 52(1)(e) for the reasons below.

292. The above-mentioned article states that an award can be annulled when it "has failed to state the reasons on which it is based." In this regard, *ad hoc* committees and doctrine have understood the failure to state reasons as a ground for annulment. Case law has developed the "failure to state reasons" standard as well as a variant thereof, the latter which provides that contradictory reasons can cancel each other out so that they represent no reason at all.[220]

293. Romania contends that the Award should be annulled since it is based on contradictory reasons and therefore it fails to state reasons on which it based its decision to allocate damages collectively.

294. Romania's arguments on the allegedly contradictory reasons are based on the Tribunal's refusal, on the one hand, to award damages solely to the Corporate Claimants on the basis that "a portion of the damages are associated with other companies that the Individual Claimants own,"[221] and its refusal to award damages also solely to the Individual Claimants on the ground that such an award would allow them to circumvent the Corporate Claimants' creditors[222]; while, on the other hand – and this is where Romania finds the contradiction – the Tribunal held that it would issue a collective award, which would leave to the discretion of the Claimants how to apportion their common entitlement. According to Romania, the Award permits the Individual Claimants to recover ahead of the Corporate Claimants' creditors and permits the Corporate Claimants to recover for losses sustained by the Non-Party Companies.

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[219] Appl. Rep., para. 149.
[220] *Klöckner v. Cameroon I*, para. 116; Ch. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention: A Commentary (2nd ed, 2009), p. 1011 (Cl. Exh. CAL-61).
[221] Award, para. 1242.
[222] *Id*., para. 1237.

295. Romania submits that the Tribunal issued an Award which ***enables*** each Claimant to recover all of the collective losses of the EFDG. This "entitles the Individual Claimants to defraud the creditors of the Corporate Claimants and Non-Party Companies,"[223] as is evident from paragraph 1245 of the Award, which reads:

> The Tribunal has found that Claimants have quantified the damage suffered by the entire EFDG, of which the Corporate Claimants are a part and of which the Individual Claimants own at least 99.96%. In the circumstances of this case, the Tribunal does not find that the Claimants' failure to specify and prove the exact quantum of damages suffered by each one of the five Claimants is sufficient reason to deny the payment of the damages that have been quantified. The Tribunal is satisfied that some or most of the damage was directly suffered by the Corporate Claimants, and that virtually all of the damage was indirectly suffered by the Individual Claimants. There is nothing inconsistent between those two conclusions. Indeed, while the Tribunal will not enter into the discussion of whether shareholder damages are equivalent to the damages suffered by the underlying company the Tribunal is satisfied that, given the size of the Individual Claimants' shareholding in the EFDG companies, the Individual Claimants indirectly suffered at least a large part, if not virtually all, of the damage suffered directly by the Corporate Claimants. Furthermore, the Tribunal has already found that, provided that the Individual Claimants can prove their ownership of the other companies in the EFDG and can prove that they have been affected in this regard by the Respondent's breaches of the BIT, they can claim for losses they have suffered indirectly through those companies. The Tribunal has further found that the Individual Claimants have met that burden and are, therefore, entitled to damages suffered by the non-claimant EFDG entities as well. Having established that both the Corporate and Individual Claimants were harmed, the Tribunal is not comfortable with declining to award damages to one group or the other simply because it lacks the information needed to allocate the damages among them. (Emphasis added)

296. Romania concludes that the Tribunal's reasoning on allocation of collective damages is contradictory so as to amount to no reason at all and, therefore, does not sustain the result reached in the Award.[224]

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[223] Appl. Mem., para. 108.
[224] Appl. Mem., para. 94.

297. It is true that, at first glance, it might appear that there is a contradiction in the conclusions of the Tribunal. Nevertheless, in the view of this Committee, this apparent contradiction does not amount to a valid ground for annulment for several reasons.

298. First, the contradiction asserted by Romania does not amount to a "failure to state reasons." Even if the reasoning in the above-referenced paragraphs (1237, 1242, 1244) were to be cancelled and eliminated, the Award would still be based on valid reasons to sustain its result to award collective damages.

299. Case law has established a very strict scrutiny to annul awards when it comes to contradictory reasons. Several *ad hoc* committees have ruled that an award based on contradictory reasons can be equated to a failure to state reasons, because genuinely contradictory reasons cancel each other out.[225]

300. In order for an award to be annullable due to a failure to state reasons – on its contradictory reasons variant – the contradiction between the reasons given must be serious enough so that the reasons will not enable the reader to understand the tribunal's[226] motives and reasoning in issues of fact or law.[227]

301. Therefore, a tribunal has a duty to give "sufficiently pertinent reasons"[228] to its award so that the reader can follow its reasoning. Thus, as long as an award deals in logical order and in some detail with all relevant considerations, contains ample reasons and explanations in support of the conclusions arrived at by the tribunal, and allows the reader to understand how the tribunal arrives to its conclusions,[229] it cannot be deemed that the award fails to state reasons.[230]

302. In this regard, it cannot be stated that there is a failure to state reasons when there are enough supporting reasons in the award. Such supporting reasons must be more than a matter of

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[225] *Klöckner v Cameroon I*, para. 116; Ch. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention: A Commentary (2nd ed, 2009), p. 1011 (Cl. Exh. CAL-61).
[226] *Vivendi v. Argentina*, para. 65; *Daimler v. Argentina*, para. 77; *Rumeli v. Kazakhstan*, para. 82.
[227] *Mitchell v. Congo*, para. 21.
[228] *Amco I v. Indonesia*, para. 42.
[229] *Caratube v. Kazakhstan*, para. 102.
[230] *Amco I v. Indonesia*, para. 42; *Klöckner v. Cameroon I*, para. 118.

nomenclature and must constitute an appropriate foundation for the conclusion reached through such reasons. As long as the reasons given make it possible to reasonably connect the facts or law of the case to the conclusions reached in the award, annulment is appropriately avoided. [231]

303. In view of the above, the Committee is of the view that it cannot reasonably be argued that such contradictory reasons exist in an award when: (i) the reasoning of the tribunal as a whole allow the reader to understand and follow the motives of fact and law given by the tribunal; (ii) the award gives ample reasons and explanations in support of its conclusions; and (iii) the award gives sufficient pertinent reasons, and deals in logical order and in some detail, with all relevant considerations.

304. In the case-at-hand, the Tribunal fully complied with the above criteria, since the Award allows a reader to follow its reasoning by dealing in logical order and in detail with all the relevant considerations, and gives ample reasons and explanations for its conclusions.

305. Specifically, Section III of the Award contains the Tribunal's analysis with respect to the requested allocation of damages and gives ample reasons to support its conclusion. Specifically, the Award provides the following reasoning:

(i) First, the Award rejected, for procedural reasons, the Claimants' request that all damages be awarded solely to the Individual Claimants.[232]

(ii) Second, the Award acknowledged that all five Claimants commenced and pursued the arbitration and requested monetary relief.[233]

(iii) The Award explained that, in calculating the total damages, the Tribunal decided to follow the Claimants' primary damages methodology, which quantified expectation damages for the entire EFDG. Under such methodology, the Tribunal found that the Claimants proved two groups of damages: (i) increased costs of raw materials (sugar, other raw materials other than PET, and the sugar stockpile) for a total of RON

[231] *Soufraki v. UAE*, para. 128.
[232] Award, para. 1129.
[233] *Id.*, para. 1136.

120,733,229 (Section VII.C.2); and (ii) lost profits of RON 255,700,000 on the sale of finished goods (Section VII.C.3).[234]

(iv) The Award explained that in the Claimants' principal expectation damages scenario, the Claimants did not attempt to allocate the damages among the five Claimants. The Award further noted that: (i) the experts quantified losses for the entire EFDG, including damages suffered by the Non-Party Companies; (ii) neither the Claimants nor their experts have provided a figure for the damages suffered by each Claimant, or stated in what proportion these damages should be distributed; and (iii) the record does not contain clear elements that would allow the Tribunal to carry out such an allocation. The Tribunal explained in the Award that there is, therefore, no evidentiary basis for allocating damages.[235]

(v) The Tribunal found that the Claimants have quantified the damages suffered by the entire EFDG. The Tribunal also explained that it did not find that the Claimants' failure to specify and prove the exact quantum of damages suffered by each one of the five Claimants is a sufficient reason to deny the payment of the damages that have been quantified. The Tribunal was satisfied that some or most of the damage was directly suffered by the Corporate Claimants and that virtually all the damage was indirectly suffered by the Individual Claimants. The Tribunal further noted that it found that the Individual Claimants met the burden of proof and are therefore entitled to damages suffered by the Non-Party Companies as well. Having established that both the Corporate and Individual Claimants were harmed, the Tribunal was not comfortable with declining to award damages to one group or the other simply because it lacked the information needed to allocate the damages among them.[236]

(vi) The Award further explained that the Claimants only quantified the direct damages suffered by the entire EFDG, and that the Tribunal has no bases to distinguish which part of those damages has been suffered directly by the Corporate Claimants, and

[234] *Id.*, para. 1239.
[235] *Id.*, para. 1243.
[236] *Id.*, para. 1245.

which part has been suffered indirectly by the Individual Claimants as a result of their shareholdings in the Non-Party Companies of the EFDG.[237]

(vii) Given these constraints, the Tribunal concluded that the appropriate way forward was to award any damages, interest and costs to all five Claimants collectively, without allocating the damages among them.[238]

(viii) The Award further reasoned that the Claimants have not proffered adequate evidence or legal arguments to support particular allocations, and that the Respondent also has not sought any particular allocation, other than to oppose the Claimants' request that damages be awarded to the Individual Claimants. The Award thus imposed the total amount that Romania has to pay fully to discharge its obligations and does not deal with the specific entitlement of each Claimant individually.[239]

(ix) The Award supported its decision by indicating that:

> A tribunal should not pass judgment on what has not been claimed. In particular, if two or more claimants fail to request a specific allocation of damages and rather claim for common entitlement, there is no reason for a tribunal to determine which claimant is entitled to what, subject of course to counterclaims or defenses made by the respondent in this regard.[240]

306. In view of the aforementioned, the Award does not fail to state reasons upon which it is based and, therefore, it is not annullable under Article 52(1)(e) of the ICSID Convention.

307. In addition to the above, Romania contends that the decision regarding the allocation of damages in the Award results in contradictory consequences in its execution. In this respect, the Committee notes that: *it is within Romania's power to avoid the contradictory consequences it considers the Award enables*. In the first place, the Award places Romania with both the obligation and the right to pay the compensation awarded to the Claimants and to decide how to discharge such obligation. In fact, Romania could exercise such right by

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[237] *Id.*, para. 1246.
[238] *Id.*, para. 1247.
[239] *Ibid.*
[240] *Id.*, para. 1248.

paying any of the five Claimants to discharge its obligation and to compensate such payment with the Corporate Claimants' fiscal obligations (those which Romania claims that the Claimants are trying to avoid). Romania has already benefitted from this right and has compensated part of the amount of the Award against the tax obligations of some of the Corporate Claimants. This fact alone disavows Romania's reiterated arguments that the Award is contradictory because it allows a result that runs afoul of the reasoning of the Tribunal. It is, as has been seen, within Romania's power, as well as a right protected by the Award, to avoid contradictory consequences in the application of the Award. This argument, in itself, is not a matter to be dealt with as a ground for annulment.

V. THE NON-DISPUTING PARTY SUBMISSION

308. On January 9, 2015, the EC presented its non-disputing party submission ("EC Submission"). It contended that the Award must be annulled on the basis of three main defects:

i. The Tribunal failed to apply the applicable law;

ii. The Tribunal failed to address the question of enforceability of the Award; and

iii. The Tribunal exercised a jurisdiction that it did not have.

309. The EC's first two arguments were also raised by the Applicant (see Section IV(1)(A) and IV(2)(A) above). The Parties addressed the EC Submission in the Reply and Rejoinder. The Applicant's arguments and the Parties' observations are set out below.

1. FAILURE TO APPLY THE APPLICABLE LAW

A. EC's Position

310. The EC argues that the Tribunal manifestly exceeded its powers in its conclusions on the applicable law because: (i) it failed to apply EU State aid law to the dispute; (ii) it manifestly misinterpreted and misapplied EU State aid law provisions, the Europe Agreement and Romania's domestic law in a "gross and egregious manner as so as to substantially amount to a failure to apply the proper law under the underlying dispute"[241]; and (iii) it failed to address the conflict of treaties that was inherent in the underlying dispute. For the same reasons, the EC submits that the Award fails to state the reasons upon which it is based.

(i) Tribunal's Failure to Apply EU Law

311. The EC states that the Tribunal's reasoning on the applicable law should have led it to conclude:

> […] that E.U. State aid law applied to the underlying dispute even before Romania's accession to the European Union by virtue of (i) Romania's international obligations under the 1995 Europe Agreement, in particular Articles 64, 69 and 70 thereof and Decision No. 4/2000 of the EU-Romania Association Council, (ii) Romania's domestic law, which incorporated E.U.

[241] EC Submission, para. 6.

> State aid law pursuant to those obligations, and (iii) Romania's international obligations to harmonize its domestic legislation with the *acquis communitaire* in the context of accession negotiations to the European Union […]. In any event, the Tribunal should have concluded that E.U. State aid law applied to the underlying dispute as a result of Romania's accession to the European Union on 1 January 2007.[242]

312. The EC states that its actions and those of Romania show that the Europe Agreement applied to Romania since 1995. In the course of Romania's accession negotiations to the EU, the EC demanded that Romania comply with several EU laws and EU agreements (including the *acquis communitaire*).[243] Romania undertook several steps toward this end, including accepting EU accession negotiating documents, enacting domestic laws that mirrored EU law and the Europe Agreement (including Laws 143/1999 and 507/2004), phasing out certain incentives and laws (including the EGO 24 scheme), taking other agencies of the Romanian Government to court to ensure compliance and requesting transitional periods to harmonize its laws with EU law.[244] The EU therefore submits that the Tribunal should have applied that law and that its failure to do so was a manifest excess of its powers.

313. In the alternative, the EC argues that EU law on State aid applied to the dispute since Romania's accession to the EU in 2007. The Commission notes that the Award compensated the Claimants for the breach of the BIT's FET clause from February 22, 2005 until April 1, 2009. For the majority of that 49-month-period – 27 months – "Romania was a full member of the European Union directly subjected to the EU State aid discipline laid down in the EU Treaties."[245] Romania would have had to seek the EC's approval to continue granting EGO 24 incentives or they would have been unlawful under EU law.

314. Next, the EC argues that the Award contained contradictory reasoning in regard to the application of EU State aid law to the underlying dispute. The Tribunal erroneously determined that the Europe Agreement did not apply to the dispute, but then concluded in examining the legitimate expectations of the Claimants under the FET standard that the

[242] *Id*., para. 10.
[243] *Id*., paras. 13-14, 17, 19, 21.
[244] *Id*., paras. 14, 16, 18, 22-23.
[245] *Id*., paras. 27 and 28.

Claimants reasonably could have believed that the EGO 24 incentives were compatible with EU law. The Tribunal's reasoning was irrelevant to this analysis if EU State aid law was not applicable to the dispute. However, since the Award did not examine whether it was reasonable for the Claimants to consider that the incentives were compatible with the Europe Agreement and/or Romania's State aid law, the Tribunal's conclusion that the incentives were compatible with EU State aid law was necessary for it to conclude that Romania had breached the BIT's FET provision.[246] Thus, the EC submits that:

> [T]he reasons cited by the Tribunal are not reasonably capable of justifying the result reached, or are not sufficiently relevant or pertinent reasons. In particular, the contradictory reasoning given by the Tribunal on the applicable law is incapable of standing together on any reasonable reading of the Award, so that the Award must be annulled on the basis of Article 52(e) of the ICSID Convention for failure to state the reasons on which it is based.[247]

(ii) Manifest Misinterpretation and Misapplication of State Aid Law

315. In the alternative, the EC argues that the Tribunal manifestly misinterpreted and misapplied the rules on State aid under EU and Romanian law and the Europe Agreement. In its analysis of FET, the Tribunal examined, among other criteria, whether the Claimants expectations were reasonable in light of Romania's accession to the EU and Romanian law.[248] According to the EC, the Tribunal's analysis "rests on several fundamental misunderstandings and misapplications of State aid law, in particular the State aid control mechanism put into place by, first, the 1995 Europe Agreement [and] the applicable domestic Romanian legislation."[249] The Tribunal's conclusions in paragraphs 601 to 707 of the Award that EGO 24 incentives were compatible with EU law "is incorrect and fundamentally disregards the State aid control mechanism"[250] in the EU Treaties under Article 87(1) of the EC Treaty as incorporated in the Europe Agreement, which prohibited Romania from granting State aid as from February 1, 1995.[251] Further, the Tribunal misapplied Article 87(3)(a) of the EC Treaty (which allows for the possibility of permitting State aid to promote economic

[246] *Id*., paras. 29-31.
[247] *Id*., para. 31.
[248] *Id*., para. 34.
[249] *Id*., para. 35.
[250] *Id*., para. 36.
[251] *Id*., para. 37.

development in certain areas, including Romania), which is an exception that the EC has exclusive competence to approve at its discretion.[252] The Tribunal also misapplied the 1998 Regional Aid Guidelines which limit the EC's ability to declare State aid compatible with the internal market under Article 87(3)(a) of the EC Treaty.[253]

316. According to the EC, had the Tribunal properly considered the State control mechanism contained in EU and Romanian law, it would not have concluded that the Claimants had reasonable expectations that the EGO 24 incentives would be available until April 1, 2009 in substantially the same form.[254]

(iii) Tribunal's Failure to Address the Conflict of Romania's International Law Obligations

317. The EC argues that the Tribunal failed to address the conflict between Romania's obligations under the BIT and under the State aid provisions of the Europe Agreement. The Tribunal's reading of the Europe Agreement was selective to avoid any conflict and to justify the "quasi-exclusive" application of the BIT. In doing so, the Tribunal relied on a false interpretation of Article 74 of the Europe Agreement (which provides that a cooperative goal of the EC and Romania is to conclude agreements for the promotion and protection of foreign investment between Romania and EU Member States).[255] The Tribunal did not take into account related provisions of the Europe Agreement (Articles 64, 69 and 70), which provide that one of the Agreement's goals is to bring Romania's State aid legislation in line with that of the EU.[256] If the Tribunal had done so, it would have concluded that there was a conflict of international obligations, or would have had to interpret the BIT in a manner so as to avoid the conflict. By failing to do either, the Tribunal manifestly exceeded its powers and failed to state the reasons upon which the Award was based.[257]

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[252] Prior to accession, the Romanian Competition Council was competent. *Id*., paras. 37-45.
[253] *Ibid.*
[254] *Id*., paras. 55-67.
[255] *Id*., para. 70.
[256] *Id*., para. 72.
[257] *Id*., para. 74.

B. Applicant's Position

318. The Applicant accepts and adopts the EC's entire section related to annulment for the Tribunal's failure to apply the applicable law.[258]

C. Claimants' Position

319. The Claimants largely rely on the same arguments as those in reply to the Applicant's arguments concerning this ground for annulment. They submit that the Tribunal applied the law that it identified as being applicable and that the EC's argument attacks "the *manner* in which" the law was applied, which is outside the scope of the annulment proceedings.[259] Moreover, the EC's argument that the law was not applied at all is "fundamentally flawed as a matter of law."[260] The EC disagrees with the conclusion the Tribunal came to, which cannot result in the annulment of the Award.[261]

320. The Claimants argue that the EC contradicted itself in its submissions in the Original Proceeding and in its submissions to the Committee; for this reason alone the Committee should dismiss the EC Submission.[262] The EC's argument that EU State aid law applied to Romania in 1995, or in the alternative, since 2007, are both fundamentally flawed.[263] With respect to the former, the law did not come into force with respect to Romania until 2007; therefore, Romanian law on State aid was applicable at the time of the breach of the BIT, which occurred in 2005.[264] The critical date is the date on which the breach occurred.[265]

321. Further, the EC's alternative argument that the Tribunal did apply the law, but manifestly misinterpreted and misapplied it, must also fail. First, the Tribunal only described the applicable State aid law in detail in the context of its task of assessing Romania's actions in light of its obligations under the BIT. Second, even if the Tribunal had misapplied the law, this could not arise to annulment under Article 52(1) of the Convention.

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[258] Appl. Rep., para. 9.
[259] Cl. Rej., para. 339 (emphasis added by the Claimants).
[260] *Ibid.*
[261] *Id*., para. 362-363.
[262] *Id*., para. 362.
[263] *Id*., para. 373.
[264] *Id*., paras. 374 and 378.
[265] *Id*., para. 379.

D. Committee's Analysis

322. The Committee, having reviewed the EC's arguments and the Parties positions in response to the EC's arguments described above, hereby confirms its conclusion not to annul the Award.

2. FAILURE TO CONSIDER THE AWARD'S ENFORCEABILITY

A. EC's Position

323. According to the EC, the Award contains an annullable flaw because the Tribunal did not consider the arguments of the Parties and the EC regarding enforceability, and thus failed to address a question that was submitted to it and state the reasons upon which the Award was based in violation of ICSID Convention Article 52(1)(b), (d) and (e).[266]

324. The EC argues that implementation and/or execution of the Award would be illegal under EU law because it would amount to unlawful State aid under Article 107(1) of the TFEU as it would give the Claimants an economic advantage that is otherwise not available on the market.[267] Implementation and/or execution of the Award by Romania would require the amounts paid to Claimants to be recovered as a matter of EU law.[268] The EC could bring Romania before the ECJ to order it to recover any such payments and Romania may face pecuniary repercussions;[269] failure to comply would be a violation of EU law.[270]

325. According to the EC, the Tribunal's failure to consider EU State aid rules renders the Award unenforceable in EU Member State courts "as a matter of public policy."[271] The EC opines that the appropriate and uniform application of EU State aid rules are a matter of public policy because they entail dealings between economic entities and the State.[272] The EC points to ECJ jurisprudence, which has held that an arbitral tribunal's failure to apply EU competition rules renders awards resulting from such proceedings unenforceable in the national courts of an EU Member State. Because the Tribunal did not address the above

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[266] EC Submission, para. 76.
[267] *Id*., paras. 78-79; EC Decision C (2014) 6484 of October 1, 2014 in Case SA.38517 (EC Exh. EC-016).
[268] EC Submission, para. 79.
[269] *Id*., para. 85.
[270] *Id*., para. 86.
[271] *Id*., para. 88.
[272] *Id*., para. 87.

issue, the EC contends that it failed to deal with a question submitted to it and state the reasons upon which it was based in violation of Article 48(3) of the ICSID Convention.[273]

B. Applicant's Position

326. The Applicant accepts and adopts the EC's entire submission related to annulment for the Tribunal's failure to consider the enforceability of the Award.[274]

C. Claimants' Position

327. The Claimants submit that whether the Award can be enforced in the EU is "irrelevant for the Claimants' BIT claims" and is further "irrelevant to whether the Tribunal committed any error that could warrant annulment under the ICSID Convention."[275] The EC's arguments that the Tribunal's handlings of the unenforceability argument constitute an annullable error under the ICSID Convention also fail. First, the EC does not establish what fundamental rule of procedure would have been departed from in regard to not deciding the enforceability issue.[276] Further, the EC's argument that the Tribunal failed to argue a point addressed by the Parties is "factually inaccurate" because the Parties did not ask the Tribunal to rule on this issue; rather, Romania raised it in its defense and the Claimants contended this point was irrelevant, with which the Tribunal agreed.[277]

D. Committee's Analysis

328. The Committee, having reviewed the EC's arguments and the Parties positions in response to the EC's arguments stated above, hereby confirms its conclusion not to annul the Award.

3. THE TRIBUNAL LACKED JURISDICTION TO HEAR THE DISPUTE

329. The EC's final argument as to why the Award must be annulled concerns the Tribunal's jurisdiction. The EC argues that the Tribunal committed a manifest excess of powers by finding that it had jurisdiction over the dispute. Further, by failing to consult with the EC on

[273] *Id*., para. 89.
[274] Appl. Rep., para. 9.
[275] Cl. Rej., para. 400.
[276] *Id*., para. 402.
[277] *Id*., para. 403.

the jurisdictional issue, the Tribunal seriously departed from a fundamental rule of procedure.

A. EC's Position

330. According to the EC, the Tribunal lacked jurisdiction as "the E.U. Treaties superseded the Sweden-Romania BIT as a result of Romania's accession to the European Union, terminating the latter, or, at the very least, rendering Articles 7 and 10 of that BIT inapplicable."[278]

331. According to the EC, the Tribunal should have found that the BIT was terminated under Article 59(1) of the Vienna Convention, which provides that a later treaty terminates an earlier treaty if it covers the same subject matter, and the termination of the earlier treaty was either the intention of the parties or the provisions between the two treaties are incompatible (*lex posterior derogat legi priori*).[279] Because Sweden and Romania are EU Member States bound by the rules of EU law, the Tribunal should have considered them to have implicitly terminated the BIT as a result of Romania's accession to the EU, or, in the alternative, because the BIT's provisions are incompatible with the provisions of the EU Treaties that govern the same matter.[280]

332. In the latter instance, the decisive criterion as determined by the ILC is "whether the parallel operation of both treaties could lead to incompatible obligations with regard to the same matter."[281] This criterion is met because: (i) the EU Treaties contain a comprehensive set of rules which govern the protection of investments made by investors of one Member State in the territory of another (Chapters 2 and 4 of the TFEU on the right of establishment and on the free movement of capital and payments between Member States);[282] and (ii) under Article 344 of the TFEU, EU Member States have agreed not to submit disputes that involve the interpretation or application of EU law to any other dispute settlement mechanism than that provided for in the EU Treaties, thus rendering the investor-State dispute settlement clause

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[278] EC Submission, para. 92.
[279] *Id*., para. 94.
[280] *Id*., paras. 95-96.
[281] *Id*., para. 96, citing ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/Cn.4/L/683, April 13, 2006, paras. 23, 253-254.
[282] *Id*., para. 97.

in the BIT incompatible with the TFEU.[283] As a result of the incompatibility, Article 10 of the BIT (the grandfathering clause) is also inapplicable in this case.[284]

333. In the alternative, the EC argues that the Tribunal should have found that Articles 7 and 10 of the BIT were inapplicable under Article 30(3) of the VCLT, "since those provisions could not be applied by the Tribunal to assume jurisdiction over the underlying dispute in a manner compatible with the EU Treaties, particularly Article 344 of the TFEU."[285]

334. Thus, according to the EC, the Tribunal lost jurisdiction in January 2007 when Romania acceded to the EU, as the BIT was terminated and/or Article 7 of the BIT became ineffective.[286] In any event, the Tribunal should have declined jurisdiction because the BIT does not cover disputes involving questions of State aid, as this is a matter under the exclusive competence of the EU.[287] Consequently, the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.

335. In addition, according to the EC, the Tribunal's failure to solicit the EC's views regarding whether the Tribunal had jurisdiction amounts to an annullable error.[288] The EC contends that the Tribunal should have, on its own initiative, under Rule 41(2) of the ICSID Arbitration Rules, sought the opinion of the EC on the question of jurisdiction in view of Romania's obligations as an EU Member State.[289] By failing to do so, the Tribunal seriously departed from a fundamental rule of procedure and the Award must be annulled under Article 52(1)(d) of the Convention.[290]

B. Applicant's Position

336. The Applicant did not comment on this ground for annulment.

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[283] *Id*., para. 98.
[284] *Id*., para. 101.
[285] *Id*., para. 102.
[286] *Id*., para. 103.
[287] *Id*., paras. 104-107.
[288] *Id*., para. 92.
[289] *Id*., paras. 108-109.
[290] *Id*., para. 111.

C. Claimants' Position

337. The Claimants note that the EC Submission on this ground for annulment has not been endorsed by Romania and therefore argue that it falls outside of the Committee's jurisdiction, as the Committee's task is limited to determining the questions submitted to it by the Parties.[291] Third parties have no power to request the annulment of an ICSID award, even if they are affected by it.[292]

338. According to the Claimants, the EC's argument is not only entirely novel, but also contradicts arguments that it made during the Original Proceeding, as it never expressed any doubt regarding the validity of the BIT and in fact affirmed it.[293] There was no objection to the Tribunal's jurisdiction because of Romania's EU accession, and there was no obligation upon the Tribunal to raise that issue *ex officio* under Article 41(2) of the ICSID Convention. Therefore, the EC's arguments that this constitutes a manifest excess of powers and a serious departure from a fundamental rule of procedure must fail.

D. Committee's Analysis

339. The Committee, having reviewed the EC's arguments and the Parties positions in response to the EC's arguments stated above, hereby confirms its conclusion not to annul the Award.

[291] Cl. Rej., para. 410.
[292] *Ibid.*
[293] *Id*., paras. 412-416, citing EC Submission in the Original Proceeding, para. 112.

VI. COSTS

340. The Parties submitted their respective statements on costs on October 13, 2015, as set out below.

A. Applicant

341. The Applicant's legal costs total EUR 2,005,916.11 and its expenses total EUR 34,190.52 (including the ICSID lodging fee of USD 25,000). Additionally, the Applicant claims EUR 1,827.56 of additional costs incurred by the Ministry of Public Finances of Romania in relation to the hearing on annulment held in Paris, France, on September 21-22, 2015. Finally, the Applicant paid USD 600,000 to ICSID in accordance with Regulation 14(3)(d) and (e) of the Administrative and Financial Regulations (made in payments of USD 200,000 on June 4, 2014, USD 250,000 on January 9, 2015, and USD 150,000 on September 28, 2015), to cover the cost of the annulment proceeding, i.e. the fees and expenses of the Committee and the charges and expenses of ICSID. Accordingly, the Applicant's total costs and expenses in the annulment proceeding amount to EUR 2,041,934.19 and USD 600,000.

342. The Applicant requests that it be awarded the entirety of its costs and expenses.

B. Claimants

343. The Claimants' legal costs total EUR 1,031,138.81 and their expenses total EUR 140,999.73, amounting to a total of EUR 1,172,138.54 (all amounts excluding VAT).

344. The Claimants request that the Committee order the Applicant to pay the Claimants' legal fees and expenses, with interest as from the date of the decision at a rate the Committee deems appropriate. The Claimants submit that the amounts they request are reasonable based on the facts and circumstances of the case, as well as the Applicant's conduct toward the Claimants.

C. Committee

345. The Committee must now deal with the question of the costs of this annulment proceeding and the Parties' legal costs.

346. The costs of this annulment proceeding, which includes, *inter alia*, the Committee Members' fees and expenses, the ICSID Secretariat's fees and expenses, and the use of the Centre's facilities, amount to USD 547,845.09.[294]

347. The Committee has discretion on the allocation of costs pursuant to Article 61(2) of the ICSID Convention and Arbitration Rule 47(1), corroborated by Article 52(4) of the ICSID Convention and Arbitration Rule 53.

348. As set out above, the Committee has received the Parties' statements of costs and each Party's request that the Committee award each Party's respective costs to the opposing party.[295] As to the allocation of costs, the Committee decides as follows:

349. First, as in several ICSID annulment proceedings,[296] the Committee decides that the Applicant should bear the costs of the annulment proceeding (these costs have already been paid by the Applicant through the advances it has paid in accordance with Administrative and Financial Regulation 14(3)(e)).[297]

350. Second, this Committee notes that a large majority of *ad hoc* committees in ICSID annulment proceedings have held that each party should bear its own legal costs. They have done so not only where the application for annulment has succeeded in whole or part, but also where it has failed.[298]

351. This Committee considers that such practice should be followed in the case-at-hand since none of the Applicant's grounds for annulment prevailed and because several of the Claimants' requests to the Committee during the annulment proceeding also failed.[299]

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[294] 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.
[295] Applicant's Statement on Annulment Costs, para. 2; Claimants' Statement of Annulment Costs, p. 1.
[296] *Caratube v. Kazakhstan*, para. 307; *Daimler v. Argentina*, para. 307; *Alapli v. Turkey*, para. 264.
[297] Applicant's Statement on Annulment Costs, para. 6.
[298] *Daimler v. Argentina*, para. 305; *Caratube v. Kazakhstan*, para. 307; *Alapli v. Turkey*, para. 263; *Continental Casualty v. Argentina*, paras. 282 and 285; *Vivendi v. Argentina*, para. 268; *Azurix v. Argentina*, para. 380.
[299] *See* paras. 20, 47 and 79 of this Decision.

352. Even though Romania was not successful in its ground for annulment, this is not a case where the annulment application was "'fundamentally lacking in merit' and that [the] Applicant's case was 'to any reasonable and impartial observer, most unlikely to succeed.'"[300] In addition, the present case involved a "difficult and novel question of public importance"[301] due to the intervention of the EC representing the EU's interests.

353. Moreover, the Committee acknowledges that the Parties and their Counsel have conducted the proceeding diligently and efficiently, and therefore the Committee found no reason to apply the principle that "costs follow the event" to the award of the legal costs and expenses borne by each of the Parties.

354. This Committee decides to follow the aforementioned practice and order that each Party bear its own legal costs because of the particular circumstances of the case-at-hand.

VII. DECISION

355. For the foregoing reasons, the Committee DECIDES:

(i) The Applicant's claims regarding the annulment of the Award are rejected based on the reasons set forth in this Decision.

(ii) The Applicant shall bear the costs of the annulment proceeding.

(iii) The Parties shall bear their own legal costs and expenses.

[300] *See Daimler v. Argentina*, para. 309, quoting *CDC v. Seychelles*, para. 89.
[301] *Daimler v. Argentina*, para. 309.

Dr. Bernardo Cremades
Member
Date: FEB 16 2016

Judge Abdulqawi A. Yusuf
Member
Date: FEB 19 2016

Dr. Claus von Wobeser
President
Date: FEB 10 2016