INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ICSID Case No. ARB/18/8)

BETWEEN

WILLIAM ARCHIBALD RAND
("**Applicant**")

AND

THE REPUBLIC OF SERBIA
("**Respondent**")

Respondent's Rejoinder on Annulment

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16 May 2025

BEFORE:

Members of the ad hoc Committee
Prof. Lawrence Boo, President of the ad hoc Committee
Dr. Claudia Annacker, Member of the ad hoc Committee
Mr. Colm Ó hOisín SC, Member of the ad hoc Committee

Secretary of the ad hoc Committee
Ms. Marisa Planells-Valero

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A. INTRODUCTION

1. Respondent submits its Rejoinder on Annulment, in response to Applicant's Reply on Annulment of 7 February 2025, in which Mr. Rand reiterates his assertions that the Tribunal, in rendering its Award of 29 June 2023, failed to state reasons with regard to its decision on quantum as well as that it committed a manifest excess of powers by refusing to accept jurisdiction over certain claims submitted by Claimants in the Arbitration.

2. Mr. Rand's request for partial annulment of the Award must be rejected in its entirety as unfounded since his latest submission does not contribute anything to the persuasiveness of Applicant's contentions.

3. As it was the case with Applicant's Memorial on Annulment, Mr. Rand takes the issue with the Tribunal's determination of facts, application of law and evaluation of evidence and attempts to present the alleged mistakes of the Tribunal as a failure to state reasons, flawed and contradictory reasoning and a manifest excess of powers.

4. An inherent flaw in Applicant's case is his refusal to recognize the difference between an appeal and the annulment under the ICSID Convention. The Committee cannot annul the Award simply because it disagrees with the Tribunal's appreciation of evidence and understanding of the law or because it deems the Tribunal's reasoning unpersuasive or even incorrect.

5. Annulment is not an appeal against the Award.[1] Mr. Rand argues against this firmly established principle by labeling it as "*an incorrect, excessively stringent standard of review*" and asserts that the Committee can look into the substance of the Award and examine the Tribunal's understanding of facts, interpretation of law and appreciation of evidence in order to assess whether the Tribunal committed annullable errors.[2] The argument is trite. There is a clear distinction between the Committee's ability to analyze the Tribunal's determination of facts, interpretation of law and valuation of evidence forming the overall context of the dispute, on the one hand, and its power to annul the Award because it

[1] ICSID Updated Background Paper on Annulment, March 2024, pp. 53-70, **RLA-256**.
[2] Reply on Annulment, para. 17.

disagrees with the substance of the Award and the outcome of the proceeding, on the other. The latter is not a part of the Committee's mandate. This is, for example, explained by the committee in *Daimler v. Argentina*:

> "*If this Committee were to undertake a careful and detailed analysis of the respective submissions of the parties before the Tribunal, as Daimler suggests, and annul the Award on the ground that its understanding of facts or interpretation of law or appreciation of evidence is different from that of the Tribunal, it will cross the line that separates annulment from appeal*."[3]

6. The distinction overlooked by Applicant is evident, for instance, in his case on the alleged manifest excess of powers – the Committee might consider that the Tribunal erred in holding that Article 25(1) of the Convention contains an objective notion of "investment", separate from the one contained in Article 1 of the Canada-Serbia BIT. However, it cannot annul the Award on this basis as long as the Tribunal's jurisdictional decision is not untenable and unreasonable.[4]

7. Likewise, Applicant must not be allowed to attack the Tribunal's appreciation of evidence or its understanding of the facts and to portrait such an attack as a discussion about the adequacy of the Tribunal's reasoning. As it was held by the committee in *Churchill v. Indonesia*: "*Questions relating to the evaluation of evidence are subject to the primacy of the arbitrators' judgment and are not reviewable by ad hoc committees under Article 52 of the ICSID Convention."*[5] Similarly, an *ad hoc* committee cannot examine whether or not the tribunal wrongly established the facts.[6] Thus, Mr. Rand's claim that the Committee has

[3] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 186, **RLA-215**.

[4] See paras. 242-244 below.

[5] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Decision on Annulment, 18 March 2019, para. 186, **RLA-285**.

[6] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, para. 122, **RLA-278**; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment, 22 November 2019, para. 97, **RLA-251**.

mandate to examine the Tribunal's factual findings simply because reasoning in the Award "*refers both to fact and law*" is clearly meritless.[7]

8. The character of the annulment proceedings also prevents Applicant from introducing new arguments or from developing arguments that he has used during the Arbitration. As it will be seen below, this remains a constant feature of Mr. Rand's submissions. Applicant's response is that those new arguments are simply "*comments on the Tribunal's reasoning in the Award*."[8] Although the precise meaning of such assertion is unclear, the fact remains that Applicant cannot rely on arguments that were not part of the record before the Tribunal.[9]

9. Applicant denies that the ICISID Convention favors finality of ICSID arbitral awards.[10] However, this is not a matter of perspective or opinion but rather the fact that follows from the manner in which annulment as a remedy is construed in the framework of the Convention. The role of annulment committees is informed by the fact that the Convention considers an award as final and not subject to any appeal.[11] The Centre itself, summarizing practice of committees, describes the annulment as an "*exceptional and narrowly circumscribed remedy*" and defines the role of an *ad hoc* committee as limited.[12] As a result, committees have mandate to examine the integrity of the arbitral process and not the substantive correctness of awards.[13] In addition, grounds for annulment must be strictly construed in order to protect the interest of finality.[14] This is explained by the committee in *Hydro v. Albania*:

> "*Given the undisputed fact that annulment in the ICSID system is an exceptional remedy, running contrary to the principle of finality, it seems clear to the Committee that all of the grounds for annulment, including Article*

[7] Reply on Annulment, para. 19.
[8] Reply on Annulment, para. 21.
[9] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, para. 240, **RLA-238**.
[10] Reply on Annulment, para. 23.
[11] Article 53(1) of the ICSID Convention.
[12] ICSID Updated Background Paper on Annulment, March 2024, p. 46, **RLA-256.**
[13] *Alapli Elektik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para. 32, **RLA-247**.
[14] *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, para. 107, **RLA-214**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 123, **RLA-282**.

> *52(1)(e), need to be strictly construed in light of their fundamental purpose, on which the parties agree, of safeguarding the fundamental procedural integrity of the proceedings. If the principle of finality is to be set aside, the basis for doing so should be clearly identifiable in one or more of the relevant grounds for annulment, with doubts resolved in favor of the arbitral tribunal*."[15]

10. Finally, an exceptional nature of annulment as a remedy also implies that *ad hoc* committees have a discretion not to annul the award even if they found that annullable error was present. Contrary to Applicant's assertion,[16] Respondent does not contend that said discretion is unlimited. However, an *ad hoc* committee should refuse to annul the award "*when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards*."[17]

11. Respondent will again explain below how the application of principles mentioned *infra* necessarily leads to the rejection of all Applicant's claims. In **Chapter B.** Respondent addresses the alleged failure of the Tribunal to state reasons in accordance with Article 52(1)(e) of the Convention. In **Chapter C.(I)-(II),** Respondent demonstrates that the Tribunal's decision to reject jurisdiction over Mr. Rand's indirect shareholding in BD Agro does not represent a manifest excess of powers under Article 52(1)(b) of the Convention. The alleged failure of the Tribunal to exercise jurisdiction with regard to Mr. Rand's payments for the benefit of BD Agro is addressed in **Chapter C(III)**.

[15] *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, para. 107, **RLA-214**.
[16] Reply on Annulment, para. 25.
[17] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment, 13 April 2020, para. 148, **RLA-260**.

B. ALLEGED FAILURE OF THE TRIBUNAL TO STATE REASONS FOR CONCLUSIONS ON QUANTUM

I. THE APPLICABLE LEGAL STANDARD

12. In the Counter-Memorial on Annulment, Respondent outlined elements of the legal standard of annulment due to failure to state reasons under Article 52(1)(e) of the ICSID Convention as developed in the practice of *ad hoc* committees, from *MINE* and *Vivendi (I)* annulment decisions up to the present day.[18]

13. Applicant's Reply does not directly take issue with Respondent's overview of the applicable legal standard for failure to state reasons but opposes certain aspects thereof when making specific allegations of contradictory reasoning. Respondent will address Applicant's remarks when addressing these specific allegations.

14. At this point, it should be noted that Applicant has agreed that the applicable standard of review in this context is the one adopted by the *MINE ad hoc* committee, which it accepts as "*a leading authority on the issue*".[19] Applicant also does not contest that the threshold for annulment due to the lack of reasons is very high and that it falls upon an applicant to prove that this threshold has been reached.[20]

15. However, Applicant incorrectly remarks that "*Serbia, in general, agrees*" that lack of reasoning, insufficient reasoning and/or the failure to address relevant evidence represent grounds for annulment.[21] As a general matter, it should be noted that Applicant's Memorial provided an incomplete and inaccurate overview of the applicable standard, as discussed in the Counter-Memorial on Annulment. More specifically, Applicant is wrong to argue that insufficient or inadequate reasons are a ground for annulment, since, as Prof. Schreuer remarked, there is a consistent practice of *ad hoc* committees that Article 52(1)(e) "*does not permit any inquiry into the quality or persuasiveness of*

[18] Counter-Memorial on Annulment, paras. 59-70.
[19] Memorial on Annulment, para. 80.
[20] Counter-Memorial on Annulment, para. 64.
[21] Reply on Annulment, para. 35.

reasons other than to ascertain that the reasoning was frivolous", while inadequacy of reasons is not a ground for annulment, provided they meet the standard set out in *MINE* and *Vivendi (I).*[22] Further, the *Ad hoc* Committee should not take up allegations of the failure to address relevant evidence, as Applicant invites it to do, because this would entail questioning of the Tribunal's assessment of relevance and probative value of evidence which is not permissible in annulment procedure.[23] Further, it is well-established that a tribunal is not required to address each argument made by a party.[24] But when it does so, it may address the argument either directly or by inference.[25] This is something that Applicant refuses to accept, despite consistent and well-established practice of *ad hoc* committees, which will be further discussed below in **Chapter B.(IV)(2)** below.

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[22] Ch. Schreuer et al. (eds.), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd edn., Cambridge University Press, 2022), p. 1351, **CLA-206**; Counter-Memorial on Annulment, paras. 79-81.

[23] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, para. 221, **RLA-211***; NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 119, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283.**

[24] Counter-Memorial on Annulment, para. 82; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; Memorial on Annulment, paras. 160-161.

[25] That reasons can be inferred from the award has been widely accepted, see, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 81, **CLA-185**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, para. 127, **RLA-152**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 75, **RLA- 232**; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, para. 97, **CLA-184**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 189, **CLA-188**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 124, **CLA-186**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 132, **CLA-205**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee, 25 March 2010, para. 83, **RLA-250;** *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, para. 203, **RLA-283.**

II. THE TRIBUNAL'S REASONING IS NOT CONTRADICTORY AND INSUFFICIENT

1. Alleged Contradiction between Exclusion of the Batajnica Transactions and Accepting Serbia's Reliance on an Asking Price for the Land in the Same Area

16. Applicant finds a contradiction in the fact that the Tribunal "*rejected the Batajnica transactions relied upon by Claimants because they allegedly represented 'an unsuitable comparator', but then accepted an asking price relied upon by Serbia from the very same area*".[26]

17. As pointed out in Serbia's Counter-Memorial on Annulment, there are several reasons why Applicant's contention is incorrect: (i) the Tribunal noted incompatibility of the specific land in Batajnica with Zones A, B and C land, not incompatibility of all land in Batajnica township, so it was not contradictory that it accepted Ms. Ilic's valuation based on asking prices, which included an asking price of the land in another part of Batajnica;[27] (ii) the Tribunal's conclusion that the Batajnica land was an unsuitable comparator was also based on two other independent reasons, so even if the alleged contradiction existed, this would not render the Award open to annulment due to the lack of reasons.[28]

a) The Batajnica transactions concerned specific land in Batajnica

18. *First,* with respect to Respondent's point about the difference between the Batajnica land used in Dr. Hern's valuation ("Batajnica transactions") and the Batajnica land plot mentioned in the advertisement relied upon by Ms. Ilic, Applicant's Reply on Annulment states that "*Serbia's argument is factually incorrect*" because the text of the advertisement relied on by Ms. Ilic allegedly shows that the two "*were in fact similar*".[29] To prove his point, Applicant compares the part of the advertisement stating that there was "*[i]nfrastructure*

[26] Reply on Annulment, para. 46.
[27] Counter-Memorial on Annulment, paras. 88-89.
[28] First, the Tribunal found that the Batajnica transactions were based on value assessments by tax authorities and not on property valuations based on international standards and, second, that their date was after the valuation date, Counter-Memorial on Annulment, paras. 87 & 90; Award, para. 693, third bullet point.
[29] Reply on Annulment, para. 50.

close to the plot" and "*[a]cces to the paved road*", with the Tribunal's remark that the Batajnica transactions were "*close to the Batajnica settlement and to major traffic infrastructure (highway, roads, and railway)*".[30] In fact, Applicant argues that the advertised property with access to a *paved* road was similar to properties (Batajnica transactions) close to a *highway* and other major traffic infrastructure. This defies common sense, as the difference between the two is obvious.

19. Further, the Tribunal was not required to expressly explain how the advertised land plot differed from the Batajnica transactions, as Claimants argue,[31] because this can be easily concluded from the reasons the Tribunal provided for not considering the Batajnica transactions' land due to their location. Namely, the Award referred to the Batajnica transactions' land, identified in Dr. Hern's and Mr. Grzesik's expert reports,[32] and compared it to Zones A, B and C land to conclude that the former was an unsuitable comparator.[33] It noted that "*Dr. Hern initially made a reservation about the comparability of the Batajnica land with Zones A, B and C*", and in a footnote provided a quote from Dr. Hern's First Report pointing out that the former land "*lies next to the E75 road*" while the latter would need to rely on a connecting road.[34] (N.B. yet to be built).[35]

20. As can be seen, the reasons for distinguishing the Batajnica transactions' land from Zones A, B and C land on the basis of their location were clearly and cogently expressed in the Award. The governing principle was the distance of land from major traffic infrastructure, in particular the highway. In the same way as it distinguished the Batajnica transactions' land from Zones A, B and C, this principle supported using asking prices for the land plot near Batajnica in the valuation of Zones A, B and C land, because both were *not* near the highway.

[30] Reply on Annulment, para. 50.
[31] Reply on Annulment, para. 51.
[32] First Expert Report of Dr. Richard Hern, para. 69; Third Expert Report of Dr. Hern, paras. 69-70; Expert Report of Krzystof Grzesik, paras. 6.16-6.17.
[33] Award, para. 693, third bullet point.
[34] Award, para. 693, third bullet point (iii).
[35] First Expert Report of Dr. Richard Hern, para. 69 and Figure 3.1; Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 93:18-23 (Mr. Grzesik & Mr. Djeric).

21. According to practice of *ad hoc* committees, reasons exists if they "*can be reasonably inferred from the terms used in the decision*"[36] or if they are "*evident and a logical consequence of what is stated in an award*".[37] The reason for the Tribunal's acceptance of Ms. Ilic's valuation and her reliance on an asking price for the land near Batajnica can clearly be inferred from the Award and from the express reasons given for the Tribunal's rejection of the Batajnica transactions. Therefore, Applicant is wrong when he argues that Serbia defends the Tribunal's contradictory reasoning by inventing new reasons that the Tribunal never invoked.[38]

22. Moreover, it should always be remembered that location was just one (and last) of the three reasons provided in the Award for the finding that the Batajnica land was not a suitable comparator, so even if Applicant were right, this would not affect the outcome, *i.e.*, the Batajnica transactions' land would be rejected as the comparator on other bases.[39] As noted by the *ad hoc* committee in *Watkins Holdings* "*a lack of reasons that would not affect the outcome should not justify annulment*" since "*[a]nnuling awards on points that do not alter the eventual outcome would invite frivolous applications curated to forestall enforcement of the award and constitute an abuse of the process*".[40]

23. Finally, the inclusion of a single asking price for the land near Batajnica in Ms. Ilic's valuation actually helped Claimants receive more money, as it raised the price per m2 of BD Agro's construction land for 17.7%. and the amount of damages by more than 7 million EUR.[41] Applicant has conveniently failed to

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[36] *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, dated 25 September 2007, para. 97, **RLA-152**.

[37] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee, 25 March 2010, para. 83, **RLA-250**.

[38] Reply on Annulment, para. 59.

[39] Counter-Memorial on Annulment, para. 87.

[40] *Watkins Holdings Sàrl. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para. 134, **CLA-207**.

[41] Counter-Memorial on Annulment, para. 91. The median price of Dobanovci construction land established by Ms. Ilic was 21 EUR (discounted by 30% at 14.7 EUR), see First Expert Report of Danijela Ilic, pp. 114-115, paras. 9.92-9.1. This median price was established on the basis of 5 asking prices arranged in order of magnitude and by taking the middle price value, with the same number of values above and below (*i.e.* 21 EUR), First Expert Report of Danijela Ilic, Appendix II, p. 28. & Asking prices for KO Dobanovci, **RE-561**; IAAO Standard on Ratio Studies, dated April 2013, p. 13, paragraphs 5.3.1 and 5.3.2, **RE-327**. However, if one excludes the asking price for the land in Batajnica, there are 4 prices left and the median is determined by taking the middle pair and dividing it by two ((13.5 EUR + 21 EUR): 2 = 17.25 EUR). In this case, after applying 30% discount, the price for Zones A, B and C land would have been 12,075 EUR per m2, *i.e.* 2.6 EUR or 17.7% less than the 14.7 EUR price determined in the Award.

mention that the alleged "contradiction" actually worked in his favor. It is absurd that he uses it now in his attempt to collect even more money from Serbia.

b) The Tribunal also rejected the Batajnica transactions for other unrelated reasons

24. Applicant states that the other two reasons for rejection of the Batajnica transactions as the comparator are also contradictory and/or insufficient.[42]

25. The first reason given in the Award for rejection of the Batajnica transactions was that they were based on value assessments by the tax administration for determining the tax on property transfer, which are different from property valuations based on international standards. In this regard the Tribunal accepted the position of Respondent's real estate expert Ms. Ilic.[43] Applicant considers that this is incorrect, since "*t[]he Batajnica assessments were not used for determining the tax on property transfers but for the purpose of paying compensation for land expropriated in Batajnica*", and they were actual market transactions.[44] Further, Applicant mentions that Dr. Hern's extensive explanation of the status and history of the Batajnica assessments was ignored by the Tribunal, which "*on its own warrants an annulment*".[45]

26. Before proceeding to refute this baseless claim, Respondent must point out that it has been raised for the first time in the Reply on Annulment. As such, it cannot be considered by the *Ad hoc* Committee because its late submission goes against Article 15.3 of PO1, which provides that in the second exchange of submissions "*the parties shall, in principle, limit themselves to responding to allegations of fact and legal arguments made by the other party in the first exchange of submission*", thereby excluding the making of new annulment claims at this stage of the proceedings.

Considering the size of the construction land of 279h, this would have decreased its value by 7,254,000 EUR.

[42] Reply on Annulment, paras. 52-56.

[43] Award, para. 693, third bullet point (i) and footnote 556 referring to Second Expert Report of Danijela Ilic, paras. 2.97-2.118.

[44] Reply on Annulment, para. 55.

[45] Reply on Annulment, para. 56.

27. The question of whether or not the Batajnica assessments are in line with international valuation standards, now raised by Mr. Rand, goes to the appreciation of evidence and is clearly not a matter for annulment proceedings. Even if the Tribunal was wrong to accept Ms. Ilic's conclusion that this was so, "… *the Committee will abstain from scrutinizing whether the Tribunal has established facts correctly*".[46] As is well-known, according to Arbitration Rule 34(1) "*the Tribunal is the judge of the probative value of the evidence produced*".[47]

28. In any case, it should be underlined that the Batajnica assessments are *not* evidence of actual transactions. They were prepared for the purpose of expropriation but there was no evidence on the record that actual expropriations took place.[48] In addition, a valuation for the purpose of expropriation cannot be considered a market transaction, because it is based on property value assessments of the Serbian tax administration made for the purpose of calculating property tax, which, in turn, are based on past transactions in the area, without application of international valuation standards.[49] Thus, it is misleading to state, as Dr. Hern and Claimants do, that the Batajnica assessments represent actual market transactions.[50]

[46] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211***; NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 119, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283.**

[47] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Mr. Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 65(iii), **CLA-187**.

[48] Claimants' Exhibit **CE-888** is a screen shot of a table containing price assessments, not evidence of actual expropriations, but was misleadingly labeled by Dr. Hern as "Batajnica Land Expropriations as Reported on Belgrade Land Development Public Agency website", Third Expert Report of Dr. Richard Hern, para. 70, Figure 2.3.

[49] Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 126:11-16 ("*So in practice, that assessment [for expropriation] is not based on the market – it is not a market assessment, nor does it express market value*") (Ms. Ilic); see, also, Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 167:5-11 & 182:15-22 (Ms. Ilic).

[50] Reply on Annulment, para. 55; Third Expert Report of Dr. Richard Hern, para. 70.

29. It is also not true that the Tribunal "*completely ignored*" Dr. Hern's explanations about the Batajnica transactions.[51] It rejected them and instead accepted expert testimony of Ms. Ilic. The Award in a footnote referred to Ms. Ilic's expert report, including to the part that expressly addressed and refuted Dr. Hern's explanations about the Batajnica transactions.[52]

30. The second reason given in the Award for rejection of the Batajnica assessments was that they were based on the information that post-dated the Valuation Date.[53] Applicant argues that this is contradictory to the Tribunal's reliance elsewhere on other evidence that post-dated the Valuation Date. This is inaccurate because the Tribunal established that information on which it relied, not evidence or documents in which this information is contained, should exist before or on the Valuation Date as explained in detail in **Section B.(V)(1)** below.

31. As can be seen from the foregoing, Applicant's remark that Serbia invents new reasons for the Award is inaccurate, since the Award itself provided ample reasons for not accepting the Batajnica's assessments as a comparator, in direct response to various contentions made by Claimants and their expert Dr. Hern at the Hearing.

2. Alleged Contradiction between Rejection of the Batajnica Transactions because They Post-Dated the Valuation Date and Acceptance of Asking Prices with Unknown Dates

32. According to Applicant, the Tribunal's contradictory reasoning could also be found in the fact that it "*rejected evidence from the Batajnica transactions because they, allegedly, post-dated the Valuation Date and, at the same time, accepted Serbia's asking prices, even though their date was and remains unclear*".[54]

33. As Respondent explained in the Counter-Memorial, Applicant's contention fails because (1) it misreads the Award and Ms. Ilic's report and concerns correctness

[51] Reply on Annulment, para. 56.
[52] Award, para. 693, third bullet point(i) & footnote 556, referring to Second Expert Report of Danijela Ilic, paras. 2.97-2.118. Ms. Ilic's express refutation of Dr. Hern's explanations about the Batajnica transactions can be found at *ibid.*, paras. 2.107-2.113.
[53] Award, para. 693, third bullet point (ii).
[54] Reply on Annulment, para. 62; see, also, Memorial on Annulment, paras. 103-108.

of the Tribunal's evaluation of evidence, *i.e.* representation contained in Ms. Ilic's report that two out of five asking prices on which she based her valuation of the Construction Land were from 2015,[55] which cannot be raised in the annulment procedure;[56] (2) Claimants never raised the issue of dates of Ms. Ilic's asking prices during the Arbitration;[57] and (3) even if Applicant were right, this alleged contradiction would not affect the outcome of the dispute, because it would have resulted in an increase of the price of the Construction Land of only 0.3 EUR per m2.[58]

34. In the Reply on Annulment, Applicant states that Respondent's argument that the alleged contradiction goes to the Tribunal's assessment of evidence is simply wrong, because "*the reasons provided by the Tribunal are contradictory and cancel one another out*".[59]

35. However, Applicant's argument about contradictory reasons concerning the dates of the Batajnica transactions and Ms Ilic's two asking prices is based on the premise that the dates of two asking prices were either not established or were not from 2015. On the basis of this premise, Applicant argues that the Tribunal was wrong in accepting Ms. Ilic's representation that the asking prices in question were from 2015 and before the Valuation Date. However, this underlying premise is by its nature a factual statement and concerns assessment of evidence.

36. Likewise, the Tribunal's view that Ms. Ilic's testimony and evidence were credible is also an assessment of facts. The Tribunal referred to Ms. Ilic's first report as the basis of Mr. Cowan's assessment of the value of the Construction Land at the price of 14.7 EUR/m2 and then accepted Mr. Cowan's use of this price.[60] By referring to, and accepting, the price of the Construction Land determined by Ms. Ilic's report, the Tribunal implicitly accepted her evidence and arguments on the basis of which she arrived at that price, including her representation that two asking prices that have been singled out by Applicant in

[55] First Expert Report of Danijela Ilic, Appendices (Appendix 2), p. 28.
[56] Counter-Memorial on Annulment, para. 94; ICSID Updated Background Paper on Annulment, para. 111, **RLA-256**, and arbitral practice in footnote 223 therein.
[57] Counter-Memorial on Annulment, paras. 96-97.
[58] Counter-Memorial on Annulment, paras. 98-99.
[59] Reply on Annulment, para. 64.
[60] Award, paras. 692 & 694.

fact originate from 2015 and her statement that she based her valuation on 21 October 2015 as the Valuation Date.[61] It does not matter whether the Tribunal's assessment was right or wrong – it simply cannot be reviewed in the annulment procedure. As noted in *Tidewater*, "*… the Committee will abstain from scrutinizing whether the Tribunal has established the facts correctly…*"[62]

37. A further reason why Applicant cannot raise the question of the dates of two asking prices in the present annulment proceedings is that Claimants failed to raise it during the Arbitration. While Applicant does not dispute the existence of this rule, he argues that the "*dates of the asking prices became relevant only in the light of the Tribunal's decision*", so Mr. Rand had no reason to raise this issue during the Arbitration.[63]

38. However, Applicant forgets that the Valuation Date was not in dispute in the Arbitration.[64] Therefore, Claimants could have challenged Ms. Ilic's representation about the dates of two asking prices on the ground that they were subsequent to the Valuation Date. As discussed above, an inherent part and a starting premise of Applicant's argument is that these dates were not established or were after the Valuation Date. This is precisely the argument that Claimants failed to make in the Arbitration. As noted by the *Wenna* committee, "*[t]he award cannot be challenged… for a lack of reasons in respect of allegations and arguments, or parts thereof, that have not been presented during the proceeding before the Tribunal*".[65] As pointed out by the *ad hoc* committee in

[61] See First Expert Report of Danijela Ilic, p. 65, paras. 9.1-9.3., & Appendices (Appendix 2), p. 28; see, also Counter-Memorial on Annulment, para. 154.

[62] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211***; RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, paras. 119, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283.**

[63] Reply on Annulment, para. 65.

[64] Award, para. 682.

[65] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 82, **CLA-185**.

UAB E v. Latvia, the time for a party to "*to challenge the evidence presented…, was during the Arbitration, not in these proceedings*".[66]

39. Finally, in response to Respondent's remark that even if the alleged contradiction existed, it would have increased the value of the Construction Land for only 5%, Applicant argues that this would amount to an increase of EUR 800 thousand, which is more than 5% of the total damages awarded to Mr. Rand.[67] However, by this Applicant fails to show that the difference would have been material, quite the opposite, it is not material considering the amount of only EUR 800,000.

40. In conclusion, there is no contradiction between the Tribunal's rejection of the Batajnica transactions because they post-dated the Valuation Date and its acceptance of Ms. Ilic's asking prices. In any case, Applicant's challenge concerns the Tribunal's assessment of evidence which is not a proper matter for annulment procedure.

3. Alleged Contradiction between the Tribunal's Refusal of Dr. Hern's Reliance on the First Confineks Valuation and Its Acceptance of Serbia's Valuation, Both of Which Were Not Based on Comparable Transactions

41. Applicant finds contradiction in the fact that the Tribunal refused to rely on the First Confineks Valuation because it did not refer to evidence of comparable transactions, but relied on Ms. Ilic's valuation although the latter also did not refer to evidence of comparable transactions.[68]

42. In the Counter-Memorial on Annulment, Respondent showed that (1) Applicant's challenge is based on a misreading of the Award, because the principal reason for rejection of Dr. Hern's lower bound price was his reliance on mass appraisals by the Serbian tax authorities which had little evidentiary weight; (2) the First Confineks Valuation was not rejected because it relied on comparable transactions but because it failed to offer any evidence of such transactions in its determination of the price of the Construction Land, all of

[66] *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, para. 221, **RLA- 211**.
[67] Reply on Annulment, para. 66.
[68] Reply on Annulment, para. 68; Memorial on Annulment, paras. 109-114.

which has nothing to do with the Tribunal's use of Ms. Ilic's land valuation based on asking prices, the latter being in accordance with international valuation standards.[69]

43. To this, Applicant responds that the Tribunal did not state anywhere that its rejection of Dr. Hern's lower bound was "primarily" based on the fact that it relied on mass appraisals and that Serbia made this up.[70] However, this indeed follows from the Award and expert reports of Claimants' own expert Dr. Hern. As can be seen from his first report, the principal source for Dr. Hern's lower bound price were the mass appraisals by tax authorities, while he referred to the First Confineks Report only as a secondary source with which this price was "*broadly consistent*".[71] The Award followed this when rejecting Dr. Hern's lower-bound price and stated that "*according to Mr. Grzesik, the Claimants' real estate expert, **this principal source** of Dr. Hern's lower bound price falls into a category of 'mass appraisals' which 'carry little evidentiary weight when valuing specific individual properties'*".[72] Then, in the next step, the Award also rejected the First Confineks Valuation, again with reference to Mr. Grzesik, by stating that he did not rely on this valuation and treated it as secondary evidence "*because it does not refer to **evidence** of comparable transactions*".[73] It clearly follows that Dr. Hern's lower-bound price primarily relied on mass appraisals and that he used the First Confineks Valuation only for the purpose of its confirmation. Therefore, once the Tribunal rejected the lower-bound price as based on mass appraisals, there was no basis for Dr. Hern's lower-bound price. It appears that the Tribunal addressed the First Confineks Valuation for the sake of completeness only.

44. More importantly, the text of the Award shows that the alleged contradiction between the Tribunal's rejection of the First Confineks Valuation and its acceptance of Ms. Ilic's valuation in fact does not exist. The Tribunal did not reject the First Confineks Valuation because it relied upon comparable

[69] Counter-Memorial on Annulment, paras. 101-103.
[70] Reply on Annulment, para. 73.
[71] First Expert Report of Dr. Richard Hern, para. 89 ("*The lower bound of 22 EUR/m2 reflects the valuation of BD Agro's land as determined by the Serbian tax authorities for calculating property taxes*. *This price is also broadly consistent with the Dec 2015 Confineks report valuation…*").
[72] Award, para. 693, first bullet point.
[73] Award, para. 693, first bullet point.

transactions, but because it did not provide any evidence of such transactions, as pointed out by Mr. Grzesik. So, it is not only wrong but manipulative as well to state that *"the Tribunal rejected the First Confineks Valuation… simply because the First Confineks valuation did not rely on comparable transactions*", as Applicant does in order to conclude that the Tribunal contradicted itself because its "*valuation of the Construction Land is not based on comparable transactions either*" but on asking prices.[74]

45. Both comparable transactions and asking prices are legitimate sources of information in real estate valuation and both are in accordance with international valuation standards.[75] The Tribunal rejected the First Confineks Valuation not because it was based on comparable transactions but because it lacked evidence of these transactions. Then the Tribunal accepted Ms. Ilic's valuation, which relied on asking prices and provided *evidence* for them. The Tribunal could not possibly ask Ms. Ilic to provide evidence of comparable transactions if her valuation was based on asking prices. That would have been plainly absurd.

4. Alleged Contradiction between the Tribunal's Rejection of Mr. Mrgud's valuation and Its Acceptance of Ms. Ilic's Valuation, Although Both Were Based on Asking Prices

46. In the Memorial on Annulment, Applicant argued that the Tribunal provided contradictory reasoning since it rejected Mr. Mrgud's valuation because it relied on asking prices, while at the same time it accepted Ms. Ilic valuation which also relied on asking prices.[76]

47. In the Counter-Memorial, Respondent showed that this is a non-existing contradiction since the Tribunal rejected Mr. Mrgud's valuation "*because it provided no information about the sources of these prices or when they were published*", not because it was based on asking prices.[77]

48. Oblivious to this, Applicant continues to maintain his flawed argument in the Reply. According to Applicant, the Tribunal "*rejected asking prices as 'the*

[74] Reply on Annulment, para. 68.
[75] Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 80:24 – p. 81:2 (Mr. Grzesik).
[76] Memorial on Annulment, para. 119.
[77] Counter-Memorial on Annulment, para. 106, quoting Award, para. 693, second bullet point.

lowest level of evidence"" but, at the same time, based its entire valuation on asking prices, *i.e.* Ms. Ilic's valuation.[78] The problem here, however, is that neither the Tribunal, nor Mr. Grzesik, *rejected* asking prices as the source of information for valuation. Rather, the Tribunal followed (and quoted in a footnote) Mr. Grzesik's observation that "***if you are relying on asking prices, then as much information as possible is needed**, because asking prices are the lowest level of evidence that you can use in a valuation"*.[79] It is clear therefore that the Tribunal did not reject asking prices as such because they were "*the lowest level of evidence*", rather it rejected Mr. Mrgud's valuation because it did not provide *any* information about the asking prices on which it was based.

49. Aware that his argument fails when compared with the text of the Award, Applicant additionally argues that the Tribunal could not have simultaneously reject asking prices in Mr. Mrgud's valuation and accept them in Ms. Ilic's valuation "*given that it had available to it evidence from actual, highly relevant, comparable transactions*".[80] However, Applicant's argument is inapposite, because it concerns a different source of information about property prices – comparable transactions – and therefore alleges a different contradiction from the one invoked in this context.

50. In any case, as discussed in detail in the Counter-Memorial on Annulment and here below, there were no actual comparable transactions that could be used in the valuation.[81] The correctness of the Tribunal's decision to accept Ms. Ilic's valuation, which was based on asking prices, and to disregard certain actual transactions as non-compatible, is clearly an evidentiary issue. As such, it is not the proper subject of annulment proceedings.[82]

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[78] Reply on Annulment, para. 79.

[79] Award, para. 693 and footnote 555 therein; Hearing on Jurisdiction and Merits, Transcript, Day 7, 80:24-81:2 (Mr Grzesik).

[80] Reply on Annulment, para. 79, see, also, paras. 81 & 84.

[81] See Section **B.(III)(3)** below and Counter-Memorial on Annulment, paras. 146-151.

[82] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *Mr. Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 65(iii), **CLA-187**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211***; NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 119,

51. Further, Applicant argues that "*the Tribunal's contradictory reasoning would not be saved even if the only reason for the Tribunal's rejection of the Mrgud Valuation had been a lack of sufficient information about the asking prices it relied upon… because the information that Ms. Ilic provide with respect to asking prices… is equally scarce*".[83] Respondent strongly disagrees.[84] The Tribunal considered that information provided by Ms. Ilic was sufficient, when it remarked that "*the descriptions of the comparators make clear that they were equipped with infrastructure and had access to roads*".[85] It is clear that this too is an issue that concerns assessment of evidence by the Tribunal, which cannot be challenged in the annulment proceedings.[86]

52. In any case, Claimants' contention that Mr. Mrgud's and Ms. Ilic's asking prices were "equally scarce" is obviously inaccurate. Mr. Mrgud provided *no information whatsoever* about the sources and publishing time of asking prices, as noted by Mr. Grzesik, Claimants' own real estate expert.[87] In contrast to this, Ms. Ilic provided information about the sources and publishing time of asking prices.[88]

5. Allegedly Insufficient, Inadequate and Contradictory Reasoning for the Tribunal's Acceptance of a 30% Discount on the Price of the Construction Land

53. In this Section, Respondent will refute Applicant's contentions about (1) inadequate or insufficient reasons as grounds for annulment (**Subsection a)**); (2) allegedly contradictory and insufficient reasoning with respect to application

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RLA-282; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283.**

[83] Reply on Annulment, para. 82& . 83.

[84] See **Section 5.(B)** below; Counter-Memorial on Annulment, paras. 152-158.

[85] Award, para. 697.

[86] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211***;NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 119, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283.**

[87] Award, para. 693, second bullet point, and footnote 555.

[88] First Expert Report of Danijela Ilic, Appendix 2, p. 28 & Asking prices for KO Dobanovci, **RE-561**.

of the discount to the value of the Construction Land (**Subsection b)**) and its magnitude (**Subsection c)**).

a) Inadequacy or insufficiency of reasons are not grounds for annulment

54. As has been discussed in the Counter-Memorial on Annulment, there has been consistent practice of *ad hoc* committees that insufficient or inadequate reasons do not amount to the lack of reasons that constitutes a ground for annulment.[89] As summarized by Prof. Schreuer,

> *"Ad hoc committees have* ***consistently*** *confirmed that Art. 52(1)(e) does not permit any inquiry into the quality or persuasiveness of reasons other than to ascertain whether the reasoning was frivolous.* ***Ad hoc committees may be dissatisfied with the adequacy of reasons, but provided they meet the conditions set out in MINE, and confirmed in Vivendi I, there will not be grounds for annulment.****"*[90]

55. Despite this, Applicant continues to argue that inadequate or insufficient reasons constitute grounds for annulment. Since he must be aware how futile it is to take issue with this consistent practice, Applicant instead scorns Serbia's remark that caselaw "*only requires that a reader should understand the award and nothing more*", dismissing it as a distinction without difference.[91] However, it is quite easy to see that this is just a restatement of Prof. Schreuer's remark also quoted by Serbia that the *MINE* standard "*merely requires that the reasons enable the reader to understand what motivated the Tribunal*".[92]

56. While Applicant seemingly accepts the *MINE* standard which requires that a reader should understand the award and nothing more ("... *the requirement to*

[89] Counter-Memorial on Annulment, paras. 79-81.
[90] Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds., *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd edn. Cambridge University Press; 2022), p. 1351, **CLA-206** (emphasis added).
[91] Reply on Annulment, para. 105, referring to Counter-Memorial on Annulment, para. 79.
[92] Counter-Memorial on Annulment, para. 79, quoting Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds., *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd edn. Cambridge University Press; 2022), p. 1349, **CLA-206**.

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 law***"[93]), the way Applicant formulates inadequacy or insufficiency of reasoning goes directly against this standard, as can be seen from the following: "***if the reasoning lacks quality and foundation*** *or is otherwise insufficient or inadequate to justify the decision, it cannot be comprehensible to the reader.*"[94]

57. The lack of quality of reasoning is not a ground for annulment, because "*Article 52(1)(e) does not permit any inquiry into the quality or persuasiveness of reasons*".[95] As noted by the *ad hoc* committee in *Wena,*

> *"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".*[96]

58. The same goes for the lack of foundation of reasoning because annulment is not an appeal and does not entail an inquiry into correctness of reasons.[97] It only

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[93] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, para. 5.09, **CLA-184** (emphasis added).

[94] Reply on Annulment, para. 105 (emphasis added).

[95] Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds., *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd edn. Cambridge University Press,2022), p. 1351, **CLA-206** (emphasis added).

[96] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 79, **CLA-185**.

[97] "*…the Committee will abstain from scrutinizing whether the Tribunal has established the facts correctly,* ***has interpreted the appliable law correctly and has subsumed the facts as established correctly under the law as interpreted***", *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188** (emphasis added); see, also, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 128, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 118 & 383, **RLA-282**; *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, para. 106, **RLA-214**; *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022, para. 79, **RLA-231**; *Agility Public Warehousing Company K.S.C.P v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment, 8 February 2024, paras. 86 & 172, **RLA-284;** *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, para. 203, **RLA-283;** *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, para. 82, **RLA-259.**

matters whether the decision is comprehensible to a reader, *i.e.* whether "*the reasons enable the reader to understand what motivated the Tribunal*".[98] In that sense, it is simply not true that any decision that lacks quality or foundation must be incomprehensible to a reader, as Applicant contends.[99]

59. Further, Applicant makes a futile attempt to use the *Soufraki*, *Mitchell* and *Fábrica de Vidrios* decisions to support his argument that the lack of quality and foundation of awards is a reason for their annulment for the lack of reasons.[100] However, the decision in *Soufraki* goes against Applicant's argument when it explicitly states that "*[i]nsufficient or inadequate reasons as a ground for annulment have thus to be distinguished from* ***wrong or unconvincing reasons***".[101] Further, the *Mitchel* decision expressly embraces the *MINE* standard,[102] which refutes the proposition that quality and foundation of awards should be considered in the context of annulment. The same goes for the decision of the *ad hoc* committee in *Fábrica de Vidrios.*[103]

60. Finally, Applicant takes issue with Respondent's remark that it has been widely accepted that tribunals have a certain degree of discretion when determining compensation and that applying various discounts is a very common example how this discretion is exercised, where no detailed reasoning is necessary.[104] In the Reply, Applicant makes a trite remark that the "*fact that the Tribunal has discretion in determining the quantum of damages cannot excuse their lack of reasoning*"[105] and then provides quotes from several cases to support it.[106] This

[98] Counter-Memorial on Annulment, para. 79, quoting Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds., *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd edn. Cambridge University Press; 2022), p. 1349, **CLA-206**.

[99] Reply on Annulment, para. 105.

[100] Reply on Annulment, paras. 103-104.

[101] *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 123, **CLA-190** (emphasis in original)).

[102] *Mr. Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 21, **CLA-187**.

[103] *Fábrica de Vidrios los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment 22 November 2019, para. 121, **RLA-251**.

[104] Counter-Memorial on Annulment, para. 111.

[105] Reply on Annulment, para. 94.

[106] Reply on Annulment, paras. 96-99. Applicant also invokes *Teco v. Guatemala* in this context, but the relevant part of this case did not deal with the issue of discretion, see *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016,paras. 123-138, **CLA-186**.

case law however confirms Respondent's point that tribunals indeed have considerable measure of discretion in the matters of quantum, while the findings in these cases about lack of reasons that are invoked by Applicant are inapposite in the circumstances of the present context.

61. For example, the *Perenco* annulment decision noted that "*tribunals enjoy a degree of discretion to assess damages*".[107] Applicant however invokes part of the *Perenco* decision where the problem was neither inadequacy of reasoning, nor the tribunal's use of discretion, but the fact that it "*reached a decision that does not follow from its analysis*",[108] which is inapposite in the present case.

62. That arbitral tribunals have discretion in determining quantum was even more forcefully put by the *ad hoc* committee in *Pey Casado v. Chile (I)*: "*arbitral tribunals are generally allowed a considerable measure of discretion in determining quantum of damages*".[109] However, the problem in *Pey Casado* (I) was not the tribunal's use of its discretion but the use of the expropriation-based damage calculation, which was "manifestly inconsistent" with its decision that such calculation was irrelevant.[110] The same goes for *Tidewater v Venezuela*, where the problem was also not the tribunal's use of discretion but its contradictory reasoning, as the tribunal "*used an element it had rejected earlier to fix the amount of compensation*".[111] No such genuine contradictions exists in the present case, as will be discussed in the next subsection.

b) The reasons for the discount are not contradictory

63. In the Reply on Annulment, Applicant continues to argue that the Tribunal provided *two* reasons for the discount on the price of the Construction Land,[112] although in reality it accepted the discount only based on one reason – access to

[107] *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 443, **CLA-193**.
[108] *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 446, **CLA-193**, see, also, *ibid.*, paras. 461 & 467.
[109] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, para. 286, **CLA-192**.
[110] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, para. 285, **CLA-192**.
[111] *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 195, **CLA-188.**
[112] Reply on Annulment, para. 87.

infrastructure. In particular, Applicant persists with its inaccurate contention that the Tribunal accepted that, in general, larger land plots would attract lower prices per m2 than smaller land plots. On this basis, Applicant concludes that the Tribunal's reasoning was contradictory because it should have applied premium instead of discount on the price, considering that the size of BD Agro's land plots was smaller than the median size of the land plots from Ms. Ilic's asking prices.[113]

64. However, it should be noted that the Tribunal in fact did not make a finding that smaller land plots should attract premium, as Applicant contends.[114] Rather, the Tribunal simply noted that "*the representative comparables chosen by Ms. Ilic and BD Agro's land were of different size*" and in a footnote made a reference to the part of Ms. Ilic's report indicating the differences in median size of the parcels in question.[115] Then, the Tribunal noted that "*Dr. Hern himself accepted that size does matter when commenting that in one transaction, the large are of BD Agro's land on sale may have pushed the price down*", but questioned his view because "*BD Agro may have been able to split its land in smaller parcels before selling it, making any discount on the sale of the land as a whole inapposite.*"[116] Finally, the Tribunal concluded that

> "*… it remains that there were other important differences between the comparators chosen by Ms. Ilic and BD Agro's land. While the comparators had access to the road and other infrastructure, this was not the case for BD AGRO's land, which still needed to be developed.*"[117]

65. As can be seen, the Tribunal did not make a finding that the size of the land was a justification for the discount it applied in the Award. Rather, it noted that there were differences in size of the BD Agro plots and the ones whose asking prices were used by Ms. Ilic, then referred to the views of experts and, finally, concluded that the large area of BD Agro's land *did not* justify a discount. Having done so, the Tribunal further noted that there were other important

[113] Reply on Annulment, para. 88.
[114] Reply on Annulment, para. 89.
[115] Award, para. 697 and footnote 569.
[116] Award, para. 697.
[117] Award, para. 697.

differences between BD Agro's land and the comparators (access to road and other infrastructure), that BD Agro's land still needed to be developed unlike the comparators, and decided to apply a discount on this basis.[118] The fact that Zones A, B and C land needed to be developed – unlike the land in industrial zones whose asking prices Ms. Ilic used in her valuation – was clearly of crucial importance for the Tribunal when applying the discount.

66. In this regard, Applicant continues to argue that it was impossible to determine the location of the land plots whose asking prices were used by Ms. Ilic and whether or not any infrastructure existed on them.[119] These contentions have already been addressed in detail in the Counter-Memorial on Annulment[120] and will be revisited further below. For the present purposes, it is sufficient to note that the Tribunal provided reasons for applying a discount based on differences in infrastructure and, in this context, directly addressed Claimants' arguments:

> *"While the comparators had access to the road and other infrastructure, this was not the case for BD Agro's land which still needed to be developed. Moreover, although the Claimants argue that it is not possible to establish the exact location of the comparators and to determine the differences between the comparators chosen by Ms. Ilic's and BD Agro's land, the descriptions of the comparators make clear that they were equipped with infrastructure and had access to roads. Ms. Ilic's testimony that these differences justify a discount* ***was not seriously rebutted****."*[121]

67. Applicant complains that the Tribunal did not engage with Claimants' arguments and the expert testimony,[122] but forgets that the Tribunal was not under the obligation to respond to each of Claimants' arguments.[123] It was

[118] Award, para. 697.
[119] Reply on Annulment, para. 90.
[120] Counter-Memorial on Annulment, paras. 121-122.
[121] Award, para. 697.
[122] Reply on Annulment, para. 117.
[123] "*No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with*", *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine*

sufficient that it noted Claimants' arguments in this regard and then explained why it chose to accept Ms. Ilic's testimony, in its words, "*because it was not seriously rebutted*".

68. In this context, Applicant argues that the analysis of Exhibit RE-561 provided by Serbia "*has been invented out of whole cloth and was not provided at all by the Tribunal in the Award*".[124] However, this is beside the point. What is relevant is that a reader can logically follow the Tribunal's reasons from the remark about the differences between the comparators and Zones A, B and C land (supported by Tribunal's references to Exhibit RE-561) to the conclusion that these differences justified the discount (supported by Tribunal's reference to Ms. Ilic's opinion). This is sufficient for a reader to understand the Tribunal's motivation.[125]

69. While Applicant disagrees with the Tribunal's assessment of evidence that served as the basis for its conclusions, it should be recalled that this is not a proper subject-matter of annulment proceedings.[126] It would be of no relevance that Tribunal may have even been wrong in its assessment (*quod non*), because the annulment is not an appeal.

70. For the sake of completeness, Respondent will again refute Applicant's factual contentions about the alleged lack of differences between Zones A, B and C

Republic, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 126, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 415, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 487, **RLA-283.**

[124] Reply on Annulment, para. 106.

[125] Ch. Schreuer et al. (eds.), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd edn., Cambridge University Press; 2022), p. 1349, para. 474, **CLA-206.**

[126] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**;*NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 119, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283.**

land and the land plots whose asking prices, presented in Exhibit RE-561, were the source of Ms. Ilic's valuation:[127]

- Applicant agrees that the first advertisement indicated that an asphalt road leads to the plot.[128] Already this supports the Tribunal's conclusion that the comparators "had access to roads".[129] Further, as Respondent noted in the Counter-Memorial on Annulment, the land plot in question was located in the industrial zone, which implies access to infrastructure (as does access to the road). Applicant responds that no such implication can be made from the advertisement.[130] However, it is obvious that this implication can reasonably be made on the basis of the common sense.

- The same applies to the second advertisement, which concerns the land plot that was also located in the industrial zone.[131] Applicant also takes issue with Respondent's remark that the Serbian text of the advertisement stated that infrastructure was "*close to the plot*", rather than in its "*vicinity*", and comments that this is a distinction without difference.[132] Respondent disagrees. Here, it should be first noted that Claimants had no objections to the English translation of Exhibit RE-561, of which the phrase "*close to the plot*" was part.[133] As for its substance, it is much more precise than the word "vicinity" and is closer to the Serbian original, which, as Respondent already noted, can literally be translated as "immediately close" ("*u neposrednoj blizini*"). This description clearly indicates that the land plot in question had infrastructure easily available to it. Finally, Applicant questions that the description "*near the highway, near the bypass*" implied that the land plot in question had a road connection. He states that this does not mean that the land plot was connected to a highway.[134] However, its proximity to a highway implies road connection.[135] In this context, Applicant's remark that the Construction Land was also close to a highway is preposterous, since

[127] Reply on Annulment, para. 107.
[128] Memorial on Annulment, para. 138(a); Reply on Annulment, para. 108, referring to Asking prices for KO Dobanovci, p. 1 (pdf), **RE-561**.
[129] Award, para. 697.
[130] Reply on Annulment, para. 108.
[131] Reply on Annulment, para. 109, referring to Asking prices for KO Dobanovci, p. 2 (pdf), **RE-561**.
[132] Reply on Annulment, para. 109.
[133] Asking prices for KO Dobanovci, p. 2 (pdf), **RE-561.**
[134] Reply on Annulment, para. 111.
[135] Counter-Memorial on Annulment, para. 121(2).

Claimant's own expert stated that it had to rely on (yet unbuilt) municipal road "Sremska Gazela" for a connection with highway.[136] In contrast to that, the land in the second advertisement is "first by the highway" ("*prva uz autoput*").[137]

– As regards the third advertisement, Applicant takes issue with Respondent's comment that the distance of only 100 meters from infrastructure is negligible, by saying that such distance clearly means that infrastructure was not on the plot, so the plot is not comparable to the Construction Land.[138] At the outset, it should be noted that the issue here are *differences* between the advertised plots and the Construction Land justifying the discount, not their compatibility. Further the distance of 100 meters is indeed negligible in terms of access to infrastructure. This clearly indicates the difference between the advertised land and Zones A, B and C land, whose large tracts have no infrastructure on that distance and are located much further away. In addition, Applicant conveniently ignores the fact that the land plot had access to a road,[139] which was also a difference relied upon by Ms. Ilic and the Tribunal for justifying the discount.[140]

– As regards the fourth advertisement, Applicant avers that it mentions only electricity but not other infrastructure, and denies that existence of premises on the land implies at least water supply.[141] Respondent disagrees. In any case, the Tribunal concluded that the land plots were "*equipped with infrastructure*" without mentioning what specific infrastructure it had in mind, so the existence of electricity supply at this land plot clearly provides support for the Tribunal's conclusion. Further, the advertisement also mentions "*access from the paved road*", which supports the Tribunal's conclusion that the land plots "*had access to roads*".[142] This is also conveniently left out by Applicant.

[136] First Expert Report of Dr. Richard Hern, para. 69 and Figure 3.1; Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 93:18-23 (Mr. Grzesik & Mr. Djeric).
[137] Asking prices for KO Dobanovci, p. 2 (PDF), **RE-561.**
[138] Reply on Annulment, para. 112, referring to Asking prices for KO Dobanovci, p. 3 (pdf), **RE-561**.
[139] Asking prices for KO Dobanovci, p. 3 (pdf), **RE-561**.
[140] Award, para. 697.
[141] Reply on Annulment, paras. 113, referring to Asking prices for KO Dobanovci, p. 4 (pdf), **RE-561**.
[142] Asking prices for KO Dobanovci, p. 4 (PDF), **RE-561**.

– Applicant states that the fifth advertisement only mentions a highway being 1 km away from the plot[143] but ignores the fact that it contained a map indicating that the plot had access to the road, as well as that it mentioned close proximity of industrial objects, implying access to other infrastructure.[144] Applicant states that this does not follow from the advertisement,[145] which is inaccurate, as can be easily determined by looking at it.[146] Applicant also states that no such indications were considered by the Tribunal, which is also inaccurate, because the Tribunal referred to the differences in infrastructure and access to roads between the comparators and Zones A, B and C land.[147] If Applicant argues that that the Tribunal should have expressly analyzed characteristics of each comparator, such argument would clearly go against the practice of *ad hoc* committees. As noted by the *ad hoc* committee in *Watkins Holdings v Spain*, "*[r]easons, however, need not be a long narration of the full technical aspects of the considerations resulting in a decision as long as the key points or pivots are identified and connected to the finding or ruling…*"[148]

71. Finally, Applicant argues that the discount was arbitrary because the Tribunal also applied it to BD Agro's farm land, which had full access to infrastructure.[149] However, Applicant is silent about the fact that the size of Zones A, B and C land was multiple times larger than the farm land, which made the latter practically irrelevant in the valuation. Namely, the farm land amounts to only 2% of the total size of the Construction Land, so its value without applying the discount would have been only 379,242 EUR higher.[150] Finally, it should be

[143] Reply on Annulment, para. 115, referring to Asking prices for KO Dobanovci, p. 5 (pdf), **RE-561**.
[144] Asking prices for KO Dobanovci, p. 5 (pdf), **RE-561**.
[145] Reply on Annulment, para. 115.
[146] Asking prices for KO Dobanovci, p. 5 (PDF), **RE-561**.
[147] Award, para. 697.
[148] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para. 133, **CLA-207**.
[149] Reply on Annulment, paras. 92 & 118.
[150] According to Ms. Ilic, the size of BD Agro's construction land outside Zones A, B and C is 57,461 m2, while the total size of the Construction Land is 2,852,015 m2, see First Expert Report of Danijela Ilic, pp. 114-115. If no discount is applied to the farm land then its price would have been 6.3 EUR higher, adding only 379,242 EUR to its value (57,461 X 6.3).

noted that Claimants never raised this argument against the discount in Ms. Ilic's valuation during the Arbitration and cannot do so now.

c) The Tribunal provided reasons for setting the discount at 30%

72. Applicant argues that the Tribunal did not provide reasons to justify the magnitude of the 30% discount. In response to Respondent's answer that the Tribunal provided reasons when it explained that, failing more precise indications on the record, it considered it reasonable to accept the size of the discount applied by Ms. Ilic,[151] Applicant states that *"It is irrelevant whether the Tribunal came up with its own value or whether it adopted one proposed by Serbia's expert. What is relevant is that the Tribunal was supposed to provide reasons for its decision."*[152]

73. Applicant is clearly wrong. As can be seen, the Tribunal provided understandable reasons for its decision to accept the 30% discount: (1) there were no other indications on the record about the size of the discount; (2) in such circumstances it appeared reasonable to accept the value of the discount applied by Ms. Ilic. Obviously, these are *reasons* that explain to a reader what were the motives for the Tribunal's decision. There is nothing arbitrary here, as Applicant contends. On the contrary, the Tribunal clearly identified two factors which led to its decision on the magnitude of the discount.

74. Being dissatisfied with the explanation that acceptance of Ms. Ilic's size of the discount appeared reasonable to the Tribunal, Applicant argues that the Tribunal had to provide a further set of reasons explaining why this was so. This is wrong, because, as aptly stated by the *ad hoc* committee in *Enron v. Argentina*, the Tribunal was "*required to state reasons for its decision, but not necessarily reasons for its reasons*".[153]

75. In this context, Applicant continues to rely on the decision of the *ad hoc* committee in *Perenco v. Ecuador* and states that the annullable failure in that case "*was found in the tribunal's rejection of claimant's calculation and*

[151] Counter-Memorial on Annulment, para. 133; Award, para. 697.
[152] Reply on Annulment, para. 124.
[153] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 222, **RLA-232**.

subsequent application of discretion, without further explanation".[154] However, the Tribunal in the present case, unlike the one in *Perenco*, did not apply its discretion without further explanation. As discussed above and in the Counter-Memorial on Annulment,[155] the Tribunal provided reasons for its application of the 30% discount (lack of other indicators, reasonableness of applying Ms. Ilic's number). Applicant may not be satisfied with these reasons and may think they are wrong, but this is not a matter for annulment proceedings.

76. Finally, as regards the scope of the Tribunal's discretion in this context, it should be noted that Applicant disagrees that there were no more precise indicators about the size of the discount on the record, by saying that Claimants and their experts consistently argued that the size of the discount was 0%.[156] This is not accurate, because Claimants and their experts consistently argued against *any discount*, but never discussed its size in case it applied.[157] They did so on their own peril, since the only estimation on the record was the 30% figure provided by Ms. Ilic. In such circumstances, the Tribunal's discretion was wider and it was indeed reasonable to accept Ms. Ilic's figure.

6. Alleged Contradiction Concerning the Tribunal's Acceptance of Ms. Ilic's Valuation Although It Contradicted the Tribunal's Findings on Appropriate Valuation Methodology

77. In the Reply on Annulment, Applicant continues to argue that the Tribunal's acceptance of Ms. Ilic's valuation contradicted a set of so-called "key principles" which Applicant himself has formulated.[158] As already discussed in the Counter-Memorial on Annulment, Applicant's summary of the "key principles" is a misrepresentation of the Award, while the alleged contradictions between them and Ms. Ilic's valuation are nothing else but a repetition of arguments that Applicant makes elsewhere.[159] Applicant's "key principles" and alleged contradictions will be addressed *seriatim* below, but the responses will

[154] Reply on Annulment, para. 122.
[155] Counter-Memorial on Annulment, para. 138.
[156] Reply on Annulment, para. 126.
[157] Applicant has referred in this context to the following sources, none of which addressed the size of the discount, but only dealt with the issue of whether it is at all justified: Third Expert Report of Dr. Richard Hern, paras. 36-41; Rejoinder on Jurisdiction, para. 765; Claimants' First Post-Hearing Brief, paras. 319-323.
[158] Reply on Annulment, paras. 128 *et seq.*
[159] Counter-Memorial on Annulment, para. 145.

at times be brief in order to avoid repetition of already made arguments, which are expressly incorporated herein.

a) The valuation should be based on actual comparable transactions as the primary, most relevant evidence

78. In the Memorial on Annulment, Applicant argued that the Tribunal contradicted itself when it accepted Ms. Ilic's valuation although "*it did not comply with the first key principle because it does not rely on* any *actual comparable transactions*" but relied on asking prices.[160] In the Counter-Memorial on Annulment, Respondent showed that the Tribunal never adopted a principle that a valuation *must* rely on actual comparable transactions, and that the experts agreed that while the valuation should *to the extent possible* be based on actual comparable transactions, where there are none, it is in accordance with international standards to use asking prices.[161]

79. In the Reply on Annulment, Applicant has modified its argument and no longer argues that a valuation must rely on actual comparable transactions, but that "*comparable transactions, if available, should be used before any other types of the evidence*".[162] The question then is whether there were any available comparable transactions? In the Arbitration, Claimants and their experts argued that there were two comparable transactions, while Respondent and its experts argued that these transactions were not comparable. This is obviously a factual matter. Applicant refuses to accept that the issue of whether there were comparable transactions concerns a determination of facts which cannot be revisited in the annulment proceedings.[163]

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[160] Memorial on Annulment, paras. 145-146.
[161] Counter-Memorial on Annulment, para. 147.
[162] Reply on Annulment, para. 131.
[163] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211** *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, paras.119, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283.**

80. With regard to this factual issue, the Reply on Annulment does not add anything new. While Ms. Ilic considered the two transactions and disregarded them because the land was "*located near urbanized residential area*" unlike Zone A, B and C land,[164] Applicant argues that this was not the case.[165]

81. In the Award, the Tribunal found that Mr. Cowan's (and by extension Ms. Ilic's) approach was "*more reasonable*" as far as the price of the land was concerned and accepted "*Mr. Cowan's use of the price of 14.6 EUR/m2 to value the Construction Land*".[166] In this way, the Tribunal also accepted Mr. Cowan's and Ms. Ilic's view that the valuation should be based on asking prices and that there were no comparable transactions.

82. Applicant argues that the Tribunal in fact never rejected the comparable transactions, but ignored them.[167] However, Applicant fails to note that the Tribunal was not required to address every argument raised by the Parties, for as long as it expressly or implicitly dealt with them.[168] By accepting Ms. Ilic's and Mr. Cowan's valuation of the Construction Land based on asking prices, the Tribunal also rejected the view of Claimants' and their experts that there were comparable transactions.

83. Finally, Applicant takes issue with Respondent's remark[169] that Claimants' experts never used these properties for their valuations by stating that Messrs. Hern and Grzesik included these transactions in their presentations at the Hearing.[170] However, this is beside the point. Although they used these two

[164] First Expert Report of Danijela Ilic, p. 113, para. 9.90.
[165] Reply on Annulment, para. 133; Memorial on Annulment, para. 147.
[166] Award, para. 694.
[167] Reply on Annulment, para. 136.
[168] "*No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with*", *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 126, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 415, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 487, **RLA-283.**
[169] Counter-Memorial on Annulment, para. 149.
[170] Reply on Annulment, para. 134.

transactions to criticize Ms. Ilic, they did not use them for their own valuations.[171]

b) Asking prices have the lowest evidentiary value and the valuation should not rely on them without corresponding information about their dates and sources

84. Applicant states that Respondent does not contest that the Tribunal adopted the "principle" that "*[a]sking prices have the lowest evidentiary value and the valuation should not rely on asking prices with no corresponding information about dates and sources of these prices*".[172] However, such formulation, with this level of detail, is nowhere to be found in the Award or in Mr. Grzesik's remark quoted by the Tribunal to which Applicant refers.[173] As Respondent noted in the Counter-Memorial on Annulment, Applicant's summary of the "key principles" is a misrepresentation of the Award and Applicant's invention.[174]

85. In this context, Applicant alleges that the Tribunal is contradicting this "principle" because it accepted Ms. Ilic' valuation that relies on five asking prices without providing proper information about their location, while some asking prices do not show their date, and the description of individual land plots is extremely limited.[175]

86. Respondent has extensively rebutted Applicant's arguments in its Counter-Memorial on Annulment.[176] It made two general points in this context. First, the issues raised by Applicant are of factual nature, as they concern factual determinations about asking prices, and therefore concern the Tribunal's assessment of evidence which is not a matter for annulment proceedings.[177] Applicant's only reply to this is that he does not ask the Committee to "*de novo* re-examine evidence", but "*assess clear contradictions in the Tribunal's reasoning*".[178] Obviously, Applicant fails to provide any substantive argument

[171] For Dr. Hern's prices, see Award, para. 693; for Mr. Grzesik's price, see Expert Report of Krzystof Grzesik, para. 6.14.
[172] Reply on Annulment, title of the Section II(A)(1)(f)(i) & para. 137.
[173] Compare, *e.g.*, Award, para. 693, second bullet point.
[174] Counter-Memorial on Annulment, para. 145.
[175] Reply on Annulment, para. 138.
[176] Counter-Memorial on Annulment, paras. 152-158.
[177] Counter-Memorial on Annulment, para. 155 and cases referred to thein.
[178] Reply on Annulment, para. 143.

in support of his position. It is completely unclear how could the Committee even assess that Ms. Ilic failed to provide sufficient information about the asking prices without re-examination of evidence. In fact, the contradiction alleged by Applicant is what he perceives as a contradiction between a rule adopted by the Tribunal for the purposes of property valuation, and the way this rule was applied to evidence. In other words, Applicant's objection concerns incorrect application of this valuation rule, and not a contradiction in reasoning.

87. Second, most of Applicant's claims in this context concern issues that Claimants have not raised during the Arbitration, so he cannot raise them now.[179] Specifically, Claimants failed to raise the issue of authenticity of advertisements because they allegedly could not be accessed through the hyperlinks provided by Ms. Ilic, nor did they raise the issue of whether two advertisements from 2015 were published before or after the Valuation Date.[180]

88. In the Reply on Annulment, Applicant has apparently dropped its argument about (in)accessibility of hyperlinks provided by Ms. Ilic. As far as the dates of the advertisements are concerned, Applicant merely states that Claimants had no reason to raise this issue before the Tribunal concluded that only "evidence" post-dating the Valuation Date was relevant, which it did in the Award.[181] However, as already discussed above,[182] the Valuation Date was not in dispute in the Arbitration, so Claimants could have raised the issue of information allegedly post-dating the Valuation Date already at that time, but they failed to do so.

89. As far as the dates of two 2015 advertisements are concerned, Respondent noted that Ms. Ilic represented in her report that they pre-dated the Valuation Date, since she indicated that she based her valuation on 21 October 2015 as the Valuation Date and also indicated "2015" as the year of the advertisements.[183]

[179] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 82, **CLA-185**.
[180] Counter-Memorial on Annulment, para. 156.
[181] Reply on Annulment, para. 140.
[182] See para. 38 above.
[183] Counter-Memorial on Annulment, para. 154 & footnote 264, referring to First Expert Report of Danijela Ilic, p. 65, paras. 9.1-9.2 & Appendix 2, p. 28.

Applicant argues that Ms. Ilic made no such representation,[184] although this clearly follows from her report.[185]

90. Another criticism of Ms. Ilic's asking prices concerns the alleged lack of information about the location of the relevant land plots. Applicant states that Serbia admitted that only two out of five sources contain a map,[186] but fails to mention that Respondent showed that they provide more than sufficient information to locate the land.[187] Here, Applicant makes much of the fact that Mr. Cowan, Respondent's financial expert, was not able to identify the exact location of advertised plots, but fails to mention that Mr. Cowan refused to do so saying that he was not a land expert or an expert on Serbia.[188]

c) Alleged contradiction concerning Batajnica as a non-comparable area

91. Applicant alleges that the Tribunal contradicted its finding that the Batajnica land was incompatible with Zones A, B and C land when it accepted Ms. Ilic's valuation based on asking prices that included one asking price for the land located in Batajnica.[189] In the Counter-Memorial, Respondent showed that this alleged contradiction in fact does not exist, since the Tribunal found that specific land plots in Batajnica ("Batajnica transactions") were incompatible, and not all land in the Batajnica municipality. Moreover, the Batajnica transactions were considered incompatible with Zones A, B and C land not only due to the fact that the former was located near major infrastructure, but also for other reasons, including that its valuations post-dated the Valuation Date, unlike the asking price used by Ms. Ilic.[190]

92. In the Reply on Annulment, Applicant is silent about the fact that the Batajnica transactions were also incompatible with Zones A, B and C land because they post-dated the Valuation Date. He only argues that the incompatibility mentioned by the Tribunal concerned "*the entire 'Batajnica region', not just a*

[184] Reply on Annulment, para. 139.
[185] First Expert Report of Danijela Ilic, p. 65, paras. 9.1-9.2 & Appendix 2, p. 28.
[186] Reply on Annulment, para. 141.
[187] Counter-Memorial on Annulment, para. 157.
[188] Hearing on Jurisdiction and Merits, Transcript, Day 8, p. 146:1-2 (Mr. Cowan).
[189] Memorial on Annulment, para. 155.
[190] Counter-Memorial on Annulment, para. 160.

specific land plot", because Dr. Hern's report, to which the Tribunal referred to, mentioned the "Batajnica region".[191]

93. However, the Award consistently uses the terms "Batajnica land" and "Batajnica transactions", which shows that it was not the whole Batajnica region that the Tribunal had in mind. This difference is further underlined when the Award states that "*the Batajnica land is close to the Batajnica settlement*",[192] which clearly shows that the Tribunal had the specific Batajnica land in mind.

94. In this context, Applicant states that the Tribunal "*explicitly based this distinction [between the Batajnica transactions and Zones A, B and C land] on the fact that "Dr. Hern initially made a reservation about the compatibility of the Batajnica land with Zones A, B and C"*".[193]. This is incorrect. The Tribunal's finding about the incompatibility between the two is in fact supported by reference to Ms. Ilic's testimony.[194]

95. Finally, even Dr. Hern, who made a reference to the "Batajnica region" in his report, actually had specific land plots in mind. Thus, his report stated that the "Batajnica region" was highlighted in blue in Figure 3.2., whereas the part of Figure 3.2. highlighted in blue actually bears the inscription "Batajnica market value assessment", clearly referring to the specific land in Batajnica.[195]

96. In conclusion, there is no contradiction between the Tribunal's finding that the specific Batajnica land was not compatible with Zones A, B and C land and its acceptance of Ms. Ilic's valuation which used one asking price (out of the total of five) for the land in another part of Batajnica. Here, the *Ad hoc* Committee is also referred to other reasons why this alleged contradiction does not stand and/or should not be taken into consideration, which are outlined **Section B.(II)(1)** above.

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[191] Reply on Annulment, para. 146.

[192] Award, para. 693, third bullet point, (iii) ("*As far as location is concerned, Dr. Hern initially made a reservation about the comparability of the Batajnica land with Zones A, B, and C. [reference to First Expert Report of Dr. Richard Hern, para. 69] There are, in fact, several differences. Importantly, the Batajnica land is close to the Batajnica settlement and to major traffic infrastructure (highway, roads, and railway).[reference to Ms. Ilic's testimony]*").

[193] Award, para. 693, third bullet point, (iii), and footnote 560.

[194] Compare Award, para. 693, third bullet point, (iii), footnote 561, with Hearing on Jurisdiction and Merits, Transcript, Day 7, 126:1-128-9 (Ms. Ilic).

[195] First Expert Report of Dr. Richard Hern, para. 69 *in fine* & Figure 3.1 at p. 23.

d) Alleged contradiction concerning use of evidence post-dating the Valuation Date

97. According to Applicant, the Tribunal contradicted itself when it relied on evidence post-dating the Valuation Date although it adopted the principle that only evidence pre-dating the Valuation Date may be relevant. In the Counter-Memorial, Serbia demonstrated that the Tribunal considered that the valuation should rely on *information* pre-dating Valuation Date, while this information may be contained in evidence post-dating it.[196] In the Reply on Annulment, Applicant argues that Respondent's interpretation contradicts the valuation standards accepted by both Parties' experts.[197] Respondent finds it convenient to refute Applicant's arguments in this regard in **Section B.(V)(1)** below and the *Ad hoc* Committee is respectfully directed to that discussion.

98. In this context, Applicant argues that the Tribunal contravened this "principle" by relying on two asking prices submitted by Serbia without any evidence of their date, so it was impossible for the Tribunal to confirm that these asking prices pre-dated the Valuation Date.[198] This is inaccurate, as Respondent has discussed in detail in the Counter-Memorial on Annulment[199] and above in Section **B.(II)(2)**. The Tribunal is respectfully directed to that discussion.

e) Alleged contradiction concerning unjustified application of a discount although there was no evidence of difference between the Construction Land and the plots that were subject of asking prices used by Ms. Ilic

99. The Parties disagree on whether there was a difference in infrastructure between the Construction Land and the land plots that were subject of asking prices used by Ms. Ilic.[200]

100. The Reply on Annulment here repeats the argument that although there was no evidence of differences in access to infrastructure between the Construction Land and the land plots whose asking prices Ms. Ilic used in her valuation, the

[196] Counter-Memorial on Annulment, para. 161.
[197] Reply on Annulment, paras. 148-152.
[198] Reply on Annulment, para. 153.
[199] Counter-Memorial on Annulment, paras. 154-155 & 161.
[200] Memorial on Annulment, para. 157-159 & Counter-Memorial on Annulment paras. 162-163.

Tribunal nevertheless accepted the 30% discount applied by Ms. Ilic, thereby contradicting its position that a discount is justified where comparators have better access to infrastructure.[201]

101. As discussed in detail in **Section B.(II)(5)(b)** above, the land whose asking prices were used by Ms. Ilic indeed had better access to infrastructure than Zones A, B and C land.

102. In addition, the Tribunal's finding about this is not a proper subject-matter of the annulment proceedings. It goes to the Tribunal's assessment of facts, but annulment is not an appeal.[202]

f) Alleged contradiction between the Tribunal's position that smaller land parcels are more valuable and its application of the discount to BD Agro's Construction Land although it is smaller than comparators

103. In the Memorial on Annulment, Applicant alleged that the Tribunal adopted a "principle" that a premium rather than discount should be applied to smaller land plots, and then contradicted it because it did not apply the premium in the valuation of the Construction Land, although median size of the plots comprising this land was smaller than the median size of the land whose asking prices Ms. Ilic used in her valuation.[203]

104. In the Counter-Memorial on Annulment, Respondent demonstrated that Applicant misinterprets the Award and that the Tribunal never accepted the idea that a discount should in this case be based on smaller size of land plots, but rather applied the discount based on differences in access to infrastructure.[204]

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[201] Reply on Annulment, paras. 154-155.

[202] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211;** *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, paras.119, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283**

[203] Memorial on Annulment, paras. 160-161.

[204] Counter-Memorial on Annulment, para. 165.

105. In the Reply on Annulment, Applicant continues to allege that the Tribunal formulated this principle, but in support provides an incomplete quote from the Award. Namely, it is clear from the Award that the Tribunal considered a discount based on size of the land, but decided not to apply it, because "*BD Agro may have been able to split its land in smaller parcels before selling it, making any discount on the sale of the land as a whole inapposite*". Then the Tribunal continued by stating that "*[h]owever, even if it had done so [i.e. split the Construction Land into smaller parcels], it remains that there were other important differences between the comparators chosen by Ms. Ilic and BD Agro's land*", as the latter did not have access to road and "*still needed to be developed*".[205] It is clear, therefore, that the Tribunal never accepted a discount based on the size of the land, but accepted the one based on differences in infrastructure.

106. It should also be noted that Applicant misinterprets this part of the Award when he mentions, as relevant, that the size of the land plots of BD Agro's Construction Land was smaller than the median size of the land whose asking prices Ms. Ilic used in her valuation. However, what the Tribunal had in mind when discussing size of the land was that the *whole area* of the Construction Land was much bigger than each of the parcels whose asking prices were used in Ms. Ilic's valuation. It was in response to the argument that the large area of BD Agro's land would push the price down,[206] that the Tribunal stated that BD Agro "*may have been able to split its land in smaller parcels before selling it*".[207] Therefore, the Tribunal's comment had nothing to do with the size of the cadastral parcels of BD Agro's and the median size of comparables, as Applicant assumes in his argument.

III. THE TRIBUNAL DID NOT IGNORE KEY EVIDENCE WHEN VALUATING CONSTRUCTION LAND

107. Applicant argues that the Tribunal ignored key evidence in its valuation, but his argument does not stand scrutiny as Respondent will demonstrate with respect

[205] Award, para. 697.
[206] Award, para. 697, First Expert Report of Danijela Ilic, para. 410.
[207] Award, para. 697.

to each specific piece of evidence invoked by Applicant: the so-called Pazova transactions (**Subsection 3.1**); the Second Confineks Valuation (**Subsection 3.2**), as well as two transactions with construction land in Dobanovci (**Subsection 3.3.**).

1. The Pazova transactions

108. In the Memorial on Annulment, Applicant briefly mentioned that the Tribunal ignored so-called Pazova transactions in the Award, although they were relevant evidence.[208]

109. In the Counter-Memorial on Annulment, Respondent demonstrated that Dr. Hern in fact did not base his upper-bound price for the Construction Land on the Pazova transactions but on Mr. Mrgud's valuation. The Pazova transactions were mentioned only as secondary evidence confirming his upper-bound price so it certainly was not the key evidence. When the Tribunal rejected Dr. Hern's reliance on Mr. Mrgud's valuation, there was no reason to further discuss the Pazova transactions, on which Dr. Hern's valuation was not based. In addition, since the Tribunal rejected the use of valuations of immovables prepared by the Serbian tax administration with respect to the Batajnica transactions, this implied that all other similar valuations were also not acceptable. Finally, all but one of the Pazova transactions post-dated the Valuation Date and for this reason also could not be taken into account.[209]

110. In the Reply on Annulment, Applicant states that just because Dr. Hern did not use the Pazova transactions as primary evidence for the upper bound price in his valuation, this does not mean that this evidence was not relevant and could be completely ignored.[210] However, Applicant does not explain why the Tribunal should have addressed evidence that Claimants' experts themselves did not use in their valuations. As noted by Mr. Grzesik, Claimants' real-estate expert, Dr Hern "*dismisses that one, the comparison to Stara Pazova and Nova Pazova*".[211]

[208] Memorial on Annulment, para. 166 & 167.
[209] Counter-Memorial on Annulment, paras. 171-174.
[210] Reply on Annulment, para. 164.
[211] Hearing on Jurisdiction and Merits, Transcript, Day 7 p. 169:12-13 (Mr. Grzesik).

111. Further, Applicant states that there is nothing in the Award that would confirm or even imply that the Tribunal rejected the Pazova transactions on the basis that they were prepared by the Serbian tax administration just because it rejected the Batajnica transactions for this reason.[212] However, the Tribunal expressly stated, when discussing the Batajnica transactions, that value assessments by the Serbian tax administration for determining the tax on property transfer were different from property valuations based on international standards.[213] It clearly follows from this that other similar value assessments prepared by the tax administration are also different from property valuations based on international standards and, as such, unacceptable.

112. In conclusion, since Claimants themselves did not use the Pazova transactions for their valuation of the Construction Land (neither did Respondent), Mr. Rand's argument that this is somehow "key evidence" rings hollow and he cannot not now complain that the Tribunal did not explicitly address this evidence. In addition, the Award expressly rejected the use of tax assessments in valuation of property and in this way implicitly rejected the Pazova transactions, which were based on such assessments.

2. Second Confineks Valuation

113. In the Memorial on Annulment, Applicant also briefly mentioned that the Tribunal ignored the Second Confineks Valuation in its valuation of the Construction Land, although it was relevant evidence.[214]

114. In the Counter-Memorial on Annulment, Respondent noted that neither the Parties, nor their experts, relied on the Second Confineks Valuation in their valuation of the Construction Land, so there was no reason why the Tribunal would discuss this document in this context.[215]

115. In the Reply on Annulment, Applicant states that the Tribunal cannot use the Second Confineks Valuation as evidence for the value of BD Agro's liabilities, "*and then reject it when it comes to another part (i.e. valuation of assets) without*

[212] Reply on Annulment, para. 165.
[213] Award, para. 693, third bullet point, (i).
[214] Memorial on Annulment, para. 168.
[215] Counter-Memorial on Annulment, para. 170.

providing any explanation for such approach".[216] Applicant provides no authority for his contention. In any case, all this goes to the Tribunal's assessment of evidence and is not the matter for annulment procedure.[217]

116. To be sure, the Tribunal provided understandable reasons as to how it arrived at its conclusions about the value of BD Agro's assets and liabilities. It accepted Ms. Ilic's valuation of the Construction Land which was adopted by Mr. Cowan.[218] It also accepted Mr. Cowan's valuation of BD Agro's liabilities which was based on the Second Confineks Valuation, with adjustments and additions.[219] For each of these factual findings, the Tribunal provided reasons that are easy to follow. It was not required to additionally explain why it used the liabilities part of the Second Confineks Valuation but did not use its part dealing with BD Agro's land assets.

117. There is no contradiction in this approach. The Tribunal was perfectly entitled to use one set of sources to value BD Agro's land assets and another to value its liabilities. Indeed, this is precisely what the financial experts of both Parties did in their valuations. Mr. Hern used Mr. Mrgud's report for his upper-bound price in valuing the Construction Land and other sources to value BD Agro's other assets but then used the company's 2015 annual accounts to value its liabilities.[220] Likewise, Mr. Cowan's valuation used Ms. Ilic's valuation to determine the value of BD Agro's land, and the Second Confineks valuation (along with other sources) to determine its other assets and liabilities.[221]

118. During the Arbitration, Applicant was content with the approach taken by Dr. Hern in which he used two different sources to valuate BD Agro's assets and its

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[216] Reply on Annulment, para. 168

[217] See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 119, **RLA-282**; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283.**

[218] Award, para. 694.

[219] Award, paras. 699 & 707.

[220] First Expert Report of Dr. Richard Hern, paras. 89 & 159.

[221] Third Expert Report of Sandy Cowan, paras. 2.17 & 3.6.

liabilities. Applicant cannot now challenge the Tribunal's decision on this basis because it failed to raise it during the Arbitration.[222]

3. Two transactions invoked by Claimants

119. Applicant continues to argue that the Tribunal completely ignored "*two highly relevant actual comparable transactions*" in its valuation of the Construction Land, although these transactions were identified by Ms. Ilic and "*subsequently relied upon*" by both Claimants and their experts.[223]

120. As Respondent demonstrated in the Counter-Memorial on Annulment, neither Claimants nor their experts actually relied on these two transactions in their valuations but rather used them to challenge Ms. Ilic's valuation and, in case of Dr. Hern, to point out that they further support his valuation. Applicant disagrees, and in the Reply on Annulment again quotes the same part of Dr. Hern's testimony that was previously used to argue that Respondent's assertion that Claimants' experts did not rely on the two transactions is "*simply false*".[224]

121. However, Applicant has failed to reproduce in the full quote of the relevant part of Dr. Hern's testimony, which makes it clear that he only used these two transactions to challenge Ms. Ilic's report and to state that they are consistent with his valuation (which was based on Mr. Mrgud's valuation that used asking prices). Specifically, Applicant has failed to reproduce Dr. Hern's conclusion:

> "*… but actually the evidence that she includes in her report actually I think does show a strong degree of consistency with my valuation…"*[225]

[222] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 82, **CLA-185**.
[223] Reply on Annulment, para. 169; see, also, Memorial on Annulment, paras. 170-171.
[224] Reply on Annulment paras. 170-171.
[225] Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 16:22-24; see, also, Opening presentation of Dr. Hern, 20 July 2021, slide 17, with the title: "*Conclusion: **my valuation of EUR 22-30/m2 is fully supported by evidence reported (but not used) by Ms. Ilic of EUR 28-34/m2** and also the expropriation evidence from Batajnica at EUR 27-37/m2*" (emphasis added).

122. Clearly, Dr. Hern referred to these two transactions as providing further support for his valuation of the Construction Land, but did not rely on them when calculating its price. Neither did Claimants.[226]

123. Ms. Ilic concluded that these two transactions were not appropriate comparables and did not use them in her valuation.[227] Once the Tribunal found Mr. Cowan's valuation (who in turn used Ms. Ilic's valuation of land) more reasonable than Dr. Hern's, there was no need to address these two specific transactions, which Ms. Ilic rejected in her report and testimony.[228] Moreover, these two transactions only served to provide additional credibility to Dr. Hern's valuation and once the latter was disregarded (for other reasons)[229] there was no need to address them.

124. Applicant nevertheless insists that the Tribunal should have addressed the two transactions and argues that failure to observe relevant evidence constitutes a ground for annulment, so the Award should be annulled because the Tribunal ignored them.[230]

125. Applicant's argument does not stand scrutiny because it effectively rejects the possibility that the Tribunal could implicitly reject certain evidence or arguments by accepting other evidence, which expressly opposed the former. Applicant's contention goes against well-established practice of *ad hoc* committees holding that motivation for an award may be provided not only expressly but also implicitly, either by inference from the express terms of the

[226] Claimants' First Post-Hearing Brief, para. 308 ("*The Claimants' valuation at EUR 30 per m2 is also* ***supported by*** *contemporaneous market transactions in Dobanovci…*" (emphasis added)).

[227] First Expert Report of Danijela Ilic, para. 9.92 & Annex 2, para. 26; Opening presentation of Ms. Ilic, 19 July 2021, slide 10; Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 118:19-25 (Ms. Ilic).

[228] In this context, Applicant argues that the Tribunal's acceptance of Ms. Ilic's valuation as reasonable related to the 30% discount, not to the exclusion of the two transactions, with reference to Award, para. 696 (which was also referred to in this context in the Counter-Memorial on Annulment, para. 183, footnote 310). However, Applicant's contention is incorrect. While the context of para. 696 is discussion of the 30% discount, the Tribunal there accepted Ms. Ilic's overall approach as reasonable, and in the preceding paragraph described this approach and mentioned Ms. Ilic's comparison of construction land sale transactions with BD Agro's land and referred to the part of her first report excluding the two transactions, see Award, paras. 695-696. Previously in the Award, the Tribunal also accepted Ms. Ilic's price for the Construction Land as reasonable, see Award, paras. 692-693 ("*Dr. Hern proposing a range between EUR 22-30/m2 and Mr. Cowan 14.7 EUR/m2,* ***based on Ms. Ilic's first report*** *[…]* ***The Tribunal finds Mr. Cowan's approach to be more reasonable***" (emphasis added)).

[229] Award, para. 693.

[230] Reply on Annulment, para. 175.

award or by reference to evidence. As stated by the *ad hoc* committee in *Vivendi (I)*:

> *"No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that* ***all questions submitted to a tribunal are expressly or implicitly dealt with.*** *"*[231]

126. This is exactly what the Tribunal did in the Award. It accepted, as reasonable, Mr. Cowan's valuation of the Construction Land, which in turn was based on Ms. Ilic's valuation, and rejected Dr. Hern's valuation.[232] Ms. Ilic explicitly disregarded the two transactions from her valuation.[233] By expressly accepting Mr. Cowan's and Ms. Ilic's valuation of the Construction Land, the Tribunal implicitly accepted Ms. Ilic finding that these two transactions were not comparable to the Construction Land and should be disregarded in the valuation.

127. In addition, Applicant's argument here implies that the Tribunal's acceptance of Ms. Ilic's valuation and refusal of Dr. Hern's valuation was not the end of the story, but that the Tribunal should have valuated the Construction Land on its own by using these two transactions. This would have been plainly absurd and

[231] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**. Similarly, the *ad hoc* committee in *Wena* stated that reasons may also be "*reasonably inferred from the terms used in the decision*" and may be "*stated implicitly by reference to… documentation*", *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 81 & 93, **CLA-185**. *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, para. 127, **RLA-152**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 75, **RLA- 232**; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, para. 97, **CLA-184**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 189, **CLA-188**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 124, **CLA-186**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 132, **CLA-205**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee, 25 March 2010, para. 83, **RLA-250;** *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, para. 203, **RLA-283.**

[232] Award, paras. 692-693.

[233] First Expert Report of Danijela Ilic, para. 9.92 & Annex 2, para. 26; Opening presentation of Ms. Ilic, 19 July 2021, slide 10; Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 118:19-25 (Ms. Ilic).

was not even requested by Claimants. This also makes inapposite Applicant's contention that the two transactions would have resulted in the value of the Construction Land that would be EUR 45 million higher than the Tribunal's valuation.[234]

128. In this context, Applicant invokes *Teco v. Guatemala* to argue that the Tribunal was nevertheless required to address the transactions in question, simply because they were, in Applicant's view, highly relevant evidence.[235] However, Applicant fails to note that the *Teco* decision concerned the situation where the tribunal found that there was *no sufficient evidence* to calculate the transaction price in the context of deciding a claim for loss of value, while the record contained expert reports and other relevant information that the tribunal ignored.[236] In stark contrast to this, the Tribunal in the present case did not ignore expert reports but discussed them and accepted Ms. Ilic's valuation of the land, which also rejected the two transactions now invoked by Applicant.

129. Further, the *Teco* award does not support the proposition, which is implied in Applicant's argument,[237] that a tribunal is required to provide an express analysis of evidence that may be relevant even if such evidence was implicitly rejected by the tribunal's acceptance of other evidence that addressed it. The *Teco* tribunal found that that there was insufficient evidence, although that evidence *was* on the record, which made it impossible to follow the tribunal's reasoning. But, if one is able to follow the reasoning of the tribunal, the fact that the tribunal did not address certain evidence is insufficient to lead to annulment.[238]

130. As already mentioned, the Tribunal in the present case expressly decided to accept Ms. Ilic's report and her valuation of the Construction Land, which in

[234] Reply on Annulment, paras. 180.
[235] Reply on Annulment, para. 176.
[236] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, paras. 128-136, **CLA-186**.
[237] See Reply on Annulment, para. 176.
[238] *Agility Public Warehousing Company K.S.C.P v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment, 8 February 2024, paras. 178-180, **RLA-284;** As the *ad hoc* committee stated, *"However, notwithstanding the Tribunal's failure to address the issues already pointed out, the Committee cannot opine on the correctness of the Tribunal's analysis, nor can it annul an award based on an error of fact or law made by the Tribunal. The Committee recalls that 'as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion', the requirement is satisfied*", *ibid.*, para. 180.

turn expressly rejected the two transactions in question.[239] Therefore, unlike the *Teco* tribunal, the Tribunal did not ignore the evidence, but *in accordance with its express holding* (to accept Ms. Ilic's valuation) *implicitly* rejected relevance of the transactions in question. It provided reasons for its finding that are easy to follow.

131. A further point of disagreement between the Parties concerns the question of whether these two transactions were comparable to Zones A, B and C land and whether they should have been used in Ms. Ilic's valuation. This is obviously a factual issue on which the Parties disagreed during the Arbitration and continue to disagree. As the Reply on Annulment does not provide any additional arguments in this regard, the *Ad hoc* Committee is respectfully directed to Respondent's discussion of this issue in the Counter-Memorial on Annulment.[240] In any case, this factual issue is not a proper subject of annulment proceedings, and the *Ad hoc* Committee should disregard it for this reason alone.[241]

IV. THE TRIBUNAL DID NOT FAIL TO PROVIDE ANY REASONS FOR ITS VALUATION OF BD AGRO'S OTHER ASSETS

132. Applicant argues that the Tribunal did not provide any reasoning with respect to its valuation of BD Agro's assets other than the Construction Land and that Serbia did not dispute that.[242] This is not true, because, as Applicant himself notes,[243] and as Respondent pointed out already in the Counter-Memorial on Annulment,[244] the Award includes a footnote explaining that the Tribunal's valuation of BD Agro's assets and liabilities was based on the table reproduced

[239] Award, para. 693.
[240] Counter-Memorial on Annulment, paras. 176-180.
[241] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**; T*idewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188**; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 403, **CLA-205**; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, paras.119, **RLA-282**; C*onocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, paras. 498-499, **RLA-283**.
[242] Reply on Annulment, paras. 184-185.
[243] Reply on Annulment, para. 185.
[244] Counter-Memorial on Annulment, paras. 201-202.

in Mr. Cowan's third expert report, "*after adjusting it as necessary in light of the Tribunal's conclusions above*".[245] However, Applicant considers that this footnote "*does not – and cannot – represent sufficient reasoning for the valuation of BD Agro's remaining assets*",[246] because (i) its language is unclear and the Tribunal provided no explanation for why the valuation of BD Agro's remining assets should be based on Mr. Cowan's rather than Dr. Hern's valuation; (ii) according to Articles 52(1)(e) and 48(3) of the ICSID Convention, the reasons should be expressly stated in an award and not implied. None of these arguments stands scrutiny.

1. The Tribunal provided a clear explanation for its valuation of BD Agro's other assets

133. While Applicant, contradicting himself, in fact accepts that the Tribunal provided explanation for its valuation of BD Agro's assets, he considers that this explanation is unclear and insufficient.

134. According to Applicant, it is unclear what the Tribunal meant when it stated that the table was "*based on*" the table provided by Mr. Cowan and to what "*conclusions above*" it referred to.[247] This argument is not serious. By using the term "*based on*", the Tribunal indicated that it used items and values from the table of assets and liabilities reproduced in Mr. Cowan's third report. By stating that it adjusted the table as necessary "*in light of the Tribunal's conclusions above*", the Tribunal pointed to its conclusions about various items in the table and adjusted their values, where necessary, in light of these conclusions. Pointing to other parts of award is a valid way to provide reasoning.[248] It also goes without saying that the Tribunal has discretion to make adjustments to experts' valuations.[249]

135. The adjusted items all concern liabilities, while the Tribunal made no adjustments with respect to assets, whose values remained the same as in Mr.

[245] Award, para. 707, footnote 593.
[246] Reply on Annulment, para. 185.
[247] Reply on Annulment, para. 185.
[248] *Hydro S.r.l. and Others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, para. 156, **RLA-214**.
[249] *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, para. 225, **RLA-214**.

Cowan's table. It should be noted that the Tribunal provided an appropriate explanation for adjustments – which concerned the Tribunal's decision not to apply Mr. Cowan's proposed 30% distress discount - in the preceding part of the Award,[250] and this is the meaning of the phrase "*after adjusting it as necessary in light of the Tribunal's conclusions above*". Further explanations about liabilities are provided in the Award, para. 699, *seriatim*, and they can be easily connected to items in the table at para. 707 and also to the table in Mr. Cowan's Third Expert Report on which the Tribunal's table was based. [251]

136. More generally, Applicant argues that the Tribunal did not explain why it opted for Mr. Cowan's rather than Dr. Hern's valuation of the "remaining assets", *i.e.* its assets other than the Construction Land.[252] This is also inaccurate.

137. The Tribunal noted that both experts separately valued BD Agro's "core assets", *i.e.* assets necessary for BD Agro's diary production, and its "non-core assets".[253] Dr. Hern valued "core assets" by using the Discount Cash Flow ("DCF") and Adjusted Book Value Methods, while for "non-core assets" he used only the latter method.[254] On the other hand, Mr. Cowan provided different valuations, but eventually used Ms. Ilic's valuation for BD Agro's land, and asset-based approach based on the Second Confineks Valuation for other assets.[255] The Tribunal rejected Respondent's argument that BD Agro was not a going concern, but also did not find it appropriate to apply the DCF methodology to value BD Agro's farm business, as proposed by Dr. Hern,[256] and decided "*that the appropriate valuation methodology to value all of BD Agro's assets, i.e. core and non-core assets, is the asset-based methodology*".[257]

138. In this way, the Tribunal decided to use the same methodology as Mr. Cowan and rejected Dr. Hern's methodology when valuing BD Agro's assets other than land. This is the reason why the Tribunal's valuation of BD Agro's assets other than land was based on Mr. Cowan's valuation, and not on Dr. Hern's. In other

[250] Award, paras. 700-701.
[251] Award, paras. 699 & 707; Third Expert Report of Sandy Cowan, Table 4.8.
[252] Reply on Annulment, para. 187,
[253] Award, para. 683.
[254] Award, para. 637.
[255] Award, paras. 658-659.
[256] Award, para. 685-687.
[257] Award, para. 688.

words, the table reproduced at paragraph 707 of the Award came as the result of the Tribunal's whole discussion of quantum, including the issue of appropriate valuation methodology. As paragraph 707 itself states:

> "***It follows from the above*** *[i.e. the preceding discussion on quantum] that the Tribunal has made several adjustments to the valuations prepared by the Parties' experts, as a result of which the final amounts are as follows: [table of BD Agro's assets and liabilities]*".[258]

2. Annulment practice confirms that reasons may be implied in the award

139. Applicant also argues that reasons must be expressly set out in an ICSID award, while only a "handful" of *ad hoc* committees adopted the proposition that the reasons may be inferred but imposed important limitations to this. According to Applicant, Articles 52(1)(e) and 48(3) of the ICSID Convention expressly require the tribunal to "state" the reasons for its decisions, so Respondent's interpretation that the Tribunal's reasoning can be implied from the Award is not correct. [259]

140. Applicant's interpretation of Article 52(1)(e) of the ICSID Convention is wrong. As Respondent pointed out in the Counter-Memorial on Annulment, there has been ample practice of *ad hoc* committees adopting the position that reasons may be provided not only expressly but also implicitly, either by inference from the express terms of the award or by reference to evidence.[260] This practice can hardly be attributed to a "handful" of *ad hoc* committees, as Applicant avers.[261]

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[258] Award, para. 707.

[259] Reply on Annulment, paras. 189-191.

[260] Counter-Memorial on Annulment, para. 73 and cases referred to therein; see, also, *ibid.*, paras. 74-75.

[261] Reply on Annulment, para. 191. That reasons can be inferred from the award has been widely accepted, see, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 81, **CLA-185**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, para. 127, **RLA-152**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 75, **RLA- 232**; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, para. 97, **CLA-184**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 189, **CLA-188**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 124, **CLA-186**; *NextEra Global Holdings et al. v. Spain*, ICSID Case

141. That the practice is widespread is confirmed by a recent edition of the leading commentary of the ICSID Convention:

> *"**This practice demonstrates that questions may be dealt with indirectly**… If it can be implied from the reasons given why a particular argument cannot be supported, it is not necessary to address that argument explicitly**. If an argument rests on premises that have been dismissed by the tribunal, the argument need not be addressed as long as the tribunal has stated reasons for dismissing the premises.**"*[262]

142. According to another commentator,

> *"Reconstructing implicit reasons 'where the result reached by the tribunal appears capable of explanation in the light of the reasons actually supplied' constitutes a necessary methodology to avoid a hair-triggering approach that results in overly formalistic annulments"*[263]

143. As has been discussed in the preceding subsection, the Tribunal rejected Dr. Hern's methodology for valuation of farm assets and adopted the asset-based methodology for valuation of all assets, which corresponded to the methodology adopted by Mr. Cowan.[264] The Tribunal was not required to explain, once again, why it adopted Mr. Cowan's table of assets and liabilities which was the product of his application of the same methodology. The Tribunal only explained that it made certain adjustments to Mr. Cowan's table in light of its findings, which were set out previously in the Award. It is submitted that all this was more than

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No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 132, **CLA-205**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee, 25 March 2010, para. 83, **RLA-250**;*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, para. 203, **RLA-283.**

[262] Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds., *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd edn. Cambridge University Press; 2022), p. 1367, para. 551 (emphasis added), **CLA-206**, see, also, *ibid*, p. 1343, para. 456.

[263] R. D. Bishop & S. Marchili, "Annulment Under the ICSID Convention", 2012, in: *Investment Claims*, OUP, 2023, , para. 9.42, **RLA-254**.

[264] Award, paras. 685-688.

sufficient explanation of the Tribunal's motivation, which was partly inferred from its previous discussion of methodology and partly stated *expressis verbis.*

144. Applicant argues that even those *ad hoc* committees that entertained the proposition that reasons may be inferred "*imposed important limitations on such a possibility*".[265] However, what Applicant presents as examples of such "important" limitations are merely requirements of elementary logic and reasonableness, since the decisions he quotes stated that inferred reasons should be "*evident and logical consequence of what is stated in the award*" (*Rumeli v. Kazkhstan*) or "*can be reasonably inferred from the terms used in the decision*" (*CMS v. Argentina*, *Wena v. Egypt*).[266]

145. As has been discussed above, the Tribunal decision to use Mr. Cowan's table of assets and liabilities and adjust it in light of its findings is "*an evident and logical consequence*" (*Rumeli*) of the Tribunal's acceptance of the asset-based-methodology for valuation of BD Agro's assets, which was also used by Mr. Cowan.

146. The reasons for the Tribunal's use of Mr. Cowan's table of assets and liabilities can also be "*reasonably inferred from the terms used in the award*" (*CMS*), because the Tribunal expressly referred to its preceding discussion on quantum ("*[i]t follows from the above…*"[267]) and in a footnote noted that the table of BD Agro's assets and liabilities was based on the table from Mr. Cowan's third expert report "*after adjusting it as necessary in light of the Tribunal's conclusions above*".[268] Its preceding conclusions were, *inter alia*, that it was appropriate to use asset-based-methodology for valuation, as Mr. Cowan did. Therefore, in contrast to the *CMS* award, the present Award does not contain a "*significant lacuna which makes it impossible for the reader to follow the reasoning on this point*".[269]

[265] Reply on Annulment, para. 191.
[266] Reply on Annulment, paras. 191-196.
[267] Award, para. 707.
[268] Award, para. 707, footnote 593.
[269] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 94, **RLA-152**.

147. Further, Applicant argues that the Tribunal fell short of the standard formulated by the *Watkins Holdings* annulment decision requiring that "*the key points or pivots are identified and connected to the finding or ruling*" although it need not address every single argument or point made by the parties.[270] At the outset, one should note here that Applicant deliberately avoided to quote this part of the *Watkins Holdings* decision in its Memorial on Annulment, but only quoted the sentence preceding it to the effect that it is not sufficient for a tribunal to merely state its findings.[271] Since this was exposed in the Counter-Memorial on Annulment,[272] Applicant now comes back with the argument that the Tribunal said nothing about "*key points and pivots*" and did not respond to the "*underlying positions and theories of the Parties*".[273] As discussed above, this is wrong, since the Tribunal provided an extensive discussion of quantum, in which it explained why it chose the asset-based-methodology, which was also used by Mr. Cowan, over DCF method used by Dr. Hern, Claimants' expert.[274] After this discussion, the Tribunal provided a table, which was based on Mr. Cowan's table, with certain adjustments and specifically referred to its preceding discussion in this regard.[275] Therefore, the Tribunal did respond to the underlying positions and theories of the Parties and did identify key points and pivots, which it then connected to its findings on quantum.

148. In conclusion, Applicant is wrong to argue that the reasons for the Tribunal's use of Mr. Cowan's table, as adjusted, cannot be inferred from the Award.[276] On the contrary, the use of Mr. Cowan's table is a logical consequence of the Tribunal's conclusions on quantum, to which the Award refers in the very paragraph in which it reproduces the table.

[270] Reply on Annulment, para. 201.
[271] See Memorial on Annulment, para. 201.
[272] Counter-Memorial on Annulment, para. 194.
[273] Reply on Annulment, para. 201.
[274] Award, paras. 687-688.
[275] Award, para. 707 and footnote 593.
[276] Reply on Annulment, paras. 194, 197-199 & 201.

3. The "Novi Becej" castle and land

149. Applicant avers that the Tribunal did not provide any reasoning as to why it valued the "Novi Becej" castle and land at EUR 0.2 million and whether this includes only the land or also the castle.[277]

150. As Respondent demonstrated in its Counter-Memorial on Annulment, this allegation is without merit because it misinterprets experts' valuation reports and the Award. Namely, Applicant has failed to note that the Tribunal accepted Mr. Cowan's valuation, which separately valued the "Novi Becej" *land* and the castle. On the one hand, Mr. Cowan's valuation of the land, including the "Novi Becej" *land*, was based on Ms. Ilic's valuation, and the figure arrived at by Ms. Ilic (EUR 0.2 million) was reproduced in his report and accepted by the Tribunal.[278] The reasons for the Tribunal's acceptance of Ms. Ilic's report were amply explained in the Award.[279]

151. On the other hand, Mr Cowan's valuation of BD Agro's other assets was based on the Second Confineks Valuation, which specifically included the "Novi Becej" *castle* among "other fixed assets".[280] The Tribunal likewise accepted Mr. Cowan's valuation of BD Agro's other assets. Therefore, by simple reading of the Award, as well as Mr. Cowan's expert report to which the Award refers, and on which its valuation of BD Agro's assets other than land was based, one can clearly see and understand the Tribunal's motives behind separate valuations of the "Novi Becej" land and the castle.[281]

152. In the Reply on Annulment, Applicant stubbornly refuses to accept the obvious. It first rejects Respondent's argument as irrelevant, because the issue is allegedly not whether Serbia included the castle anywhere in its valuation but rather why the Award does not explain the Tribunal's preference for Serbia's valuation.[282] This is a repetition of the general argument that Applicant already

[277] Memorial on Annulment, paras. 191-192 & 195; Reply on Annulment, para. 205.
[278] Third Expert Report of Sandy Cowan, para. 4.4. & Award, para. 707.
[279] Award, paras. 692-694.
[280] Report on the valuation of assets, liabilities and capital of BD Agro Dobanovci, January 2016, p. 52 (pdf) (indicating Novi Becej land, including plot no. 22063/1 on which the castle was located) & pp. 180-181 (pdf) (indicating "Cultural heritage building built on plot no. 22063/1", *i.e.* the castle), **CE-172**. This is also noted by Dr. Hern, see First Expert Report of Dr. Richard Hern, para. 118.
[281] Counter-Memorial on Annulment, paras. 199-203.
[282] Reply on Annulment, para. 206.

made with respect to the Tribunal's valuation of BD Agro's assets other than land. As discussed extensively at the beginning of this Section, the Tribunal provided a clear explanation for the method of its valuation of BD Agro's other assets, which was also used by Mr. Cowan,[283] and then accepted Mr. Cowan's valuation with certain adjustments that were expressly and *seriatim* explained in the Award.[284] The Tribunal's reasoning is therefore quite clear and it was not required to explain its acceptance or refusal of each item in the table. One should also note in the present context that Mr. Cowan's valuation of BD Agro's assets other than the land, including the "Novi Becej" castle, was based on the Second Confineks report, which was promoted by Claimants themselves.[285] Considering this, the Tribunal did not need to further discuss their inclusion in Mr. Cowan's valuation but simply could accept it.

153. Applicant doubts that Mr. Cowan included the castle in "other fixed assets" because it placed "other fixed assets" under "Farm Assets" and a castle is clearly not a farm asset and was never used as such.[286] However, Applicant fails to note that Mr. Cowan's category of "non-farm assets" includes only the construction and forest land which he was instructed to value on the basis of Ms. Ilic's land valuation.[287] On the other hand, the "farm assets" for the purposes of his valuation included agricultural land which he valued on the basis of Ms. Ilic's valuation, as well as all other assets of BD Agro, which he valued on the basis of the Second Confineks valuation. Neither Mr. Cowan nor the Tribunal were obligated to further define the category "other fixed assets" or to list all buildings and structures that fell into this category. The fact that Mr. Cowan placed the category "other fixed assets", which included the "Novi Becej" castle, into "farm assets" was obviously a matter of convenience.

154. Applicant further speculates that a table in Mr. Cowan's report which makes a parallel between Mr. Cowan's valuation of "Novi Becej" (land) and Dr. Hern's valuation of "Novi Becej" (land and castle) suggests that Mr. Cowan did not take the castle into account.[288] It is however, completely unclear how Applicant

[283] See above XXX /4.1/; Award, paras. 658-659 & 685-687.
[284] See above XXXX /4.1./; Award, paras. 699-701 & 707.
[285] Claimants' Reply, paras. 1298-1302.
[286] Reply on Annulment, para. 207.
[287] Second Expert Report of Sandy Cowan, para. 6.6.
[288] Reply on Annulment, para. 207.

could draw this conclusion from the table in question, which itself refers to "all land" not buildings.

155. Finally, answering Serbia's argument that he should have initiated proceedings under Article 49(2) of the ICSID Convention if he thought that the Tribunal failed to decide on the value of the "Novi Becej" castle, Applicant states that it is unclear what the Tribunal decided, and why, with respect to the value of the castle and that such failure is properly addressed in the context of annulment proceedings.[289] As already discussed, it could not be unclear to Applicant what the Tribunal decided, if only it read carefully expert reports and the Award. But even if the Award had been unclear in this regard (*quod non*), this lack of clarity concerns primarily what the Tribunal decided about the "Novi Becej" castle, rather than the lack of reasons about why it accepted Mr. Cowan's valuation, which includes an item titled "Novi Becej". In other words, if unsure, Applicant should have asked the Tribunal to decide the question of the value of the "Novi Becej" castle pursuant to Article 49(2) of the ICSID Convention.

4. The "Current assets"

156. In the Memorial on Annulment, Applicant argued that the Tribunal did not provide any reasoning for its decision to value BD Agro's "current assets" at EUR 5 million, nor did it explain which assets it included in the mentioned category.[290]

157. In the Counter-Memorial on Annulment, Respondent pointed out that the Tribunal adopted Mr. Cowan's valuation of BD Agro's other assets, including "current assets", as explained in the Award at paragraph 707.[291]

158. In the Reply on Annulment, Applicant argues that the Tribunal's explanation is insufficient, in particular because the Tribunal did not explain "*how and why*" it adjusted Mr. Cowan's valuation and, more generally, did not explain "*why it accepted Mr. Cowan's valuation rather than the valuation provided by Dr. Hern*".[292]

[289] Reply on Annulment, para. 213.
[290] Memorial on Annulment, para. 199.
[291] Counter-Memorial on Annulment, para. 206.
[292] Reply on Annulment, para. 218.

159. However, the Tribunal's acceptance of Mr. Cowan's rather than Dr. Hern's valuation was explained in the Award, as already discussed in **Section B.(IV)(1)** above. In short, the Tribunal explicitly rejected the DCF method for valuing BD Agro's farm business proposed by Dr. Hern and also explicitly adopted asset-based methodology to value all of BD Agro's assets.[293] In this way, the Tribunal decided to use the same methodology as Mr. Cowan and rejected Dr. Hern's methodology and, as a result, used Mr. Cowan's valuation of BD Agro's current assets. Accordingly, the Tribunal used Mr. Cowan's valuation table, with certain adjustments, explained in the Award.[294] In conclusion, the Tribunal provided sufficient reasoning for its use of Mr. Cowan's valuation of BD Agro and the adjustments it made.

160. Applicant further argues that since Mr. Cowan based his valuation on the Second Confineks Valuation, which post-dates the Valuation Date, if the Tribunal used Mr. Cowan's valuation that would create a further contradiction in the Award.[295] However, as Respondent already pointed out in the Counter-Memorial on Annulment, (i) the Tribunal stated that *information* originating after the Valuation Date should not be used for valuation, not evidence or documents, thus there is nothing contradictory in the Tribunal's decision to rely on this document, and (ii) the Second Confineks Valuation used information originating from the whole of 2015, which in most part originated before the Valuation Date and it is incumbent on Applicant to point to specific information that originated after the Valuation Date.[296]

161. According to Applicant, the original date of the information is irrelevant, rather what is relevant is when the information became available and could have been known to a willing buyer and a willing seller.[297] However, the point here is that most, if not all, information in the Second Confineks Valuation had already been available from BD Agro's books to a willing buyer and a willing seller at the Valuation Date. Acting prudently and using reasonable due diligence,[298] as they

[293] Award, paras. 687-688.
[294] Award, paras. 699-701 & 707.
[295] Reply on Annulment, para. 219.
[296] Counter-Memorial on Annulment, para. 209.
[297] Reply on Annulment, para. 220.
[298] International Valuation Standards 2017, published by International Valuation Standards Council, July 2017, para. 10.5, **CE-517.**

would be assumed to have done, they would most certainly inspect BD Agro's books before valuing the company at the Valuation Date, 21 October 2015, and so the information that would be later summarized in the financial statements at the end of the year would be available to them.

162. Even more importantly in the context of the present proceedings, Claimants never challenged the Second Confineks Valuation, which they considered "credible",[299] as did Dr. Hern.[300] They are precluded from doing so now.[301]

163. The fact that the Parties' experts eventually came to different values in valuing BD Agro's current assets is irrelevant in this context. What is relevant is that Claimants have never challenged the use of the Second Confineks Report on the basis of its date. On the contrary, Claimants made a considerable effort to impose the Second Confineks Report upon Respondent in the debate over quantum in the Arbitration.[302] In any case, the First Confineks Valuation, used by Dr. Hern, and the Second Confineks Valuation, used by Mr. Cowan, "*are not substantially different"*.[303]

164. In conclusion, Applicant's argument that the Tribunal did not provide any reasons for its valuation of BD Agro' remaining assets (*i.e.* assets other than the Construction Land) is without merit. The Tribunal explained its choice of the valuation method, which corresponded to Mr. Cowan's valuation method, and then used his table of BD Agro's assets and liabilities in the valuation, while making certain adjustments to it.

V. THE TRIBUNAL DID NOT PROVIDE CONTRADICTORY AND INSUFFICIENT REASONING WITH RESPECT TO ITS VALUATION OF BD AGRO'S LIABILITIES

165. Applicant requests the annulment of the Award also in part dealing with the evaluation of the following BD Agro's liabilities: total estimated liabilities

[299] Claimants' Reply, para. 1300.
[300] First Expert Report of Dr Richard Hern, para. 79.
[301] See, *e.g.*, *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case, No. AR/98/4, Decision (Annulment Proceedings), 5 February 2002, para. 82, **CLA-185**.
[302] See, *e.g.*, Claimants' Reply, paras. 1316-1321.
[303] First Expert Report of Dr Richard Hern, para. 79.

(Section 2), court proceeding liabilities (**Section 3**), redundancy payments (**Section 4**), conversion fee (**Section 5**), and capital gains tax (**Section 6**). Applicant contends that the Tribunal's reasoning related to valuation of these liabilities is either contradictory, insufficient, or both.

166. In **Sections 2 to 6**, Respondent will provide the arguments to the contrary, but first it will deal with Applicant's assertion from paragraphs 148 to 153 of the Reply on Annulment that the Tribunal has set the principle that the valuation should rely only on evidence, *i.e.* documents pre-dating the Valuation Date (**Section 1**).

1. The Tribunal did not intend to disregard the documents post-dating the Valuation Date but the information post-dating the Valuation Date

167. Applicant argues that when evaluating BD Agro's total estimated liabilities and court proceeding liabilities, the Tribunal relied on the Second Confineks Report from January 2016 and BD Agro's 2015 Financial Statements, although it previously accepted the principle that all evidence, *i.e.* documents post-dating the Valuation Date should be disregarded.[304] In this Section, Respondent will explain that such principle was never adopted by the Tribunal.[305]

168. In the part of the Award dealing with the value of the Construction Land, the Tribunal noted that it is

> *"well accepted that the* ***information*** *used for valuation should originate on or before the valuation date".*[306]

169. The Parties disagree on what the Tribunal regarded as *information*. According to Applicant when referring to the information the Tribunal also meant to say that the documents (*i.e.* evidence, in Applicant's words) created after the Valuation Date should be disregarded.[307] Respondent disagrees[308] as the

[304] Reply on Annulment, paras. 233-236 and 242-251.
[305] See also Counter-Memorial on Annulment, paras. 214, 234 and 244.
[306] Award, para. 693, third bullet point (ii).
[307] Reply on Annulment, paras. 233 and 235.
[308] Counter-Memorial on Annulment, paras. 213-214.

Tribunal explicitly stated that the *information* used for valuation must have existed on the Valuation Date, and not the documents.[309]

170. In the Reply on Annulment, Applicant argues that: (i) Serbia's interpretation contradicts the stance of its own expert, Ms. Ilic, who criticized Dr. Hern for using evidence post-dating the Valuation Date;[310] (ii) the Tribunal refused to accept Respondent's arguments concerning size of the Construction Land because they relied on the post-Valuation Date judgments, although they were based on information predating the Valuation Date;[311] (iii) definition of the fair market value requires the information that was available only in evidence post-dating the Valuation Date, to be disregarded.[312] These assertions are inaccurate.

a) Ms. Ilic did not criticize Claimants' experts for using post-Valuation Date documents but was saying the same as the Tribunal – that the information used must have pre-dated the Valuation Date

171. First of all, whether Ms. Ilic criticized Claimants' expert for using the documents post-dating the Valuation Date or not, is utterly irrelevant for the interpretation of the stance adopted by the Tribunal. Nevertheless, as will be explained, Ms. Ilic did not criticize Claimants' experts in that regard.

172. In the part of her first expert report referred to by the Applicant, [313] Ms. Ilic noted that

> "*all qualified valuers undertaking role of reviewers should also use only* ***evidence which occurred*** *before the date of valuation as well as call upon valuation standards which were in force at the date of valuation*".[314]

173. Although Ms. Ilic did not criticize Claimants' experts in the quoted part of her first expert report, as Applicant wrongly suggests[315], she did so in another part,

[309] Award, para. 693, third bullet point (ii).
[310] Reply on Annulment, para 149.
[311] Reply on Annulment, para 152.
[312] Reply on Annulment, para 150-151.
[313] Reply on Annulment, para 149.
[314] First Expert Report of Danijela Ilic, para. 4.3.
[315] Reply on Annulment, para. 149.

but not because of the use of the documents post-dating the Valuation Date but because of the use of information post-dating the Valuation Date. She stated:

> *"Generally speaking, Mr. Grzesik's report (as well as Mr. Hern's) has a number of methodological and evidentiary deficiencies that make it unreliable, which are in detail discussed below: (1) use of evidence and valuation standards that post-date the Valuation Date…"*[316]

174. When mentioning "*evidence"* in the quoted texts Ms. Ilic did not refer to documents, as Applicant suggests, but to information. This is evident from the above quoted part of her first expert report in which she explicitly stated that "*evidence which **occurred***" after the Valuation Date should be excluded.[317] The information occurs, and not the documents.

175. This is also proven by another quote from her second report:

> *"Second, in paragraph 76 of RHR 3, Dr. Hern justifies the use of **information** dated after the date of valuation, 21 October 2015, by stating:*
>
> *"*It is correct that some of the evidence I have relied on post-dates the valuation date. Given the lack of other sources of market evidence, I chose to rely on evidence that slightly post-dates the expropriation date to provide me with a wider range of evidence. Nevertheless, the evidence I rely on remains close (2016) to the expropriation date (21 October 2015*)."*
>
> *Above statement is again not in line with internationally recognized valuation standards, which provide that:*
>
> *"*on the valuation date" requires that the value is time-specific as of a given date. Because markets and market conditions may change, the estimated value may be

[316] First Expert Report of Danijela Ilic, para. 4.2.
[317] First Expert Report of Danijela Ilic, para. 4.3.

incorrect or inappropriate at another time. **The valuation amount will reflect the market state and circumstances as at the valuation date, not those at any other date**;*"*[318]

176. As it is evident from the quoted text, Ms. Ilic was using the words *information* and *evidence* interchangeably. More importantly, she was saying the same as the Tribunal – that the information used for valuation must have occurred before the date of valuation and not that documents used for valuation must have existed before the date of valuation.

177. Finally, she specifically addressed and criticized the First and the Second Confineks Report, however, when doing so, she did not mention that reliance on them is wrong because they post-dated the Valuation Date, but for some other reasons.[319] This further proves that, same as the Tribunal, Ms. Ilic had no problem with using the documents post-dating the Valuation Date.

b) The Tribunal rightly concluded that the legal situation at the Valuation Date is relevant and that post-Valuation Date court decisions should therefore be excluded

178. When valuing BD Agro's assets, Respondent's experts excluded certain land plots from the valuation as they were subject to a legal dispute on the Valuation Date. The Tribunal found this approach to be incorrect, as the outcome of the dispute was not fully certain at the Valuation Date and the relevant land was still owned by BD Agro at that moment.[320] From this, Applicant infers that it is clear that the Tribunal's intention was to exclude post-Valuation Date judgements (court decisions) even if based on pre-Valuation Date information.[321] Same as Applicant's other arguments, this one is also misleading.

179. In the relevant part of the Award the Tribunal clearly stated what it meant: "*the Tribunal sees no reason to disregard the **legal situation** as it stood at the time*

[318] Second Expert Report of Danijela Ilic, paras. 2.119-2.120.
[319] For instance, Ms. Ilic criticised the First Confineks Report because it contains mistakes relating to the size of cadastral parcels, and the Second Confineks Report because she found that "*there is no information about market evidences upon which they have based opinion as well as there is no evidence of analytical process in comparable approach*". First Expert Report of Danijela Ilic, paras. 8.1-8.4.
[320] Award, para. 690, second bullet point.
[321] Reply on Annulment, para 152.

of the valuation, being that the land in question was owned by BD Agro…".[322] Depending on the outcome of the court proceedings, legal situation(s) before and after rendering the court decision could differ and thus the Tribunal noted that what is relevant is the legal situation at the time of valuation. This conclusion is in line with Tribunal's statement that "*information used for valuation should originate on or before the valuation date*".[323]

180. Unlike the court decisions that can **change** the existing legal situation, documents such as the Confineks Reports and financial statements merely **reflect** the status of the company's assets without altering it and thus it is irrelevant when they were created as long as they contain information pre-dating the Valuation Date. Therefore, the Tribunal was not contradictory when it intended to exclude post-Valuation Date judgements (court decisions).

c) Definition of the fair market value does not indicate that the Tribunal intended to disregard documents drafted after the Valuation Date

181. Applicant argues that the Tribunal calculated the fair market value of BD Agro's assets as of the Valuation Date and notes that the Parties agree that the definition of the fair market value requires that "*both a willing buyer and a willing seller act "knowledgeably", i.e. based on information available to them..."*[324] On this basis, Applicant concludes that the Tribunal intended to disregard documents drafted after the Valuation Date,[325] since *information* that existed on the Valuation Date but was only made available in *evidence* post-dating the Valuation Date cannot be taken into consideration, because it was not available to a willing buyer or a seller at the Valuation Date.[326] This argument is completely inapposite.

182. Applicant's assertion that the accepted definition of the fair market value can prove what the Tribunal meant when it stated that the information used for valuation should originate on or before the Valuation Date, is obviously far-

[322] Award, para. 690, second bullet point.
[323] Award, para. 693, third bullet point (ii).
[324] Reply on Annulment, para. 150.
[325] Reply on Annulment, paras. 150-151.
[326] Reply on Annulment, para. 151.

fetched. However, even if that argument is accepted, it does not help Applicant's case.

183. The fair market value assessment is inherently abstract rather than concrete, as it pertains to what a knowledgeable buyer would have hypothetically known (or could have known) at the relevant time.[327] Accordingly, what matters is that the relevant liability existed as of the Valuation Date as that would mean that a knowledgeable buyer would have known (or could have known) about that liability.

184. In this respect, it should be underlined that the concept of a "*knowledgeable*" buyer or seller necessarily implies the exercise of reasonable due diligence. Information from BD Agro's documents and financial records were available to prudent and diligent buyer who could have reviewed those records and identified the relevant liabilities even before the First and the Second Confineks Report and 2015 Financial Statements were prepared.

185. What is also worth noting here is that Applicant has himself confirmed that there is a difference between information on the one side and documents/evidence on the other, when he stated that "[i]*f* ***information*** *existed as of the Valuation Date but was only made available* ***in evidence*** *post-dating the Valuation Date…*"[328] With this in mind, it is hard to follow Applicant's argument that when saying that *"information used for valuation should originate on or before the valuation date"*[329] the Tribunal was actually saying that documents (evidence) used for valuation should originate on or before the Valuation Date.

2. The Tribunal's valuation of the total estimated liabilities is neither contradictory nor insufficient

a) The Tribunal's valuation of the total estimated liabilities is not contradictory

186. Applicant argues that the Tribunal contradicted its alleged principle that it would not rely on any *evidence* post-dating the Valuation Date when it (i) accepted

[327] This was confirmed by Claimants who agreed that the fair market value concerned hypothetical buyer/seller. *See* Claimants' Memorial, para. 491.
[328] Reply on Annulment, para. 151.
[329] Award, para. 693, third bullet point (ii).

Serbia's calculation of BD Agro's debt *vis-à-vis* Banca Intesa, and (ii) relied on the Second Confineks Valuation dated January 2016, and BD Agro's 2015 Financial Statements for the purposes of valuating total estimated liabilities (and court proceeding liabilities).[330]

a.a. Calculation of BD Agro's debt vis-à-vis Banca Intesa was based on information pre-dating the Valuation Date

187. When it comes to BD Agro's debt *vis-à-vis* Banca Intesa, Tribunal accepted calculation of Respondent's financial expert, Mr. Cowan.[331] Claimants argue that this calculation was "*based on both "*evidence*" and "*information*" post-dating the Valuation Date*".[332] This is far from the truth.

188. In his third expert report, Mr. Cowan noted:

> *"I have been instructed to recalculate the **default loan interest** between the dates of 8 November 2013 and the **valuation date** of 21 October 2015 based on a principle of **RSD 1,048.0 million** and to include the recalculated default loan interest in my valuation."*[333]

189. He then provided the chart showing the calculation:[334]

Default Interest on Banca Intesa Loan

Date Start	Date End	Debt Amount (RSD million)	Key/base policy rate in % p.a.	Increase in the key/ base policy rate in p.p.	Default rate per annum (%)	Default Interest (RSD million)
08/11/2013	17/12/2013	1,048.294	10.0%	8.0%	18.00%	20.679
18/12/2013	08/05/2014	1,048.294	9.5%	8.0%	17.50%	71.37
09/05/2014	12/06/2014	1,048.294	9.0%	8.0%	17.00%	17.089
13/06/2014	13/11/2014	1,048.294	8.5%	8.0%	16.50%	72.978
14/11/2014	12/03/2015	1,048.294	8.0%	8.0%	16.00%	54.684
13/03/2015	09/04/2015	1,048.294	7.5%	8.0%	15.50%	12.465
10/04/2015	11/05/2015	1,048.294	7.0%	8.0%	15.00%	13.786
12/05/2015	11/06/2015	1,048.294	6.5%	8.0%	14.50%	12.91
12/06/2015	13/08/2015	1,048.294	6.0%	8.0%	14.00%	25.331
14/08/2015	10/09/2015	1,048.294	5.5%	8.0%	13.50%	10.856
11/09/2015	14/10/2015	1,048.294	5.0%	8.0%	13.00%	12.694
15/10/2015	21/10/2015	1,048.294	4.5%	8.0%	12.50%	2.513
					Total	**327.355**
					Euros	**2.7 million**

[330] Reply on Annulment, paras. 233-235.
[331] The Tribunal accepted Mr. Cowan's valuation of the total estimated liabilities which included BD Agro's debt *vis-à-vis* Banca Intesa. Award, para. 699 (i).
[332] Reply on Annulment, para. 239.
[333] Third Expert Report of Sandy Cowan, para.2.22 (emphasis added).
[334] Third Expert Report of Sandy Cowan, para. 2.22.

190. What can be concluded from the above is that Mr. Cowan used only information which was available on the Valuation Date: first, for the calculation of the default interest he used principal amount of RSD 1,048 million which was determined by the court's decision dated 25 March 2014 as the amount on which the default interest should be calculated (this decision became final in August 2015, *i.e.* before the Valuation Date);[335] second, he used the default interest rate applicable in the period from November 2013 to the Valuation Date (21 October 2015); third, he calculated the default interest only until the Valuation Date.

191. Applicant's argument that from the Pre-Pack Reorganizational Plan dated 6 March 2015 it can be determined that Banca Intesa "*did not claim higher amount of interest*" and that this was done only after the Valuation Date by Agrounija to whom Banca Intesa subsequently sold its claim, is incorrect.[336]As evident from the said Pre-Pack Reorganizational Plan, at the time the Plan was prepared, BD Agro's debt *vis-à-vis* Banca Intesa was the subject of the pending court proceeding between Banca Intesa and BD Agro.[337] In other words, Banca Intesa did claim its debt in the court proceeding before the Valuation Date.[338] Even more, the court's decision dealing with this debt became final before the Valuation Date (in August 2015).[339] As explained above, Mr. Cowan's calculation of Banca Intesa debt was performed in accordance with this court's ruling, *i.e*. it was based on information pre-dating the Valuation Date.

192. Having in mind the above, it is clear that Applicant is also wrong when stating that the Tribunal's acceptance of the calculation of BD Agro's debt *vis-à-vis* Banca Intesa is contradictory to its decision not to consider certain court claims related to the size of BD Agro's land because, as of the Valuation Date, these claims were not yet advanced or decided upon.[340] As explained, the matter of

[335] First and Second Instance Judgments in Intesa Court Claim dated 25 March 2014 and 20 August 2015, **RE-605**.
[336] Reply on Annulment, para. 238.
[337] Amendment to the Pre-pack Reorganization Plan of BD Agro dated 6 March 2015, p. 126 (of PDF), **CE-101**.
[338] *See* Amendment to the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 126 (of PDF), **CE-101**.
[339] First and Second Instance Judgments in Intesa Court Claim dated 25 March 2014 and 20 August 2015, p. 2, **RE-605**.
[340] Reply on Annulment, para. 240.

BD Agro's debt *vis-à-vis* Banca Intesa was decided by the court before the Valuation Date and thus Applicant's comparison is inappropriate.

193. Finally, Applicant's argument that Mr. Cowan's calculation prepared in the course of this arbitration itself represents post-Valuation Date evidence which cannot be used, is absurd.[341] If such a position is accepted, then the valuation of any obligation or asset of BD Agro prepared by experts for the purposes of the Arbitration would have to be deemed inadequate, as all expert reports were prepared after the Valuation Date. In any event, even if Mr. Cowan's calculation indeed represents "*post-Valuation Date evidence*" Tribunal reliance on it would not mean that it acted contrary to its previously taken position, as Applicant failed to prove that Mr. Cowan's calculation includes information post-dating the Valuation Date.

a.b. Reliance on the Second Confineks Valuation and BD Agro's 2015 Financial Statements is not contradictory to the stance that information post-dating the Valuation Date should not be used for valuation

194. Applicant persists in asserting that the Tribunal relied on the Second Confineks Valuation and BD Agro's 2015 Financial Statements for the purposes of quantifying BD Agro's total estimated liabilities, and that in that way it contradicted its stance that the evidence post-dating the Valuation Date should not be used for valuation.[342]

195. First, as explained above[343] the Tribunal did not state that documents, but rather information post-dating the Valuation Date should not be used for valuation. Second, Applicant still does not explain which information from the Second Confineks Report and BD Agro's 2015 Financial Statements, indirectly used by the Tribunal, post-dated the Valuation Date, despite Respondent raising this issue in its Counter-Memorial on Annulment.[344] Third, as explained in the Counter-Memorial on Annulment, what is important is that the Tribunal

[341] Reply on Annulment, para. 241.
[342] Reply on Annulment, paras. 242-251
[343] See paras- 167-177 above.
[344] Counter-Memorial on Annulment, para. 221.

believed that the valuations it adopted were based on pre-Valuation Date information.[345]

196. Indeed, the Tribunal in this case had no reason to believe otherwise as it accepted Mr. Cowan's calculation for which the expert explicitly stated was prepared at the Valuation Date: "*I rely on the Feb 16 Confineks Report as a starting point for valuing BD Agro's total liabilities* ***at the valuation date***".[346] During the Arbitration, Claimants and their expert, Dr. Hern, did not argue that this is the false statement and that the information used by Mr. Cowan post-dates the Valuation Date. That was yet another reason for the Tribunal not to question Mr. Cowan's statement. Furthermore, as Claimants and their expert Dr. Hern never challenged Mr. Cowan's reliance on the Second Confineks Valuation, and considered this document credible, Applicant is precluded from raising such challenge now.[347]

197. Applicant's allegation that they have not commented on this because this question was of no importance before the Award, is inapposite. The mere existence of the Valuation Date (agreed upon by both Parties' experts[348]) proves that that date was always relevant for valuation. Claimants' expert, Dr. Hern, made it clear that information should originate before the Valuation Date and was constantly repeating that he relied on the information that originated close to the Valuation Date.[349]

198. In conclusion, when it accepted Mr. Cowan's valuation, the Tribunal understood it to be based on information reflecting BD Agro's liabilities at the Valuation Date. Whether the Tribunal' factual finding was correct is irrelevant for the

[345] As already noted in the Counter-Memorial on Annulment, incorrect conclusion of the Tribunal on factual matter is beyond the scope of the annulment proceeding. In other words, even if the Tribunal wrongly believed that Mr. Cowan's valuation of the total estimated liabilities includes only pre-Valuation Date information, this would not amount to an annullable error. *See* Counter-Memorial on Annulment, para. 230.

[346] Third Expert Report of Sandy Cowan, para. 2.17; Reply on Annulment, para. 244; Counter-Memorial on Annulment, para. 219.

[347] Claimants' Reply, para. 1300; First Expert Report of Dr Richard Hern, para. 79; *See Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case, No. AR/98/4, Decision (Annulment Proceedings), 5 February 2002, para. 82, **CLA-185**.

[348] Award, para. 682.

[349] "…*I rely on the net book value as reported in the 2015 annual accounts, as they represent* ***the closest available information relative to the expropriation date 21 October 2015***" First Expert Report of Richard Hern, para. 44; "*I use the value of liabilities as reported in the 2015 annual accounts, as they represent the* ***closest available information relative to the expropriation date 21 October 2015***". First Expert Report of Richard Hern, para. 47.

annulment of the Award, as the arbitral practice has consistently held that an *ad hoc* committee "*may not annul an award for failure to provide reasons on the basis that the reasoning is incorrect in fact or in law".*[350]

199. Finally, Applicant's assertion that the Tribunal "*rejected Dr. Hern's reliance on BD Agro's 2015 Financial Statements and the Second Confineks Valuation because they post-date the Valuation Date, but then accepted Mr. Cowan's reliance on the same documents for the valuation of BD Agro's BD Agro's total estimated liabilities and the court proceedings liabilities*" is obviously incorrect.[351] This is confirmed by the fact that Applicant was unable to refer to the part of the Award where the Tribunal allegedly rejected Dr. Hern's calculation of BD Agro's liabilities on the grounds that it was based on these documents. In paragraph 699 of the Award, referred to by Applicant, the Tribunal gave its remarks on Dr. Hern's valuations of BD Agro's liabilities, however, there is no indication that it rejected any of his valuations because they were based on BD Agro's 2015 Financial Statements or the Second Confineks Valuation.[352] Rather, the Tribunal considered Mr. Cowan's approach to be either more reasonable than that of Dr. Hern's, or concluded that Claimants and their experts had failed to offer any persuasive justification for their position. On that basis, the Tribunal ultimately gave preference to Mr. Cowan's valuations over those of Dr. Hern.[353]

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[350] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, 29 May 2019, para. 211, **RLA-162**. "*In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law*", *Maritime International Nominees Establishment v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award, 22 December 1989, para. 5.09, **CLA-184**; "*However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons*", *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 64, **RLA-155**; The quoted position from Vivendi was also endorsed by Global Telecom ad hoc committee: "*Ad hoc committees have explained that the requirement to state reasons is intended to ensure that the reader can understand the reasoning of the tribunal, meaning the reader can understand the facts and law applied by the tribunal in coming to its conclusion. The correctness of the reasoning or whether it is convincing is not relevant*", *Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16*, Decision on Annulment, 30 September 2022, paras. 79-80, **RLA-231.**

[351] Reply on Annulment, para 251.

[352] See Award, para. 699.

[353] Award, para. 699.

c) The Tribunal's reasoning related to calculation of the total estimated liabilities is sufficient as the Award is clear that it excludes deferred tax liabilities

200. Applicant recycles his arguments from the Memorial on Annulment and argues that it is not clear whether the Tribunal's final calculation of BD Agro's total estimated liabilities includes deferred tax liabilities or not.[354] This is incorrect. The Tribunal explicitly stated in para 699 (i) of the Award that total estimated liabilities **excluding** deferred tax liabilities amount to EUR 42.2 million:

> *"**Total estimated liabilities (excluding deferred tax liabilities)**: Relying on the figures included in the Second Confineks Valuation and his own analysis, Mr. Cowan submits that BD Agro's estimated liabilities were **EUR 42.2 million**…The Tribunal finds Mr. Cowan's approach reasonable."*[355]

201. Subsequently, in the paragraph 707 of the Award, where the Tribunal indicated final valuations of BD Agro's liabilities, it mentioned the same amount of EUR 42.2 million for the total estimated liabilities:[356]

Total estimate liabilities	(42.2)

202. It was unnecessary for the Tribunal to note again that this amount does not include deferred tax liabilities as that was already noted in para 699 (i) of the Award. Thus, Applicant's assertion that it is not clear whether "*final value of "*total estimate liabilities*" adopted by the Tribunal included "*deferred tax liabilities*" or not*" is incorrect.[357] The Tribunal clearly and sufficiently explained that EUR 42.2 million of the total estimated liabilities exclude deferred tax liabilities. And indeed, the Tribunal was right to believe so.

203. Namely, as already explained in the Counter-Memorial on Annulment, in its second report, Dr. Hern criticized Mr. Cowan for double counting capital gains

[354] Reply on Annulment, paras. 289 and 291.
[355] Award, para. 699 (i).
[356] Award, para. 707.
[357] Reply on Annulment, paras. 289 and 291.

tax ("**CGT"**) by arguing that CGT was first included in calculation of total estimated liabilities as deferred tax liability (proxy of CGT) and then as a separate amount.[358] Mr. Cowan explicitly stated that he accepts Dr. Hern's double counting observations and that thus he amends his calculation in his second report.[359] Following Mr. Cowan's second report, Dr. Hern provided his third report but raised no objections to Mr. Cowan's calculation in this regard. Thus, the Tribunal had no reasons to question and further elaborate on Mr. Cowan's statement that he had accepted Dr. Hern's double counting observations and corrected his calculation accordingly.

204. In this regard, Applicant's statement that "*it is completely irrelevant what Mr. Cowan did*" and that issue lies with the Tribunal which ignored "*crucial argument by one of the Parties*" does not stand scrutiny.[360] By accepting Mr. Cowan's calculation, the Tribunal also accepted its reasoning (which, as noted, was not contested in Dr. Hern's third report). Respondent's position is rooted in the position of the *ad hoc* committees which have established that accepting a particular document is tantamount to stating the reasoning set forth in that document. For instance, *Wena hotels ad hoc* committee stated that the tribunal's reasons may be stated implicitly, by reference to documentation from the record.[361] Similarly, *ad hoc* committee in *Enron* found that "*there is no reason why a tribunal cannot state sufficient reasons for its decision by referring to*" the reasoning in a previous ICSID case or any other source whatsoever.[362]

205. It is therefore clear that Applicant's reference to the *Teinver* case, in which the *ad hoc* committee annulled the award because the tribunal ignored "*argument that was so important that it would clearly have been determinative of the*

[358] Counter-Memorial on Annulment, para. 228; Second Expert Report of Sandy Cowan, para. 7.42-7.45; Second Expert Report of Richard Hern, para. 172.

[359] "*In my First Report, I added a CGT liability of €3.1 million to the liabilities of the Feb 16 Confineks Report. Dr Hern has stated that I have double counted the CGT liability, leading to an understatement of the value of BD Agro… **I agree with Dr Hern and I have removed the additional CGT liability** of €3.1 million. I have calculated an additional CGT liability of €5.7 million under a going concern scenario at paragraph 6.10 above…"*. Second Expert Report of Sandy Cowan, para. 7.44-7.45. See also Counter-Memorial on Annulment, para. 228.

[360] Reply on Annulment, para. 295.

[361] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 93, **CLA-185.**

[362] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3I, (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 94, **RLA-232**.

outcome"[363] is entirely irrelevant for the case at hand, as the Tribunal in the present case did not ignore one party's argument, but rather addressed it by adopting the opposing party's viewpoint.

206. Finally, as for Applicant's argument that "*Mr. Cowan did not correct his calculation and continued to double-count the CGT in his third and final expert report*",[364] Respondent emphasizes that even if this was the case, that would not represent a valid ground for annulment because: (i) an *ad hoc* committee should not question the tribunal's assessment of relevance and probative value of evidence,[365] and (ii) the error in facts, as well as computational error, cannot lead to annulment of the award.[366]

3. The Tribunal's reference to the BD Agro's 2015 Financial Statements does not make the valuation of the court proceeding liabilities contradictory

207. In the Award, the Tribunal adopted Mr. Cowan's calculation of the court proceedings liabilities.[367] The Tribunal stated that it decided to include these liabilities, as a category, among BD Agro's liabilities because they were also included in BD Agro's 2015 Financial Statements, but accepted the amount of these liabilities from Mr. Cowan's report:

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[363] Reply on Annulment, para. 296.

[364] Reply on Annulment, para. 295.

[365] "*As previously pointed out, and pursuant to Rule 34 of the Arbitration Rules, the arbitral tribunal is the judge of the probative evidence put before it. The Committee is neither empowered nor competent to conduct a re-evaluation of the significance of the factual evidence weighed by the Tribunal..." Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, 25 March 2010, para. 104, **RLA-250**.

[366] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, 29 May 2019, para. 211, **RLA-162**. Similar approach was taken by numerous *ad hoc* committees. "*In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion,* ***even if it made an error of fact or of law***", *Maritime International Nominees Establishment v. Republic of Guinea (II),* ICSID Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award, 22 December 1989, para. 5.09, **CLA-184**; "*However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award,* ***not the failure to state correct or convincing reasons***", *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 64, **RLA-155**. The quoted position from *Vivendi* was also endorsed by *Global Telecom ad hoc* committee: "*Ad hoc committees have explained that the requirement to state reasons is intended to ensure that the reader can understand the reasoning of the tribunal, meaning the reader can understand the facts and law applied by the tribunal in coming to its conclusion.* ***The correctness of the reasoning or whether it is convincing is not relevant****", Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022, paras. 79-80, **RLA-231**

[367] Award, para. 699 (iv).

"*Court proceedings: Mr. Cowan includes EUR 200,000 in BD Agro's liabilities. The Tribunal agrees, as the item was included in BD Agro's 2015 financial statements.*"[368]

208. Applicant argues that "[*t*]*he Tribunal expressly stated that it agreed with Mr. Cowan's* ***number*** *because* 'the item was included in BD Agro's 2015 Financial Statements*'*", but that is not true.[369] The Tribunal did not say that it accepts Mr. Cowan's number because that number was stated in BD Agro's 2015 Financial Statements, but that it accepts court proceedings liabilities, as a category, to be included in BD Agro's liabilities, because BD Agro itself recognised this liability as relevant in its financial statements. The Tribunal's explanation of the reasons to include category of court proceedings liabilities in the calculation was triggered by the fact that the experts had differing opinions on whether this liability should be included among BD Agro's liabilities or not.[370] Unlike Mr. Cowan, Claimants' expert, Dr. Hern, did not include this category in the list of BD Agro's liabilities[371] **and thus the Tribunal noted that it accepts Mr. Cowan approach, as it was in line with BD Agro's approach which also recognised these liabilities in its financial statements.**

209. Therefore, the fact that the Tribunal did not accept the amount of these liabilities accounted for in BD Agro's 2015 Financial Statements does not make the reasoning of the Award contradictory, as Applicant alleges.[372] Namely, the Tribunal never stated that it accepted the number from this document but instead referred to the relevant parts of **Mr. Cowan's** third report, where he explained how he arrived at the EUR 200,000 figure for these liabilities.[373]

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[368] Award para 699 (iv). In the footnote 584, the Award referred to the Second Confineks report instead of BD Agro's 2015 Financial Statements by obvious mistake.
[369] Reply on Annulment, para. 273.
[370] Counter-Memorial on Annulment, fn. 386.
[371] Second Expert Report of Sandy Cowan, para. 7.31; The comparative analysis of valuations prepared by Dr. Hern and Mr. Cowan shows that Dr. Hern did not include court proceeding liabilities as a category of liabilities, while Mr. Cowan did. Third Expert Report of Sandy Cowan, table chart under para. 4.8.
[372] Although Applicant explicitly uses the term "*inclusion*" in the title of the section addressing court proceeding liabilities, he appears to suggest that the Tribunal acted contradictorily by mentioning BD Agro's 2015 Financial Statements and the Second Confineks Valuation in his reasoning, but not relying on the amounts indicated in them. However, as already explained, the Tribunal explicitly stated that it accepts Mr. Cowan's calculation, not the one from these documents, making these arguments meaningless. Reply on Annulment, heading "*d*" titled "*The Tribunal provided contradictory reasoning for inclusion of liabilities related to court proceedings"*, p. 73; See Counter-Memorial on Annulment, para 233;
[373] Award, para. 699 (iv) and footnote 584.

210. Finally, as explained in detail above, even if the Tribunal did rely on BD Agro's 2015 Financial Statements (or the Second Confineks Valuation) and adopted the figures indicated therein (*quod non*), that would not render its approach contradictory, as it never stated that post-Valuation Date documents should not be used for valuation.[374] On the other hand, Claimants (and Applicant) did not prove that any of the information used by Mr. Cowan for its calculation - which was accepted by the Tribunal - post-dated the Valuation Date. To the contrary, Mr. Cowan explained that his court proceeding analysis consisted of liabilities which he believed "*were probable at the valuation date*".[375] Therefore, by relying on Mr. Cowan's valuation, the Tribunal effectively accepted Mr. Cowan's statement that his calculation encompasses only information available up to the Valuation Date.

211. Finally, even if Mr. Cowan's valuation contained post-Valuation Date information, which Applicant did not prove, that would not constitute an adequate ground for annulment, because it would only mean that the Tribunal reached the incorrect conclusion by accepting Mr. Cowan's statement as accurate.[376]

4. The Tribunal's reasoning related to valuation of redundancy payments is not based on Annex 1 of the Privatization Agreement and thus it is not contradictory

212. As explained in the Counter-Memorial on Annulment,[377] during the Arbitration the Parties were in a disagreement whether the redundancy payments obligation was voluntary or obligatory for BD Agro. Eventually, in the Award, the Tribunal concluded the following:

> *"Redundancy payments: The experts disagree whether certain redundancy payments should be included in BD Agro's valuation. While the Claimants submit that the redundancy program was voluntary,* ***they offer no***

[374] Reply on Annulment, para. 275.
[375] Third Expert Report of Sandy Cowan, para. 2.1.
[376] As explained in paras. 54-58 above the correctness of the Tribunal's reasoning is out of the scope of the annulment reasons.
[377] Counter-Memorial on Annulment, para. 236.

> ***authority in support****. In any event, BD Agro was obliged to prepare a redundancy program in accordance with Annex 1 of the Privatisation Agreement. Further, BD Agro's 2015 financial statements also recognize redundancy payments as being obligatory. The Tribunal finds that these payments must be accounted for."*[378]

213. Unsatisfied with the outcome, Applicant alleges that the Tribunal based its conclusion that the redundancy payments were mandatory on Annex 1 of the Privatization Agreement, which conclusion, according to him, "*cannot be reconciled with the Tribunal's earlier conclusion that the Privatization Agreement ceased to apply upon the full payment of the purchase price in 2011*".[379] This is misleading.

214. The reason why the Tribunal accepted the inclusion of the redundancy payments among BD Agro's liabilities was because Claimants failed to convince the Tribunal that these payments were voluntary, which it was Claimants' burden to prove. The fact that BD Agro was obliged to make these payments also in accordance with Annex 1 of the Privatization Agreement was only mentioned as "*in any event*" consideration. Nothing in the Tribunal's reasoning indicates that its conclusion would have been different, if Annex 1 had not been applicable.[380]

215. Applicant further alleges that, contrary to the Tribunal's conclusion, Claimants did offer authority in support of the fact that the redundancy payments were voluntary, because they relied on Dr. Hern who explained that no redundancy costs were included in the March 2015 Reorganization plan.[381] This argument is not serious.

216. First of all, neither Dr. Hern's opinion nor the Reorganization plan can be deemed as an *authority* that can resolve dilemma whether the redundancy payments were obligatory or voluntary. On the other hand, such authorities were provided by Respondent and relied on by Mr. Cowan. Namely, Respondent's

[378] Award, para. 699 (vi).
[379] Reply on Annulment, para 253.
[380] Award, para. 699(vi).
[381] Reply on Annulment, para. 259.

expert noted that in BD Agro's case redundancy payments were obligatory by explicit reference to Serbian Labour Law.[382] He further noted that the same conclusion derives from 2013 PwC's report titled "Doing Business and Investing in Serbia".[383] Therefore, the Tribunal was right to conclude that the redundancy payments were obligatory, especially having in mind that Claimants did not provide any relevant authority to the contrary.

217. Second, for the sake of completeness, Respondent notes that, contrary to Dr. Hern's assertions, the March 2015 Reorganization Plan explicitly accounted for redundancy payments – in Serbian *otpremnina*[384] which is translated as "*severance payment*" in the March 2015 Reorganization Plan.[385] Applicant's argument that the *severance* payments referenced in the March 2015 Reorganization Plan are different from "*redundancy payments*" which are not mentioned in this plan,[386] is unsupported by any evidence. What is more, Claimants never argued that the term "*severance payment*" means something other than "*otpremnina*". In any event, even if Applicant is right that the March 2015 Reorganization Plan did not provide for redundancy payments, that certainly cannot prove that these payments were not obligatory.

218. Moreover, Applicant contends that the Tribunal erred in concluding that BD Agro's 2015 Financial Statements also recognize redundancy payments as obligatory, arguing instead that the 2015 Financial Statements "*only refer to the redundancy program in general*".[387] However, this contention is not only irrelevant for the annulment proceeding,[388] but also fails under closer examination. The section titled "*Employee earnings*" in 2015 Financial Statements, that addressed redundancy payments, does not contain general information, but is rather tailored to address the specific circumstances of BD

[382] Second Expert Report of Sandy Cowan, para. 6.17.
[383] Second Expert Report of Sandy Cowan, para. 6.19.
[384] For Serbian original *see* Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 72, **CE-101**.
[385] Redundancy payments (translated as "*severance*") were included in the chart no. 5. 10 titled "*Projected salary costs*". *See* English translation of the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 168 (of PDF), **CE-101**.
[386] Reply on Annulment, para. 260.
[387] Reply on Annulment, para. 256.
[388] As already explained, even if the Tribunal's conclusion was incorrect, this would not warrant annulment of the Award, as the correctness of the Tribunal's reasoning falls outside the scope of the *ad hoc* committee's examination. See, *e.g. Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022, paras. 79-80, **RLA-231.**

Agro. This can be concluded from the fact that this section explicitly states that "*Company [BD Agro] recognizes severance at termination of employment when it is obviously obligatory*…", and that BD Agro "*does not have own pension funds and there aren't any identified liabilities based on this*".[389] These are clearly not generic accounting observations, but statements that directly reflect BD Agro's financial position and its obligations.

219. Finally, Applicant alleges that the Tribunal's conclusion that Claimants' expert did not provide any authority to support his position mirrors the situation in *Teco v. Guatemala*.[390] However, in *Teco* case the committee annulled the award because the tribunal concluded that there was "*no sufficient evidence*", and did not "*discuss **at all** the Parties' respective expert reports*". The *Teco* committee clarified that, while it does not question the tribunal's discretion to assess the relevance and materiality of expert reports, it takes issue with the Tribunal's **complete failure** to discuss the parties' expert reports.[391] Unlike in *Teco*, the Tribunal in this case did not disregard evidence or expert reports; rather, it assessed them and (correctly) concluded that the assertion of Claimants' expert was unsubstantiated by any authority.[392]

220. In view of all the issues discussed above, it is evident that the Tribunal's reasoning concerning the valuation of redundancy payments is not, by any means, contradictory, let alone so contradictory as to render it "*incapable of standing together on any reasonable reading of the decision,*" as Applicant contends.[393]

[389] Notes to the 2015 Financial Statements, p.8-9 (of PDF), **CE-171**. As for Applicant's argument that BD Agro's 2015 Financial Statement post-date the Valuation Date and reflect the situation at the time when BD Agro was a state-owned entity, Respondent notes that this document reflects BD Agro's state for the whole year of 2015, not just its state after 21 October 2015 when BD Agro became state-owned entity. In any event, Applicant did not point out to a specific information from this document used by the Tribunal which post-dates the Valuation Date, which makes his argument utterly inapposite. Reply on Annulment, para 257.

[390] Reply on Annulment, para. 261.

[391] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, paras. 68 and 130-131, **CLA-186**.

[392] Award, para. 699 (vi).

[393] Reply on Annulment, para. 258.

5. Acceptance of Ms. Ilic calculation as "plausible" does not make the Tribunal's reasoning related to valuation of the conversion fee contradictory

221. Applicant reiterates his contention from the Memorial on Annulment that the Tribunal acted in contradictory manner because it first adopted Ms. Ilic's stance that the average price of equivalent agricultural land, as the basis for calculation of the conversion fee, *"should be based on the previous year's tax assessment*", but then adopted the amount of the conversion fee calculated by Ms. Ilic that was not based on that assessment.[394]

222. In the Counter-Memorial on Annulment, Respondent explained that the question whether Ms. Ilic applied the "*previous year's tax assessment*" method is irrelevant as the Award cannot be annulled on the grounds that the Tribunal arrived on an incorrect conclusion on the factual issue.[395] Respondent also explained why the Tribunal adopted Ms. Ilic's calculation – because in "*the absence of any contrary indications provided by the Claimants"* it found her reasons *"plausible*".[396]

223. Applicant now argues that (i) the Tribunal's contradictory approach is the same as the one in in *Tidewater v. Venezuela* case, and that (ii) Serbia's argument that the Tribunal merely "*arrived at an incorrect conclusion on the factual issue*" - which is not basis for annulment, misses the point. [397]

224. According to Applicant, the tribunal in *Tidewater v. Venezuela* "*has established elements for the determination of the market value*" and then "*fixed the amount in contradiction to these elements*", which led to annulment of the corresponding part of the award. Applicant alleges that the Tribunal in this case also established "*specific elements for calculation of the conversion fee",* but then fixed the conversion fee in contradiction to those elements. This is misleading. As it is clear from the Tribunal's reasoning, it did not establish any elements nor criteria for calculation of the conversion fee, but simply accepted Ms. Ilic's explanation that her calculation was based on the certain method and, in the "*absence of contrary indications provided by Claimants*", adopted Ms.

[394] Reply on Annulment, paras. 264-265.
[395] Counter-Memorial on Annulment, paras. 246-251.
[396] Award, para. 699 (ii).
[397] Reply on Annulment, paras. 266-270.

Ilic's calculation which it found "*plausible*".[398] There cannot be contradiction in the Tribunal's approach if it believed that the calculation it adopted was based on the previous year's tax assessment, even if it was not based on that method. In addition, it should be emphasized that during the Arbitration neither Claimants nor their experts alleged that the numbers used by Ms. Ilic did not correspond to previous year's tax assessment. In such circumstances there was simply no reason for the Tribunal to question the accuracy of Ms. Ilic's statement.

225. Finally, Applicant contends that the decisions invoked by Respondent (*NextEra* and *Watkins Holdings*) are not relevant for the case at hand given that in both cases the *ad hoc* committees *"concluded that an error in computation is a mere mistake, not a failure to state reasons*", while at the case at hand "*the Tribunal's reasoning suffers from more than a mere computation error*".[399] This is incorrect. The Tribunal had valid reasons to believe that Ms. Ilic's valuation was grounded in the previous year's tax assessment.[400] Therefore, if the figures ultimately adopted do not align with those calculated via "*tax assessment*" method, any potential discrepancy should be regarded as a computational error.

6. The Tribunal's reasoning related to the calculation of CGT, in which it adopted Mr. Cowan's approach as "objective and logical", is sufficient

226. In his previous submission, Applicant argued that the Tribunal's reasoning for adopting Mr. Cowan's calculation of CGT, as opposed to that of Dr. Hern, is not sufficiently detailed, as the Tribunal merely stated that it adopts Mr. Cowan's approach because it is "*objective and logical*". According to Applicant, alleged lack of reasoning (i) prevented Mr. Rand and any other reader from following and understanding the Tribunal's conclusion, (ii) amounts to failure to state reasons, and (iii) warrants annulment given that the Tribunal ignored argument that "*was so important that it would clearly have been determinative of the outcome*".[401]

[398] Award, para. 699 (ii).
[399] Reply on Annulment, para. 269.
[400] Award, footnote 581; First Expert Report of Danijela Ilic, Appendix, 1, para 1.1, p. 118-120 (of PDF); Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 177-183 (Ms. Ilic).
[401] Memorial on Annulment, paras. 231-239.

227. Respondent refuted these allegations in its Counter-Memorial and clarified that (i) according to the arbitral practice "*the tribunal is required to state reasons for its decision, but not necessarily reasons for its reasons*",[402] (ii) the Tribunal was under no obligation to further elaborate its decision as the *ad hoc* committees have confirmed that the length of the Tribunal's reasoning is of no importance in the annulment proceedings, for as long as an informed reader can comprehend the reasoning,[403] (iii) Applicant failed to specify which Claimants' arguments were not addressed, and why they were determinative for the outcome of the case,[404] and (iv) there is a long-standing practice of the *ad hoc* committees holding that reasons may also be stated implicitly in the award, by reference to a documentation/expert report that contains appropriate reasoning.[405]

228. As a response to the arguments presented in the Counter-Memorial on Annulment, Applicant now provides a number of assertions[406] that are all refuted hereunder.

229. First, Applicant's contention that certain weight should be put on the fact that "*Dr. Hern relied on information from BD Agro's audited financial statements, while Mr. Cowan simply presented his own estimate, which he rightfully admitted was based on insufficient information*", is irrelevant for this case because the Tribunal's assessment of evidence is beyond the scope of the annulment proceeding.[407] Thus, it is not appropriate to elaborate, in an annulment proceedings, on whether the Tribunal should have accepted Dr. Hern's approach as more suitable than Mr. Cowan's.

230. Second, Mr. Rand reiterates that the Tribunal did not address Claimants' arguments, but again does not specify which arguments in particular were not addressed, and merely states that the Tribunal "*did not address **any** of Claimants' arguments related to the calculation of the CGT*".[408] This is not accurate as the Award contains an explicit comparison of the both Parties'

[402] Counter-Memorial on Annulment, para. 257.
[403] Counter-Memorial on Annulment, para. 259.
[404] Counter-Memorial on Annulment, paras. 260-261.
[405] Counter-Memorial on Annulment, para. 262.
[406] Reply on Annulment, paras. 276-288.
[407] Counter-Memorial on Annulment, paras 66-67; *UAB E Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA- 211;** *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para. 234, **RLA-247.**
[408] Reply on Annulment, para. 283; Counter-Memorial on Annulment, para. 261.

experts' methods used for calculation of the CTG, demonstrating that the Tribunal considered Claimants' arguments before rendering decision on this issue.[409] In the same vein, Applicant's allegation that the Tribunal ignored Claimants' experts' calculation which "*would have been determinative to the outcome of the case*" cannot stand, as the Tribunal assessed Dr. Hern's calculation and ultimately chose not to rely on it.[410]

231. Third, Applicant states that the conclusion of the *InfraRed ad hoc* committee that adopting arguments "*of one expert in detriment of the other does not amount to a failure to state reasons"* is inapplicable to the present case because in the *InfraRed* case the tribunal addressed in several paragraphs why it accepted one party's experts' calculation.[411] However, what Applicant ignores is that the InfraRed *ad hoc* committee did not state that the tribunal's reasons did not provide grounds for annulment because they were detailed. Quite contrary, it noted that adoption of one experts' argument in detriment of the other is sufficient to satisfy the "*state reasons*" requirement.[412] The Tribunal in the present case did the same – it analysed methodology of both experts and then stated that it adopts Mr. Cowan's valuation in detriment of Dr. Hern's. The fact that other *ad hoc* committees have found that the tribunal's reasons can be implied in the award, by referencing documentation containing appropriate reasoning, further supports Respondent's position.[413]

232. Recognizing weakness in his argument, Applicant attempts to downplay the importance of this position by asserting that its application would imply that the

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[409] "*Capital gains tax: Dr. Hern and Mr. Cowan disagree on the applicable capital gains tax. Dr. Hern calculates capital gains tax by using the "deferred tax liabilities" in BD Agro's 2015 balance sheet as a proxy for the capital gains, based on the Claimants' instruction. By contrast, Mr. Cowan deducts the book value of BD Agro's tangible assets (i.e. BD Agro's land, plant, equipment and biological assets) as of 31 December 2013 as a proxy for the purchase price, from the value of land according to Ms. Ilic and applies a 15% capital gain tax rate. The Tribunal adopts Mr. Cowan's approach, which it finds objective and logical."* Award, para. 699 (v).

[410] The fact that the discrepancy between Mr. Cowan's and Dr. Hern's calculations amounts to EUR 2.6 million is of no relevance. Not only did the Tribunal explicitly address Dr. Hern's calculation in the Award, but even assuming that it had not, Applicant has failed to demonstrate that Dr. Hern's approach would have been preferred over Mr. Cowan's. In other words, there is no sufficient indication that even more detailed analysis of Dr. Hern's calculation would lead to a substantially different "*outcome of the case*". Reply on Annulment, para. 284.

[411] Reply on Annulment, paras. 286-288.

[412] *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, para. 694, **RLA-209**.

[413] Counter-Memorial on Annulment, para. 262; See, for *e.g. Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 93, **CLA-185**.

entire damages part of the Award could have been reduced into a single sentence stating that the Tribunal agrees with Mr. Cowan's valuation.[414] This is an oversimplification. Cases invoked by Respondent serve to clarify that the tribunal is not required to express an explicit opinion on every single argument raised by a party, but that its reasons could also be stated implicitly, with the reference to a certain document or report.

C. THE TRIBUNAL DID NOT MANIFESTLY EXCEED ITS POWERS BY REFUSING JURISDICTION OVER MR. RAND'S CLAIMS

I. THE MEANING OF MANIFEST EXCESS OF POWERS

233. As already explained by Respondent, Article 52(1) (b) of the ICSID Convention considerably limits the scope of review of the Tribunal's jurisdictional decisions by the *ad hoc* Committee.[415] The provision must be interpreted in conformity with one of general principles identified by the ICSID in its Background Paper on Annulment: *ad hoc* committees are not courts of appeal and annulment is not a remedy against an incorrect decision.[416] The requirement that an excess of powers must be "manifest" in order to result in annulment serves to underline the said principle and its meaning is explained, *inter alia*, by the *ad hoc* committee in *Tenaris v. Venezuela* (II):

> "*[I]n the Committee's mind, the term "manifest" underlines the limited and exceptional character of an annulment as opposed to an appeal. The finality of an award must not be disturbed if the excess of powers is not manifest. This objective must be taken into account when establishing the standard*."[417]

234. Applicant does not argue against the exceptional character of annulment as a remedy. However, he continues to profess his grievances against supposedly

[414] Reply on Annulment, para. 288.
[415] Counter-Memorial on Annulment, paras. 269, 270.
[416] ICSID Updated Background Paper, March 2024, pp. 53-70, **RLA-256**.
[417] *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)* (ICSID Case No. ARB/12/23), Decision on Annulment, 28 December 2018, para. 73, **CLA-220**.

"incorrect" denial of jurisdiction by the Tribunal, without explaining precisely how purported errors of the Tribunal could reach the threshold of manifest excess of powers, apart from labeling them as clear and effect-determinative.[418] In its essence, Applicant's request is an appeal contending that the Tribunal should have adopted one interpretation of the law over the other. This cannot be permitted in the annulment proceeding.

235. As Respondent has already explained in its Counter-Memorial on Annulment,[419] in order to be considered as manifest, an excess of powers must be, at the same time, textually obvious and substantially serious in terms of its consequences.[420] This follows from the ordinary meaning of the term "manifest", in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, as well as from the necessity to protect the finality of an award.

236. Ordinary meaning of the word "manifest" implies that an excess of powers must be plain on its face, evident, obvious, clear[421] or easily recognizable.[422] As explained by the *ad hoc* committee in *RREEF v. Spain*, such reading is also in conformity with Article 36(3) of the Convention:

> "*The Committee notes that aside from Article 52(1)(b) of the ICSID Convention, the term 'manifest' is also used in Article 36(3), which provides that the Secretary-General shall not register a request for arbitration if he finds that the dispute is "**manifestly** outside the jurisdiction of the Centre"(emphasis added). Given that the Secretary-General does not exercise jurisdiction, and that parties*

[418] Reply on Annulment, para. 300.
[419] Counter-Memorial on Annulment, para. 267.
[420] *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic* (ICSID Case No. ARB/14/16), Decision on Annulment, 30 November 2022, para. 203, **Annex-8**; *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (II) (ICSID Case No. ARB/98/2), Decision on Annulment, 8 January 2020, para. 198, **RLA-263**; *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 22 September 2014, para. 142, **RLA-264**; *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Excerpts of Decision on Annulment, 22 May 2013, para. 102, **RLA-265**; *Malicorp Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Decision on the Application for Annulment of Malicorp Limited, 3 July 2013, para. 56, **RLA-266**.
[421] *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016, para. 77, **CLA-186**.
[422] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, 30 December 2015, para. 56, **RLA-212**.

> *may not present arguments at that stage,* ***the term 'manifest' can only refer to a defect that is obvious, or so evident on a first reading of the document without need for further investigation or inquiry****. This interpretation accords with the plain meaning of the term, and the Committee has no difficulty accepting this is as a right interpretation to adopt for Article 52(1)(b) but not necessarily the only meaning in its context*."[423]

237. Although Applicant agrees that "manifest" excess of powers means excess that is "*clear, obvious and without need for further debate or investigation*,"[424] he argues that an *ad hoc* committee is not prevented to engage into in-depth analysis of the tribunal's decision, in order to establish whether the tribunal exceeded its powers.[425] In support of this assertion, he relies on the decision in *Occidental v. Ecuador*. The argument adds very little, if anything, to the interpretation of the term and it certainly does not lower the threshold for the occurrence of manifest excess of powers.

238. In *Occidental v. Ecuador*, while stating that some cases require an extensive analysis to prove that the tribunal committed a misuse of its powers, the *ad hoc* committee accepted that "manifest" is a term meaning "*perceived without difficulty*."[426] Mr. Rand refers to merely three other cases[427] in an effort to prove that "*numerous other ad hoc committees*"[428] have confirmed the *Occidental* conclusion.[429]

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[423] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Annulment, 10 June 2022, para. 22, **RLA-223**. Emphasis added.

[424] Replay on Annulment, para. 300.

[425] Reply on Annulment, para. 301.

[426] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, para. 57, **CLA-5**.

[427] *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (I) (ICSID Case No. ARB/98/2), Decision on Annulment, 8 January 2020, para. 70, **RLA-263**; *Caratube International Oil Compani LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application, 21 February 2014, para. 84, **CLA-16**; *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (II) (ICSID Case No. ARB/12/23), Decision on Annulment, 28 December 2018, para. 75, **CLA-220**.

[428] Reply on Annulment, para. 302.

[429] Reliance on *Vivendi*, *Helnan*, *MHS* and *Patrick Mitchell* is inapposite since those decisions simply do not discuss the issue. See, Reply on Annulment, fn. 378.

239. On the other hand, *ad hoc* committee in *Tenaris v. Venezuela* suggests that the reasoning employed by the *Occidental* committee does not conform with the ordinary meaning of manifest excess:

> "*The Applicant has based its allegations on the interpretation of "manifest" by the annulment committee in the Occidental case. In said case, the committee agreed with the parties that "manifest excess" means "perceived without difficulty." Nevertheless, in the following paragraph, in reliance on Pey Casado, it added that "[t]he above said, 'manifest' does not prevent that in some cases an extensive argumentation and analysis may be required to prove that the misuse of powers has in fact occurred."* ***In the Committee's opinion, an issue requiring such extensive arguments and analysis could rarely be perceived without difficulty. The Committee will adopt the ordinary meaning of "manifest access" that is, a clear and patent excess under the rules of interpretation of treaties of the Vienna Convention***."[430]

240. Applicant's reliance on the decision in *Tenaris v. Venezuela II* is also inapposite.[431] There, the committee's reference to an extensive argumentation and analysis concerns solely the methods a committee needs to employ so it could understand the tribunal's decision:

> "*Two levels of reflection have to be distinguished. The first level concerns the ease with which the tribunal's analysis can be understood.* ***Once understood, the second level concerns the ease with which the excess of powers can be detected. Only if the tribunal's extensive argumentation and analysis represent an 'obvious', 'clear', 'evident', 'serious', or in other words, a***

[430] *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Decision on the Application for Annulment, 8 August 2018, para. 193, **RLA-249**. Footnotes omitted. Emphasis added.
[431] Reply on Annulment, para. 303.

> ***'manifest' non-application of the proper law (and therefore a usurpation of jurisdiction), will it be justified to annul the award****. A tribunal's argumentation and analysis can be complex, extensive, deep and at the same time obviously, clearly and seriously outside the scope of application of the proper law*."[432]

241. In summary, qualification that an excess of powers must be "manifest" in Article 52(1) (b) demands that a potential defect in an award must be obvious, clear, evident, serious or perceived without difficulty, whether or not an in-depth analysis is necessary in order to comprehend the Tribunal's jurisdictional decision.

242. The Tribunal's disposition on a question of law could lead to annulment only if it was untenable.[433] The so-called tenable standard is almost universally accepted in ICSID case law.[434] It indicates that the tribunal's opinion on an issue of law, however debatable, represents a manifest excess of powers only if it cannot be supported by reasonable arguments.[435]

243. Mr. Rand does not dispute application of the standard. Instead, he argues that a manifest excess of powers is possible when a tribunal decides on a point of law where the case law is not settled.[436] This is off point.

244. Manifest excess of powers ensues when arbitrators produce misinterpretation of law "*which no reasonable person could accept in a tribunal of three*."[437] Whether or not the case law on a particular point of law is settled or not is not decisive. The fact that the case law is not settled, however, indicates *prima facie* that the tribunal's disposition on a point of law is tenable and that there is no

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[432] *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (II) (ICSID Case No. ARB/12/23), Decision on Annulment, 28 December 2018, para. 76, **CLA-220**. Emphasis added.

[433] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee on, 3 May 1985 [English translation], para. 52(e), **CLA-189**.

[434] Counter-Memorial on Annulment, para. 272.

[435] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para. 99, **RLA-226**.

[436] Reply on Annulment, para. 308.

[437] *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, 30 November 2022, para. 199, **Annex-8**.

manifest excess of powers, since the issue is debatable. As pointed out by the committee in *Duke Energy v. Peru*: "*A debatable solution is not amenable to annulment, since the excess of powers would not then be "manifest*.""[438] If various ICSID tribunals have decided differently on a particular issue it serves to demonstrate that, in the words of committees in *Wena Hotels v. Egypt* and *CDC v. Seychelles*, a potential excess of powers is susceptible of argument "*one way or the other*" and therefore not manifest.[439] This is more so since the *ad hoc* committees do not have mandate to harmonize ICSID's jurisprudence[440] and to "*bring about consistency in the application and interpretation of international investment law*."[441]

245. In following sections Respondent once again explains that the Tribunal correctly decided to refuse jurisdiction with regard to Mr. Rand's indirect shareholding in BD Agro and his payments for the benefit of the company. Respondent will demonstrate that, even if the Tribunal erred its interpretation of the Convention and the BIT, *quod non*, its dispositions on points of law and facts are at the very least tenable and reasonable, excluding thereby any possibility that the Tribunal committed manifest excess of powers.

II. THE TRIBUNAL DID NOT MANIFESTLY EXCEED ITS POWERS BY REFUSING JURISDICTION OVER MR. RAND'S INDIRECT SHAREHOLDING

246. According to Claimants in the Arbitration, one of their separate, distinct investments was Mr. Rand's 3.9 % indirect shareholding in BD Agro, held through his Serbian company, MDH Serbia.[442]

247. It was neither disputed by Respondent nor questioned by the Tribunal that MDH Serbia was in fact the nominal owner of the shares. However, the Tribunal

[438] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para. 99, **RLA-226**.
[439] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 25, **CLA-185**; *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 41, **RLA-220**.
[440] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, 19 May 2014, para. 105**, RLA-267**.
[441] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October, 2009, para. 24, **RLA-35**.
[442] Award, para. 202.

correctly held that the nominal ownership of shares, without proven contribution of capital, did not fulfill requirements of "investment" under Article 25(1) of the Convention.[443]

248. In accordance with the dominant view in the ICSID case law, the Tribunal held that the term "investment" in Article 25(1) has an objective character. Based on Articles 31 and 32 of the Vienna Convention on the Law of Treaties, it established that the ordinary meaning of the term includes commitment of resources, certain duration and risk.[444] Since Mr. Rand was unable to prove that he had ever paid anything for the indirect shareholding, the Tribunal was left with no choice but to refuse jurisdiction over the purported investment.[445]

249. Contrary to what has been asserted by Applicant, the Tribunal's refusal of jurisdiction with regard to Mr. Rand's indirect shareholding does not come anywhere near the threshold required for manifest excess of powers. It rests upon the reasoning that is not only plausible, reasonable and tenable but also represents the dominant position in the case law.

1. The meaning of 'investment' under Article 25(1) of the ICSID Convention is objective

250. In order for jurisdiction to be established, an ICSID tribunal must be satisfied that the dispute is within the jurisdiction of the Centre.[446] Limits of jurisdiction *ratione materiae* are established through the requirement given in Article 25(1) of the Convention - that any dispute before the Centre must be arising directly out of an investment. In Applicant's contention, the fact that the Convention does not define the notion of "investment" means that the jurisdiction depends solely on the definition of investment contained in Article 1 of the Canada-Serbia BIT.[447] This is wrong.

251. A clear majority of ICSID tribunals examine whether an investment exists both under the relevant BIT containing consent to arbitrate, and separately under

[443] Award, para. 271.
[444] Award, para. 228.
[445] Award, para. 273.
[446] Convention, Article 41(2).
[447] Reply on Annulment, paras. 315, 316.

Article 25(1) of the Convention.[448] The so-called double keyhole approach is well known in ICSID case law and was described, for instance, by the tribunal in *Kim v. Uzbekistan*:

> "*For jurisdiction to be established, the claim must pass both through the institutional jurisdictional keyhole set forth in Article 25 as well as the specific jurisdictional keyhole defined in the BIT. The drafters of Article 25 in constructing that keyhole were cognizant that the parties to a particular BIT may construct a more specific jurisdictional keyhole in their instrument. Both Article 25 of the ICSID Convention and Article 1 of the BIT are to be interpreted in accordance with the VCLT*."[449]

252. Applicant's contention[450] cannot be reconciled with the principle of effective interpretation – the fact that the Convention does not define the notion of "investment" cannot possibly mean that the term has no meaning at all. This was emphasized, for example, by the tribunal in *Quiborax v. Bolivia*:

> "*First, as both Parties accept, the ICSID Convention must be construed in accordance with the Vienna Convention on the Law of Treaties. The Claimants note that the drafting history of the Convention shows that "[n]o attempt was made to define the term 'investment'." **Yet, as***

[448] *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 50, **RLA-94**; *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 82, **RLA-5**; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 43, **RLA-172**; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 108, **CLA-90**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 211, **RLA-24**; *Vladislav Kim and Others v. Republik of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 242, **CLA-154;** *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICISD Case No. ARB/15/29, Award of the Tribunal, 22 October 2018, para. 291, **RLA-23**; *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award of the Tribunal, 11 October 2019, para. 194, **RLA-235**; *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award of the Tribunal, 5 March 2020, para. 272, **RLA-236**; *Westwater Resources, Inc. v. Republic of Turkey*, ICSID Case No. ARB/18/46, Award, 3 March 2023, para. 126, **RLA-268**.

[449] *Vladislav Kim and Others v. Republik of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 242 (footnote omitted), **CLA-154**.

[450] Reply on Annulment, para. 316.

> ***the Respondent correctly points out, this does not mean that this term has no meaning***. *Rather, in the Tribunal's view, it means that the Contracting States to the ICSID Convention intended to give to the term "investment" an "ordinary meaning" as opposed to a "special meaning." This ordinary meaning is an objective one – an observation that finds support in the Saba Fakes award*."[451]

253. Applicant's reading of Article 25(1) contradicts the Report of the Executive Directors on the Convention:

> "*While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction.* ***In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto***."[452]

254. Additionally, there are two more obvious flaws in Mr. Rand's argument.

255. First, he claims that the Tribunal manifestly exceeded its powers by refusing to adopt the interpretation of Article 25(1) of the Convention and Article 1 of the BIT offered by Claimants during the Arbitration. As explained previously,[453] the subjectivist approach in interpreting the notion of "investment" under Article 25(1) was argued by Claimants in the Arbitration and unequivocally rejected by the Tribunal.[454] What Mr. Rand now essentially requests is that the Committee substitutes the Tribunal's determination on the issue with its own. This goes against one of the ground principles of annulment established by the Centre itself.[455]

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[451] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 212 (emphasis added), **RLA-24.**

[452] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 25 (emphasis added), **RLA-253**.

[453] Counter-Memorial on Annulment, para. 278.

[454] Award, paras. 227, 228.

[455] ICSID Updated Background Paper, March 2024, pp. 53-70, **RLA-256**.

256. Second, Applicant rather absurdly claims that the Committee should annul the decision concerning jurisdiction over the indirect shareholding because it "*departed from established case law*", *i.e.* from the proposition that jurisdiction *ratione materiae* of an ICSID tribunal depends solely on requirements contained in the relevant investment treaty.[456] Respondent considers that it is unnecessary to again explain that said case law is not established, but in fact represents a minority position. It is sufficient to point to the renowned Commentary, relied on in various instances by Applicant throughout his submissions, holding that:

> "*By contrast, the large majority of arbitral tribunals rightly has accepted that the notion of investment in Art. 25(1) has an objective meaning that is independent from the parties' consent*."[457]

257. Thus, Applicant's claim that the Tribunal manifestly exceeded its powers by employing the objective notion of "investment" from Article 25(1) of the Convention must be rejected.

2. The Tribunal's interpretation of Article 25(1) of the ICSID Convention is not a manifest excess of powers

258. After reaching the correct conclusion about independent and objective notion of "investment" from Article 25(1), the Tribunal continued to identify an ordinary meaning of the term and applied the three objective criteria test to Mr. Rand's indirect shareholding in BD Agro.

259. Numerous ICSID tribunals accept the proposition that the notion of investment in Article 25(1) of the Convention contains three elements - commitment of resources, duration and risk.[458] The tribunal in *Orascom v. Algeria*, for example,

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[456] Reply on Annulment, para. 316.

[457] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair (Eds.), *Schreuer's Commentary on the ICSID Convention*, 3rd ed., Cambridge University Press, 2022, Article 25, para. 181 (footnotes omitted), **RLA-258**.

[458] *Bernardh von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, para. 285, **CLA-168**; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 237, **CLA-157**; *Mabco Constructions v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, 30 October 2020, para. 296, **RLA-269**; *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, para. 370, **CLA-111**; *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, 14 July, 2010, para. 110, **CLA-90**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 151, **RLA-241**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v.*

explains that this is an ordinary meaning of the term in accordance with the Vienna Convention on the Law of Treaties:

> "*As held by a number of recent investment awards, this ordinary meaning of the term is an objective one, and comprises the elements of (i) a contribution or allocation of resources, (ii) a duration; and (iii) risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return. As noted by the tribunal in Saba Fakes, these requirements "are both necessary and sufficient to define an investment within the framework of the ICSID Convention*.""[459]

260. Even tribunals outside of the ICSID framework hold that the three elements are part of the inherent meaning of "investment" contained in relevant BITs.[460] In fact, this is the reason why an ICSID tribunal in *Eyre v. Sri Lanka* found that it was unnecessary to resolve the parties' disagreement over application of the *Salini* test:

> "*The Tribunal does not find it necessary to resolve the dispute between the Parties as to whether the Salini criteria do or do not apply per se in evaluating whether an investor has made a protected investment. There are now many decisions that have considered that "investment" has an inherent meaning and implies at*

Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 219, **RLA-24**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 170, **RLA-95**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 187, **CLA-32**; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, paras. 188-189, **RLA-168**; *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award of the Tribunal, 5 March 2020, para. 293, **RLA-236**; *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 January 2023, para 376, **RLA-243**; *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, para. 446, **RLA-244**.

[459] *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, para. 370 (footnotes omitted), **CLA-111**.

[460] *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para. 207, **CLA-201**; *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of the Award, 30 April 2014, para. 84, **RLA-270**;

least a contribution by the investor, a certain duration, and economic risk."[461]

261. The Conclusion in *Eyre v. Sri Lanka* was echoed by another ICISID tribunal in *Rasia v. Armenia*, where the tribunal held that the term "investment" in both the Convention and the relevant BIT has an objective and inherent meaning,[462] comprising of contribution of resources, certain duration and risk.[463]

262. Against such background, Applicant disputes the finding of the tribunal in *Electrabel v. Hungary* about general acceptance of the three objective criteria test and relies, once again, on a highly controversial decision of the *Malaysian Historical Salvors ad hoc* committee.[464]

263. Apart from an attempt to downplay the criticism against the *Malaysian Historical Salvors* decision,[465] Mr. Rand's latest submission does not address at all its biggest deficiency – the fact that the *ad hoc* committee confused annulment with an appeal and overstepped its mandate under Article 52 of the Convention. The issue was raised already in the dissenting opinion of Judge Shahabuddeen.[466] The majority's decision was criticized in literature for assessing the tribunal's jurisdiction *de novo*,[467] and for dressing up a perceived error of legal interpretation as a case on non-exercise of jurisdiction and, thereby, as a reason for annulment.[468]

264. Other *ad hoc* committees in subsequent cases have consistently refused to annul awards over disagreement with tribunals with regard to definition of

[461] *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award of the Tribunal, 5 March 2020, para. 293, **RLA-236**.
[462] *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 January 2023, para. 374, **RLA-243**.
[463] *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 January 2023, para 376, **RLA-243**.
[464] Reply on Annulment, paras. 317, 318.
[465] Reply on Annulment, para. 321.
[466] *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, Dissenting Opinion of Judge Mohamed Shahabuddeen, 19 February 2009, para. 55, **RLA-271**.
[467] R. D. Bishop, S. M. Marchili, Annulment under the ICSID Convention, Oxford University Press, 2012, para. 6.80, **RLA-254**.
[468] B. M. Aronson, A New Framework for ICSID Annulment Jurisprudence: Rethinking the "Three Generations", *Vienna Online Journal on International Constitutional Law*, vol. 6, No. 1 (2012), p. 24, **RLA-272**; See, also, P. Friedland, P. Brumpton, Rabid Redux: The Second Wave of Abusive ICSID Annulments, "American University International Law Review", vol. 27 (2012), p. 741, fn. 59, **RLA-273**.

investment,[469] while the *ad hoc* committee in *Cortec Mining v. Kenya* explicitly rejected the majority's approach in *Malaysian Historical Salvors* as too broad and inconsistent with Article 52(1) (b) of the Convention.[470]

265. Thus, an *ad hoc* committee must not annul the jurisdictional decision simply because it disagrees with the manner in which the tribunal interpreted the notion of "investment" under the Convention. As long as the tribunal's disposition is tenable, an *ad hoc* committee cannot annul the award, even if it considers the award incorrect as a matter of law.[471]

266. As already discussed by Respondent,[472] even if the mandate of the Committee would allow it to replace the Tribunal's interpretation on Article 25(1) with its own (which it does not), the decision rendered in *MHS* does not carry any more weight than the one in *Patrick Mitchell v. Congo*.[473] The committee in *Patrick Mitchell* explicitly adopted the *Salini* criteria as four elements of "investment" under the Convention,[474] and annulled the award because the tribunal had failed to explain the way in which those criteria were fulfilled.[475]

267. Mr. Rand now argues that the committee in *Patrick Mitchell* discussed the notion of investment under the Convention only as *obiter dictum* and that it annulled the award since the claimant's returns held outside of Congo were wrongly qualified as an investment under the BIT.[476] This is an incorrect reading of the decision. The main issue in *Patrick Mitchell* was whether the activity of the claimant (the claimant's provision of legal consulting services in DRC)

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[469] *Caratube International Oil Company LLP v. Republic of Kazakhstan* (I), ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para. 163**, CLA-16***; Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, para. 87, **RLA-162**.

[470] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, para. 142, **RLA-219.**

[471] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010, para. 55, **CLA-116**.

[472] Counter-Memorial on Annulment, para. 292.

[473] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, **CLA-187**.

[474] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 27, **CLA-187**.

[475] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 41, **CLA-187**.

[476] Reply on Annulment, para. 322.

represented an investment under the Convention.[477] The committee annulled the award based on the fact that the tribunal had failed to explain, in particular, how providing consulting services in Congo satisfied the fourth *Salini* criterion, *i.e.* how it represented "*contribution to the economic development or at least interests of the State*."[478] The committee did subsequently find that one element of the putative investment – the claimant's returns registered in the US bank accounts – was not an investment under the relevant BIT. However, it also stated that the tribunal's error to include the non-reinvested returns in the notion of investment would not be annullable, had the tribunal adequately explained the existence of the investment under the Convention.[479] Thus, the committee's interpretation of Article 25(1) of the Convention was the key reason to annul the award and not an observation made in passing or inconsequential for the outcome, as Applicant would have it.

268. Finally and most importantly, even if Mr. Rand would somehow be able to prove that the majority of ICSID tribunals were wrong and that his reading of Article 25(1) was indeed the correct one, the fact still remains that he has failed to demonstrate that the Tribunal's rejection of jurisdiction concerning indirect shareholding was *manifest* excess of powers. Overwhelming authority of previous arbitral decisions supports the Tribunal's interpretation, which shows that it is, at the very least, defensible, reasonable and tenable. The "manifest" requirement cannot be satisfied if reasonable minds differ as to whether or not the tribunal issued a correct decision.[480] This is clearly the case with the dispute at hand.

3. Contribution of capital is an indispensable element of "investment" under Article 25(1) of the ICSID Convention

269. Mr. Rand continuous to maintain an indefensible position: that an investment under the Convention can exist without proven contribution and that his indirect

[477] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, paras. 36-40, **CLA-187**.
[478] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 39, **CLA-187**.
[479] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 45, **CLA-187**.
[480] *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on the Application for Annulment, 22 August 2018, para. 183, **RLA-237**.

ownership of shares in BD Agro is enough to satisfy requirements of Article 25(1).[481] Yet, he is still to identify a single case in which an investor was unable to prove his contribution of resources and obtained protection under the Convention. This is for a good reason: there is no investment under the ICISID Convention without contribution of resources.

270. Even tribunals that specifically reject the objective character of "investment" under Article 25(1) and the *Salini* test accept that contribution of capital or other resources is a necessary prerequisite for the protected investment.[482]

271. Applicant's contention that an ICISD tribunal is essentially prohibited from investigating the way in which an investor obtained its shareholding is simply untenable.[483] As Respondent has already pointed out,[484] several tribunals have found that the ownership of shares does not satisfy requirements of Article 25(1) of the Convention if an investor is unable to demonstrate that it made necessary contribution while obtaining the shares.[485] Mr. Rand's repeated reference to *Lopez-Goyne v. Nicaragua* and *Victor Pey Casado v. Chile* cases[486] is inapposite, since it proves only that an investor, in certain cases, can rely on a contribution of other natural persons or entities, and not that the contribution is irrelevant.

272. The *Lopez-Goyne* tribunal found that shareholders of the company holding the investment directly ("*ION*") did not need to prove that they had made separate contribution towards the investment, as long as they hold title to their respective shares in *ION* and *ION itself qualifies as investor*.[487] It continued by

[481] Reply on Annulment, paras. 323, 324.

[482] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, paras. 200-201**, CLA-26**; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Decision on Jurisdiction and Liability, 4 August 2011, paras. 363-366, **CLA-81**; Counter-Memorial on Annulment, paras. 297, 298.

[483] Reply on Annulment, para. 324.

[484] Counter-Memorial on Annulment, para. 296.

[485] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 206**, RLA-95**; *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award, 5 June 2012, paras. 455, 456, **RLA-11**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 233, **RLA-24**; *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, 21 December 2015, paras. 264, 274, **RLA-245**.

[486] Reply on Annulment, paras. 325, 327.

[487] *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, para. 322, **CLA-198**.

investigating whether the company has made necessary disbursements in order to qualify as an investor and concluded that it did.[488] Thus, the tribunal's observation that ownership of shares *generally* is considered sufficient, cited by Applicant,[489] is clearly given *obiter dicta*.

273. Mr. Rand attempts to salvage his argument based on *Lopez-Goyne* by asserting the tribunal there did not hold that the intermediary company (*ION*) must have made a contribution.[490] The only way for Respondent to answer this false assertion is to respectfully direct the Committee's attention to the text of the award. Another incorrect contention of Applicant is that the *Lopez-Goyne* tribunal examined the existence of contribution by the intermediary company only because its investment was a concession and not a shareholding.[491] In truth, the award does not restrict the requirement of contribution to any specific forms of investment.

274. In *Pey Casado v. Chile*, Chile argued that one of the claimants (*President Allende Foundation*) could not obtain the status of protected investor since it did not pay anything for shares donated by Mr. Pey Casado.[492] The tribunal held that Foundation obtained the status of an investor through donation of shares, since the initial acquisition of shares by Mr. Pey Casado was valid.[493] The tribunal explicitly endorsed the three objective criteria test of a contribution, duration and risk[494] and, in particular, established that Mr. Pey Casado contributed his own capital when he initially acquired the shares.[495]

275. Therefore, neither *Lopez-Goyne* nor *Pey Casado v. Chile* can be used to demonstrate that the nominal shareholding only, without proven contribution of resources, could represent an investment under the Convention. Those cases

[488] The Lopez-Goyne Family Trust and others v. Republic of Nicaragua, ICSID Case No. ARB/17/44, Award, 1 March 2023, paras. 334-339, **CLA-198**.
[489] Reply on Annulment, para. 325.
[490] Reply on Annulment, para. 326.
[491] Reply on Annulment, para. 326.
[492] *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 542, **CLA-199**.
[493] *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 542, **CLA-199**.
[494] *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 233, **CLA-199**.
[495] *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 233 (a), **CLA-199**.

simply show that a contribution towards the acquisition of shares can be made by the investor's local company or by a third person, but it must be made and proven, contrary to what Mr. Rand has been arguing.

276. To reiterate: the Tribunal rejected jurisdiction over Mr. Rand's indirect shareholding simply because he was unable to prove that he had paid 200,000 EUR (or any other sum) for the shares in BD Agro, either directly or through his Serbian company (MDH Serbia).[496] In order to succeed with his request for annulment, Applicant must demonstrate that his interpretation of "investment" under Article 25(1) of the Convention is so firmly enshrined in the case law that, for all practical purposes, any other interpretation would be unreasonable.[497] Not only that Mr. Rand has been unable to show that a contribution of resources is irrelevant for jurisdictional inquiry *ratione materiae* under the Convention, but the exact opposite is true: the Tribunal reached its decision based on the prevailing practice of ICSID tribunals. Thus, Applicant's claim concerning jurisdiction over his indirect shareholding must be rejected.

4. Applicant cannot argue that he was unaware of the requirement to prove the existence of contribution

277. In his latest submission,[498] Applicant simply repeats his contention from the Memorial on Annulment – that the Tribunal, by applying the contribution requirement with regards Mr. Rand's indirect shareholding, based its decision on a legal theory that was not addressed in the Arbitration and that the Parties could not reasonably anticipate.[499]

278. Even a cursory analysis of the Arbitration's record demonstrates that Mr. Rand's contention is clearly meritless. However, for the sake of completeness Respondent will again briefly address Applicant's contentions.

279. First, the Parties have extensively debated the four criteria of the *Salini* test in its application to the circumstances of the dispute during the entire proceeding.[500] Claimants were not only given ample opportunity to comment on

[496] Award, para. 273.
[497] Counter-Memorial on Annulment, para. 309.
[498] Reply on Annulment, paras. 330-333.
[499] Reply on Annulment, para. 331.
[500] Counter-Memorial on Annulment, para. 311.

the application of the *Salini* criteria, but they also used this opportunity with regard to all of their putative investments and not only the indirect shareholding. The absurdity of Applicant's argument is best seen from the fact that it was Claimants themselves who introduced the discussion and argued consistently that the requirements of *Salini* were fulfilled.[501] Applicant cannot now seriously argue that the Tribunal based its decision on a legal theory that was not addressed by the Parties or that he could not reasonably anticipate.

280. Second, Respondent has repeatedly raised the issue of Claimants' inability to prove that Mr. Rand made the 200,000 EUR disbursement towards the acquisition of the BD Agro's shares during the Arbitration.[502] Claimants chose not to respond to the assertion in several subsequent submissions. It is simply baffling that Mr. Rand now requests the annulment of the Tribunal's jurisdictional decision simply because he was invited to submit the necessary evidence by Respondent and not directly by the Tribunal.[503]

281. Finally, even had it not been for Respondent's objection, it was up to Claimants to provide evidence about Mr. Rand's purported contribution. The principle that "*he who asserts must prove*" as a general rule applies to Mr. Rand's claim as well. Mr. Rand asserted that he paid 200,000 EUR for his indirect shareholding in BD Agro but failed to submit any evidence to that regard. Thus, Applicant's latest submission[504] misses the point entirely: whether or not Mr. Rand was able to prove that he was the nominal indirect owner of the 3.9% shareholding in BD agro does not have anything to do with the lack of evidence concerning Mr. Rand's alleged contribution.

5. The Tribunal made a correct assessment of evidence with respect to Mr. Rand's indirect shareholding

282. In his Reply on Annulment, Applicant briefly repeats his assertion that the Tribunal committed a manifest excess of powers by refusing to accept Mr. Rand's contribution towards the beneficially owned shares as his contribution

[501] Request for Arbitration, para. 216; Claimants' Memorial, para. 329; Claimants' Reply, paras. 669-690; Claimants' Rejoinder on Jurisdiction dated 6 March 2020, paras. 470-495.
[502] Respondent's Rejoinder, 24 January 2020, para. 1028; Respondent's Post-Hearing Brief, 28 September 2021, para. 158.
[503] Reply on Annulment, para. 330.
[504] Reply on Annulment, para. 333.

concerning the indirect shareholding in BD Agro as well.[505] The submission does not respond to any of the arguments of Respondent contained in its Counter-Memorial on Annulment[506] and it adds nothing to the persuasiveness of Applicant's claim. There are still three main reasons why Applicant's contention is untenable.

283. First, the Committee does not have the mandate to reassess the Tribunal's appreciation of evidence, review *de novo* its factual findings and evidence used by the Tribunal or substitute its finding of facts in lieu of the Tribunal's. This is an undisputable fact confirmed by numerous *ad hoc* committees.[507] The Tribunal assessed the factual matrix of the dispute and found that there was no evidence that Mr. Rand had paid anything for the indirect shareholding. This should be the end of the matter.

284. Second, once the issue of lack of evidence with regard to the contribution concerning the indirect shareholding was raised by Respondent in the Arbitration, Claimants had plenty of opportunity to make the argument Mr. Rand's is making now: that his contribution towards the beneficially owned shares should also count towards the indirect shareholding. They never did. A party in the annulment proceeding cannot use the proceeding to raise an argument it did not use during the arbitration or to complete and develop an argument that it could and should have made in the arbitration.[508]

285. Finally, even if Mr. Rand would be allowed to attack the Tribunal's assessment of evidence in the annulment proceeding, which he is not, the assessment was

[505] Reply on Annulment, paras. 334-336.
[506] Counter-Memorial on Annulment, paras. 317-327.
[507] *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, 15 January 2016, para. 129, **RLA-274**; *Fabrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment, 22 November 2019, para. 97, **RLA-251**; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, 30 July 2021, para. 168, **RLA-262**; *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para. 234, **RLA-247**; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, para. 239, **RLA-238**.
[508] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, para. 251, **RLA-238**; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, para. 83, **CLA-189**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 97, **CLA-185**.

correct. Claimants have argued that Mr. Rand's indirect shareholding in BD Agro represented one of their investments, separate from the investment in beneficially owned shares.[509] They insisted on circumstantial evidence in order to prove that Mr. Rand was the beneficial owner of the shares acquired during the privatization by Mr. Obradovic, a Serbian citizen.[510] Mr. Rand cannot seriously argue now that the Tribunal should have accepted such *indicia* as evidence of contribution towards the indirect shareholding, contrary to Claimants' assertions during the Arbitration. In addition, the process of proving the nominal ownership of public joint stock companies in Serbia is rather straightforward: those companies are listed at the Belgrade Stock Exchange (BSE) and trading with their shares is possible only through the BSE.[511] Thus, the only viable evidence that Mr. Rand could have provided in the Arbitration would be sale and purchase agreements between his company (MDH Serbia) and sellers of BD Agro's shares. No such evidence was ever provided and it is hardly surprising that the Tribunal reached the only possible conclusion – Mr. Rand failed to carry his burden of proof with regard to the indirect shareholding.

286. To summarize: the Tribunal correctly decided that Mr. Rand's claim concerning his indirect shareholding in BD Agro was outside its jurisdiction based on Article 25(1) of the Convention. The Tribunal's interpretation of the relevant provision is dominant in the ICSID case law, supported by the legal doctrine and based on the legal argumentation discussed by the Parties in the Arbitration. The Tribunal's holding that "an investment" under Article 25(1) requires a proof of contribution of resources is, at the very least, indisputably plausible, tenable and reasonable, thereby excluding any possibility of manifest excess of powers. Applicant's attempt to question the Tribunal's assessment of evidence is not only prohibited, but also futile and does not change the conclusion that the manifest excess of powers did not occur.

[509] Award, para. 202.
[510] Award, para. 238.
[511] Counter-Memorial on Annulment, para. 324.

III. THE TRIBUNAL DID NOT MANIFESTLY EXCEED ITS POWERS BY REFUSING JURISDICTION OVER MR. RAND'S PAYMENTS FOR THE BENEFIT OF BD AGRO

287. The Tribunal correctly declined jurisdiction over Mr. Rand's payments for the benefit of BD Agro, since those payments fall outside both Article 1 of the Canada-Serbia BIT and Article 25(1) of the ICSID Convention.[512]

288. Applicant continues to argue that the Tribunal "incorrectly" applied the BIT and the Convention.[513] The essential nature of Mr. Rand's claim remains unchanged: it is an appeal against what Applicant sees as misapplication of the law and incorrect evaluation of evidence. Mr. Rand's case is also built around wrong and even manipulative reading of the Tribunal's conclusions and reasoning and rests upon arguments introduced only in the annulment proceeding.

289. Applicant implies that the Tribunal had acknowledged Mr. Rand's expenditures towards BD Agro's business as "loans" under Article 1(d) of the BIT, and then proceeded to erroneously apply the carve-out provision from Article 1(k) and (l) to such "loans". However, the Tribunal correctly concluded that Mr. Rand's payments towards BD Agro's suppliers of heifers as well as his expenditures for retaining the services of the heard management experts were "*other claims for money*" outside of the ambit of protection under Article 1(l) of the BIT. As an alternative proposition only, the Tribunal correctly held that, even if Mr. Rand's disbursement could have been considered as "loans", such loans would not enjoy protection under the BIT. In any event, the Tribunal's interpretation of the Canada-Serbia BIT was of secondary relevance, since the Tribunal had previously found that Mr. Rand's payments for the benefit of BD Agro did not fulfill the requirement of necessary duration in terms of Article 25(1) of the Convention.

290. As Respondent will explain in detail below, none of those conclusions can represent a manifest excess of powers.

[512] Award, paras. 342-345, 274-275.
[513] Reply on Annulment, para. 342.

1. Payments for the benefit of BD Agro do not represent "*loan(s) to an enterprise*" under Article 1(d) of the Canada-Serbia BIT

291. Contrary to what Claimants' asserted during the Arbitration, the Tribunal held that Mr. Rand's payments for the benefit of BD Agro could not be regarded as loan(s) to an enterprise in accordance with Article 1(d) of the BIT. This is primarily since Claimants failed to prove that such payments were indeed loans granted by Mr. Rand to BD Agro.[514] The Tribunal relied, *inter alia,* on the fact that Mr. Rand was unable to present any loan agreement between himself and BD Agro during the company's bankruptcy proceedings.[515] Thus, all that Mr. Rand had was a claim for money arising out of the unofficial uncommanded agency, in accordance with Article 220 of the Serbian Law on Obligations.[516] Such claims are explicitly excluded from the BIT's ambit according to the carve out provisions in Article 1(k) and (l) of the BIT.[517]

292. The Tribunal effectively accepted the argument that Respondent put forward in the Arbitration: Mr. Rand's payments for the benefit of BD Agro created a claim for money against the company, excluded from the notion of investment by virtue of Article 1(l) of the BIT referring to "*any other claim to money; that does not involve the kind of interests set out in subparagraphs (a) to (j)*".[518] Respondent consistently claimed, from its very first submission,[519] that Mr. Rand's expenditures were omitted from the protection of the BIT under Article 1(l).

293. On the other hand, the Tribunal was denied the benefit of Claimants' position on the issue. As Respondent explained previously,[520] Claimants have never responded to any of Serbia's contentions with regards the carve-out provision

[514] Award, para. 343
[515] Award, fn. 237.
[516] Award, para. 344; Law on Obligations, Article 220(1), **RE-32**; Commercial Court in Belgrade Decision number 9, St-321/2015, 30 March 2018, Decision on the List of Determined and Contested Claims, p. 2 (English translation), **CE-136**.
[517] Award, para. 344.
[518] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1(l), **CLA-1**.
[519] Respondent's Counter-Memorial with Request for Bifurcation, para. 309; Respondent's Rejoinder, paras. 743-745.
[520] Counter-Memorial on Annulment, para. 339.

from Article 1(l), its application and scope. Applicant raised the argument for the first time in the current proceeding.

294. It is beyond dispute that the annulment cannot be used by one party "*to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its argument*".[521] To allow Applicant to do so would essentially turn the Committee's control of the Tribunal's decision into *de novo* review of its jurisdiction, effectively introducing an appeal against the Award. As it was held by the *ad hoc* committee in *JGC Corporation v. Spain*: the Committee must assess the case as it was presented to the Tribunal and not as if it were being presented before the Committee itself.[522]

295. Mr. Rand does not contest that he is prohibited from introducing the argument that he failed to use during the Arbitration, but submits that he "*consistently argued that the Loans were "loans to an enterprise" and were not captured by the carve-out language of letters (k) and (l)*".[523] This statement is simply untrue. Claimants' submissions that Mr. Rand relies on in support of his assertion[524] do not contain a single word about the provision in Article 1(l), excluding "*any other claim to money*" from the Treaty's ambit.

296. Even if Mr. Rand would be allowed to argue what he should have argued during the arbitral proceeding, which he is not, the Tribunal's decision to refuse jurisdiction was correct. The argument developed in the present proceeding by Applicant rests upon the premise that payments for the benefit of BD Agro are not excluded by virtue of Article 1(l) since those payments involved Mr. Rand's beneficial and nominal ownership of shares in BD Agro.[525] Although Mr. Rand

[521] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee , 3 May 1985 [English Translation], para. 83, **CLA-189**; *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Decision on Annulment, 5 November 2024, para. 143, **RLA-275**; *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Decision on Annulment, 8 April 2020, para. 301, **RLA-211**; *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Annulment, 29 September 2016, para. 130, **RLA-240**.

[522] *JGC Holdings Corporation (formerly JGC Corporation) v. Kingdom of Spain*, ICSID Case No. ARB/15/27, Decision on Annulment, 6 February 2024, para. 66, **RLA-276**.

[523] Reply on Annulment, para. 356.

[524] Reply on Annulment, fn. 446; Claimants' Reply, paras. 632-643; Claimants' Rejoinder on Jurisdiction, paras. 448-453.

[525] Reply on Annulment, para. 348.

claims otherwise,[526] his interpretation of the carve-out provision is clearly too broad and would lead to unacceptable and even absurd results – every payment made for the benefit of BD Agro, for instance, for utilities or office materials would create a separate investment under the BIT, simply because Mr. Rand is the owner of the company. That would render the exclusion in Article 1(l) virtually meaningless, since every payment would create a claim to money that would "*involve the kinds of interest set out in subparagraphs (a) to (j)*" of Article 1.

297. Claimants in the Arbitration themselves argued that Mr. Rand, as the owner of BD Agro, made necessary expenditures for heifers and services of heard management consultants in order to "'*secure continuity of business operations of the [BD Agro] in main business activity,' **as required by Article 5.3.2. of the Privatization Agreement***".[527] Applicant cannot now assert that the fulfillment of his contractual obligations from the Privatization Agreement created a separate, distinct investment under the BIT.

298. Thus, the rationale of the *Inmaris* award is clearly apposite for the case at hand. There, the tribunal held that expenditures made by claimants and required by relevant contracts (for necessary repairs and operation of the ship *Khersones*) were made in furtherance of their investment (a contractual right to hold and operate the ship), and did not create a separate investment under the Germany-Ukraine BIT.[528] This is despite the fact that the treaty explicitly recognized "*claims to money*" as a form of investment.[529]

299. Applicant asserts that the *Inmaris* award is distinguishable and claims that the tribunal there rejected jurisdiction because payments made were not related to any other investment and did not result in the acquisition of any assets, such as claims to money.[530] This is entirely wrong interpretation of the award. The exact opposite is true – the *Inmaris* tribunal held that the claimants' expenditures could not result in the acquisition of separate tangible or intangible asset

[526] Reply on Annulment, para. 354.
[527] Claimants' Reply, para. 638 (emphasis added).
[528] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, paras. 99-101, **RLA-13**.
[529] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 65, **RLA-13**.
[530] Reply on Annulment, para. 355.

precisely because they were made in relation and in furtherance of another intangible asset forming the investment (claims to performance of contracts).[531] Just as it was the case in *Inmaris*, Mr. Rand cannot claim that the expenditures he made under the Privatization Agreement, in order to obtain and operate his investment (BD Agro), somehow created another investment protected under the BIT.

300. Applicant again relies on the three NAFTA cases (*Canadian Cattlemen v. USA*, *Apotex v. USA* and *Koch Industries v. Canada*) in an attempt to prove that his payments for the benefit of BD Agro are not excluded from the notion of investment under Article 1(l) of the BIT.[532] The argument is based on similarities of the carve-out provisions in Article 1(k) and (l) with those contained in NAFTA Article 1139(i) and (j). The crux of Applicant's argument is his contention that the relevant NAFTA provisions, according to the cases he relies on, serve to exclude "*mere cross-border trade interests*" from the protection under NAFTA.[533] However, it remains unpersuasive for two main reasons.

301. First, the fact that the NAFTA tribunals hold that, generally speaking, mere cross-border trade interests are excluded from the ambit of NAFTA does not imply that Mr. Rand's expenditures for the benefit of his company are automatically covered by Article 1 of the BIT. This is clearly *a non sequitur* argument. More importantly, none of the cases that Mr. Rand relies on are remotely comparable to the case at hand. The cases concerned the alleged discrimination of the Canada-based investor by the US import-restriction measures,[534] the purported investment in the form of the claimant's interest to register and sell its drugs on the US market[535] and the interest of the claimant to purchase emission allowances in Ontario and re-sell them in California.[536] Thus,

[531] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 101, **RLA-13**.
[532] Reply on Annulment, para. 350-353.
[533] Reply on Annulment, para. 350.
[534] *The Canadian Cattlemen for Fair Trade v. United States of America, UNCITRAL (formerly Consolidated Canadian Claims v. United States of America)*, Award on Jurisdiction, 28 January 2008, para. 39, **CLA-213**.
[535] *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, para. 235, **CLA-214**.
[536] *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Award of the Tribunal, 13 March 2024, paras. 371-373, **CLA-215**.

it is difficult to comprehend how exactly the fact that the right of access to a certain market does not represent an investment under NAFTA could translate into Mr. Rand's payments for the benefit of his Serbian company being covered by Article 1 of the Canada-Serbia BIT.

302. Furthermore, even should the Committee find that the Tribunal "*misapplied*" the provision of Article 1(l) of the BIT, as Applicant contends,[537] misapplication of the law is not a ground for annulment. For instance, the *ad hoc* committee in *Rasia v. Armenia* held most recently that the wrong interpretation of the law is not a matter that may be subject to annulment.[538] Such reasoning follows from a limited role of *ad hoc* committees in the annulment proceedings, as well as from the fact that the treaty interpretation is not an exact science and is often possible that there is more than one interpretation of a disputed provision.[539] Thus, as long as the Tribunal's interpretation of the BIT is not arbitrary, untenable or unreasonable there can be no manifest excess of powers.[540] Even if accepted, for the sake of argument, that the Tribunal erred in its application of Article 1 of the BIT, the above discussion unequivocally demonstrates that its interpretation is, at the very least, tenable and cannot be regarded as a manifest excess of powers under Article 52(1) (b) of the Convention.

2. In any event, purported "loan(s)" are expressly excluded from the BIT's ambit

303. As an alternative and subsidiary argument only, the Tribunal discussed a hypothetical in which Mr. Rand's payments for the benefit of BD Afro could be classified as loans. It found that the putative "loans" would in any case be excluded from the notion of investment under Article 1(k) (ii) of the Canada-Serbia BIT.[541]

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[537] Reply on Annulment, para. 348.

[538] *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Decision on Annulment, 5 November 2024, para. 147, **RLA-275**.

[539] *Empresas Lucchetti, S.A. and and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4 (also known as: Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru), Decision on Annulment, 5 September 2007, para. 112, **CLA-209**; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 81, **CLA-205**.

[540] See paras. 242-244 above.

[541] Award, para. 345.

304. The text of the provision at stake is unambiguous – it excludes from the ambit of protection under the BIT a claim to money arising solely from the extension of credit in connection with a commercial transaction, *such as* trade financing.[542] The Tribunal held that the purchase and transport of heifers as well as the provision of management services fell within the notion of "commercial transaction", thereby making Mr. Rand's payments for purchase of livestock and services the loans extended in connection with a commercial transaction.[543]

305. The Tribunal effectively accepted the argument put forward by Respondent during the Arbitration, based, *inter alia*, on the BIT's drafting history recording the State Parties' understanding that claims to money arising from loans taken in order to perform commercial contracts are excluded from the notion of investment.[544] On the other hand, Claimants had nothing to say about the issue.[545]

306. In his Reply on Annulment, Mr. Rand essentially repeats his argument submitted and developed only in the annulment proceeding – that the Tribunal's jurisdictional decision should be annulled because the Tribunal allegedly "misapplied" Article 1, subparagraphs (k) (ii) and (l) of the BIT.[546] Applicant argues that the Tribunal erred by excluding the "loans" by virtue of Article 1(k) (ii) and by failing to apply the last sentence of Article 1(l) to said "loans".[547]

307. Applicant's latest submission adds nothing to the discussion. The argument is still misplaced and must be rejected for two obvious reasons.

308. First, Mr. Rand has never argued in the arbitral proceeding that his payments for the benefit of BD Agro were not extended in connection with a commercial transaction. In fact, all that Claimants had to say about the issue is a single sentence in their Rejoinder on Jurisdiction that the "loans" were not trade

[542] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1(k) (i), **CLA-1**.
[543] Award, para. 345.
[544] Report from the negotiations regarding conclusion of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, held in Ottawa, from 23 – 25 May 2013, **RE-271.**
[545] Counter-Memorial on Annulment, para. 345.
[546] Reply on Annulment, para. 346.
[547] Reply on Annulment, paras. 346-348.

financing,[548] a statement that was off point since Respondent has never asserted that the transaction at issue represented that particular type of commercial contract.[549] Likewise, Mr. Rand has never argued that the last sentence from Article 1(l) applies to his "loans". As Respondent already explained, Applicant cannot request the Committee to effectively impeach the Tribunal for omitting to consider the arguments that were never put before it in the first place.[550] This should be the end of the matter.

309. Second, and in any event, the last sentence of subparagraph (l) does not apply to the extension of credit in connection with a commercial transaction referred to in subparagraph (k) (ii) of Article 1. Subparagraph (l) excludes from the protection under the BIT "*any other claim to money; that does not involve the kinds of interest set out in subparagraphs (a) to (j)*". It follows from the structure and text of Article 1 of the BIT that the sentence is an integral part of subparagraph (l) and that it applies to *any other claim to money*, and not the claims to money already excluded by virtue of Article 1(k). In other words, whether or not the purported loans involved Mr. Rand's ownership of BD Agro's shares is irrelevant – a claim to money arising solely form the credit given for purchase of the livestock and services from third parties is excluded through Article 1(k) (ii) of the BIT and no other condition applies.[551] As a result, the Tribunal's alternative conclusion: that Mr. Rand's "loans" extended to BD Agro were excluded from the protection by virtue of Article 1(k) (ii) was the correct one and it certainly cannon be regarded as a manifest excess of powers.

3. The Tribunal correctly declined jurisdiction over Mr. Rand's payments for the benefit of BD Agro under the ICSID Convention

a) Mr. Rand's payments lacked necessary duration under Article 25(1) of the ICSID Convention

310. Mr. Rand's payments for the benefit of BD Agro did not satisfy the criterion of duration necessary for the existence of an investment under Article 25(1) of the

[548] Claimants' Rejoinder on Jurisidiction dated 6 March 2020, para. 452.
[549] Counter-Memorial on Annulment, para. 345.
[550] See para. 294 above; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Annulment, 20 March 2023, para. 212, **RLA-277**.
[551] Counter-Memorial on Annulment, para. 348.

ICSID Convention. This was the primary reason why the Tribunal rejected jurisdiction concerning Mr. Rand's expenditures with regard to the livestock and services of heard management experts.[552]

311. The requirement of duration is one of the three elements comprising the objective notion of "investment" under the Convention.[553] The three objective criteria test is widely accepted by ICSID tribunals in determining jurisdiction *ratione materiae* under the Convention.[554] Thus, Applicant's claim that the Tribunal committed a manifest excess of powers by employing the test is obviously baseless and warrants no further attention.[555]

312. The tribunal in *Casinos v. Argentina* simply explains the rationale for introducing the requirement of duration, which is otherwise self-evident: the Convention does not protect one-time transactions since it does not include them in the notion of an investment.[556] Applicant's response is to declare that the *Casinos* award excludes from the notion of an investment only one-time sales transactions that do not face investment-specific risk and that Mr. Rand's payments were not of such nature.[557] This is an over-simplification of the *Casinos* tribunal reasoning. According to the tribunal, the purpose of the Convention is to protect "*long-term forms of economic involvement in a host State*".[558] The payment of invoices for goods and services, presented by Mr. Rand as his separate "investment", is certainly not a long-term form of economic involvement and clearly lacks necessary duration under Article 25(1) of the Convention.

313. Applicant again contends that his transactions were long-term loans, lasting up to ten years before the Arbitration commenced.[559] He once more relies on the *Deutsche Bank v. Sri Lanka* tribunal's finding that a twelve-months hedging

[552] Award, para. 274.
[553] Award, para. 275.
[554] Counter-Memorial on Annulment, para. 283. See, also, paras. 258-261 above.
[555] See paras. 258-258 above.
[556] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 189, **RLA-168**.
[557] Reply on Annulment, para. 360.
[558] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 189, **RLA-168**.
[559] Reply on Annulment, para. 362.

agreement fulfilled the requirement of duration.[560] The problem with the argument remains the same: Mr. Rand's payments were not "*loans*" and were not made in the framework of any contract.[561] This is not a consequence of Respondent's assertion that every loan agreement must be concluded in writing - an assertion that has never been made, contrary to what Mr. Rand argues.[562] It is a fact determined by the Tribunal: Mr. Rand failed to prove that he has ever concluded a loan agreement with BD Agro.[563] Applicant attempts to deal with the problem by advancing a novel proposition - that whether his payments are characterized as loans, contracts or a claim to money is irrelevant for determining their duration.[564] The suggestion is absurd since it implies that the nature of transaction is irrelevant for its duration. Applicant cannot seriously argue that a long-term contract and a simple payment for goods are transactions equal in terms of their duration.

314. The reasoning of the *Doutremepuich v. Mauritius* tribunal is clearly applicable here: one-off outlays made at the claimant's initiative and for the benefit of his investment do not meet the requirement of necessary duration.[565] Applicant unsuccessfully attempts to explain that *Doutremepuich* is distinguishable from the case at hand, since it considered outlays made as part of the preparations of the project.[566] However, whether or not an investment project is ongoing when the payments are made does not have any impact on the character of the transaction and its duration – payment of bills and invoices for goods and services received by a company owned by the investor simply does not last long enough to be considered as an investment itself.

315. In an effort to somehow prove that Mr. Rand's payments to the Canadian vendors and heard-management experts fulfill the requirement of duration, Applicant apparently contends that the payments were an element of Mr. Rand's "*partial investments*" that needed to be "*assessed in their unity, as part of one economic venture*" and relies again on decisions rendered by the *CSOB* and

[560] Reply on Annulment, para. 363.
[561] Counter-Memorial on Annulment, para. 356.
[562] Reply on Annulment, para. 363.
[563] Award, para. 343.
[564] Reply on Annulment, para. 363.
[565] *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, paras. 137, 143, **RLA-171**.
[566] Reply on Annulment, para. 364.

Sempra tribunals.[567] The argument is both unpersuasive and reveals an inherent contradiction in Applicant's case.

316. First, it remains unclear how precisely would the assertion that Mr. Rand's payments were a part of "*one economic venture*" help Applicant to prove that the payments, considered as a stand-alone, separate investment, were of necessary duration.

317. Second, as Respondent already explained in its Counter-Memorial on Annulment,[568] both *CSOB* and *Sempra* cases considered loans as purported investments.[569] Mr. Rand's expenditures towards BD Agro were not loans, which renders the two cases even *prima facie* inapposite for the case at hand. As the Tribunal determined, the bulk of those payments were reported in the BD Agro's bankruptcy proceeding and resulted in Mr. Rand's claim *vis-à-vis* BD Agro originating from the unofficial uncommanded agency, and not from a loan agreement.[570]

318. Finally, and most importantly, Applicant's reliance on *CSOB* and *Sempra* contradicts the way in which Applicant's case has been presented both during the Arbitration and in the annulment proceeding. The relevant paragraph of the *CSOB* decision, partially reproduced also in the Reply on Annulment,[571] reads as follows:

> "*The Tribunal agrees with the interpretation adopted in the Fedax case. An investment is frequently a rather complex operation, composed of various interrelated transactions,* ***each element of which, standing alone, might not in all cases qualify as an investment****. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on* ***a transaction which, standing alone, would not qualify as***

[567] Reply on Annulment, para. 365;
[568] Counter-Memorial on Annulment, paras. 358, 359.
[569] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, paras. 70-82, **CLA-3**; *Sempra Energy International v. the Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras. 211-215, **CLA-52**.
[570] Award, para. 344.
[571] Reply on Annulment, para. 367.

> ***an investment under the Convention****, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment*."[572]

319. During the Arbitration Applicant argued that his payments for the benefit of BD Agro must be considered as a self-standing, separate and distinct investment, apart from his shareholding in BD Agro.[573] The Tribunal considered the claim in a way in which it was put before it.[574] Mr. Rand now asserts that his payments, taken alone, might not qualify as an investment under the Convention and argues that the Tribunal should have examined the transaction as a part of his overall economic venture. The Committee should not allow Mr. Rand to relitigate the issue of jurisdiction in order to secure a better outcome for himself,[575] especially when the request for annulment is based on a legal argument that clearly contradicts the one that was put before the Tribunal.

320. Thus, the Tribunal rightfully held that Mr. Rand's payments for the benefit of BD Agro did not satisfy the requirement of duration under the objective notion of investment in Article 25(1) of the Convention. Applicant has failed to demonstrate that the Tribunal's jurisdictional decision is untenable or unreasonable. Therefore, it is not amenable to annulment under Article 52(1) (b) of the Convention.

b) The Tribunal did not fail to state reasons with regard to Mr. Rand's payments for the benefit of BD Agro

321. As Respondent explained in its Counter-Memorial on Annulment,[576] from the simple fact established by the Tribunal: that Mr. Rand's expenditures for the benefit of BD Agro were not "loans" to an enterprise in the sense of Article 1(d) of the BIT but simple payments, followed the only logical conclusion: such payments are not long-term transactions and do not fulfill the requirement of duration under the Convention. The Tribunal pointed out to the payment of

[572] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 72 (emphasis added; footnotes omitted), **CLA-3**.
[573] Claimants' Rejoinder on Jurisdiction, dated 6 March 2020, para. 450.
[574] Award, para. 202.
[575] *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, para. 253, **RLA-259**.
[576] Counter-Memorial on Annulment, para. 363.

consulting fees, as a transaction that clearly did not satisfy the requirement, in order to illustrate the point.[577]

322. Applicant's assertion that the Tribunal failed to state reasons for its decision must fail on two grounds.

323. First, a tribunal's reasoning does not need to be given explicitly. As already discussed,[578] reasons for a particular decision may be implicit and a committee should seek to understand the motivation of the award in the light of the record before the tribunal.[579] The tribunal does not need to set out explicitly all of its reasons "*as long as they can be understood from the rest of the award*".[580] The reasons may be "*implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision*".[581] There can be no annulment if a careful reader can follow the implicit reasoning of the tribunal.[582]

324. This is precisely the case here – an informed and careful reader can easily understand the motivation behind the Tribunal's decision. From the conclusion that Mr. Rand's expenditures for the benefit of his company are not loans but simple payments,[583] it follows that such payments are not the transactions of necessary duration.[584] The transfer of funds from one banking account to the other simply cannot last from two to five years, a duration that is, according to Applicant, a minimal duration of an investment under the ICSID Convention.[585]

325. Mr. Rand's response is, once again, that the nature of transaction does not affect its duration and that it is irrelevant whether his payments qualify as loans or as

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[577] Award, para. 274.
[578] See para. 125 above.
[579] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee, 25 March 2010, paras. 138, 179(1), **RLA-250**.
[580] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 88, **CLA-186**; *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, 30 November 2022, para. 408, **Annex-8**.
[581] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/08/4, Decision (Annulment Proceeding), 5 February 2002, para. 81, **CLA-185**.
[582] *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12*, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para. 56, **RLA-233**; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 127, **RLA-152**.
[583] Award, paras. 343, 344.
[584] Counter-Memorial on Annulment, para. 365.
[585] Memorial on Annulment, para. 323, fn. 415; Counter-Memorial on Annulment, para. 357.

any other claim for money.[586] This is patently wrong. The only way to determine the duration of a particular transaction is with reference to the transaction's nature. It is simply impossible that a wire transfer of money has the same duration as a long-term loan agreement, regardless of the fact that both transactions can create a claim to money. Therefore, the fact that the Tribunal classified Mr. Rand's payments as "payments" and not "loans" clearly determined its conclusion on the duration criterion. This is obvious to any reasonable reader and Applicant cannot seriously claim otherwise.

326. Second, numerous *ad hoc* committees have found that the tribunal's reasoning, even if missing entirely from the award, which is not the case here, can be reconstructed or clarified by the committee. For instance, in *Micula v. Romania I* the committee stated:

> "*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 award, provided they can be reasonably inferred from the terms used in the decision." This has been confirmed by other committees*".[587]

327. The Wena *ad hoc* committee held that, even if the award suffers from a lack of reasons, the remedy need not be the annulment of the award:

> "*If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the ad hoc Committee so concludes,* ***on the basis of the knowledge it has received upon the dispute, the reasons supporting***

[586] Reply on Annulment, para. 373.

[587] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, para. 138 (footnotes omitted), **RLA-278**.

the Tribunal's conclusions can be explained by the ad hoc Committee itself".[588]

328. Other committees also accept that a committee can explain, clarify or supplement the reasoning given by the tribunal.[589] Even the *Rumeli ad hoc* committee, the single authority Applicant relies on to support its assertion that a committee "*should not construct reasons in order to justify the decision of the tribunal*",[590] holds that a committee can reconstruct reasons, "*if reasons are not stated but are* ***evident and a logical consequence of what is stated in an award***".[591]

329. Since it is undoubtedly clear that the Tribunal's decision that Mr. Rand's payments for the benefit of BD Agro did not meet the requirement of duration was informed by its conclusion about the character of the transaction at issue, the Committee should not annul the relevant part of the Award, even if it finds that the Tribunal's reasoning is insufficient.

D. THE TRIBUNAL'S DECISION ON COSTS SHOULD NOT BE ANNULED

330. In exercise of its discretion under Article 61(2) of the Convention, considering all the circumstances of the case, the Tribunal decided that it was fair and reasonable that the Parties should each bear half of the costs of the proceeding and their own legal and other costs.[592] Mr. Rand continuous to argue that the

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[588] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/08/4, Decision (Annulment Proceeding), 5 February 2002, para. 83 (emphasis added), **CLA-185**.

[589] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 108, **RLA-212**; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, para. 228(d), **RLA-219**; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 24, **RLA-257**; *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic)*, Decision on Annulment, 5 May 2017, para. 248, **RLA-279**; *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on the Application on Annulment, 22 August 2018, paras. 608, 609, **RLA-237**.

[590] Reply on Annulment, para. 374.

[591] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee, 25 March 2010, para. 83 (emphasis added), **RLA-250**.

[592] Award, para. 716.

decision on costs should be annulled since it was based, *inter alia*, on the allegedly annullable parts of the Award concerning jurisdiction and quantum.[593] Applicant's request must be denied for two main reasons.

331. First, Mr. Rand did not put forward any separate ground for annulment of the decision on costs under Article 52(1) of the Convention. The request is founded solely on the alleged inability of the decision on costs to survive the partial annulment of the Award. As Respondent amply demonstrated during the proceeding, Mr. Rand failed to prove that the Tribunal's decisions on jurisdiction and quantum should be annulled, which renders his request concerning the decision on costs entirely moot.

332. More importantly, even if the Committee should find that the relevant parts of the Award warrant annulment, the decision on costs would not be affected.

333. As his Memorial on Annulment, Mr. Rand's latest submission ignores the fact that the Tribunal's decision on costs was based on all the circumstances of the dispute, and not only on the relative success of the Parties on issues of jurisdiction and damages. The entire set of relevant circumstances was listed by the Tribunal as follows:

> *"• The Tribunal concluded that it had jurisdiction only over Mr. Rand's claims under the ICSID Convention and the Canada-Serbia BIT in respect of his interest in the Beneficially Owned Shares. It lacked jurisdiction over his claims in respect of his payments for the benefit of BD Agro and his indirect shareholding in BD Agro.* ***It also lacked jurisdiction over the claims of the other Claimants under the Canada-Serbia BIT, and over Sembi under the Cyprus-Serbia BIT****;*
>
> • ***The issues involved were complicated because of Mr. Rand's unusual investment structure, which triggered objections and extensive debates****;*

[593] Reply on Annulment, para. 376.

> • *Mr. Rand has been awarded less than 20% of the amount claimed,* ***and that by majority****;*
>
> • *While the Parties and their counsel conducted these proceedings in a professional, cooperative, and efficient manner incurring reasonable costs****, there is a significant disparity between the Claimants' costs and those of the Respondent****."*[594]

334. Thus, Applicant's repeated reliance on the *MINE* and *Teco* decisions is once again inapposite.[595] The *MINE* an *Teco* committees dealt with the decisions on costs based on the reasons that entirely disappeared with the annulment of relevant parts of respective awards.[596] In particular, that was the case with the decision of the *Teco* committee, although Mr. Rand now apparently attempts to argue otherwise.[597] There, the tribunal applied the costs follow the event principle but ordered Guatemala to reimburse only 75% of *Teco's* legal costs.[598] The decision was motivated by the fact that although *Teco* was successful on jurisdiction as well as on liability, Guatemala was partially successful on quantum.[599] However, once the committee decided to annul the relevant part of the tribunal's quantum analysis, *the only reason* for the tribunal's decision not to order Guatemala to reimburse *Teco* for the entirety of its legal costs ceased to exist:

> "*The Committee finds that, while the Tribunal did explain its decision on the issue of costs, it was based on Guatemala having been partially successful on quantum.* ***Following the annulment of the Tribunal's decision on***

[594] Award, para. 716 (emphasis added).
[595] Reply on Annulment, paras. 377, 378.
[596] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, para. 6.112, **CLA-184**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 363, **CLA-186**; Counter-Memorial on Annulment, para. 373.
[597] Reply on Annulment, para. 378: "*Serbia is wrong. For example, the Teco committee also did not annul the entire basis for the award on costs. The annulment of a portion of the award was nonetheless a sufficient reason for the annulment of the decision on costs*."
[598] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 360, **CLA-186**.
[599] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 363, **CLA-186**.

the loss of value claim and on the claim for interest for the period pre-dating the sale of EEGSA (Sections V.1.2 and V.1.6 above), the basis for the Tribunal's finding that Guatemala was partially successful on quantum has also disappeared".[600]

335. Unlike in *MINE* and *Teco*, the circumstances that influenced the Tribunal's decision on costs would for the most part remain the same, even if the Committee would decide to annul the relevant portions of the Award. The annulment would not change the fact that, for instance, the Tribunal denied jurisdiction for every other Claimant under the Canada-Serbia BIT, except for Mr. Rand, and for every claim submitted under the Cyprus-Serbia BIT, or the fact that the complexity of the dispute was mainly caused by the peculiar structure of Mr. Rand's investment.[601]

336. It is undisputable that the partial annulment of an award does not automatically lead to the annulment of the decision on costs. In fact, *ad hoc* committees have refused to annul decisions on costs even when applicants were successful in obtaining partial annulment of the award on quantum[602] or even on liability.[603] An ICSID tribunal enjoys a wide discretion in awarding the costs of the proceeding under Article 61(2) of the Convention[604] and the tribunal's decision regarding costs should be annulled only if the partial annulment of the award completely "*removes the basis for that decision as to costs*".[605] For the reasons just explained , this is not the case with the Tribunal's decision on costs even if

[600] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 361 (emphasis added), **CLA-186**.

[601] Award, para. 716.

[602] *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I)* (ICSID Case No. ARB/98/2), Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, paras. 353, 354, **CLA-192**.

[603] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 417, **RLA-232**.

[604] *LG &E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 112, **RLA-280**; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 693, **RLA-281**; Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award, 25 July 2018, para. 1300, **RLA-111**.

[605] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 416, **RLA-232**.

every Mr. Rand's claim with regard to jurisdiction and quantum would be accepted. Thus, Applicant's request to annul the Tribunal's decision on costs must be rejected as unfounded.

E. PRAYER FOR RELIEF

337. Respondent requests the *Ad hoc* Committee to

1) *dismiss* Applicant's request for annulment of the Award rendered on 29 June 2023 in its entirety,

2) *order* Applicant to reimburse Respondent all its costs of the proceedings, with interest.

Belgrade / Novi Sad, 16 May 2025

Respectfully submitted,

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