

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ALAPLI ELEKTRIK B.V.

Applicant

v.

REPUBLIC OF TURKEY

Respondent

ICSID Case No. ARB/08/13

ANNULMENT PROCEEDING

DECISION ON ANNULMENT

Members of the *ad hoc* Committee

Prof. Bernard Hanotiau, President

Prof. Karl-Heinz Böckstiegel

Mr. Makhdoom Ali Khan

Secretary of the *ad hoc* Committee

Ms. Martina Polasek

Representing Applicant

Mr. Robert Volterra

Mr. Stephen Fietta

Mr. Patricio Grané Labat

Mr. Jiries Saadeh

Mr. Bernhard Maier

Volterra Fietta

London, United Kingdom

Representing Respondent

Mr. Stanimir Alexandrov

Ms. Marinn Carlson

Ms. Jennifer Haworth McCandless

Mr. Aaron Wredberg

Sidley Austin LLP

Washington, D.C.

USA

Date of Dispatch to the Parties: July 10, 2014

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I. PROCEDURAL HISTORY

1. On November 12, 2012, Alapli Elektrik B.V. (the “Applicant”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application for annulment (the “Application”) of the award rendered on July 16, 2012 in *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13) (the “Award”). Attached to the Award was a dissenting opinion by arbitrator Marc Lalonde (the “Dissent”). The Application was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”).
2. The Application was made within the time period provided in Article 52(2) of the ICSID Convention and sought annulment of the Award on three of the five grounds set out in Article 52(1) of the Convention: (i) that the Tribunal had manifestly exceeded its powers (Article 52(1)(b)); (ii) that there had been a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) that the Award had failed to state the reasons on which it was based (Article 52(1)(e)).
3. On November 16, 2012, the Secretary-General notified the Parties that the Application had been registered on that date in accordance with Rule 50(2) of the Arbitration Rules.
4. By letter of December 12, 2012, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the Parties that an *ad hoc* Committee (“Committee”) had been constituted, composed of Prof. Bernard Hanotiau (Belgian) as President, Prof. Karl-Heinz Böckstiegel (German) and Mr. Makhdoom Ali Khan (Pakistani) as Members, and that the annulment proceeding was deemed to have begun on that date. The Parties were also informed that Ms. Martina Polasek, Team Leader/Legal Counsel at ICSID, would serve as Secretary of the Committee.
5. By agreement of the Parties, the Committee held its first session by telephone conference on February 15, 2013. Participating at the session were:

On behalf of Applicant

Mr. Stephen Fietta	Volterra Fietta
Mr. Jiries Saadeh	Volterra Fietta
Mr. Bernhard Maier	Volterra Fietta

On behalf of Respondent

Ms. Marinn Carlson	Sidley Austin LLP
Ms. Jennifer Haworth McCandless	Sidley Austin LLP

6. During the first session, the Parties confirmed their agreement on certain procedural matters and made oral submissions on certain points of disagreement. Among other things, the Parties agreed on the timetable of the proceeding, that the applicable Arbitration Rules would be those in force as of April 2006 and that the language of the proceeding would be English. The Parties did not agree on the possibility of fact witness testimony and new documentary evidence in the annulment proceedings (the Applicant wished to retain the possibility of new witness and documentary evidence, while the Respondent objected to any such new evidence), and on the place of proceedings (the Applicant proposed Paris, while the Respondent raised Rule 13(3) of the Arbitration Rules to request that the proceedings be held in Washington, D.C.).
7. On February 28, 2013, the Committee issued Minutes of the First Session of the *ad hoc* Committee and Procedural Order No. 1. In addition to confirming the Parties' agreements, the Order stated that the Committee did not exclude the possibility that a witness statement, expert report or new documentary evidence could be admitted in an annulment proceeding, to the extent that the statement, report or documentary evidence were relevant to the consideration of the grounds for annulment pleaded. The admissibility of any such disputed new evidence would therefore be considered on a case by case basis. The Committee noted, however, that it expected that the Parties would primarily refer to the evidentiary record of the arbitration proceeding. The Order further stated that the place of proceedings would be Washington, D.C., pursuant to Articles 62 and 63 of the ICSID Convention and Arbitration Rule 13(3).
8. On March 25, 2013, in accordance with Procedural Order No. 1, the Applicant filed its Memorial on Annulment, accompanied by exhibits C-273 through C-303.
9. On June 10, 2013, the Respondent filed its Counter-Memorial on Annulment, accompanied by exhibits R-299 through R-311, legal authorities RLA-152 through RLA-204 and an expert opinion of Judge Bruno Simma.
10. On July 29, 2013, the Applicant filed a Reply on Annulment, accompanied by exhibits C-304 through C-309.
11. On September 23, 2013, the Respondent filed its Rejoinder on Annulment, accompanied by exhibits R-312 through R-317, legal authorities RLA-205 through RLA-226, and a second expert opinion of Judge Bruno Simma.
12. On October 10, 2013, the Secretary of the Committee informed the Parties that Mr. Ali Khan had not by that date received a visa to travel to the United States, which he had

applied for in April 2013. The Committee therefore decided that, if Mr. Ali Khan did not obtain his US visa by October 25, 2013, the hearing would be moved to the World Bank facilities in Paris. Since Mr. Ali Khan had not received the US visa by November 1, 2013, the hearing venue was moved to Paris on that date with the Parties' agreement.

13. The hearing on annulment was thus held at the World Bank facilities in Paris, France on December 17 and 18, 2013. In addition to the Members of the Committee and the Secretary of the Committee, the following persons participated in the hearing:

Attending on behalf of Applicant

Mr. Robert Volterra	Volterra Fietta
Mr. Patricio Grané	Volterra Fietta
Mr. Jiries Saadeh	Volterra Fietta
Mr. Bernhard Maier	Volterra Fietta
Ms. Clementine Lietar	Volterra Fietta

Attending on behalf of Respondent

Mr. Stanimir A. Alexandrov	Sidley Austin LLP
Ms. Jennifer Haworth McCandless	Sidley Austin LLP
Mr. Aaron Wredberg	Sidley Austin LLP
Mr. Ali Ağaçdan	Chief Legal Counsel, Ministry of Energy and Natural Resources, Republic of Turkey
Mr. Zafer Demircan	General Director, Ministry of Energy and Natural Resources, Republic of Turkey
Mr. Murat Hardalaç	Head of Department, Ministry of Energy and Natural Resources, Republic of Turkey
Mr. Serkan Yıkarbaba	Legal Counsel, Ministry of Energy and Natural Resources, Republic of Turkey

14. Messrs. Volterra, Grané Labat, Maier and Saadeh addressed the Committee on behalf of the Applicant. Mr. Alexandrov and Ms. Haworth McCandless argued on behalf of the Respondent. The hearing was recorded and a verbatim transcript was made and circulated to the Parties.
15. Pursuant to the Committee's directions at the hearing, the Parties filed their respective statements of costs on February 7, 2014.
16. In accordance with Arbitration Rules 53 and 38(1), the proceedings were declared closed on May 5, 2014.

II. THE AWARD AND THE DISSENT

17. The Award of July 16, 2012¹ was rendered by a Tribunal composed of Prof. William W. Park (President, appointed by the Chairman of the Administrative Council), Mr. Marc Lalonde (appointed by the Applicant, *i.e.* Claimant in the original proceedings) and Prof. Brigitte Stern (appointed by the Respondent).
18. After a brief introductory section and a section setting out the procedural history, the Award describes the factual background of the dispute in its Section III. The facts in that Section can be summarized as follows:
19. The dispute between the Parties concerned a concession to develop, finance, construct, own, operate and transfer a combined cycle power plant in Turkey. In 1995, two Turkish nationals, Mr. Taylan Morova and Mr. Mustafa Özkan, established a company in Turkey as the investment vehicle for the concession (“Atam Elektrik” or “First Project Company”). In 1997, Atam Elektrik submitted a feasibility study for the Project which was approved by the Ministry of Energy and Natural Resources of the Republic of Turkey (“MENR”). Concurrently, the First Project Company concluded a Letter of Intent with an affiliate of the General Electric Group (“GE”), providing that the affiliate would be the engineering, procurement and construction contractor for the Project. Atam Elektrik also entered into a Joint Development Agreement with another affiliate of GE, which provided, among other things, that the affiliate would provide certain funding for development of the Project.
20. In October 1998, the First Project Company and the MENR concluded a concession contract concerning the Project. Further contracts with State-owned companies were concluded concerning the supply of gas to the plant and the sale of electricity generated at the plant.
21. Subsequently, in April 1999, the Applicant (a company incorporated in the Netherlands) was established as a subsidiary of a holding company incorporated in Curacao, which in turn was wholly owned by Mr. Morova. In March 2000, the Applicant obtained shares in a newly registered Turkish entity (“Atam Alapli” or “the Second Project Company”), which was assigned the rights of the First Project Company under the concession contract.² The assignment was approved by the MENR in November 2000.

¹ Exh. C-273 (labeled “Exhibit C-1” in the Application for Annulment).

² A chart showing the initial corporate structure and the modified corporate structure can be found at p. 8 of the Award.

22. In February 2000, following the adoption of a law providing for a conversion process for certain administrative law concession contracts (Law No. 4501), the First Project Company sought to convert the concession contract to a private law contract. At the same time, another new law in Turkey eliminated Treasury Guarantees for certain energy sector projects not finalized before December 31, 2002 (Law No. 4628) and made certain restrictions to energy sales agreements.
23. As described in paragraphs 2 and 224-260 of the Award, the Applicant asserted that it made its investment in reliance upon governmental assurances and legislation intended to attract international investment, and that the Respondent undermined the project by conduct that contradicted its assurances and by making adverse legislative changes. The Applicant argued that these actions led to the loss of its investment and violated a number of investment protection provisions of the Energy Charter Treaty (“ECT”) and the Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey of March 27, 1986 (“BIT”).
24. Sections IV, V and VI of the Award describe the Parties’ arguments on jurisdiction, on the merits and on quantum. Section VII proceeds with the Tribunal’s analysis on jurisdiction. The first three introductory paragraphs of that Section provide as follows:

311. A Turkish national, backed by an American multinational, seeing a dispute looming with his own government, established a Dutch entity which is claiming treaty protection for a proposed combined cycle power plant. The entirety of the financial contribution and technological know-how came from American backers, the GE Group, which advanced monies to realize an opportunity to provide equipment and services, taking all risk of loss if the Project never came to fruition. [footnote omitted] The Concession Contract, by which the host country agreed in principle to the Project’s terms, was awarded to a Turkish company, Atam Elektrik.

312. After careful consideration of all arguments and evidence, Arbitrators Stern and Park (the “Majority”) conclude that this Tribunal lacks jurisdiction to hear the dispute pursuant to the ECT and the Netherlands-Turkey BIT.

313. The Majority has considered the two lines of reasoning set forth below. Although Arbitrator Stern and Arbitrator Park do not necessarily assign the same weight to the various components in these overlapping lines of reasoning, both members conclude that jurisdiction is clearly absent.

25. The two lines of reasoning mentioned at paragraph 313 of the Award are contained in paragraphs 337-389 (Arbitrator Park’s reasoning) and 390-417 (Arbitrator Stern’s reasoning). In essence, Arbitrator Park found that the “Claimant never made a contribution to the Alapli Project sufficient to create for itself the status of an investor under either the ECT or the Netherlands-Turkey BIT” (para. 337 of the Award). Arbitrator Stern, on the other hand, found that there was no “*bona fide* investment,” as “it

is clear that Claimant, as a Dutch company, acquired its investment for the sole purpose of manufacturing international jurisdiction, at a time when the project was already in great difficulty and the facts that are at the root of the dispute with Turkey were already known to the Sponsors of the Project” (paras. 416 and 417 of the Award). These lines of reasoning are further described below in the context of the Parties’ arguments.

26. The Majority consisting of Arbitrator Park and Arbitrator Stern thus concluded that there was no jurisdiction over the Claimant’s claims under the ECT and the BIT and did therefore not address the merits of the dispute. The Award ordered that each Party bear its own legal expenses and that the costs of arbitration be divided equally between the Parties.
27. Arbitrator Lalonde’s Dissent opined that there was jurisdiction over both the ECT and the BIT “concerning all events arising after 30 March 2000, the date of the acquisition of 50% of the shares of Atam Alapli by Claimant.”

III. THE NATURE OF THE ANNULMENT PROCEDURE

28. Before setting out the Parties’ positions with regard to the various grounds for annulment invoked by the Applicant, the *ad hoc* Committee wishes to make some preliminary observations.
29. The first observation concerns the interpretation of the ICSID Convention itself. In this respect, the Committee will be guided by the Vienna Convention on the Law of Treaties of 1969 (the “VCLT”), in particular its Articles 31 to 33. Therefore, according to Article 31 VCLT, the terms of the ICSID Convention will be read in good faith, in accordance with their ordinary meaning, in their context, and in light of the object and purpose of the Convention as a whole. Moreover, based on Article 33 VCLT, the terms of the ICSID Convention will be presumed to have the same meaning in each of the equally authoritative versions of the treaty: English, French and Spanish.
30. The second observation concerns the role of annulment within the ICSID Convention system.
31. It is the *ad hoc* Committee’s view that the ICSID Convention has achieved a careful balance between the interest of ensuring the finality of awards, on the one hand, and of guaranteeing the fundamental fairness of the arbitral process, on the other hand.
32. In the Committee’s view, and in light of the text of the Convention, annulment is a limited remedy with a strictly circumscribed role: to safeguard the fundamental fairness

and integrity of the underlying proceeding. Indeed, Article 52(1) of the ICSID Convention limits annulment to five grounds, all of which concern the very integrity of the arbitral process. What is more, Article 53 of the ICSID Convention provides that an award may not be the subject of an appeal or, for that matter, of any remedy other than the ones expressly provided in the Convention.

33. In light of annulment's limited scope, the *ad hoc* Committee considers that it is not within its power to review the substantive correctness of the Award, both in fact and in law. The Committee may only examine whether the standards of procedural integrity of the underlying proceeding were adhered to. In this respect, the *ad hoc* committee concurs with the committee in *MINE v. Guinea*:

“Article 52(1) makes it clear that annulment is a limited remedy. This is further confirmed by the exclusion of review of the merits of awards by Article 53. Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52.”³

34. In the present case, the Applicant invokes three of the five possible grounds for annulment, namely:

- (b) that the Tribunal has manifestly exceeded its powers;
- (d) that there has been a serious departure from a fundamental rule of procedure;
- and
- (e) that the Award has failed to state the reasons upon which it is based.

35. In the paragraphs below, the *ad hoc* Committee will first briefly present the Applicant's (IV.1.) and the Respondent's (IV.2.) respective positions on the three grounds for annulment. It will then proceed with its own Analysis (V.), starting with a few observations on the relationship between Article 48 of the ICSID Convention and Arbitration Rule 47 (V.1.). Thereafter, the Committee will investigate whether the Tribunal committed a serious departure from a fundamental rule of procedure (V.2.A.), whether the Award failed to state the reasons on which it is based (V.2.B.), and whether the Tribunal committed a manifest excess of powers (V.2.C.). Finally, the Committee will make its decision with respect to costs (VI.).

36. In the analysis below, the *ad hoc* Committee has not only considered the positions of the Parties as summarized in this Decision, but also the numerous detailed arguments made in their written submissions and at the hearing. To the extent that these arguments are not

³ *Maritime International Nominees Establishment v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, January 6, 1988, para. 4.04 (“*MINE v. Guinea*”).

referred to expressly, they must be deemed to be subsumed in the *ad hoc* Committee's analysis.

IV. THE PARTIES' POSITIONS

1. The Applicant

37. According to the Applicant, the Award is annulable on three grounds set out under Article 52(1) of the ICSID Convention because two of the members of the Tribunal refused to exercise jurisdiction and did so on two entirely different grounds which were both manifestly wrong as a matter of fact and law. In particular, the Applicant argues that:

(a) the Tribunal has manifestly exceeded its powers because: (i) the Majority failed to exercise a jurisdiction that it plainly had; and (ii) the Majority failed to apply the applicable law;

(b) there has been a serious departure from a fundamental rule of procedure because the Tribunal failed to establish a real majority rejecting jurisdiction, in violation of Article 48(1) of the ICSID Convention; and

(c) the Award has failed to state the reasons on which it is based because: (i) the Award does not allow a reader to discern a logical chain of reasoning since there was in fact a clear majority in favor of jurisdiction; and (ii) the Award presents contradictory and wholly incoherent fragmented individual opinions which do not satisfy the minimum requirement to state reasons under Article 48(3) of the ICSID Convention.

38. The Applicant recognizes that the annulment mechanism is not an appeals process and that it is an extraordinary remedy to preserve the integrity of ICSID arbitration. The Applicant does not seek to substitute the view of the Committee for that of the Tribunal, but requests the Committee to decide whether the Award should be annulled on any of the pleaded grounds. If the Committee finds an annulable error, the Committee has no discretion but to annul the Award, save under exceptional circumstances which cannot relate to a serious departure from a fundamental rule of procedure.⁴

⁴ Applicant's Reply, para. 34. The Applicant relies on the following cases for this proposition: *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment, May 3, 1985 ("*Klöckner I*"), para. 179; *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of Award of June 5, 1990 and of Supplemental Award of October 17, 1990, December 3, 1992 ("*Amco II*"), para. 1.20, and *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Application for Annulment of the Republic of Chile, December 18, 2012 ("*Pey Casado v. Chile*"), para. 80.

39. The Committee’s task includes a review of the Tribunal’s interpretation and application of the ICSID Convention and any other relevant treaties in accordance with the principles of public international law and the rules of interpretation under customary international law.⁵ The Committee must scrutinize the Award to determine whether there has been an annulable error. Such scrutiny does not preclude the Committee from undertaking a review of relevant parts of the factual record in the underlying arbitration.⁶

A. *MANIFEST EXCESS OF POWERS*

(i) The Applicable Standard

40. The Applicant requests that the Committee should decide whether the Tribunal exceeded its powers, and whether such excess was manifest. According to the Applicant, an excess of powers includes the failure to exercise a jurisdiction bestowed by the parties upon a Tribunal and the failure to apply the rules of law agreed by the parties.⁷ For an excess of powers to be “manifest,” it must be “*prima facie* apparent from a review of an award,” “self-evident”, or “obvious and clear.”⁸ The word “manifest” does not relate to the seriousness of the excess, but rather the ease with which it is perceived.⁹

(ii) Failure to Apply the Applicable Law

41. The Applicant states that the Tribunal identified the provisions of the BIT and of the ECT as the “operative provisions under which the claims have been made,” meaning that the applicable law must be determined in accordance with those provisions.¹⁰ Article 10.1 of the BIT provides that the dispute be decided “in accordance with the applicable rules of international law.” Similarly, the ECT refers to the provisions of the ECT itself “and applicable rules and principles of international law.” The Applicant argues that,

⁵ Applicant’s Reply, para. 16.

⁶ *Id.*, at para. 22.

⁷ Applicant’s Memorial, para. 86-90.

⁸ *Id.*, at paras. 86-89, quoting *CDC Group plc. v. Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, June 29, 2005 (“*CDC v. Seychelles*”), para. 41; *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, January 28, 2002 (“*Wena v. Egypt*”), para. 25, *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on the Application for Annulment, January 8, 2007, para. 36, and *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision of the *ad hoc* Committee, June 14, 2010 (“*Helnan v. Egypt*”), para. 55.

⁹ Applicant’s Memorial, para. 86.

¹⁰ *Id.*, at para. 118 quoting the Award, para. 320.

despite recognizing the applicable law, both Arbitrators Park and Stern (*i.e.* the alleged Majority) did not apply it to the Parties' dispute.

42. According to the Applicant, it is not enough for a tribunal to identify the proper law or to endeavor to apply the proper law.¹¹ Article 42(1) of the ICSID Convention is framed in mandatory terms, stating that a tribunal "shall decide a dispute in accordance with such rules of law as may be agreed by the parties." ICSID jurisprudence has held that, where a misinterpretation or misapplication of the proper law is so gross or egregious that it constitutes a failure to apply the proper law, an award should be annulled.¹²
43. The Applicant claims that in this case each of Arbitrator Park's and Stern's reasoning was "so gross and egregious as substantially to amount to a failure to apply the proper law, therefore warranting annulment pursuant to Article 52(1)(b) of the Convention."¹³ Not only were their legal analyses mistaken, they also reached manifestly erroneous factual conclusions.¹⁴ This led to a manifest excess of powers of the Tribunal affecting the Award as a whole.

a. Arbitrator Park

44. Both the BIT and the ECT define the terms "investor" and "investment."¹⁵ Under those definitions, it is clear that the Applicant qualifies as a Dutch "investor," which was recognized by Arbitrators Stern and Lalonde in the Award and Dissent. It is equally clear that the Applicant held a qualifying "investment" under the provisions of the treaties, since it held shares in Atam Alapli. According to the Applicant, the evidence on the record further demonstrates that the Applicant contributed US\$60,700, corresponding to 50% of the capital of Atam Alapli, by two separate transfers on March 3 and June 28, 2000.¹⁶ The Applicant thus became an "investor" holding an "investment" on March 3, 2000.
45. According to the Applicant, Arbitrator Park disregarded the terms of the treaties and engaged in a legally irrelevant analysis of "funding sources," finding that the Applicant

¹¹ Transcript, Day 1, 102:3-7.

¹² *Id.*, at 101-102, referring to *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, June 5, 2007 ("*Soufraki v. UAE*"), para. 86, and *Amco II*, para. 7.19.

¹³ Applicant's Reply, para. 58, quoting *Soufraki v. UAE*, para. 86.

¹⁴ Applicant's Reply, para. 52.

¹⁵ Under the BIT, an "investor" is "a legal person duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Contracting Party" (Article 1(a)(ii)), and the ECT defines an "investor" as "a company or other organization organized in accordance with the law applicable in that Contracting Party" (Article 1(7)). Both the BIT and the ECT contain a broad, asset based definition of an "investment" (Article 1(b) of the BIT, Article 1(6) of the ECT).

¹⁶ Applicant's Memorial, para. 133.

merely acted “as a conduit” for a third party.¹⁷ Arbitrator Park went on to state that “to be an investor a person must actually make an investment, in the sense of an active contribution.”¹⁸ While he accepted that two transfers were made in 2000 from a bank account in the Netherlands, he concluded that the Applicant “made no relevant contribution to the Project” and played “no meaningful role” as “any significant contribution to the Project was made either by Americans, the GE Group, or by Turkish nationals...not by the Dutch Claimant.”¹⁹ By so doing, Arbitrator Park (i) failed to analyze the features pertaining to the Applicant’s investment; (ii) introduced new qualitative requirements (that the contribution must be “relevant” and “significant” and that the investor must play a “meaningful” role) which had no legal basis; (iii) disregarded the evidence on the record; and (iv) applied a mistaken interpretative approach that led him to ignore the provisions of the treaties and commit a manifest jurisdictional error.²⁰

46. Arbitrator Park’s analysis has strayed beyond any precedent or accepted legal norms, to the very sources of funding.²¹ Such new legal requirement presents fundamental practical concerns in the context of modern international financial transactions, since funds often originate from a party other than the investor itself.²² This approach is not supported by any jurisprudence.²³ It can be compared to the erroneous interpretative approach of the tribunal in *MHS v. Malaysia*.²⁴ An *ad hoc* committee annulled that award because it found that the tribunal had “altogether failed to take account of and apply the [...] broad and encompassing terms [of the definition of investment in the applicable BIT] but rather limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) of the ICSID Convention.”²⁵ Arbitrator Park similarly disregarded the applicable law, leading to a manifest excess of power.²⁶

¹⁷ *Id.*, at para. 134, referring to Award, paras. 349, 367 and 386.

¹⁸ Award, para. 350.

¹⁹ Applicant’s Memorial, para. 141, quoting Award, paras. 349, 362, 387 and 389.

²⁰ *Id.*, at paras. 142-143.

²¹ Transcript, Day 1, 114:11-15.

²² *Id.* at p. 114:16-23

²³ The Applicant refers to *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holdings, Ltd., Mobil Venezolana de Petróleos Holdings Inc., Mobil Cerro Negro Holding Ltd. and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, June 10, 2010 (“*Mobil v. Venezuela*”), *Saipem S.p.A. v. People’s Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007 and the majority in *Tokios Tokelès v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction, April 29, 2004 for the proposition that the origin of the capital is irrelevant; Transcript, Day 1, 115:3-25.

²⁴ Applicant’s Reply, para. 74; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, April 16, 2009 (“*MHS v. Malaysia*”).

²⁵ Applicant’s Reply, para. 73, quoting *MHS v. Malaysia*, para. 80.

²⁶ Applicant’s Reply, para. 74.

b. Arbitrator Stern

47. According to the Applicant, Arbitrator Stern also disregarded the relevant provisions of the BIT and the ECT and neglected, or at the least manifestly misinterpreted, the facts and evidence that were presented to the Tribunal.²⁷ Finding that the facts were similar to those in *Mobil v. Venezuela*,²⁸ Arbitrator Stern proceeded to examine whether the relevant corporate restructuring was made in good faith. She found that the introduction of the Applicant in the investment chain was made to access international arbitration at a time when the “facts at the root of the dispute presented to the Tribunal were already known.”²⁹ In her opinion, this constituted an abuse of the system of international investment protection under the ICSID/BIT/ECT mechanism and the investment could therefore not be protected under the provisions of these treaties.³⁰
48. It is a well-established principle of international law that an investor may restructure its investment so as to benefit from investment treaty protection before a dispute arises.³¹ In this case, it is clear that the dispute crystallized in 2002, long after the Applicant had become an “investor” for the purposes of the BIT and ECT.³² According to the Applicant, Arbitrator Stern herself acknowledged that a dispute had yet to arise at the time of the restructuring.³³ She stated at paragraph 406 of the Award that the dispute was merely a “probability”, albeit a “high probability.” The Applicant further argues that the evidence on the record demonstrates that the corporate restructuring in this case “was a strategy devised approximately two years before the dispute crystallised as a means of obtaining certain diverse benefits.”³⁴ The situation is not analogous to the *Mobil v. Venezuela* case, which concerned claims that arose before the claimants acquired the required nationality and with respect to which they had already sent a letter to Venezuela seeking amicable settlement of the dispute.³⁵
49. In addition, the Applicant contends that Arbitrator Stern has failed to apply the concept of a “dispute”³⁶ under international law, as she introduced her own criteria as to the time

²⁷ Applicant’s Memorial, para. 155.

²⁸ *Mobil v. Venezuela*, cited at para. 400 of the Award.

²⁹ Award, para. 393.

³⁰ *Id.*, at para. 417.

³¹ Applicant’s Reply, paras. 75 and 79; Transcript, Day 1, pp. 117-118, referring to *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), *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3) and *Mobil v. Venezuela*.

³² Applicant’s Reply, para. 83.

³³ *Id.*, paras. 75 and 79.

³⁴ Applicant’s Memorial, para. 161.

³⁵ *Id.*, at para. 181.

³⁶ *Id.*, at paras. 171-172, referring to *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30) (“*Mavrommatis*”) and *Helnan v. Egypt*, the Applicant states that a “dispute” is “a disagreement

when a corporate restructuring becomes “abusive” in nature: (i) “when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration”; and/or (ii) when “the relevant party can see an actual dispute or can foresee a specific future dispute as a high probability and not merely a general future controversy.”³⁷ The legal tests introduced by Arbitrator Stern were not grounded on the BIT, ECT or general international law or any international jurisprudence.³⁸ Her misinterpretation and misapplication of international law was so gross and egregious so as to amount to a failure to apply the law agreed by the Parties. She also grossly and egregiously misapplied the law to the facts on the record, requiring the annulment of the Award.³⁹ This conclusion is supported by the fact that Arbitrators Park and Lalonde explicitly disagreed with Arbitrator Stern’s conclusion.

(iii) Failure to Exercise an Existing Jurisdiction

50. As a result of their conclusions based on a disregard of the proper law and the evidence on the record, Arbitrators Park and Stern failed to exercise jurisdiction which the Tribunal possessed. Each of Arbitrators Park and Stern therefore manifestly exceeded their powers. This culminated in an award that failed to exercise the jurisdiction bestowed on the Tribunal, meaning that the Majority manifestly exceeded its powers.⁴⁰ The Applicant contends that if the Committee decides that only one of the arbitrators making up the Majority manifestly exceeded his/her powers, the Award must still be annulled under Article 52(1)(b) of the Convention.⁴¹

B. *SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE*

(i) The Applicable Standard

51. The Applicant states that *ad hoc* committees have consistently recognized that there are two self-standing aspects to the standard under Article 52(1)(d).⁴² The first consists of an examination whether the tribunal departed from a “fundamental rule of procedure.” Second, it has to be shown that the departure was “serious.” While the ICSID Convention

on a point of law or fact, a conflict of legal views or of interests between two persons” (*Mavrommatis*, p. 11) which “crystallises as a ‘dispute’ as soon as one of the parties decides to have it solved, whether or not by a third party” (*Helnan v. Egypt*, para. 52).

³⁷ Applicant’s Memorial, para. 175, quoting Award, para. 403.

³⁸ Transcript, Day 1, 121:11-18.

³⁹ *Id.*, at pp. 87-88.

⁴⁰ Applicant’s Reply, para. 54.

⁴¹ *Id.*

⁴² Applicant’s Memorial, para. 50.

and Arbitration Rules do not define these terms, *ad hoc* Committees have considered them in the past. They have observed that a fundamental rule of procedure relates to the essential fairness of the proceeding, e.g. the tribunal's impartiality and meaningful deliberation.⁴³ In order for the departure to be "serious," (i) there must be a deprivation of a party's benefit or protection; and (ii) it must have a material effect on the outcome of the dispute.⁴⁴

52. On Applicant's submission, there can be no doubt that the international law principle embedded in Article 48(1) of the ICSID Convention that "[t]he Tribunal shall decide questions by a majority of the votes of all its members" constitutes a fundamental rule of procedure. In addition, Article 48(3) of the Convention requires that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." These rules of procedure are obligatory and binding on the Tribunal.⁴⁵ Even if they were discretionary, there is no support for the proposition that a fundamental rule of procedure needs to be a non-discretionary, obligatory procedural norm that is binding on the Tribunal.⁴⁶
53. As a result, an ICSID tribunal must decide all of the questions submitted to it, and must do so by a majority vote. The ICSID Convention and the Arbitration Rules do not recognize any system of outcome-based voting.⁴⁷ If only the dispositive decision mattered, tribunals would never have to give any reasoning for their decisions, which would go against the clear and mandatory wording of Article 48(3) of the Convention.⁴⁸ The Convention mandates that voting should always be on relevant "questions" or "issues."⁴⁹ This obligation is limited to the questions presented by the parties, *i.e.*, it does not extend to all arguments, reasons or assertions made by the parties.⁵⁰ For example, when a tribunal is faced with an objection to jurisdiction *ratione materiae*, it must decide by a majority vote the question whether there was a qualifying investment. However, it

⁴³ *Id.*, at paras. 51-54, citing *Wena v. Egypt*, para. 57 and *CDC v. Seychelles*, para. 49.

⁴⁴ *Id.*, at para. 58, citing Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009) ("Schreuer, ICSID CONVENTION") p. 982. The Applicant also cites Bishop and Marchili, *Annulment under the ICSID Convention* (Oxford, 2012), para. 8.16, claiming that the key point is that the departure must entail "a sense of gravity, which can be identified by the existence of a concrete consequence attributable to it." See Applicant's Memorial, para. 59.

⁴⁵ Transcript, Day 1, 25:15-24.

⁴⁶ *Id.*, at 24:6-19. The Applicant states that, according to *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Application for Annulment, September 1, 2009, the exercise of discretion can call for annulment under Article 52(1)(d) if it "amounts to a serious departure from another rule of procedure of a fundamental nature", para. 210.

⁴⁷ Transcript, Day 1, 42:4-6.

⁴⁸ *Id.* at p. 42:19-23.

⁴⁹ Applicant's Reply, para. 98. This is also made clear by Note D to Arbitration Rule 47 of 1968, which provides that "[c]onsideration has been given to the formulation of a provision to cover the contingency that a Tribunal might be unable to reach a majority decision *on an issue*, in particular on the amount of damages to be awarded".

⁵⁰ Transcript, Day 2, 18:21-25.

need not decide by majority vote whether there was a contribution, a risk and certain duration of the commitment to funds, unless the parties put those issues before the tribunal as questions that it has to decide.⁵¹

54. The parties thus retain control over the questions that the tribunal must answer in the award. This is supported by the wording of ICSID Arbitration Rule 47(1)(i), which provides that the award shall contain “the decision of the Tribunal on every question submitted to it.”⁵² A tribunal’s conclusions do not trump its decisions on the questions that the parties have submitted to it.⁵³ According to the Applicant, the Respondent’s legal expert confirmed that the parties retain control over aspects of the proceedings, although not absolute control.⁵⁴
55. The principle of a majority decision is present in a vast majority of international judicial and arbitral bodies, including in Article 55 of the Statute of the International Court of Justice. The requirement of a true majority is therefore the very core of the international arbitral process.⁵⁵ Because the Respondent admits this principle (paras. 147-148 of its Counter-Memorial), in the Applicant’s submission, the only question for this Committee is to decide whether the Tribunal seriously departed from Article 48(1) of the ICSID Convention when it rendered the Award.⁵⁶
56. The Applicant submits that, once a serious departure from a fundamental rule of procedure is established, an *ad hoc* committee does not have any choice but to annul the award, since the discretion lies in the evaluation of the impact made when considering whether the departure was “serious.”⁵⁷

(ii) Failure to Decide by Majority

57. According to the Applicant, the Parties had submitted three jurisdictional questions to the Tribunal: (i) whether the Tribunal had jurisdiction *ratione personae*; (ii) whether the Tribunal had jurisdiction *ratione materiae*; and (iii) whether the Tribunal had jurisdiction *ratione temporis*.⁵⁸ The Applicant points to its own and the Respondent’s submissions in the underlying arbitration to show that the Parties had specifically addressed these three

⁵¹ *Id.* at 18:12-20.

⁵² *Id.*, at 28:17-20.

⁵³ *Id.*, at 31:6-11.

⁵⁴ Transcript, Day 2, 28:5-9, Second Judge Simma Opinion, para. 48.

⁵⁵ Applicant’s Memorial, para. 95.

⁵⁶ Transcript, Day 1, 27:12-16.

⁵⁷ Applicant’s Memorial, para. 60, citing *Pey Casado v. Chile*, para. 80.

⁵⁸ Transcript, Day 1, 28:3-8.

questions.⁵⁹ The Applicant argues that, although the Majority concluded that it had no jurisdiction, the Tribunal failed to establish a real majority rejecting jurisdiction with respect to the three questions.

58. The Majority stated as follows:

The Majority has found Claimant not entitled to protection under either the Energy Charter Treaty or the Netherlands-Turkey BIT. For Arbitrator Stern this conclusion derives from notions of timing and bona fides, considering that Claimant did not make an investment until after the root of the controversy was evident and the dispute itself had become a high probability. For Arbitrator Park, the Claimant simply lacks the status of an investor, for want of any contribution to the Alapli Project.⁶⁰

59. The Tribunal thus explicitly recognized that there was no agreement between Arbitrators Park and Stern, resulting in a jurisdictional rejection which was “made on the basis of a fictional ‘majority’ which agreed on no single ground for its conclusion.”⁶¹

60. The Applicant submits that the actual majority decision on each relevant jurisdictional requirement, *i.e.* on jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*, found in favor of jurisdiction. The Applicant illustrates this in a table showing the real majority on each of the issues:⁶²

	Jurisdiction <i>ratione personae</i>	Jurisdiction <i>ratione materiae</i>	Jurisdiction <i>ratione temporis</i>
Arbitrator Park	No	No	Yes (Award, para. 386)
Arbitrator Lalonde	Yes (Dissent, para. 4)	Yes (Dissent, para. 10)	Yes (Dissent, para. 58)
Arbitrator Stern	Yes (Award, para. 390)	Yes (Award, para. 390)	No
Actual Majority	Jurisdiction exists	Jurisdiction exists	Jurisdiction exists

⁵⁹ Exhibits C-277, C-278, C-279, C-298, C-299, C-300 and C-301.

⁶⁰ Award, para. 315.

⁶¹ Applicant’s Memorial, para. 97.

⁶² *Id.*, at para. 102. The table in this Decision includes the Applicant’s references to the Members’ positive findings on jurisdiction in the Award and Dissent; Applicant’s Memorial, paras. 99-101.

61. According to the Applicant, had the Tribunal voted on each of the questions presented by the Parties, it would have reached a substantially different result in favor of jurisdiction.⁶³
62. The Applicant concedes that separate opinions are permitted pursuant to Article 48(4) of the Convention, but argues that they can only exist in relation to a majority award issued pursuant to Article 48(1) of the Convention.⁶⁴ An individual opinion must be “attached” to a majority award, not to another individual opinion. The individual opinions cannot simply coincide in the same result: they must coincide on each of the questions presented to the Tribunal.⁶⁵ It is clear from the ICSID Convention that there must be a majority award based on majority reasoning, *i.e.* Article 48(4) cannot be used to circumvent Article 48(1) and (3).⁶⁶ In this case, Arbitrators Park and Stern’s opinions were divergent, joined together in form (*i.e.* in a single document), but disjointed in substance.⁶⁷ They cannot be viewed as individual opinions under Article 48(4) of the ICSID Convention or Arbitration Rule 47(3) because they are part of the Award.⁶⁸
63. As a result, because Arbitrators Park and Stern reached contradictory findings on each of the constituent elements of the Tribunal’s jurisdiction and concluded that jurisdiction was lacking, the Tribunal failed to render an award that was in compliance with Article 48(1) of the ICSID Convention, read together with Article 48(3). Because the departure caused the Tribunal to reach a result substantially different from what would have resulted had the Tribunal voted by majority on each of the jurisdictional questions submitted by the Parties, the departure must be considered as “serious.”⁶⁹ Therefore, all the requirements of Article 52(1)(d) of the Convention are met.

C. *FAILURE TO STATE REASONS*

(i) The Applicable Standard

64. Article 48(3) of the ICSID Convention provides that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.” Arbitration Rule 47(1)(i) restates the requirement that an award must contain “the reasons upon which the decision is based.” Read in conjunction with Article 52(1)(e) of

⁶³ Applicant’s Memorial, para. 103; Applicant’s Reply, para. 105.

⁶⁴ Applicant’s Reply, para. 118.

⁶⁵ *Id.*, at para. 120.

⁶⁶ Transcript, Day 1, 43:8-15.

⁶⁷ Applicant’s Reply, para. 136.

⁶⁸ Transcript, Day 2, 39:7-15.

⁶⁹ Transcript, Day 1, 50:7-16.

the Convention, it is clear that this is an imperative, mandatory requirement.⁷⁰ These provisions of the ICSID Convention and Arbitration Rules set out a minimum standard requiring that an award, as a whole, provide coherent and adequate reasoning.⁷¹

65. The Applicant submits that, although *ad hoc* committees have found that Article 52(1)(e) of the Convention “does not require that each reason be stated expressly,”⁷² “a failure to deal with a question which would have altered an important finding of the tribunal or would have rendered the award unintelligible”⁷³ does amount to a failure to state reasons. If reasons are essentially lacking on a particular point and that point is necessary to the tribunal’s decision, the award is annulable. In addition, as stated in *Lucchetti v. Peru*, a tribunal’s reasoning must allow the parties to ascertain “whether or to what extent a tribunal’s findings are sufficiently based on the law and on a proper evaluation of the relevant facts.”⁷⁴
66. The lack of reasons can thus be demonstrated through a tribunal’s failure to provide adequate reasons or logical sequence of reasons, or through a tribunal’s contradictory or wholly incoherent reasoning.⁷⁵ The Applicant submits that the Award is defective on both accounts.

(ii) No Adequate Reasons or Logical Sequence of Reasons

67. An award must allow a reader to determine a logical chain of reasoning. This means that there has to be a connection between the deliberations of the tribunal members and the tribunal’s ultimate conclusion.⁷⁶ In this case, there was no logical chain of reasoning discernible from a plain reading of the opinions of the Majority. Read together with the Dissent, the actual majority should have assumed jurisdiction under the BIT and the ECT. Because of the gap of reasoning created by the conclusions of Arbitrators Park and Stern, the reader was unable to determine how the Tribunal got from “point A” to Point B” and then to its conclusion. The Applicant states that:

⁷⁰ *Id.*, at 53:14-18.

⁷¹ *Id.*, at 59:19-25.

⁷² Applicant’s Memorial, para. 63, quoting *Wena v. Egypt*, para. 81.

⁷³ *Id.*, quoting *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Kazakhstan* (ICSID Case No. ARB/05/16), Decision of the *ad hoc* Committee on the Application for Annulment, March 25, 2010 (“*Rumeli v. Kazakhstan*”), para. 81.

⁷⁴ Transcript, Day 1, 55:6-14, quoting *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, September 5, 2007 (“*Lucchetti v. Peru*”), para. 98.

⁷⁵ *Id.*, at paras. 64-65. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, July 3, 2002 (“*Vivendi I*”), para. 65.

⁷⁶ Applicant’s Memorial para. 110.

[h]ad the Tribunal complied with the fundamental rule to reach a genuine majority as per Article 48(1) of the Convention, both Arbitrators Stern and Park should have realized that their jurisdictional “routes” would never meet at a common conclusion (to adopt the reasoning in the *MINE* decision cited in paragraph 67 above).⁷⁷

68. It is irrelevant that each line of reasoning is coherent or that the reader can “trace the logic of how each arbitrator reached the majority conclusions within his or her own line of reasoning.”⁷⁸ The adequacy of the reasons supplied in the separate opinions cannot be evaluated independently. What matters for the test under Article 52(1)(e) of the Convention is whether the Tribunal “identi[fied] and [...] let the parties know, the factual and legal premises leading the *Tribunal* to its decision.”⁷⁹ In this case, because there is no reasoning of the Tribunal as a whole, a reader is unable to follow the reasoning of the Tribunal on points of fact and law. The minimum requirement to determine “how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion is not met here, as the Majority agreed on a conclusion and then assembled an award out of two entirely separate and independent opinions.
69. However, even if each of Arbitrator Park’s and Stern’s opinions were to be evaluated independently, neither of the opinions allows the Applicant to determine whether and to what extent the reasoning is based on the law and a proper analysis of the relevant facts, as required under the *Lucchetti v. Peru* standard (for the deficiencies *see* above, paragraphs 44-49).⁸⁰

(iii) Contradictory and Incoherent Reasoning

70. One of the first *ad hoc* committees in *Klöckner I* established that contradictory or wholly incoherent reasons amount to a failure to state reasons under Article 52(1)(e).⁸¹ This is because contradictory reasons are as useful as no reasons.⁸²
71. On the Applicant’s submission, “Arbitrator Park and Stern’s opinions, read together with Arbitrator Lalonde’s dissent, are inherently contradictory and incoherent.”⁸³ The opinions are not “overlapping” in nature, as stated in the Award.⁸⁴ They are not even

⁷⁷ *Id.*, at para. 113; *MINE v. Guinea*, paras. 5.08 and 5.09.

⁷⁸ Applicant’s Reply, para. 161, quoting Respondent’s Counter-Memorial, para. 209 (emphasis added or omitted).

⁷⁹ *Id.*, at para. 165, quoting *Wena v. Egypt*, para. 79.

⁸⁰ Transcript, Day 1, 79-96.

⁸¹ Applicant’s Memorial, para. 69, quoting *Klöckner I*, para. 116.

⁸² *Id.*, at para. 70, quoting Schreuer, ICSID CONVENTION, p. 1011.

⁸³ Applicant’s Memorial, para. 73.

⁸⁴ Applicant’s Reply, para. 157.

complementary, as they are irreconcilably different and in conflict.⁸⁵ The purported majority contradicted each other in that:

(a) “Arbitrator Park determined that there was no jurisdiction on the basis of the Applicant not being an “investor” with a qualifying “investment” in Turkey. Arbitrator Stern explicitly refuted this, noting that ‘there is indeed in this case a foreign investor which is the owner of an investment (fn referring to Award, para. 390);

(b) Arbitrator Stern determined that there was no jurisdiction on the basis that ‘the introduction of the Dutch company in the investment chain was, at the time it was performed, an abuse of the system of international investment protection under the ICSID/BIT/ECT mechanism.’ (fn referring to Award para. 390) Arbitrator Park disagreed, labeling it ‘legitimate corporate planning.’”⁸⁶

72. The fact that Arbitrator Park’s and Stern’s opinions are conflicting is important because, for the purposes of Article 52(1)(e) of the Convention, contradictory reasons cancel each other out. There is no nexus between the opinions and the outcome at the end of the Award, leading to a fundamental and manifest *lacuna* in the Award. That *lacuna* calls for the annulment of the Award for failure to state reasons.⁸⁷ The Applicant states that the Convention “does not permit the majority arbitrators to draft two separate and inconsistent opinions based on entirely different factual and legal elements, articulate a conclusion and package the result into a document entitled ‘Award.’”⁸⁸

2. Respondent’s Position

73. The Respondent submits that the Application is nothing more than an improper attempt to appeal the Tribunal’s Award. In its view, a party cannot resort to annulment to remedy what it considers to be an incorrect decision or to review awards for alleged errors in fact or law, which is in effect what the Applicant is seeking to do.⁸⁹ The purpose of the annulment mechanism is to “police the integrity of the award and of the process leading to the award,” not to review the substantive correctness of the award.⁹⁰ The Respondent agrees with the Applicant that annulment is a “control mechanism to preserve the integrity of ICSID arbitration,” but it submits that such mechanism must strike a balance

⁸⁵ Transcript, Day 1, 64:3-21. The Applicant notes that the Respondent’s legal expert admitted that the separate opinions of Arbitrators Park and Stern reflect “conflicting considerations.” Transcript, Day 1, 68:22-24.

⁸⁶ Applicant’s Memorial, para. 108.

⁸⁷ Applicant’s Reply, para. 155.

⁸⁸ *Id.*, at para. 159.

⁸⁹ Respondent’s Counter-Memorial, para. 115.

⁹⁰ *Id.*, quoting Andrea K. Bjorklund, *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (T. Weiler ed. 2005) at p. 473.

between the interests of finality, on one side, and substantive correctness, on the other side.⁹¹ Because the grounds for annulment are narrowly circumscribed, the resolution must lean in favor of finality of the Award.⁹²

74. The principle that the annulment mechanism is not concerned with the substance of the award means that it cannot be used to correct alleged errors in “interpreting and applying the Convention and any other relevant treaties.”⁹³ In addition, absent allegations that a party was deprived of the opportunity to present arguments and adduce evidence before a tribunal, the tribunal’s factual findings are conclusive.⁹⁴ An annulment proceeding is not an opportunity to reassess the probative value of the evidence, as confirmed by several *ad hoc* committees.⁹⁵ The *ad hoc* committee’s determination whether the award exhibits fundamental procedural flaws is legal rather than factual.⁹⁶ Therefore, the *ad hoc* committee must focus on the facts established by the tribunal and essential to its award. The Respondent states that, in this case, the Applicant asks the Committee to go beyond its mandate to review the factual record and to correct alleged errors of law.
75. According to the Respondent, it is generally accepted that *ad hoc* committees are not required to annul even where they find an annullable error. They have discretion to find in favor of an award, for example when there is doubt whether or not a tribunal has manifestly exceeded its powers.⁹⁷ This discretion in exercising an *ad hoc* committee’s authority to annul has been endorsed by ICSID jurisprudence and by legal commentators.⁹⁸

A. *MANIFEST EXCESS OF POWERS*

(i) Applicable Standard

76. The Respondent agrees with the Applicant that the applicable test under Article 52(1)(b) of the ICSID Convention is to determine whether (i) there is an excess of powers; and (ii) whether the excess is “manifest.” According to the Respondent, it is the Applicant that bears the burden of establishing these two predicates.⁹⁹

⁹¹ Respondent’s Rejoinder, para. 54, quoting Applicant’s Reply, para. 15.

⁹² Respondent’s Rejoinder, para. 54.

⁹³ *Id.*, at para. 55, quoting Applicant’s Reply, para. 16.

⁹⁴ Respondent’s Counter-Memorial, para. 8.

⁹⁵ Respondent’s Rejoinder, para. 74, referring to *Rumeli v. Kazakhstan*, para. 96 and *CDC v. Seychelles*, para. 77.

⁹⁶ Respondent’s Counter-Memorial, para. 9.

⁹⁷ *Id.*, at para 116, referring to *Klöckner I*, para. 52(e).

⁹⁸ *Id.*, referring to *Soufraki v. UAE*, para. 24 and *CDC v. Seychelles*, para. 37; Respondent’s Rejoinder, paras. 78-82, referring to *Vivendi I*, para. 66, *MINE*, para. 4.09 and *Amco II*, para. 1.20.

⁹⁹ Respondent’s Counter-Memorial, para. 219.

77. The term “manifest” should be interpreted to mean that the excess of powers must be both “textually obvious and substantively serious,”¹⁰⁰ and that the exercise must be made “with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award.”¹⁰¹ This means that an alleged excess of powers that requires an in-depth examination of evidence and arguments before the Tribunal is not manifest.

(ii) Failure to Apply the Applicable Law

78. The Respondent notes that the Applicant admits that the Majority identified and cited to the proper law: the BIT, the ECT and “applicable rules and principles of international law.”¹⁰² According to the Respondent, the annulment inquiry should stop at that point. There is an important distinction between the failure to apply the proper law (which the Respondent agrees is a ground for annulment) and the misinterpretation or erroneous application of the proper law (which the Respondent submits is not a ground for annulment).¹⁰³ The substantive correctness of the analysis of the proper law is irrelevant because it goes beyond the inquiry whether there was any flaw in the legitimacy of the process of decision.¹⁰⁴ If an *ad hoc* committee finds that the tribunal “endeavored” or “str[ove] to apply the relevant law in good faith” it must be satisfied that the tribunal did apply the proper law.¹⁰⁵ In this case, the Applicant seeks to annul the award on an alleged incorrect application of the proper law, which must be distinguished and denied.

79. The Respondent states that the Applicant has failed to point to any instance where Arbitrator Park and Arbitrator Stern applied the wrong body of law or failed to “endeavor” or “strive” to apply the proper law. To the contrary, on Respondent’s submission, the Tribunal was very clear as to the applicable law. It set forth in detail the key treaty provisions, explained the principles of treaty interpretation that it would apply and stated its understanding of the object and purpose of the ECT and the BIT, which included the principle that a tribunal should not “facilitate the use of treaties by persons not intended to receive their benefits.”¹⁰⁶

80. It is also clear that the Tribunal did apply the law that it had identified. Arbitrator Park interpreted the words “investor” and “investment” as used in the ECT and the BIT and concluded that an “investment” requires some form of active or meaningful

¹⁰⁰ *Id.*, quoting *Soufraki v. UAE*, para. 40.

¹⁰¹ *Id.*, quoting *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, November 1, 2006, para. 20.

¹⁰² Respondent’s Counter-Memorial, paras. 222-224.

¹⁰³ *Id.*, at para. 223.

¹⁰⁴ *Id.*, at para. 224.

¹⁰⁵ Respondent’s Rejoinder, para. 94, citing *CDC v. Seychelles*, para. 45 and *Soufraki v. UAE*, para. 97.

¹⁰⁶ Respondent’s Counter-Memorial, para. 91; Award, para. 334.

contribution.¹⁰⁷ This legal analysis was, in Arbitrator Park's view, supported by two ICSID awards.¹⁰⁸ He proceeded to a factual analysis, placing particular weight on testimony by one of Applicant's witnesses to arrive at the conclusion that the Applicant had made no contribution to the Alapli Project.

81. Arbitrator Stern focused her legal analysis on whether the structuring of the investment in this case was legitimate corporate planning or if it was aimed at creating access to ICSID jurisdiction and thus constituted an abuse of the ICSID system. She also referred to two ICSID awards in support of the principle that the structuring of an investment could amount to an abuse.¹⁰⁹ She undertook a factual analysis of the circumstances, especially with regard to the timing of the Applicant's investment, and concluded that the Applicant made the alleged investment as part of an illegitimate effort to manufacture international investor-State jurisdiction at a time when the dispute with the Respondent was already a high probability.¹¹⁰ She thus found that the Applicant was precluded from invoking the rights under the BIT or the ECT.
82. Consequently, there is no credible claim that either Arbitrator Park or Arbitrator Stern failed to "endeavor" to apply the law that the Tribunal identified in the Award. Even if the *ad hoc* Committee were to find that "gross and egregious" misapplication of law can rise to the level of non-application of the proper law, that exception is subject to an extraordinarily high standard which is not met here.¹¹¹ The Applicant has not demonstrated a misinterpretation of the facts and the law so gross and egregious so as to amount to a failure to apply the proper law in its entirety.¹¹² To meet this standard, the Applicant would have to show that the "Tribunal's legal analysis was so untenable or implausible that the error is evident on the face of the award."¹¹³ The standard cannot be met by a mere showing that some tribunals have adopted a different interpretation than the Tribunal in this case. The Applicant would need to prove that its interpretation is a monolithic and firmly settled principle of law that is "not subject to debate."¹¹⁴ The Applicant is unable to show this because both Arbitrator Park's and Stern's legal

¹⁰⁷ *Id.*, at para. 93; Award, paras. 350, 352 and 360.

¹⁰⁸ Award, paras. 381-384, citing *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, February 4, 2004 ("*Salini v. Morocco*") and *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12), Decision on Jurisdiction, September 11, 2009 ("*Toto Costruzioni v. Lebanon*").

¹⁰⁹ Award, paras. 391-392, citing *Mobil v Venezuela* and *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award, April 15, 2009 ("*Phoenix Action v. Czech Republic*").

¹¹⁰ Award, paras. 416-417.

¹¹¹ Respondent's Rejoinder, paras. 103-104.

¹¹² Transcript, Day 1, 131 :9-19.

¹¹³ *Id.*, at 162:11-14.

¹¹⁴ *Id.*, at 162-163; Respondent's Rejoinder, para. 112, citing *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on Annulment, October 19, 2009, para. 52. The Respondent adds that even a novel analysis does not have to be grossly and egregiously wrong. See Transcript, Day 1, 173:5-9.

analyses are in line with other ICSID awards that have adopted treaty interpretations and applied substantially similar legal principles.¹¹⁵

(iii) Failure to Exercise Jurisdiction

83. A decision to decline jurisdiction where jurisdiction exists may constitute an excess of powers, but a jurisdictional mistake is not necessarily a manifest excess of powers.¹¹⁶ Several *ad hoc* committees have noted that the language of Article 52(2)(b) of the ICSID Convention does not make any exception for issues of jurisdiction, rejecting the argument that all jurisdictional errors are by their nature “manifest.”¹¹⁷

84. In this case, the Tribunal did not manifestly fail to exercise jurisdiction that it possessed. The Respondent states that:

[a]t a minimum, President Park’s and Arbitrator Stern’s reasoning was a plausible interpretation of two international investment law concepts that have been subject to extensive debate and wide-ranging viewpoints in recent years: the proper definition of an “investment,” and abuse of rights to access the ICSID system [...].¹¹⁸

85. In the Respondent’s view, both Arbitrator Park’s and Stern’s reasoning is sound and well supported by ICSID jurisprudence and international law. Their factual findings cannot be re-evaluated in the annulment proceeding because it is not within the powers of an *ad hoc* committee to conduct its own fact-finding investigation. Indeed, overturning the Tribunal’s substantive application of the law or fact-finding would seriously undermine the legitimacy of the annulment mechanism.¹¹⁹

86. However, even if a committee did possess the authority to overturn or re-evaluate a tribunal’s fact-finding, there would be no justification for doing so here. There were two key factual findings in the award: (i) that the dispute involved a Turkish national who internationalized a previously domestic business venture when he saw a dispute looming with his own government; and (ii) that Alapli Elektrik B.V. failed to make any active contribution to the project or incur any investment risk.¹²⁰ Both of these factual findings were reasonable and well supported by the record.¹²¹ The Tribunal took into account both Parties’ evidence and submissions, including their responses to the Tribunal’s questions

¹¹⁵ Respondent’s Rejoinder, paras. 131-143 and 172-186.

¹¹⁶ Respondent’s Counter-Memorial, para. 230.

¹¹⁷ *Id.*, referring to *Lchetti v. Peru*, para. 101, and *Soufraki v. UAE*, paras. 118-119.

¹¹⁸ Respondent’s Counter-Memorial, para. 232.

¹¹⁹ Respondent’s Rejoinder, para. 215.

¹²⁰ Transcript, Day 1, 145:19-23 and 154:15-18.

¹²¹ *Id.*, at 145-160.

of August 8, 2011 concerning one of these issues.¹²² The evidence that the Applicant submitted not only failed to convince the Tribunal of the *bona fides* of its investment, it featured in Arbitrator Park’s analysis for why the Applicant had failed to show any active contribution.¹²³ As to Arbitrator Stern, she made detailed factual findings on the issue of a good faith investment consistent with the core factual determination.¹²⁴

B. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

(i) Applicable Standard

87. The Respondent agrees with the Applicant that Article 52(1)(d) of the ICSID Convention requires the identification of a “fundamental rule of procedure” from which the Tribunal has departed and a showing that the departure has been “serious.”¹²⁵ It stresses that this ground for annulment pertains to rules of natural justice that concern the essential fairness of the process, as opposed to all procedural rules.¹²⁶ The rule of procedure must be obligatory and binding on the tribunal as a matter of international law, as opposed to a rule that vests discretion in the tribunal.¹²⁷
88. The Respondent thus argues that the test is not only a two-pronged test, but includes the showing by the Applicant of the following elements: (i) a non-discretionary, obligatory procedural norm that is binding on the Tribunal; (ii) that is “fundamental”; (iii) and a departure from that rule; (iv) that is “serious.”¹²⁸

(ii) Failure to Decide by Majority

89. The Respondent submits that the Applicant misinterprets the majority rule in Article 48(1) of the ICSID Convention and misconstrues the Tribunal’s Award.
90. The term “questions” for the purposes of Article 48(1) of the Convention is not synonymous to the term “every question” in Article 48(3).¹²⁹ This is evident from the French and Spanish texts of Article 48. The French uses the word “*questions*” in Article

¹²² *Id.*, at 159:8-19. Following the Parties’ responses, the Applicant was granted the opportunity to file additional evidence concerning the issue of contribution of funds. *See* Exhibits C-273 - C-275.

¹²³ *Id.*, at 159: 19-23.

¹²⁴ *Id.*, at 154:5-10.

¹²⁵ Respondent’s Counter-Memorial, para. 121.

¹²⁶ *Id.*

¹²⁷ Respondent’s Rejoinder, para. 217.

¹²⁸ *Id.*, at para. 220.

¹²⁹ Respondent’s Rejoinder, para. 240; Transcript, Day 1, 195:6-9.

48(1) but “*chefs de conclusions*” in Article 48(3). The Spanish uses “*questiones*” in Article 48(1) but “*pretensiones*” in Article 48(3).¹³⁰ Thus, under Article 48(3), the issues that a tribunal must “deal with” are “more detailed, particularized, and numerous” than the questions that it must decide under Article 48(1).¹³¹ The questions under Article 48(1) relate to more general and overarching issues.¹³²

91. A distinction must be made between the “result” or “outcome,” which is the final disposition of the Tribunal that is put to a vote, and the “reasoning” that leads to an individual arbitrator reach that result or outcome.¹³³ Tribunals need not address, much less vote upon, each and every argument raised by the parties.¹³⁴ Where the parties do not submit an agreed list of “questions” that the tribunal must decide by majority, the tribunal itself has discretion to determine the granularity of the “questions” which are put to a vote.¹³⁵ As the *CDC v. Seychelles ad hoc* committee stated:

The specific terminology used by the Republic in its Memorial cannot define the quest the Tribunal was obliged to answer. Rather, the Tribunal was required to answer a legal question, or to put it another way, come to a conclusion about the Parties’ rights and liabilities.¹³⁶

92. Because the Parties’ requests for relief were very general as to jurisdiction in this case, the relevant “question” which the Tribunal had to decide by a majority of votes was whether the Tribunal had jurisdiction to entertain the Applicant’s claims.¹³⁷
93. Even under the Applicant’s theory that the Tribunal had to decide *every* question by majority vote, the Tribunal would need to decide the general question whether there was jurisdiction, as opposed to only deciding on the constituent elements of jurisdiction. There would otherwise be a contradiction under the Applicant’s interpretation of Article 48, because that general question is also a question.¹³⁸
94. The Respondent submits that the Applicant wrongly focused on “constituent grounds” for purposes of the majority vote, suggesting that the Tribunal must vote by majority on each of the requirements of jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*. The Applicant’s table in this respect is misleading and inaccurate, if only because the Majority makes no reference to the terms *ratione personae*, *ratione materiae*

¹³⁰ Transcript, Day 1, 195:9-24.

¹³¹ Respondent’s Rejoinder, para. 241.

¹³² *Id.*, at para. 244.

¹³³ Respondent’s Counter-Memorial, para. 134.

¹³⁴ *Id.*, at para. 102.

¹³⁵ *Id.*, at para. 101.

¹³⁶ *CDC v. Seychelles*, para. 57; Respondent’s Opening Statement, slide 20.

¹³⁷ Respondent’s Counter-Memorial, para. 103, quoting Judge Simma’s Opinion at para. 23.

¹³⁸ Transcript, Day 1, 198:11-18.

and *ratione temporis*.¹³⁹ Under this voting theory, it could be argued that the Tribunal should go a level deeper and vote on every requirement (contribution, risk and duration) for e.g. the existence of an investment.¹⁴⁰ This approach means that the Tribunal would need to vote on every single step of their factual and legal analysis.¹⁴¹

95. According to the Respondent, the Majority’s position in the Award is clear. It sets forth the overlapping legal analyses of two arbitrators who were in full agreement on the appropriate resolution of the Applicant’s claims, concluding that “jurisdiction is clearly absent.” The Respondent presents the following table depicting the majority vote:¹⁴²

	Arbitrator	Reasoning		Vote on Jurisdiction
Majority	Prof. William W. Park (President)	<i>Ratione personae</i>	✗	No jurisdiction
		<i>Ratione materiae</i>	✗	
		<i>Ratione temporis /abuse</i>	? (explicitly not reached)	
	Prof. Brigitte Stern	<i>Ratione personae</i>	? (not fully addressed)	No jurisdiction
		<i>Ratione materiae</i>	? (not fully addressed)	
		<i>Ratione temporis /abuse</i>	✗	
Dissent	Hon. Marc Lalonde	<i>Ratione personae</i>	☑	Jurisdiction exists
		<i>Ratione materiae</i>	☑	
		<i>Ratione temporis /abuse</i>	☑	

96. The Respondent refers to a seminal case before the International Court of Justice (“ICJ”), which rejected a similar argument as that made by the Applicant. In *Guinea-Bissau v.*

¹³⁹ Respondent’s Counter-Memorial, para. 98.

¹⁴⁰ Transcript, Day 1, 192:3-24.

¹⁴¹ *Id.*, at 193:2-4.

¹⁴² Respondent’s Counter-Memorial, para. 111.

Senegal,¹⁴³ a three-member arbitral tribunal rendered an award that contained a dissent and a separate declaration from the presiding arbitrator. The majority had answered one question presented by the Parties in the affirmative, with the president indicating in his declaration that he would have given a “partially affirmative and partially negative” reply, which he admitted would have significantly changed the outcome of the case. The ICJ dismissed Guinea-Bissau’s challenge that the award was inexistent because it was not supported by a real majority, declaring that:

As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. *The validity of his vote remains unaffected by the expression of any such differences* in a declaration or separate opinion of the member concerned, which are therefore *without consequence for the decision of the tribunal*.¹⁴⁴

97. According to the Respondent, Article 48(1) of the Convention must be read together with Article 48(4), which provides that “any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.” The Respondent quotes Prof. Schreuer as to the interplay between these two provisions:

A majority vote is not affected by an apparent contradiction contained in a declaration or individual opinion (see paras. 92-106 *infra*) made by a member who has voted in favour of the decision. A member of the tribunal may vote for an award not because he or she wholly agrees with it but because he or she feels that it is necessary to provide a majority.¹⁴⁵

98. A majority’s conclusion cannot be invalidated because of alleged contradictions between “separate opinions” of arbitrators forming the majority, as this would undermine the legitimacy of the majority vote.¹⁴⁶ The language of Article 48(4) is broad and permissive, authorizing any member of the tribunal to submit a separate opinion, whether that member joins the majority or dissents. This means that arbitrators comprising the majority are permitted to submit separate opinions with independent reasoning.¹⁴⁷

¹⁴³ Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*), 1991 I.C.J. 53 (November 12) (“*Guinea-Bissau*”). The Respondent stresses the importance of this case in particular because the Statute of the ICJ contains similar provisions to those contained in Article 48 of the ICSID Convention. Article 55 of the Statute provides: “All questions shall be decided by a majority of the judges present.” Article 57 provides: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.”

¹⁴⁴ *Guinea-Bissau*, p. 64-65 (emphasis added by the Respondent), cited in Respondent’s Counter-Memorial, para. 158.

¹⁴⁵ Respondent’s Counter-Memorial, para. 129, quoting Schreuer, ICSID CONVENTION, at Article 48, para. 17.

¹⁴⁶ *Id.*, at para. 130.

¹⁴⁷ *Id.*, at para. 133.

Concurring opinions which express some level of disagreement between members of the majority are an established part of the ICSID system.¹⁴⁸ It would defeat the purpose of Article 48(4) if concurring arbitrators were restricted to using their separate opinions only to describe how they embrace or vote in favor of the legal reasoning of the other arbitrators.¹⁴⁹

C. *FAILURE TO STATE THE REASONS*

(i) Applicable Standard

99. The goal of the ground for annulment set forth in Article 52(1)(e) is to “allow the parties to understand the Tribunal’s decision.”¹⁵⁰ The provision does not require that each reason be stated expressly or specify the manner in which the reasons are to be stated. Reasons may be implicit provided that they can be reasonably inferred.¹⁵¹ *Ad hoc* committees have held that tribunals “must be allowed a degree of discretion as to the way in which they express their reasoning.”¹⁵² However, they have also stressed that the correctness of the reasons is beside the point and that committees must take care not to intrude into the Tribunal’s decision-making.¹⁵³

(ii) No Adequate Reasons or Logical Sequence of Reasons

100. According to the Respondent, the Tribunal’s factual and legal reasoning were “overlapping,” and do not create a *lacuna* in the Award.¹⁵⁴ The Award’s common portions as well as the separate lines of reasoning comprising the Majority are internally consistent, logical, and readily followed to their conclusion. Each of Arbitrator Park and Stern’s reasoning does not exhibit any gap as they clearly identified and spelled out the factual and legal premises with a logical progression from the relevant factual findings, to the applicable law, to the conclusion that follows from the application of the law to the facts. Thus, the Respondent concludes that “each line of reasoning is internally coherent and can be followed with relative ease.”¹⁵⁵

¹⁴⁸ *Id.*, at paras. 138-144, referring, *inter alia*, to *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1), Award, February 21, 1997, p. 42 (“*AMT v. Zaire*”) and *TSA Spectrum de Argentina, S.A. v. Argentine Republic* (ICSID Case No. ARB/05/5), Concurring Opinion of G. Abi-Saab and Dissenting Opinion of G. Aldonas, December 19, 2008.

¹⁴⁹ Transcript, Day 1, 205:3-10.

¹⁵⁰ Respondent’s Counter-Memorial, para. 198, citing *Wena v. Egypt*, para. 83.

¹⁵¹ *Id.*, citing *Wena v. Egypt*, para. 81.

¹⁵² Respondent’s Rejoinder, para. 400, citing *Vivendi I*, para 64.

¹⁵³ Respondent’s Counter-Memorial, para. 199-200; Respondent’s Rejoinder, para. 400.

¹⁵⁴ Respondent’s Rejoinder, para. 405.

¹⁵⁵ Respondent’s Counter-Memorial, para. 214, citing Judge Simma Opinion, para. 96.

101. While the reasoning of the Award as a whole must be adequate, the fact that concurring arbitrators may take their own internally consistent and well-reasoned paths to the majority outcome must be taken into account.¹⁵⁶ Articles 48(4) and 52(1)(e) of the ICSID Convention must be reconciled to balance the need for reasoned and intelligible award, on the one hand, with the ability of tribunal members, even those joining the majority, to freely express their separate views, on the other hand.¹⁵⁷ It is irrelevant that the reasoning of Arbitrator Park and Arbitrator Stern diverged between point A and the common ending. What matters is that the path to the common result, viewed independently, established a logical sequence of reasoning that can be followed by an informed reader.¹⁵⁸

(iii) Contradictory and Incoherent Reasoning

102. The Respondent states that *ad hoc* committees have taken “a careful approach” that is “mindful of the dynamics of collegiate decision-making” when confronted with alleged inconsistencies in a tribunal’s reasoning.¹⁵⁹ Committees should therefore endeavor to construe an award in a way that results in consistency.

103. However, even considering “contradictory reasoning,” the Applicant’s argument must fail because Article 48(4) expressly permits separate opinions, whether those opinions take the form of dissents or concurring opinions.¹⁶⁰ Since the very purpose of a separate opinion is to set forth views that differ in some respect from the principal opinion of the tribunal, they are by nature “contradictory.”¹⁶¹ Differing views of concurring arbitrators can therefore not create *lacunae* in an award. If this were annulable, it could call into question the legitimacy of many other awards.

104. Instead, the reasons given in separate lines of reasoning must be evaluated independently, meaning that the award only fails to state reasons if a reader cannot trace the logic of how each arbitrator reached the majority conclusion within the individual line of reasoning. Contradictory reasons can be problematic only if they arise within the same line of reasoning.¹⁶² Because both lines of reasoning of the Majority lead to precisely the

¹⁵⁶ Transcript, Day 1, 216:13-18.

¹⁵⁷ *Id.*, at 215-216.

¹⁵⁸ Respondent’s Counter-Memorial, para. 217.

¹⁵⁹ Respondent’s Rejoinder, para. 402, citing Second Judge Simma Opinion, para. 18.

¹⁶⁰ Respondent’s Counter-Memorial, para. 205.

¹⁶¹ *Id.*, at para. 206.

¹⁶² Transcript, Day 1, 216:5-9.

same ultimate conclusion, “they are complimentary, rather than contradictory, reasons.”¹⁶³

V. ANALYSIS

1. The Interplay between Articles 48(1) and 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i)

105. A considerable part of the Parties’ arguments gravitate around the interpretation of, and correlation between, Article 48(1) and 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i). Before analyzing each of the grounds for annulment invoked by the Applicant, the *ad hoc* Committee considers it useful to first clarify the meaning of, and relationship between, these legal texts.

(i) The applicable texts

106. Article 48 of the ICSID Convention reads:

- “(1) The Tribunal shall *decide questions* by a majority of the votes of all its members.
 - (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.
 - (3) The award shall *deal with every question* submitted to the Tribunal, and shall state the reasons upon which it is based.
 - (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
 - (5) The Centre shall not publish the award without the consent of the parties.”
- [emphasis added]

107. For purposes of the present analysis, only paragraphs (1) and (3) of Article 48 are relevant.

108. In this respect, the *ad hoc* Committee observes that paragraph (1) uses, in the English text, the unqualified term “questions”, whereas paragraph (3) uses the expression “every question”. In the Committee’s view, the choice of words in the Convention could not have been accidental. Indeed, the difference in meaning between the two expressions becomes clearer once one reads the equally authoritative French and the Spanish versions of the ICSID Convention.

¹⁶³ Respondent’s Rejoinder, para. 407.

109. The French version of Article 48 of the ICSID Convention reads:

- “(1) Le Tribunal *statue sur toute question* à la majorité des voix de tous ses membres.
- (2) La sentence est rendue par écrit; elle est signée par les membres du Tribunal qui se sont prononcés en sa faveur.
- (3) La sentence doit *répondre à tous les chefs de conclusions* soumises au Tribunal et doit être motivée.
- (4) Tout membre du Tribunal peut faire joindre à la sentence soit son opinion particulière – qu’il partage ou non l’opinion de la majorité – soit la mention de son dissentiment.
- (5) Le Centre ne publie aucune sentence sans le consentement des parties.” [emphasis added]

110. The Spanish version of Article 48 reads:

- “(1) El Tribunal *decidirá todas las cuestiones* por mayoría de votos de todos sus miembros.
- (2) El laudo deberá dictarse por escrito y llevará la firma de los miembros del Tribunal que hayan votado en su favor.
- (3) El laudo contendrá *declaración sobre todas las pretensiones* sometidas por las partes al Tribunal y será motivado.
- (4) Los árbitros podrán formular un voto particular, estén o no de acuerdo con la mayoría, o manifestar su voto contrario si disienten de ella.
- (5) El Centro no publicará el laudo sin consentimiento de las partes.” [emphasis added]

111. The Committee notes that the French version of Article 48(1) refers to “questions” by using the expression “toute question”, whereas the Spanish text uses “todas las cuestiones”. However, the French and Spanish texts employ different terms to refer to “every question” in Article 48(3): the French text refers to “tous les chefs de conclusions”, whereas the Spanish text refers to “todas las pretensiones”. Both the French and the Spanish versions of Article 48(3) refer therefore not to questions in general, but to the parties’ heads of claim (the English language equivalent of “chefs de conclusions” and “todas las pretensiones”).

112. Paragraphs (1) and (3) of Article 48 have been implemented in two different sections of the Arbitration Rules.

113. Article 48(1) of the Convention has been implemented in Arbitration Rule 16, under the heading “Decisions of the Tribunal”. The English version of the text reads:

- “(1) Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.”

114. Article 48(3) of the Convention has been implemented in Arbitration Rule 47, under the heading “The Award”. The text reads:

“(1) The award shall be in writing and shall contain:

[...]

(i) the decision of the Tribunal on *every question* submitted to it, together with the reasons upon which the decision is based;” [emphasis added]

115. The French version of Rule 47 reads:

“(1) La sentence est rendue par écrit et contient :

[...]

(i) La décision du Tribunal sur *toute question* qui lui a été soumise, ainsi que les motifs sur lesquels la décision est fondée... ” [emphasis added]

116. The Spanish version of Rule 47 reads:

“(1) El laudo será escrito y contendrá:

[...]

(i) La decisión del Tribunal sobre *cuada cuestión* que le haya sido sometida, junto con las razones en que funda su decisión; ...” [emphasis added].

(ii) The relationship between the texts

117. As a preliminary matter, the Committee again notes that its interpretative process will be guided by the provisions of the VCLT, in particular Articles 31 and 33. Therefore, the terms of the ICSID Convention shall be read in good faith and will be given their ordinary meaning, taking into account their context, and in light of the object and purpose of the Convention as a whole. Moreover, the terms of the ICSID Convention shall be presumed to have an identical meaning in all three language versions of the treaty: English, French and Spanish.

118. The Committee first observes that, in spite of similarities, there is a significant difference between the terms employed in Article 48(1) and Article 48(3) of the ICSID Convention. In light of this difference, the *ad hoc* Committee considers that paragraphs (1) and (3) of Article 48 refer to two distinct issues.

119. Article 48(1) is the more general of the two and provides that, whenever the tribunal “decides” “questions”, this decision needs to be supported by the vote of a majority of

the panel's members. Article 48(1) was implemented in Arbitration Rule 16, which is not contained in the Chapter on "The Award" (where Article 48(3) is implemented), but in the Chapter on the "Working of the Tribunal". Thus, Article 48(1) is applicable not only when the tribunal renders an award, but whenever the tribunal needs to issue a decision, whether it is procedural or substantive. Significantly, the ICSID Convention does not define the term "questions" used in Article 48(1). The French and Spanish versions of this text provide no further assistance in discerning the meaning of the term. Indeed, the French version of Article 48(1) refers to "questions" by using the expression "toute question", whereas the Spanish text uses "todas las cuestiones".¹⁶⁴

120. Article 48(3), on the other hand, refers to the tribunal's obligation to "*deal with*" "every question" submitted to it when rendering an "award". It is the *ad hoc* Committee's view that Article 48(3) of the ICSID Convention refers to the tribunal's obligation to deal with, either directly or indirectly, the parties' *heads of claim* within its award.
121. In this respect, the Committee also notes that the ICSID Convention does not define the term "every question" used in Article 48(3). However, the meaning of this term can be discerned if one compares the English version of the Convention with the French and Spanish versions. According to Article 33(4) of the VCLT, when there are multiple, equally authentic versions of a treaty, they are all presumed to have the same meaning.
122. In the case of the ICSID Convention, Article 48(3) of the English version refers to "every question submitted to the Tribunal". Article 48(3) of the French version refers to "tous les chefs de conclusions", while the Spanish version to "todas las pretensiones sometidas por las partes al Tribunal". Considering that all three versions of the text must have an identical meaning, the *ad hoc* Committee considers that the term "questions" in the English version of Article 48(3) must also refer to the parties' heads of claim (the English-language equivalent of the parties' "chefs de conclusions" or "las pretensiones sometidas... al Tribunal").
123. What is more, the Committee notes that, in stipulating the tribunal's obligation with regard to the parties' heads of claim, Article 48(3) uses the term "to deal" in the English version, "répondre" in the French version, and "declaración sobre" in the Spanish version. These terms are different to the ones employed in Article 48(1), which uses the term "to decide" in the English version, "statuer" in the French version and "decidir" in the Spanish version. The *ad hoc* Committee considers that the different wording chosen by the drafters of the ICSID Convention could not have been accidental and must reflect

¹⁶⁴ The Committee is of the view that the use of the word "toute [question]" in the French version of Article 48(1) and "todas las [cuestiones]" in the Spanish version are the equivalent of the English plural "questions", although the term "all" is omitted in the English version.

a difference in meaning between the two texts. The Committee will therefore give these terms their ordinary meaning, in light of their context and the object and purpose of the treaty.

124. Consequently, pursuant to Article 48(3) of the ICSID Convention, a tribunal must “deal with”, i.e., address each head of claim, answering them directly or indirectly. A tribunal is not obliged to “decide”, i.e., vote, on each head of claim. A tribunal is also not obliged to address each argument or sub-issue raised by the parties as long as it deals with each one of the parties’ heads of claim.
125. On the other hand, pursuant to Article 48(1) of the ICSID Convention, a tribunal renders decisions on “questions” by a majority of votes. Considering the Convention’s silence as to the meaning of the term “questions” in this context, it will be for the tribunal to determine in each case which specific “questions” need to be put to a vote in order to deal with the parties’ heads of claim. In its determination, the tribunal will be guided not only by the parties’ heads of claim, but also by their pleadings and arguments, and the facts of the case. A tribunal is not in duty bound to decide each and every question raised by the parties but only such questions as it considers are determinative to resolve the dispute between the parties.
126. This conclusion is not in any way affected by the language used in Arbitration Rule 47(1)(i). Indeed, the Applicant argued during the hearing that Arbitration Rule 47(1)(i) in all three language versions mandates that the tribunal render a decision on every question submitted to it, together with the reasons on which said decision is based.¹⁶⁵
127. The Committee observes that indeed all three language versions of Arbitration Rule 47(1)(i) refer to “questions” (“every question”, “toute question”, “cuada cuestión”), as the term is used in Article 48(1). However, the Arbitration Rules were and are adopted by the Centre’s Administrative Council on the basis of the ICSID Convention. As a result, while the Arbitration Rules may help in elucidating the meaning and rationale of one or more provisions of the ICSID Convention, they cannot be employed to contravene or enlarge any of its provisions and must be consistent with it. Should the Arbitration Rules differ from or conflict with the ICSID Convention, the latter would prevail. According to Prof. Schreuer:

“The Arbitration Rules are subject to the Convention. In the unlikely case of conflict, the latter prevails. The Convention’s provisions are mandatory unless otherwise stated. The Arbitration Rules are generally subject to modification by the parties.”¹⁶⁶

¹⁶⁵ Transcript, Day 2, 28:10-25 and 29: 30.

¹⁶⁶ Schreuer, ICSID CONVENTION, p. 683.

128. Therefore, the *ad hoc* Committee considers that Arbitration Rule 47(1)(i) has an identical meaning to that of Article 48(3) of the ICSID Convention: when rendering an award, an arbitral tribunal has the obligation to “deal with” all the heads of claims submitted by the parties. From this perspective, the Tribunal is not obliged to put to vote every question or sub-question raised by a party. It is for the Tribunal to determine which questions are material and must, therefore, be put to a vote in order to resolve the dispute between the parties.
129. To conclude, the *ad hoc* Committee finds that Article 48 paragraphs (1) and (3) of the ICSID Convention refer to two different obligations of the tribunal. On the one hand, Article 48(1) provides that any and every question that is decided by a tribunal must be approved by a majority of its members. On the other hand, Article 48(3) stipulates that, in its award, a tribunal needs to deal with, either directly or indirectly, all the parties’ heads of claim (“questions”, “chefs de conclusions” or “las pretensiones sometidas... al Tribunal”). To meet this obligation it is for the Tribunal to determine the questions which are material to resolve the dispute between the parties and put these to a vote.
130. The Committee will now turn to the analysis of the grounds for annulment invoked by the Applicant.

2. The Grounds for Annulment

A. ARTICLE 52(1)(D): SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

(i) Applicable standard

131. The *ad hoc* Committee considers that a departure from a procedural rule justifies the drastic measure of annulment under Article 52(1)(d) of the ICSID Convention only if: (i) the departure is serious, i.e., if it deprives a party of the protection afforded by the said rule; and (ii) if the rule in question is fundamental, i.e., if it concerns a rule of natural justice. In this respect, the Committee shares the view of the *MINE v. Guinea* annulment committee:

“5.05 A first comment on this provision concerns the term ‘serious’. In order to constitute a ground for annulment the departure from a ‘fundamental rule of procedure’ must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.

5.06 A second comment concerns the term ‘fundamental’; even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is ‘fundamental’. The Committee considers that a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides:

The parties shall be treated with equality and each party shall be given full opportunity of presenting his case.

The term ‘fundamental rule of procedure’ is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.”¹⁶⁷

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

“A departure is serious where it is ‘substantial and [is] such as to deprive the party of the benefit or protection which the rule was intended to provide.’ In other words, ‘the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed.’ As for what rules of procedure are fundamental, the drafters of the Convention refrained from attempting to enumerate them, but the consensus seems to be that only rules of natural justice – rules concerned with the essential fairness of the proceeding – are fundamental. Not all ICSID Arbitration Rules are fundamental in this sense.”¹⁶⁸

133. Therefore, the threshold for finding that a rule of procedure is fundamental is very high.

134. The Applicant bears the burden of proving both that (i) the Tribunal committed a serious departure from a procedural rule; and (ii) that the said rule was fundamental.

(ii) Brief summary of the Parties’ positions

135. The Applicant’s position is essentially that the Tribunal disregarded the majority rule when it decided that it did not have jurisdiction to decide the case.

136. In the Applicant’s view, Article 48 paragraphs (1) and (3) of the ICSID Convention mandate that a tribunal decide by a majority vote all the questions submitted by the

¹⁶⁷ *MINE v. Guinea*, paras. 5.05-5.06.

¹⁶⁸ *CDC v. Seychelles*, para. 49.

parties and provide reasons for each such decision. The Applicant submits that the Parties had put before the Tribunal three questions:

- (i) whether the Tribunal had jurisdiction *ratione personae*;
- (ii) whether the Tribunal had jurisdiction *ratione materiae*; and
- (iii) whether the Tribunal had jurisdiction *ratione temporis*.

137. The Applicant contends that the Tribunal failed to garner a real majority in favor of the Award and to decide by a majority vote each jurisdictional question presented by the Parties. In the Applicant's view, the real majority evidenced by the Award was in favor of upholding jurisdiction. However, by failing to abide by Article 48 paragraphs (1) and (3) of the ICSID Convention, the Tribunal seriously departed from a fundamental rule of procedure.
138. The Respondent's position is that the Award fully complies with the requirements of Articles 48 and 52(1)(d) of the ICSID Convention. In its view, paragraphs (1) and (3) of the ICSID Convention refer to two distinct categories of questions, with paragraph (1) relating to more general and overarching issues. Respondent also argues that, in the absence of an agreed list of questions submitted by the Parties, the Tribunal had discretion to determine which questions were to be put to a vote. Moreover, the Parties themselves had only asked the Tribunal to decide whether it had jurisdiction, and not whether there was jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*.
139. Respondent adds that, even if the Tribunal had to rule on the objections separately, it was still under the obligation to decide whether or not it had jurisdiction.
140. The Respondent disagrees with the Applicant, and submits that the Award was carried by a real majority, with Arbitrators Park and Stern agreeing on the lack of jurisdiction and not voting against each other's position. In the Respondent's view, a majority's conclusion cannot be invalidated because of alleged contradictions between the opinions of the majority's members.

(iii) The *ad hoc* Committee's decision

141. After having carefully studied the Parties' arguments in this respect, as well as the record in this case, the *ad hoc* Committee has concluded that the challenged Award evinces no serious departure from a fundamental rule of procedure.

142. In the following paragraphs, the Committee will substantiate its conclusion by first verifying whether the Tribunal dealt with all the heads of claim the Parties had submitted to it (a.). The Committee will then ascertain whether the majority decision which is reflected in the Award is real (b.), and whether the Award in fact reflects a different, “hidden” majority, in favor of upholding jurisdiction (c.).

a. Whether the Tribunal dealt with all the heads of claim the Parties had submitted to it

143. The Applicant contends that paragraphs (1) and (3) of the ICSID Convention’s Article 48 reflect a fundamental rule of procedure, namely that a tribunal has the obligation to positively decide all the questions submitted by the parties by a majority vote, and to provide reasons in this respect. The Respondent, on the other hand, considers that the two paragraphs of Article 48 refer to two different issues, and that a tribunal has discretion to determine the questions that need to be put to a vote.

144. As discussed above at paragraphs 117-129, the *ad hoc* Committee agrees with the Respondent that Article 48 paragraphs (1) and (3) of the ICSID Convention stipulate two different obligations of an arbitral tribunal. Indeed, the Committee has found that Article 48(1) provides that any question that is decided by the tribunal needs to be approved by the vote of a majority of its members. Article 48(3) stipulates that the tribunal needs to deal, in its award, either directly or indirectly, with all the parties’ heads of claim. Reading these two sub-articles together, the Tribunal is of the view that when dealing with the heads of claims of the parties, it is for the Tribunal to determine which questions are material and then put these to vote in order to dispose of the issue(s) before it. It is under no obligation to decide each and every question or sub-question raised by a party irrespective of its view whether it is material or immaterial to deal with the heads of claims raised by the parties.

145. The Committee therefore does not share the Applicant’s interpretation of Article 48 paragraphs (1) and (3) of the ICSID Convention. However, because the Applicant contends that the Tribunal seriously departed from the prescriptions of Article 48, the Committee will verify whether indeed there was such a departure. Only if such a departure is found, will an analysis of whether Article 48 of the ICSID Convention is a fundamental rule of procedure become necessary.

146. As explained in more detail below, the Committee finds that there was no departure from the prescriptions of Article 48.

147. Indeed, the *ad hoc* Committee will determine what were the heads of claim that the Parties had put before the Tribunal and how the Tribunal went about to decide them. The identification of these heads of claim can be achieved by verifying the Parties' requests for relief in the underlying arbitration.

148. In its Memorial on Jurisdiction and Counter-Memorial on the Merits¹⁶⁹, the Respondent formulated the following request for relief:

“650. For all the foregoing reasons, Respondent respectfully requests:

(a) that the Tribunal proceed to resolve Respondent's objections to jurisdiction as a preliminary matter, and dismiss Claimant's claims for lack of jurisdiction;

or, in the event the Tribunal finds jurisdiction,

(b) that the tribunal dismiss Claimant's claims for lack of merit.

651. Respondent also respectfully requests an award of its costs, including counsel fees, that have been incurred in these proceedings.”

149. In the Reply on the Merits and Counter-Memorial on Jurisdiction¹⁷⁰, the Applicant/Claimant worded its request for relief in the following manner:

“747. For the reasons set out in the Memorial and this Reply on the Merits and Counter-Memorial on Jurisdiction, the Claimant requests that the Tribunal render an award:

(i) dismissing the Respondent's objections to jurisdiction in their entirety;

(ii) declaring that the Respondent has violated Articles 10 and 13 of the ECT and Articles 3 and 5 of the BIT in respect of the Claimant's investment;

(iii) ordering that the Respondent pay damages to the Claimant in the amount of US\$ 104.12 million;

(iv) ordering that the Respondent pay the costs of the arbitration, including all fees and expenses of the Tribunal and of ICSID, along with all legal costs and expenses incurred by the Claimant in this arbitration;

(v) ordering that the Respondent pay interest on such amount that the Tribunal awards to the Claimant (including costs and interest) at the LIBOR three-month US Dollar rate

¹⁶⁹ Exhibit C-299.

¹⁷⁰ Exhibit C-277.

plus 2 per cent (or such other rate as the Tribunal deems to be appropriate), compounded on a quarterly basis, from the date of the award until full payment of the amount of the award by the Respondent; and

(v) ordering such other and further relief as the Tribunal deems appropriate.”

150. In the Counter-Memorial on Jurisdiction and Rejoinder on the Merits,¹⁷¹ the Respondent requested:

“510. For all of the foregoing reasons, Respondent respectfully requests:

(a) that the Tribunal dismiss Claimant’s claims for lack of jurisdiction;

or, in the event the Tribunal finds jurisdiction,

(b) that the Tribunal dismiss Claimant’s claims for lack of merit.

511. Respondent also respectfully requests and award of its costs, including counsel fees, that have been incurred in this proceeding.”

151. In the Rejoinder on Jurisdiction,¹⁷² the Applicant/Claimant requested:

“234. For the reasons set out in the Memorial, the Reply on the Merits and Counter-Memorial on Jurisdiction and this Rejoinder on Jurisdiction, the Claimant requests that the Tribunal render an award:

(i) dismissing the Respondent’s objections to jurisdiction in their entirety;

(ii) declaring that the Respondent has violated Articles 10 and 13 of the ECT and Article 3 and 5 of the BIT in respect of the Claimant’s investment;

(iii) ordering that the Respondent pay damages to the Claimant in the amount of US\$ 104.12 million;

(iv) ordering that the Respondent pay the costs of the arbitration, including all the fees and expenses of the Tribunal and of ICSID, along with all legal costs and expenses incurred by the Claimant in this arbitration;

(v) ordering that the Respondent pay interest on such amount that the Tribunal awards to the Claimant (including costs and interest) at the LIBOR three-month US Dollar rate plus 2 per cent (or such other rate as the Tribunal deems to be appropriate),

¹⁷¹ Exhibit C-279.

¹⁷² Exhibit C-278.

compounded on a quarterly basis, from the date of the award until the full payment of the amount of the award by the Respondent;

and

(vi) ordering such other and further relief as the Tribunal deems appropriate.”

152. The *ad hoc* Committee is of the opinion that on an examination of the pleadings of the Parties and their respective heads of claims, the Tribunal could rightly conclude that the only material question on jurisdiction for a resolution of the dispute between the parties that it had to decide was whether or not it had jurisdiction. The decision of this question was dispositive of the issue in this regard before the Tribunal. The Tribunal did not have to decide, i.e., vote on, whether it had jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*.
153. The Committee considers that the Tribunal accomplished the task of determining whether or not it had jurisdiction in compliance with the ICSID Convention. Indeed, the Award was rendered by a Majority made up of Arbitrators Park and Stern, who agreed that the Tribunal lacked jurisdiction to hear the case. The Hon. Marc Lalonde dissented, having reached the conclusion that the Tribunal had jurisdiction.
154. Therefore, the decision that the Tribunal lacked jurisdiction to hear the case was lawfully taken by a majority of two out of three arbitrators, in strict compliance with Article 48 (1) of the ICSID Convention.
155. In the following paragraphs, the Committee will analyze whether this majority was, as the Applicant claims, not real.

b. Whether there was a real majority in favor of the Award

156. The Applicant contends that the majority in favor of the Award was not “real” because of the purported contradictions in reasoning between the arbitrators making up the Majority. The Respondent, on the other hand, argues that the only requirement set by the ICSID Convention is that the majority’s vote be consistent, as opposed to the reasoning leading up to that vote.
157. The Committee agrees with the Respondent. The only requirement of the ICSID Convention’s Article 48 is that the votes of the tribunal members making up the majority, and not the reasoning which they embrace, be identical.

158. However, as a preliminary remark, the Committee observes that both Arbitrators making up the Majority *agreed* that there was no jurisdiction to hear the case. Indeed, paragraphs 312-313 of the Award are very clear in this respect:

“312. After careful consideration of all arguments and evidence, Arbitrators Stern and Park (the ‘Majority’) conclude that this Tribunal lacks jurisdiction to hear the dispute pursuant to the ECT and the Netherlands-Turkey BIT.

313. The Majority has considered the two lines of reasoning set forth below. Although Arbitrator Stern and Arbitrator Park do not necessarily assign the same weight to the various components in these overlapping lines of reasoning, both members conclude that jurisdiction is clearly absent.”¹⁷³

159. As stated in the Award, Arbitrator Park reasoned that the Tribunal lacked jurisdiction because the Claimant was not an investor, having failed to make any personal contribution to the Alapli Project. Arbitrator Stern considered that the Tribunal lacked jurisdiction because the timing of the investment reflected the lack of good faith of the Claimant. They consequently agreed that jurisdiction was lacking:

“The Majority has found Claimant not entitled to protection under either the Energy Charter Treaty or the Netherlands-Turkey BIT. For Arbitrator Stern this conclusion derives from notions of timing and *bona fides*, considering that Claimant did not make an investment until after the root of the controversy was evident and the dispute itself had become a high probability. For Arbitrator Park, the Claimant simply lacks the status of an investor, for want of any contribution to the Alapli Project.”¹⁷⁴

160. Contrary to the Applicant’s allegations, these lines of reasoning were not contradictory, but complementary.

161. Indeed, as the Award itself clearly states, the arbitrators making up the Majority did not disagree as to the reasoning, but merely did not “assign the same weight to the various components in these overlapping lines of reasoning”.¹⁷⁵

162. Moreover, the Award is based on a common understanding of the factual record of the case by the two arbitrators making up the Majority:

“A Turkish national, backed by an American multinational, seeing a dispute looming with his own government, established a Dutch entity which is claiming treaty protection for a proposed combined cycle power plant. The entirety of the financial contribution

¹⁷³ Award, paras. 312-313.

¹⁷⁴ *Id.*, at para. 315.

¹⁷⁵ *Id.*, at para. 313.

and technological know-how came from American backers, the GE Group, which advanced monies to realize an opportunity to provide equipment and services, taking all risk of loss if the Project never came to fruition. The Concession Contract, by which the host country agreed in principle to the Project's terms, was awarded to a Turkish company, Atam Elektrik.”¹⁷⁶

163. The Committee observes that paragraph 311 is part of the reasoning of the Award that is common to both Arbitrator Park and Arbitrator Stern. Therefore, it is not only Arbitrator Park who found “[t]he entirety of the financial contribution and technological know-how came from American backers”, but also Arbitrator Stern. Equally, it is not only Arbitrator Stern who considered that “[a] Turkish national, backed by an American multinational, seeing a dispute looming with his own government, established a Dutch entity”, it was also Arbitrator Park. That is the reason why the Award states at 313 that “[t]he Majority has considered the two lines of reasoning set forth below”. However, the two arbitrators making up the Majority chose to assign different weight to the two lines of reasoning, each preferring to emphasize a different aspect of the case.
164. The Committee therefore finds that, contrary to the Applicant's contention, there were no contradictions within the Award.
165. However, even assuming for purposes of the present analysis that the lines of reasoning employed by Arbitrators Park and Stern were contradictory, this would not affect the validity of the Award in any way. In the *ad hoc* Committee's view, what matters for the validity of the Award is how the Majority *voted*. The fact that the members of the Majority may not have agreed on the reasoning leading up to the identical vote is irrelevant.
166. Indeed, the ICSID Convention envisages that arbitrators may disagree as to the reasoning underlying their award and allows them to formulate a separate/dissenting opinion. Article 48(4) is very clear in this respect and also allows arbitrators making up the majority to formulate an individual opinion:
- “Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.”*
167. By its very nature, an individual opinion is an opinion that is different in reasoning from the award itself. However, as Article 48(4) makes clear, it does not affect the validity of the award to which it is appended.

¹⁷⁶ *Id.*, at para. 311.

168. In this respect, in his treatise on the ICSID Convention, Prof. Schreuer states the following:

“A majority vote is not affected by an apparent contradiction contained in a declaration or individual opinion [...] made by a member who has voted in favour of the decision. A member of a tribunal may vote for an award not because he or she wholly agrees with it but because he or she feels that it is necessary to provide a majority.”¹⁷⁷

“A concurring opinion that differs from the majority opinion on certain points of the reasons does not affect the majority necessary for reaching a decision [...]. What matters for the validity of the award in accordance with Art. 48(1) is that the result has attracted the votes of a majority of the tribunal and not that the members who voted for the award agreed on all points of the reasoning accompanying it.”¹⁷⁸

169. Moreover, the ICSID Convention does not set forth any formal requirements for individual opinions. Therefore, arbitrators are free to choose how to structure and present their separate opinions. There is no specific requirement, much less a fundamental procedural rule as the Applicant alleges, that an arbitrator append his/her individual opinion after the signature page of an award. Therefore, if the majority agrees, the individual opinions of each arbitrator may be included in the text of the award.

170. In other words, what matters for purposes of making up a majority is not the reasoning of that majority’s members, but their votes. This view has been consistently embraced by numerous international tribunals, within or outside the ICSID system, underscoring the conclusion that the relevant procedural requirement is the identity of votes within a majority, and not an identity in reasoning.

171. In the ICSID Convention system, the award in the *AMT v. Zaire* case is particularly on point. In that case, all three arbitrators disagreed with each other on one important issue: damages. One of the arbitrators (Mr. Heribert Golsong) issued an individual opinion with respect to the basis for awarding damages and the amount, while a co-arbitrator (Mr. Kéba Mbaye) concurred in the award’s reasoning, but dissented with respect to the amount of damages. All three arbitrators voted for the award. In his individual opinion, Arbitrator Golsong explicitly stated:

“1. In order to strengthen the necessary authority of the award, I have joined my colleagues in voting in favor of the operative part of the award.

¹⁷⁷ Schreuer, ICSID CONVENTION, p. 810.

¹⁷⁸ *Id.*, at p. 832.

2. I am, however, unable to follow them on the road of legal reasoning which led my colleagues to establish the responsibility of Zaire for the losses endured by the claimant. [...]

21. My colleagues have not been persuaded by my reasoning. As a consequence, they have not followed the rather stringent requirements of prompt, adequate and effectively realizable compensation as laid out by Article III, to assess the measure of compensation in the favor of the Claimant. However, it seems to me that the strict application of Article III could not have brought about an amount of compensation substantially different of the one we have agreed upon in the dispositif of the Award.”¹⁷⁹

172. The *AMT v. Zaire* case evidences a stronger divergence of views between the members of a tribunal than was present in the underlying award. Indeed, in the award, both arbitrators making up the Majority agreed on the result, despite preferring a different reasoning leading up to that result. In the *AMT v. Zaire* case, all three arbitrators would have preferred a (slightly) different solution on the issue of damages, with one of them also expressing a different view on the underlying reasoning. However, all three arbitrators voted in favor of the award.
173. The Committee has already found that only the breach of rules of natural justice, which ensure the fundamental fairness of the proceeding, may warrant annulment. These rules being common to most jurisdictions, the Committee considers it helpful to take into consideration the views of other international adjudicative bodies with regard to the majority rule.
174. Outside of the ICSID Convention system, examples of differing views between the arbitrators making up the majority are even more numerous. This is particularly so in the case of the Iran-U.S. Claims Tribunal, where a multitude of arbitral awards involved a majority consisting of the president of the tribunal and an arbitrator who issued an individual opinion. However, in no such case was the validity of the ensuing award questioned for lack of an authentic majority.
175. For instance, in the *Starrett Housing Corp. v. The Islamic Republic of Iran* case, arbitrator Howard M. Holtzmann issued a concurring opinion, in which he stated:

“I concur with reluctance to the Interlocutory Award in this case. I do so in order to form a majority for the key finding that the Government of the Islamic Republic of Iran has expropriated property of the Claimants in Iran. My concurrence is reluctant because the Interlocutory award sets the date of the taking far later than when it actually

¹⁷⁹ *AMT v. Zaire*, Statement of the individual opinion of Mr. Heribert Golsong, paras. 1, 2 and 21.

occurred. The Interlocutory Award also includes a number of errors, and contains needlessly muddled terms of reference for the accounting expert who is appointed to give an opinion concerning the value of the expropriated property.

In view of the many errors in the Interlocutory Award, it would be easier to dissent from it than to concur in it. The Tribunal Rules provide, however, that awards can only be made by a majority vote. Thus, in a three-member Chamber, at least two members must join or there can be no decision. My colleague, Judge Kashani, having dissented, I am faced with the choice of joining the President in the present Interlocutory Award despite its faults, or accepting the prospect of an indefinite delay in progress toward final decision of this case [...]. The Hearing in this case closed more than ten months ago; now that an Award has at least been prepared, no one would benefit from further delay.”¹⁸⁰

176. In the *Granite State Machine Co. Inc. v. The Islamic Republic of Iran*, arbitrator Richard M. Mosk issued the following concurring opinion:

“I concurred in the award in this case so as to end protracted deliberations which must, as noted above, ‘continue... until a majority, and probably a compromise solution, has been reached’.

[...]

The rate arrived at in this case may not be sufficient to compensate the Claimant fully. Nevertheless, I concurred in the majority decision of the rate specified in the award in order to form the majority for the award”.¹⁸¹

177. Also relevant in this respect is the concurring opinion of arbitrator Howard M. Holtzmann in the *Economy Forms Corporation v. Islamic Republic of Iran* case:

“Unfortunately, however, the damages awarded are only about half of what the governing law requires.

Why then do I concur in this inadequate Award, rather than dissenting from it? The answer is based on the realistic old saying that there are circumstances in which ‘something is better than nothing’. [...] Thus, in a three-member Chamber a majority of two members must join, or there can be no Award. My colleague Dr. Kashani having dissented, I am faced with the choice of either joining in the present Award or accepting the prospect of an indefinite postponement of any Award in this case. [...] The deliberations in this case have continued long enough; the hearing was closed on

¹⁸⁰ *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. The Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat*, Interlocutory Award No. IITL 32-24-1, December 19, 1983, 4 Iran-US C.T.R. 122, 159 (Concurring Opinion of Howard H. Holtzmann).

¹⁸¹ *Granite State Mach. Co. v. The Islamic Republic of Iran*, Award No. 18-30-3, December 15, 1982, 1 Iran-US C.T.R. 442, 450.

February 15, 1983, four months ago. Neither the parties nor the Tribunal will, in my view, benefit from further delay.”¹⁸²

178. In all the cases referred to above, the concurring arbitrator made clear that the *only* reason for voting in favor of the award was to obtain the number of votes necessary to achieve a majority. Indeed, without the vote of the concurring arbitrator, no award could have been issued. There was therefore no identity of views or similarity in reasoning between the president and the concurring arbitrator; nevertheless, due to the identity of their votes, the awards were valid.

179. Perhaps the most articulate expression of the principle that it is the voting that matters in collegiate adjudicative bodies comes from the International Court of Justice. In the *Guinea-Bissau* case, the ICJ rejected a challenge against an arbitral award in which the president of the tribunal, whilst signing the award, appended a declaration stating that he would have preferred a slightly different solution to the case. The International Court of Justice upheld the award and stated unanimously:

“Furthermore, even if there had been any contradiction [...] between the view expressed by President Barberis and that stated in the Award, such contradiction could not prevail over the position which President Barberis had taken when voting for the Award. In agreeing to the Award, he definitively agreed to the decisions, which it incorporated, as to the extent of the maritime areas governed by the 1960 Agreement, and as to the Tribunal not being required to answer the second question in view of its answer to the first. As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned, which are therefore without consequence for the decision of the tribunal.”¹⁸³

180. In his separate opinion, Judge Ni further clarified the point by stating:

“[J]udges or arbitrators do not vote as a mere matter of formality. They do so in order to express their precise position. They are fully aware of the substantive implications of their vote. The vote indicates their final decision. If the Declaration, as in this case, raises an uncertainty as to whether a judge or arbitrator concurs with or dissents from a judgment or an award, it is the vote that constitutes the authentic expression of his attitude.”¹⁸⁴

¹⁸² *Economy Forms Corporation v. The Islamic Republic of Iran*, Award No. 55-165-1, June 13, 1983, 3 Iran-US C.T.R. 42, 55 (Concurring Opinion of Howard H. Holtzmann).

¹⁸³ *Guinea-Bissau*, at 64-65.

¹⁸⁴ *Guinea-Bissau v. Senegal*, Separate Opinion of Judge Ni, p. 99.

181. Commenting on this case in his 1996 Freshfields Lecture, Judge Stephen M. Schwebel noted the following:

“The claim of Guinea-Bissau in the end boiled down to the complaint that the tribunal had voted for what it could muster a majority for rather than for what a majority of its members thought to be right. That complaint was well-founded. But it did not follow that the resultant award was inexistent, null and void, or even voidable. On the contrary, so much of the judicial and arbitral process is characterized by judges and arbitrators voting to form a majority rather than voting to express what each of them may see as the optimum judgment. In a collective body, there is very frequently a process of accommodation of differing views, sometimes sharply differing views. The result may be the consecration of the least common denominator. That may not be a noble result, but it is a practical result. It is better than no result.”¹⁸⁵

182. The *ad hoc* Committee shares Judge Schwebel’s view entirely: what matters for the validity of an award is not the majority’s reasoning, but the identity of the votes with respect to the outcome. In the present case, there is no doubt that the arbitrators making up that Majority voted in favor of dismissing the case for lack of jurisdiction.

183. The Committee will now verify whether the Award reflects a different, hidden majority in favor of upholding jurisdiction.

c. Whether the Award reflects a different, hidden, majority in favor of upholding jurisdiction

184. Before turning to the analysis of the next ground for annulment invoked by the Applicant, the Committee wishes to make some observations with regard to the Applicant’s allegation that an issue-based counting of the votes would have yielded a different outcome on jurisdiction. In this respect, the Applicant alleges that Arbitrator Park voted in favor of jurisdiction *ratione temporis*, while Arbitrator Stern voted in favor of jurisdiction *ratione personae* and *ratione materiae*, and this, in turn, led to a “real” majority upholding jurisdiction.

185. The Committee does not share the Applicant’s view. Indeed, a careful analysis of the Award reveals that there was no majority of the votes in favor of upholding jurisdiction, no matter what the grounds.

¹⁸⁵ Stephen M. Schwebel, *May the Majority Vote of an International Arbitral Tribunal be Impeached?*, 13 *Arbitration International* 2 (1997), p. 153.

186. As a preliminary observation, the Committee reiterates that the Award is based on a common understanding of the factual background of the case shared by Arbitrators Park and Stern (see above at paragraphs 158-163). Based on this common understanding, the arbitrators making up the Majority chose to assign different weight to the two complementary lines of reasoning within the Award.
187. The arbitrators making up the Majority manifestly did not vote against each other's position, but acknowledged them as possible lines of reasoning leading up to the same outcome: the absence of jurisdiction.
188. More precisely, the Committee considers that Arbitrator Park expressed no view and did not vote on the objection to jurisdiction *ratione temporis*. Indeed, Arbitrator Park's observations with regard to the Claimant's corporate restructuring were made within the context of his analysis on the Claimant's lack of a personal contribution to the Alapli project. Arbitrator Park did not express any view with respect to the legitimacy of the Claimant's corporate restructuring and manifestly did not cast a vote in this respect:
- “The tribunal in *Mobil* found jurisdiction under the BIT despite the respondent's contention that the claimant was a ‘corporation of convenience.’ Moreover, the *Mobil* tribunal did not doubt the legitimacy of the Dutch company's role, noting that the claimant in that case ‘contributed their part to [the] investments’. For this reason, *Mobil* is not perfectly analogous to the present dispute. While Claimant may have been established pursuant to ‘legitimate corporate planning’, there is no indication that it contributed anything to the relevant investments. Claimant acted merely as a conduit in effecting the back-to-back payments required to incorporate Atam Alapli.”¹⁸⁶
189. The words employed by Arbitrator Park (“While Claimant *may have been established* pursuant to ‘legitimate corporate planning’”) manifestly do not express any view of his with respect to the corporate restructuring. The Committee understands from these words that Arbitrator Park in effect wishes to point out that the issue of the corporate restructuring is irrelevant to his analysis on contribution. He does not make any finding with respect to its legitimacy and does not cast any vote on the issue of jurisdiction *ratione temporis*. Indeed, the reference to jurisdiction *ratione temporis* is entirely absent from his analysis.
190. Under these circumstances, the Committee can find no support for the Applicant's view that Arbitrator Park found in favor of jurisdiction *ratione temporis*.

¹⁸⁶ Award, para. 386.

191. The Committee also considers that Arbitrator Stern’s analysis could not be interpreted as upholding jurisdiction *ratione materiae* and *ratione personae*. The contested passage in her analysis is paragraph 390 of the Award, which reads:

“Although Arbitrator Stern shares the conclusion arrived at by Arbitrator Park, to the effect that the Tribunal has no jurisdiction, she arrives at such a conclusion through a different legal analysis. The uncontested fact that a Dutch company owns the shares of Atam Alapli seems sufficient to consider that there is indeed in this case a foreign investor which is the legal owner of an investment. However, the factual elements on which Arbitrator Park relies are a confirmation that there is no protected investment in this case, as they are the visible sign that the whole operation did not have any economic rationale, but had as its main purpose to gain access to ICSID arbitration at a time when there were already important disagreements between the Turkish company and the Turkish authorities, the precise disagreements that are at the core of the present claim of Claimant. In other words, the introduction of the Dutch company in the investment chain was, at the time it was performed, an abuse of the system of international investment protection under the ICSID/BIT/ECT mechanism.”¹⁸⁷

192. The Committee observes, as the Applicant has pointed out, that Arbitrator Stern found that “[t]he uncontested fact that a Dutch company owns the shares of Atam Alapli seems sufficient to consider that there is indeed in this case a foreign investor which is the legal owner of an investment”.

193. However, the Committee does not share the Applicant’s conclusion that this sentence expresses Arbitrator Stern’s view that there was jurisdiction *ratione materiae* and *ratione temporis* in this case. Indeed, Arbitrator Stern clearly does not express any clear view on the matter in the contested sentence, but uses the words “seems sufficient” to show that there is the *appearance* of an investment. Nevertheless, she makes it very clear in the following sentence, which the Applicant does not quote, that this is merely an appearance and there is in fact no protected investment:

“However, the factual elements on which Arbitrator Park relies are a confirmation that *there is no protected investment in this case*, as they are the visible sign that the whole operation did not have any economic rationale”.¹⁸⁸

194. If anything, this sentence expresses the view that jurisdiction *ratione materiae* and *ratione personae* do not exist. However, Arbitrator Stern did not cast a vote on these two objections and chose to focus her analysis solely on the issue of the timing of the investment and jurisdiction *ratione temporis*.

¹⁸⁷ *Id.*, at para. 390.

¹⁸⁸ *Id.*

195. In light of these considerations, the *ad hoc* Committee finds that Arbitrator Park did not vote on the objection to jurisdiction *ratione temporis*, and that Arbitrator Stern did not vote on the objections to jurisdiction *ratione materiae* and *ratione personae*. They chose to leave those objections unanswered in light of their finding that jurisdiction was lacking, but on different grounds. There is therefore no “hidden majority” within the Award in favor of upholding jurisdiction, and no contradiction between Arbitrator Park’s and Arbitrator Stern’s analyses.

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196. For all the reasons expressed above, the *ad hoc* Committee finds that the Award evinces no serious departure from a fundamental rule of procedure.

B. ARTICLE 52(1)(E): FAILURE TO STATE REASONS

(i) Applicable standard

197. The *ad hoc* Committee considers that annulment under Article 52(1)(e) of the ICSID Convention is warranted only when a tribunal has failed to discharge its duty to render an award that allows readers to comprehend and follow its reasoning. Article 52(1)(e) does not empower an *ad hoc* Committee to review the merits of a case. Indeed, such a review would amount to an appeal, which is an impermissible remedy pursuant to Article 53 of the ICSID Convention.

198. In this respect, the *ad hoc* Committee aligns itself with the *MINE v. Guinea* annulment committee, which stated:

“5.08 The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal’s decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. [...]

5.09 In the Committee’s view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.”¹⁸⁹

¹⁸⁹ *MINE v. Guinea*, paras. 5.08-5.09.

199. In other words, what a committee is authorized to verify under Article 52(1)(e) of the ICSID Convention is whether the sequence of arguments within an award evidences a logical chain of reasoning that is apt to lead to the conclusion that was reached by the tribunal. This was also the view of the *Wena v. Egypt* annulment committee:

“79. The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal’s decisions were appropriate or not, convincing or not. As stated by the *ad hoc* Committee in *MINE*, this ground for annulment refers to a ‘minimum requirement’ only. This requirement is based on the Tribunal’s duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision. If such sequence of reasons has been given by the Tribunal, there is no room left for a request for annulment under Article 52(1)(e).¹⁹⁰

200. Although the Committee does consider that genuinely contradictory reasons cancel each other out and amount to no reasons at all, it also notes that annulment committees should not be quick to find contradiction when in fact what is evident from the award is the compromise reached in an international collegiate adjudicative body. In this respect, the *Vivendi I* annulment committee rightly observed:

“In the Committee’s view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal’s reasons could more truly be said to be but a reflection of such conflicting considerations.”¹⁹¹

201. The Committee is persuaded that, if possible, an interpretation which confirms an award’s consistency as opposed to its alleged inner contradictions should be preferred. The *CDC v. Seychelles* annulment committee’s view was similar:

“In construing awards, as in construing statutes and legal instruments generally, one necessarily should construe the language in issue, whenever possible, in a way that results in consistency[...].”¹⁹²

¹⁹⁰ *Wena v. Egypt*, paras. 79 and 81.

¹⁹¹ *Vivendi I*, para. 65.

¹⁹² *CDC v. Seychelles*, para. 81.

202. In light of these considerations, the *ad hoc* Committee finds that the threshold for annulment under Article 52(1)(e) of the ICSID Convention is very high. Indeed, the Applicant bears the burden of proving that the Tribunal's reasoning on a point which is essential to the outcome of the case was either unintelligible or contradictory or frivolous or absent.

(ii) Brief summary of the Parties' positions

203. The Applicant first argues that the Award as a whole does not satisfy the requirements of Article 52(1)(e) of the ICSID Convention because the Majority denied jurisdiction over the dispute despite the fact that, when one counted the votes, the actual majority was in favor of upholding jurisdiction. In the Applicant's view, the opinions of Arbitrators Park and Stern cannot be evaluated independently in order to ascertain whether they evince a failure to state reasons, but only as parts of the Award itself.

204. The Applicant also argues that, individually, Arbitrator Park's and Arbitrator Stern's opinions failed to evidence on what extent they are based on the law and on a proper analysis of the relevant facts.

205. Finally, the Applicant argues that the Award is wholly incoherent and contradictory because Arbitrator Park and Arbitrator Stern manifestly contradicted each other with respect to the objections to jurisdiction raised by the Claimant.

206. The Respondent, on the other hand, argues that the Award as a whole is logical and internally consistent, and that it can be easily followed from the beginning up to its conclusion. In its view, the lines of reasoning of Arbitrators Park and Stern were not contradictory.

207. Respondent adds that, in any event, annulment committees should endeavor to read awards in ways that result in consistency, and not inconsistency. Moreover, in light of Article 48(4) of the ICSID Convention, the lines of reasoning of Arbitrators Park and Stern, even if contradictory, would not endanger the validity of the Award.

208. Finally, the Respondent considers that the reasons given by Arbitrators Park and Stern must be evaluated independently to verify if they comply with the requirements of Article 52(1)(e) of the ICSID Convention.

(iii) The *ad hoc* Committee's decision

209. In light of the Parties' arguments and the record before it, the *ad hoc* Committee finds that there are no grounds to annul the Award on the basis of Article 52(1)(e) of the ICSID Convention. The Committee will present in the following paragraphs the reasons which have prompted it to reach this conclusion.
210. As a preliminary matter, the Committee wishes to again stress that its mandate is not to sit in appeal on the Tribunal's reasoning. An award is not to be annulled merely because an annulment Committee forms the view that, on the same facts and evidence, it would have reached a different conclusion. There is a difference between an absence of reasons and reasons which are genuinely contradictory or frivolous on the one hand and reasons with which a party or a committee simply disagrees on the other. The former may form the basis of an annulment but the latter cannot. This Committee is of the view that a tribunal and a committee can reasonably come to different and even opposite conclusions, when evaluating or analyzing the same set of facts and evidence without the opinion of either being regarded as being devoid of reasons. The only scrutiny that may be undertaken, by a Committee, on the basis of Article 52(1)(e) of the ICSID Convention is whether the Award satisfies the requirements of reasoning which enable the reader to discern what considerations prompted the Tribunal to reach its conclusions.
211. After having carefully analyzed the Award and in light of its previous findings at Section V.2.A.iii above, the *ad hoc* Committee concludes that there is no support for the Applicant's contentions that: (i) no reasons were given why the Award denied jurisdiction when an "actual majority" was in favor of upholding jurisdiction; and (ii) Arbitrator Park's and Arbitrator Stern's analyses are contradictory which makes the Award itself contradictory. The considerations that have prompted the Committee to reach this conclusion are the following.
212. First, at paragraphs 158-163 above, the *ad hoc* Committee has already found that the Majority issued the Award based on a common understanding of the factual background, and that Arbitrator Park's and Arbitrator Stern's lines of reasoning are not contradictory, but complementary. What is more, Arbitrators Park and Stern expressly *agreed* that the Tribunal lacked jurisdiction to hear the case.
213. Second, the Committee has also established that the Tribunal was under no obligation to vote separately on each objection to jurisdiction. The Tribunal was only obliged to "deal with" the heads of claims presented by the Parties and when doing so it was for the Tribunal to determine and put to vote such questions which, in its view, were dispositive

of the issue(s) before it. The Committee has determined that the Tribunal discharged this duty in full compliance with the requirements of Article 48 of the ICSID Convention.

214. Third, the Committee has stated that the ICSID Convention allows all arbitrators, even arbitrators making up a majority, to issue an individual opinion, the essence of which is a divergence of views from that taken in the award. As a result, the Convention does not regard a difference in views between arbitrators making up the majority as problematic. In this respect, the only requirement for the validity of an award is that the majority cast their votes to the same effect.
215. Finally, the Committee has found that there was no “hidden majority” within the Award in favor of upholding jurisdiction. In fact, Arbitrator Park did not vote on the objection to jurisdiction *ratione temporis*, and Arbitrator Stern did not vote on the objections to jurisdiction *ratione materiae* and *ratione personae*. They chose to leave those objections unanswered in light of their finding that jurisdiction was lacking, but on different grounds.
216. The Committee also considers that, individually, Arbitrator Park’s and Arbitrator Stern’s analyses satisfy the requirements of reasoning established by Article 52(1)(e) of the ICSID Convention.
217. Arbitrator Park. Arbitrator Park found that there was no jurisdiction to decide the case because the Claimant had never made any personal contribution and had not taken any risk with respect to the Alapli Project.¹⁹³
218. Arbitrator Park substantiated this finding by referring to key pieces from the record, which, in his view, evidenced that the Claimant had served as a mere conduit through which financial contributions to Atam Alapli were funneled by the American GE Group. Indeed, Arbitrator Park found that the Claimant had had no merit in obtaining the Concession Contract and had not become a party to it, that it had not provided any technological expertise (ensured by General Electric), and that the statutory capital itself was contributed by General Electric, with the Claimant never acquiring any dominium over the funds.¹⁹⁴
219. In his analysis, Arbitrator Park referred to the Netherlands-Turkey BIT, the ECT, the ICSID Convention and the VCLT. He referenced the Preamble and Articles 1(a)(ii), 3(1) of the BIT; Article 1(7)(a)(ii), Article 10(1) and Article 26(1) of the ECT; and Article 25 of the ICSID Convention. By applying the interpretative principles of the VCLT, he

¹⁹³ Award, paras. 337, 347, 350.

¹⁹⁴ *Id.*, at paras. 338-346, 362-380.

found the applicable law to require an “active contribution of some sort” on the part of the investor.¹⁹⁵ Based on the record available before the Tribunal, Arbitrator Park again stressed that “any significant contribution to the Project was made either by Americans, the GE Group, or by Turkish nationals (the Project Sponsors), not by the Dutch Claimant”.¹⁹⁶

220. In support of his conclusion that the Claimant had not made any personal contribution, took no risk, and thereby lacked the status of an investor, Arbitrator Park referred to other investor-State awards. He placed particular reliance on *Salini v. Morocco* and *Toto Costruzioni v. Lebanon*. Despite analyzing the concepts of “investor” and “investment” under Article 25 of the ICSID Convention, Arbitrator Park considered these cases to be useful in order to substantiate the definitions of the terms under the BIT and the ECT. Arbitrator Park observed that even the *Mobil v. Venezuela* case, cited by the Claimant, assumed some contribution on the part of the claimant.¹⁹⁷
221. Finally, Arbitrator Park referred to the cross-examination of Mr. Morova during the evidentiary hearing as support for his conclusion that the Claimant had not made any contribution to the Alapli Project.¹⁹⁸
222. Having regard to these considerations, Arbitrator Park concluded that there was no jurisdiction over the dispute.
223. The *ad hoc* Committee considers that Arbitrator Park’s analysis enables the reader to understand his reasoning, and to follow it from beginning until its conclusion. Therefore, the Committee considers that Arbitrator Park’s analysis meets the level of reasoning required by Article 52(1)(e) of the ICSID Convention.
224. Arbitrator Stern. Arbitrator Stern found that the Claimant had abused the investment treaty system by restructuring its investment at a time when there were important disagreements with the Turkish authorities, the very same disagreements that were at the heart of the dispute before the Tribunal. As a result, she found that there was no jurisdiction to hear the case.
225. Arbitrator Stern began her analysis by referring to the seminal *Mobil v. Venezuela* and *Phoenix Action v. Czech Republic* cases, and stated that a corporate restructuring can be made either in good faith or in bad faith, depending on its timing.¹⁹⁹ Arbitrator Stern

¹⁹⁵ *Id.*, at paras. 337, 341, 352-361.

¹⁹⁶ *Id.*, at para. 362.

¹⁹⁷ *Id.*, at paras. 381-386.

¹⁹⁸ *Id.*, at paras. 387-388.

¹⁹⁹ *Id.*, at paras. 391-392, 401-403.

clarified that, in order to determine whether a corporate restructuring was undertaken in bad faith, one needs to verify if, at that time, “the relevant party can see an actual dispute or can foresee a specific future dispute as a high probability and not merely as a general future controversy”.²⁰⁰

226. Arbitrator Stern then made specific references to the record and found that there were numerous elements which justified the conclusion that the sole purpose of the corporate restructuring was to obtain access to the investment arbitration system at a time when a dispute with the Turkish government was very probable. She compared the circumstances of the case to the ones in *Phoenix Action v. Czech Republic*, stating that in both cases the investment was manipulated to appear foreign, by carrying out the corporate restructuring inside a (corporate) family. She substantiated her conclusion by referring to the facts of the case, such as: (i) contrary to the initial agreement, the Claimant was formed 14 months after the expiry of the contractual deadline with no plausible explanation for the delay; (ii) at the time, the problems that were at the core of the arbitration had already appeared in the relationship with the Turkish authorities; (iii) the only investors involved were the two Turkish shareholders who initiated the Project and who attempted to hide this information from the Tribunal.²⁰¹
227. Based on these findings, Arbitrator Stern concluded that the Claimant had committed an abuse of the investment treaty system and that the Tribunal lacked jurisdiction to hear the case.
228. The Committee considers that Arbitrator Stern’s analysis is fully in line with the prerequisites of Article 52(1)(e) of the ICSID Convention. Her reasoning is clear and can be followed without any difficulty from beginning to end.
229. For the above reasons, the *ad hoc* Committee finds that the Award does not fail to state the reasons upon which it is based and that its annulment under Article 52(1)(e) of the ICSID Convention is therefore not warranted.

²⁰⁰ *Id.*, at para. 403.

²⁰¹ *Id.*, at paras. 393-399, 404-415.

C. ARTICLE 52(1)(B): MANIFEST EXCESS OF POWERS

(i) Applicable standard

230. The *ad hoc* Committee shares the view of both the Applicant²⁰² and the Respondent²⁰³ that an excess of power must be “manifest”, meaning plain, evident, obvious, clear, in order to warrant annulment. In this respect, the *ad hoc* Committee aligns itself with the view taken by the *Wena v. Egypt* annulment committee:

“The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.”²⁰⁴

231. The *CDC v. Seychelles* committee further clarified that, when more than one interpretation of a disputed issue are equally possible, there can be no room for a manifest excess of powers, and the tribunal’s determination will be final:

“As interpreted by various *ad hoc* Committees, the term ‘manifest’ means clear or ‘self-evident’. Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal’s conduct, if susceptible of argument ‘one way or the other’, is not manifest. [...] If the issue is debatable or requires examination of the materials on which the tribunal’s decision is based, the tribunal’s determination is conclusive.”²⁰⁵

232. The *ad hoc* Committee shares this view entirely. The annulment procedure is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed, but a limited remedy meant to ensure the fundamental fairness of the arbitration proceeding.

233. The Applicant invokes two instances of a manifest excess of powers: the failure to apply the proper law and the failure to exercise existing jurisdiction. The Committee will make some brief observations with respect to both.

234. With respect to the failure to apply the applicable law, at the risk of repeating itself, the Committee wishes to stress that it is not the role of an annulment committee to verify whether the tribunal’s interpretation of the law or assessment of the facts was correct. As long as the tribunal correctly identified the applicable law, and strove to apply it to the

²⁰² Applicant’s Memorial, para. 86.

²⁰³ Respondent’s Counter-Memorial, para. 219.

²⁰⁴ *Wena v. Egypt*, para. 25.

²⁰⁵ *CDC v. Seychelles*, para. 41.

facts that it established, there is no room for annulment. Moreover, pursuant to Arbitration Rule 34(1), the tribunal is the judge of the admissibility of any evidence adduced and of its probative value. It is certainly not the role of an annulment committee to verify whether a tribunal correctly established the facts of a case. Not only is such an analysis not warranted by the language of Article 53(1) of the ICSID Convention, but also the tribunal, having first-hand knowledge of the evidence before it, is best situated to interpret it. What is more, a tribunal has considerable discretion in its evaluation of the evidence.

235. The Committee considers that any other interpretation of this ground for annulment would veer the annulment procedure dangerously towards an appeal, a remedy which the Contracting States to the ICSID Convention have expressly excluded.

236. In this respect, the Committee finds the *CDC v. Seychelles* committee's position particularly persuasive:

“Regardless of our opinion of the correctness of the Tribunal’s legal analysis, however, our inquiry is limited to a determination of whether or not the Tribunal endeavored to apply English law. That it did so is made plain by its explicit statement in the Award that it did as well as by its repeated citation to relevant English authorities.”²⁰⁶

237. The *MINE v. Guinea* annulment committee found, in a similar vein:

“Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment.”²⁰⁷

238. With respect to the failure to exercise a jurisdiction which a tribunal did possess, the standards to be employed are identical. The excess of powers must be manifest, meaning evident, obvious and clear on its face. Indeed, the ICSID Convention does not draw any distinction between jurisdictional excesses and other types of excesses that a tribunal may commit.²⁰⁸

²⁰⁶ *Id.*, at para. 45.

²⁰⁷ *MINE v. Guinea*, para. 5.04.

²⁰⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID case No. ARB/01/7), Decision on Annulment, March 21, 2007, para. 54.

(ii) Brief summary of the Parties' positions

239. The Applicant argues that the Tribunal both failed to apply the applicable law and to exercise a jurisdiction which it did have.
240. With respect to the former, the Applicant considers that it is not enough for a tribunal to identify and to endeavor to apply the proper law. A misinterpretation or misapplication of the proper law that is gross or egregious will also amount to a failure to apply the proper law. The Applicant argues that Arbitrator Park's and Arbitrator Stern's analyses were grossly mistaken, and based on erroneous factual conclusions.
241. With respect to the Tribunal's failure to exercise a jurisdiction which it did possess, the Applicant considers that it stems directly from the Majority's manifestly erroneous legal analyses and factual findings.
242. The Respondent, on the other hand, considers that an *ad hoc* committee may only verify if a tribunal endeavored to apply the proper law, and not whether a tribunal misinterpreted the law or misapplied it to the facts of the case. The Respondent contends that both Arbitrators Park and Stern referred to the correct body of law and strove to apply it to the facts of the case.
243. The Respondent adds that, in the event the Committee should find that a gross misapplication of the law is a ground for annulment, the very high threshold for finding such an error is not met in the present case.
244. Finally, the Respondent considers that the Tribunal did not manifestly fail to exercise jurisdiction in this case.

(iii) The *ad hoc* Committee's decision

245. As explained in more detail at paragraphs 234-235 above, an *ad hoc* Committee is not empowered to review the Tribunal's appreciation of the law and the Tribunal's determination of the relevant facts, as the Applicant is urging it to do. What the Committee may do is to verify whether the Tribunal correctly identified the proper law and endeavored to apply it. In the present case, the Committee finds that it did.
246. Indeed, the Committee notes that the Tribunal found the following legal sources to be applicable to the dispute: the ICSID Convention, the Netherlands-Turkey BIT and the

ECT, as interpreted in light of the VCLT.²⁰⁹ The Committee also notes that the Applicant acknowledges that the Tribunal correctly identified the proper law.²¹⁰ There is therefore no dispute in this respect.

247. Moreover, the Tribunal not only correctly identified the proper law, but also endeavored to apply it. This is sufficient, in the Committee's view, to conclude that annulment of the Award under Article 52(1)(b) of the ICSID Convention is not warranted.

248. Arbitrator Park. Within his analysis, Arbitrator Park referred to the interpretative principles set out in the VCLT when he deciphered the meaning of the expression "investment of an investor". Based on the BIT's preamble and the ECT's Article 10(1), he found that both international treaties require an active contribution of the investor.²¹¹ By referring to the record, Arbitrator Park found that the Claimant had not made any such contribution to the Alapli Project, and had assumed no risk in this respect. Arbitrator Park carefully scrutinized the operations by which the transfer of Atam Alapli's statutory capital was effectuated and discovered that:

"378. To summarize, the sequence was as follows. First Project Company made payments to Claimant; Claimant made payments to Second Project Company; GEPSI reimbursed the capital payments to First Project Company.

379. The payments were all made within a period of five months, from late-February through mid-July 2000, pursuant to a scheme best characterized as a revolving door of sorts. Back-to-back payments by GEPSI reimbursed Atam Elektrik for monies sent to Claimant as capital contribution to Atam Alapli, the Second Project Company."²¹²

249. Based on these findings, Arbitrator Park concluded that the Claimant had not acquired any dominium over the funds which transited its accounts, and that the entire financial contribution came from the General Electric Group, which also ensured the technological expertise necessary for the project.²¹³

250. By applying Article 1 of the BIT and Article 1 of the ECT to the facts of the case, Arbitrator Park found that Atam Alapli was not an investment "of" the Claimant, because there had been no underlying activity of investing on the Claimant's part.²¹⁴ He then referred to other investor-State awards which had analyzed the concept of "investment" under Article 25 of the ICSID Convention and had reached similar conclusions²¹⁵.

²⁰⁹ Award, paras. 320-336.

²¹⁰ Applicant's Reply, paras. 57-58.

²¹¹ Award, paras. 352-360.

²¹² *Id.*, at paras. 378-379.

²¹³ *Id.*, at paras. 338-347, 380.

²¹⁴ *Id.*, at paras. 338-349, 362-380.

²¹⁵ *Id.*, at paras. 381-386.

251. The Committee therefore observes that Arbitrator Park referred to the applicable law on numerous instances and endeavored to apply its provisions to the facts of the case. Whether or not the application of the proper law to these facts was correct is not within the Committee’s mandate to ascertain. There was therefore no failure on Arbitrator Park’s part to apply the proper law.

252. Arbitrator Stern. Arbitrator Stern interpreted the notions of a protected “investment” and of “investor” under the ICSID Convention, the BIT and the ECT in light of the international law principle of good faith. By referring to previous investor-State awards that shed light on the distinction between good faith and bad faith corporate restructurings (*Phoenix Action v. Czech Republic*, *Mobil v. Venezuela*), she found that the applicable investment treaties could only confer legal protection upon investments that had been made in good faith.²¹⁶ She stated that:

“It is indeed an abuse for an investor to manipulate the nationality of a shell subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. Before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be.”²¹⁷

253. Upon applying these findings to the facts of the case, Arbitrator Stern concluded that the corporate restructuring undertaken by the Claimant had not been made in good faith. Indeed, Arbitrator Stern found that the sole purpose of the corporate restructuring was to obtain access to the investment arbitration system at a time when a dispute with the Turkish Government was very probable. More precisely, Arbitrator Stern found that: (i) the Claimant had been formed with a significant delay than initially planned, and no acceptable explanation could be offered in this respect; (ii) at the time, the Claimant had already begun to experience the problems that were at the core of the arbitration; (iii) no foreign investor was involved in the corporate restructuring, but only the two Turkish shareholders who had initiated the project; and (iv) the Turkish investors attempted to conceal this information from the Tribunal.²¹⁸

254. Based on her conclusion that the Claimant’s corporate restructuring had been undertaken in bad faith, Arbitrator Stern concluded that there was no jurisdiction to hear the case.

255. The Committee considers that there can be no question of Arbitrator Stern failing to apply the proper law. Arbitrator Stern correctly identified the proper law and repeatedly

²¹⁶ *Id.*, at paras. 390-392, 400-403.

²¹⁷ *Id.*, at para. 403.

²¹⁸ *Id.*, at paras. 393-399, 404-415.

referred to it within her analysis, when applying it to the facts of the case. Again, whether Prof. Stern's analysis is correct is not an issue that an annulment Committee may determine.

256. In light of these considerations, the Committee finds that the Applicant has failed to discharge its burden of proving that the Tribunal manifestly exceeded its powers by failing to apply the proper law to the facts of the case. What is more, for the same reasons, the Award evinces no manifest failure to exercise jurisdiction.
257. Consequently, the *ad hoc* Committee dismisses the Applicant's contention that the Award is the result of a manifest excess of power, as per Article 52(1)(b) of the ICSID Convention.

VI. COSTS

258. In light of the provisions of Article 61(2) of the ICSID Convention and Arbitration Rule 47(1), corroborated with Article 52(4) of the ICSID Convention and Arbitration Rule 53, the *ad hoc* Committee has discretion with regard to the allocation of costs.
259. The Parties submitted their submissions with regard to costs on February 7, 2014.
260. The Applicant seeks to recover their legal costs and expenses incurred in connection with the annulment proceeding, totaling USD 1,878,310.31 (USD 1,518,310.31 as legal fees, and USD 360,000 as advances and lodging fee remitted by the Applicant to ICSID).
261. The Respondent seeks to recover USD 1,075,156.93 (USD 942,282.81 attorneys' fees, USD 117,000 expert fees, USD 8,034.92 travel expenses and USD 7,839.20 translator fees).
262. In accordance with Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations, the Applicant has been solely responsible for the advance payments to cover the fees and expenses of the Committee and ICSID.
263. In deciding how to allocate the costs of these proceedings, the Committee has been guided by the principle that "costs follow the event" if there are no indications that a different approach is called for. The Committee has found no such indications in this case. Indeed, the Respondent has prevailed in totality. What is more, it has been forced to go through the process and should not be burdened further by having to pay for its defense. The Committee does acknowledge however that both Parties and their counsel have conducted the proceedings diligently and efficiently.

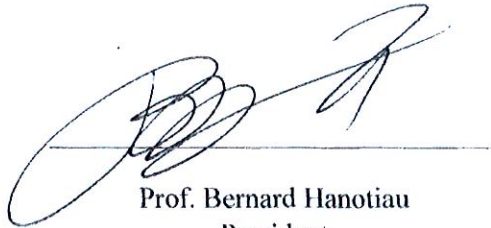
264. The Committee therefore concludes that the Applicant is to bear all ICSID costs, *i.e.*, the fees and expenses of the members of the *ad hoc* Committee and of the ICSID Secretariat, amounting to USD 346,141.53,²¹⁹ as well as Turkey's legal costs and expenses, amounting to USD 1,075,156.93.

²¹⁹ The amount includes estimated charges (courier, printing, and copying) in respect of the dispatch of this Decision. The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all of the invoices are received and the account is final.

VII. DECISION

265. For the foregoing reasons, the *ad hoc* Committee decides unanimously that:

- (1) The Applicant's claims for annulment under Article 52(1)(b), Article 52(1)(d) and Article 52(1)(e) of the ICSID Convention are dismissed in their entirety;
- (2) The Applicant shall bear the full costs and expenses incurred by ICSID in these annulment proceedings, including the fees and expenses of the Members of the Committee;
- (3) The Applicant shall bear Turkey's legal expenses and costs.



Prof. Bernard Hanotiau
President

Date: 7.7.2014



Prof. Karl-Heinz Böckstiegel
Member

Date: 4 July 2014



Mr. Makhdoom Ali Khan
Member

Date: 2 July 2014