EXCERPT PURSUANT TO ICSID ARBITRATION RULE 48(4)
WITH ADDITIONAL REDACTIONS BY THE RESPONDENT

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CYPRUS POPULAR BANK PUBLIC CO. LTD.
Respondent on Annulment

and

HELLENIC REPUBLIC
Applicant

ICSID Case No. ARB/14/16
Annulment Proceeding

DECISION ON ANNULMENT

Members of the Tribunal
Prof. Dr. Rolf Knieper, President of the *ad hoc* Committee
Ms. Dyalá Jiménez Figueres, Member of the *ad hoc* Committee
Mr. Michael D. Nolan, Member of the *ad hoc* Committee

Secretary of the Tribunal
Ms. Martina Polasek

Date of dispatch to the Parties: 30 November 2022

REPRESENTATION OF THE PARTIES

Representing Cyprus Popular Bank:

Mr. Joe Hage
Mr. Daniel Margolin KC
Mr. Richard Kiddell
Mr. Seth Cumming
Mr. John Marjason-Stamp
Ms. Lucy Needle
Mr. Gaurav Ramani
Joseph Hage Aaronson LLP
7th Floor
280 High Holborn
London WC1V 7EE
United Kingdom

and

Mr. Nicos Makrides
Markides, Markides & Co LLC
Markides House
1-1A Heroes Street
Nicosia 1703
Republic of Cyprus

Representing the Hellenic Republic:

Ms. Styliani Charitaki
Ms. Maria Vlassi
Legal Council of the State
Ministry of Finance
Kar. Servias 10
10184 Athens
Hellenic Republic

and

Ms. Emmanouela Panopoulou
Legal Council of the State
General Accounting Office
Amerikis 6
10671 Athens
Hellenic Republic

and

Mr. Christopher Moore
Mr. Paul Kleist
Cleary Gottlieb Steen & Hamilton
2 London Wall Place
London EC2Y 5AU
United Kingdom

and

Ms. Laurie Achtouk-Spivak
Mr. Robert Garden
Cleary Gottlieb Steen & Hamilton
12, rue de Tilsitt
75008 Paris
French Republic

and

Dr. Claudia Annacker
Dr. Enikő Horváth
Mr. Panos Theodoropoulos
Dechert LLP
32, rue de Monceau
75008 Paris
French Republic

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TABLE OF SELECTED DEFINED TERMS

Achmea Judgment	Judgment of the CJEU in *Slovak Republic v. Achmea*, dated 6 March 2018
Award	Award, dated 15 April 2021, in the present dispute
BIT	Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments, in force since 26 February 1993
CBC	Central Bank of Cyprus
[redacted]	[redacted]
CJEU	Court of Justice of the European Union
Counter-Memorial	Claimant's Counter-Memorial on Annulment, dated 1 March 2022
Decision	Decision on Jurisdiction and Liability, dated 8 January 2019, in the present dispute
EBA	European Banking Authority
ECB	European Central Bank
ECFR	European Charter of Fundamental Rights
ECHR	European Convention of Human Rights
ECT	Energy Charter Treaty, dated 17 December 1994
[redacted]	[redacted]
ESCB	European System of Central Banks
ESM	European Stability Mechanism (= international financial institution with legal personality)
Eurogroup	Informal body composed of the Ministers of Finance of the Eurozone
GGB	Greek Government Bonds
[redacted]	[redacted]
[redacted]	[redacted]
ICSID or the Centre	International Centre for Settlement of Investment Disputes

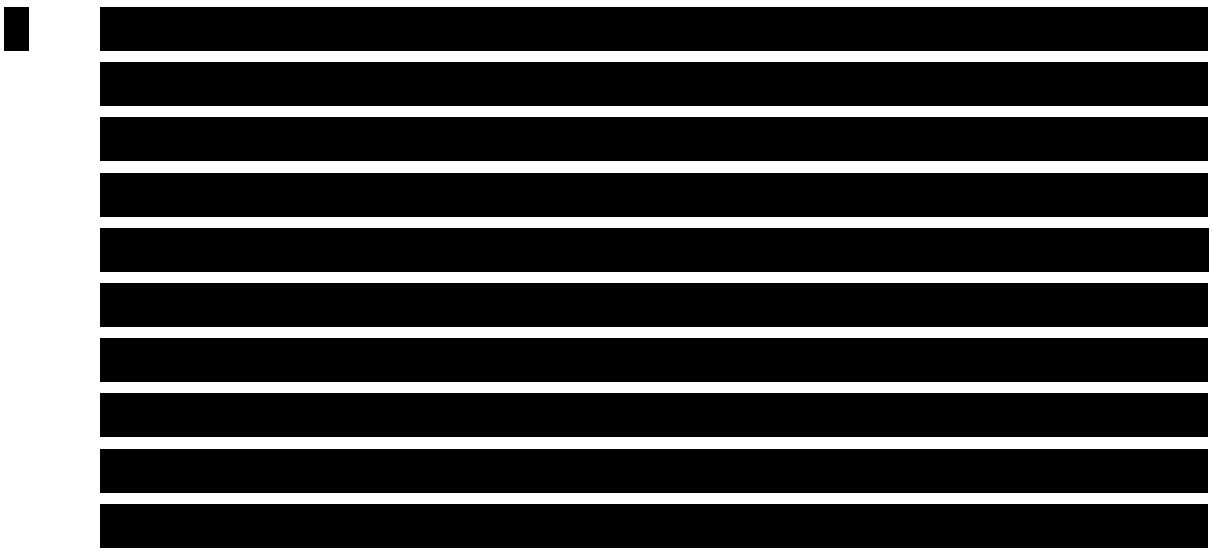
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated 18 March 1965
ILC	International Law Commission
IMF	International Monetary Fund
Komstroy Judgment	Judgment of the CJEU in *Republic of Moldova v. Komstroy LLC*, dated 2 September 2021
Laiki	Cyprus Popular Bank Public Co. Ltd.
Marfin	Marfin Investment Group
MEB	Marfin Egnatia Bank S.A.
Memorial	Respondent's Memorial on Annulment, dated 21 December 2021
MoU	Memorandum of Understanding
PCIC	Private Creditor Investment Committee
Rejoinder	Claimant's Rejoinder on Annulment, dated 14 June 2022
Reply	Respondent's Reply on Annulment, dated 26 April 2022
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Troika	European Central Bank, European Commission, International Monetary Fund
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969

I. INTRODUCTION AND PARTIES

1. This case concerns an application for annulment ("**Annulment Application**") of the award rendered on 15 April 2021 ("**Award**"), which incorporates the decision on jurisdiction and liability of 8 January 2019 ("**Decision**"), in the arbitration proceeding ICSID Case No. ARB/14/16 between the Cyprus Popular Bank Public ("**Claimant"** or **"Laiki"**), a commercial bank incorporated in the Republic of Cyprus, resolved in March 2013 and since then under the direction and control of its Resolution Authority, the Central Bank of Cyprus (the "**CBC**"), and the Hellenic Republic ("**Applicant**" or "**Respondent,**" "Hellenic Republic" or "**Greece**"). They are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above.

2. The dispute in the original proceeding was submitted by the Claimant on 20 June, 2014 to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments, in force since 26 February 1993 (the "**BIT**" or the "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated 18 March 1965 (the "**ICSID Convention**").

3. The tribunal in the original proceeding was composed of Professor Juan Fernández-Armesto (president), Professor Giorgio Sacerdoti and Professor Philippe Sands (arbitrators) (the "**Tribunal**").



[redacted]

5. The proceedings were bifurcated. On 8 January 2019, the Tribunal rendered its 273-page Decision on Jurisdiction and Liability (the "**Decision"**); and on 15 April 2021, it rendered its 91-page Award (the "**Award"**). The Decision "is incorporated into and forms integral part of" the Award.[1]

6. The Tribunal:

a) denied jurisdiction of the Centre and its competence for claims based on alleged violations of the Treaty on the functioning of the European Union ("**TFEU**"), the European Charter of European Rights ("**ECFR**") and the European Convention of Human Rights ("**ECHR**"), as not covered by the consent to arbitration under the BIT;[2]

b) accepted jurisdiction of the Centre and its competence by rejecting the Respondent's objections that

- since Laiki was owned by the Republic of Cyprus, it was part of the State, and the dispute was in reality an inter-State dispute, by finding that Laiki had at all times retained its separate legal personality;[3]

- Laiki had assigned its claims before the dispute and was not a party in interest, by finding that the claims against the Respondent had not been assigned to third parties;[4]

- the Hellenic Republic's consent to arbitration in Article 9 of the BIT was incompatible with European law and thereby invalid, by finding that (i) the Tribunal did not have to apply European law and could not contradict it, (ii) Laiki had a legitimate expectation that Article 9 of the BIT and Greece's consent to arbitration had remained valid and that neither the EU Treaties nor the CJEU's jurisdiction had retroactive effects, (iii) the primacy of EU law had only

[1] Award ¶ 8
[2] Decision ¶¶ 746 ss.
[3] Decision ¶¶ 373 ss.
[4] Decision ¶¶ 447 ss.

internal effects and is of limited relevance in investment arbitration governed by international law, and (iv) the issue of obstacles to enforceability is not decisive for the adjudication of a claim;[5]

- the lack of mandatory amicable settlement negotiations led to the inadmissibility of the proceeding, by finding that the Claimant had tried to initiate such negotiations and that they had proven futile.[6]

c) dismissed the major part of the claims on the merits, with respect to alleged violations of the BIT in the context of

- Laiki's participation in the debt exchange of private creditors, by finding that it had participated voluntarily in the process and had waived its right to accede to arbitration, thereby causing the inadmissibility of the claim;[7]

[redacted]

[redacted]

[redacted]

[5] Decision ¶¶ 601 ss.

[6] Decision ¶¶ 776 ss.

[7] Decision ¶¶ 981 ss.

[redacted]

- the cumulative impact of all measures by the Respondent during the financial crises, allegedly amounting to a composite breach and thus creeping expropriation, by finding that the impact of the events on the Claimant was unfortunate but not attributable to Greece, as no underlying pattern, systematic policy, common denominator, purpose nor intent were discernible.[11]

d) granted compensation for damages in an amount of EUR 34.5 million resulting from the Respondent's violations of Articles 2(2) and 3(1) of the BIT [redacted]

7. As will be discussed below, the Applicant asserts three grounds for annulment in accordance with Article 52(1) (b), (d) and (e) of the ICSID Convention.

II. PROCEDURAL HISTORY

8. On 12 August 2021, the Hellenic Republic filed the Annulment Application with ICSID pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"). The Parties' representatives and their addresses are listed above on page (i).

9. On 25 August 2021, the ICSID Acting Secretary General registered the Annulment Application.

10. On 14 September 2021, the *ad hoc* Committee (the "**Committee**") was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are Professor Dr. Rolf Knieper (German), serving as President, Ms. Dyalá Jiménez Figueres (Costa Rican) and Mr. Michael D. Nolan (United States). All members were appointed by the Chairperson of the ICSID Administrative Council. Also on 14 September 2021, the Parties were informed that the Annulment Proceeding was deemed to have begun on that date, and that Ms. Martina Polasek, ICSID Deputy Secretary-General, would serve as Secretary of the Committee.

[11] Decision ¶¶ 1526 ss.
[redacted].

11. On 28 September 2021, the ICSID Secretariat circulated a draft Procedural Order No. 1 and invited the Parties to liaise and react to it.

12. On 12 October 2021, the Parties submitted their joint proposals concerning the draft Procedural Order.

13. On 18 October 2021, the Centre received the Applicant's advance payment in an amount of USD 150,000.00, as requested.

14. The Committee held a first session with the Parties on 19 October 2021 by video conference. The following persons attended the session:

Members of the *ad hoc* Committee
Prof. Dr. Rolf Knieper, President
Ms. Dyalá Jiménez Figueres
Mr. Michael Nolan

ICSID Secretariat
Ms. Martina Polasek, Secretary of the *ad hoc* Committee
Ms. Phoebe Ngan, Paralegal

Representing the Applicant
Ms. Styliani Charitaki, Vice-President of the Legal Council of the State
Ms. Emmanouela Panopoulou, Member of the Legal Council of the State
Ms. Maria Vlassi, Member of the Legal Council of the State
Mr. Christopher Moore, Cleary Gottlieb Steen & Hamilton
Mr. Paul Kleist, Cleary Gottlieb Steen & Hamilton
Dr. Claudia Annacker, Dechert LLP
Dr. Enikő Horváth, Dechert LLP

Representing the Claimant
Mr. Daniel Margolin KC, Joseph Hage Aaronson LLP
Mr. Richard Kiddell, Joseph Hage Aaronson LLP
Mr. John Marjason-Stamp, Joseph Hage Aaronson LLP
Ms. Lucy Needle, Joseph Hage Aaronson LLP
Mr. Gaurav Ramani, Joseph Hage Aaronson LLP
Mr. Nicos Makrides, Makrides, Makrides & Co.

15. The Parties confirmed that the members of the Committee had been validly appointed. It was agreed *inter alia* that the place of the proceeding would be Washington D.C., that the applicable Arbitration Rules would be those in effect from 10 April 2006, and that a hearing should be held in person unless international travel restrictions and social distancing measures would motivate the Committee to decide to hold the hearing remotely. The Parties proposed Zürich or London as possible venues for a hearing,

without establishing a clear priority. After deliberations, the Committee directed the Secretariat to make preliminary reservation of hearing facilities in London. Further, the Committee set up a procedural calendar, after having heard the Parties' proposals and explanations. It decided to hold the hearing on 12-13 September 2022, with 14 September held in reserve.

16. Following the first session, on the same date, 19 October 2021, the Committee issued Procedural Order No. 1 ("**PO 1**") recording the agreement of the Parties and the Committee's decisions.

17. In accordance with the procedural calendar in PO 1, the Applicant filed a Memorial on Annulment (the "**Memorial**") on 21 December 2021, together with factual exhibits and legal authorities.

18. The Claimant filed a Counter-Memorial on Annulment (the "**Counter-Memorial**") on 1 March 2022, together with factual exhibits and legal authorities.

19. On 24 March 2022, the EC filed an "Application for Leave to Intervene as Non-Disputing Party in the Annulment Proceedings" with a view to assist the Committee to determine jurisdictional issues. Upon the Committee's invitation of 25 March 2022, the Parties submitted their observations on the Application on 1 April 2022, with the Applicant endorsing it and the Claimant objecting to it.

20. After deliberation, the Committee rejected the Application by Procedural Order No. 2, dated 8 April 2022. The Committee found that the Application addressed jurisdictional issues that had been before the Tribunal, and not the specific and limited questions which *ad hoc* committees are competent to decide under Article 52(2) of the ICSID Convention.

21. On 26 April 2022, the Applicant filed its "Reply on Annulment" (the "**Reply**"), together with additional legal authorities, in accordance with the procedural calendar.

22. On 14 June 2022, the Claimant filed its "Rejoinder on Annulment" (the "**Rejoinder**"), together with additional legal authorities, in accordance with the procedural calendar.

23. On 15 July 2022, the Centre received an additional advance payment by the Applicant in an amount of USD 250,000.00, as requested.

24. After a request by and in consultation with the Parties, the Committee decided to reschedule the hearing by one day and to hold it on 13 to 14 September 2022 in person in London. Since all outstanding procedural, administrative and logistical matters had been clarified in the Committee's Procedural Order No. 3 of 5 August 2022, the pre-hearing conference, originally planned for 3 August 2022 'if needed', was cancelled.

25. On 31 August 2022, the Claimant submitted, in accordance with paragraph 17 of Procedural Order No. 3, three new legal authorities which had been published after its Rejoinder.

26. On 2 September 2022, the Applicant sought leave to introduce three further legal authorities to respond to certain arguments made in the Claimant's Rejoinder. On 6 September 2022, the Committee authorized their submission after consultation with the Claimant, and granted leave to Claimant to file responsive legal authorities if it so wished.

27. The hearing on annulment was held on 13 and 14 September 2022 in London (the "**Hearing**"). The participants were:

Members of the *ad hoc* Committee
Prof. Dr. Rolf Knieper, President
Ms. Dyalá Jiménez Figueres
Mr. Michael Nolan

ICSID Secretariat
Ms. Martina Polasek, Secretary of the *ad hoc* Committee

Representing the Applicant
Dr. Claudia Annacker, Dechert LLP
Mr. Christopher Moore, Cleary Gottlieb Steen & Hamilton
Ms. Styliani Charitaki, Vice-President of the Legal Council of the State
Ms. Emmanouela Panopoulou, Member of the Legal Council of the State
Ms. Maria Vlassi, Member of the Legal Council of the State
Dr. Enikő Horváth, Dechert LLP
Mr. Paul Kleist, Cleary Gottlieb Steen & Hamilton
Mr. Panos Theodoropoulos, Dechert LLP
Mr. Robert Garden, Cleary Gottlieb Steen & Hamilton
Mr. Alexandru Diaconu, Dechert LLP
Mr. Simon Yolland, Dechert LLP

Representing the Claimant
Mr. Daniel Margolin KC, Joseph Hage Aaronson LLP
Mr. Richard Kiddell, Joseph Hage Aaronson LLP

Mr. Seth Cumming, Joseph Hage Aaronson LLP
Mr. John Marjason-Stamp, Joseph Hage Aaronson LLP
Ms. Lucy Needle, Joseph Hage Aaronson LLP (Participating remotely)
Mr. Gaurav Ramani, Joseph Hage Aaronson LLP
Ms. Polina Shishkina, Joseph Hage Aaronson LLP
Mr. Nicos Makrides, Makrides, Makrides & Co. (Participating remotely)
Mr. August Papathomas, Cyprus Popular Bank Public Co. Ltd (Participating remotely)
Ms. Iphigenia Fisentzou, Cyprus Popular Bank Public Co. Ltd (Participating remotely)

28. At the end of the Hearing, both Parties confirmed to have had a full opportunity to present their cases, and that they did not see any need for post-hearing briefs. Accordingly, the Committee decided that no post-hearing briefs would be submitted, and that both Parties would submit cost statements on 12 October 2022.

29. On 3 October 2022, the Parties filed their proposed corrections to the transcript of the Hearing. Following a short extension of time, the Parties filed their submissions on costs on 17 October 2022.

30. On 11 November 2022, the proceeding was declared closed, in accordance with ICSID Arbitration Rules 53 and 38(1).

III. REQUESTS FOR RELIEF

31. The Applicant requests that:

> *(a) The Award be annulled in its entirety,*
>
> *(b) In the alternative, the Award be annulled in relevant part concerning the Tribunal's holding that* [redacted] *Respondent breached Articles 2 and 3 of the BIT and/or the Tribunal's award of compensation to Claimant under the headings of both Loss 1 and Loss 3; and*
>
> *(c) The Hellenic Republic be reimbursed for all costs and expenses incurred in connection with the annulment proceedings, with interest as of the date of the Decision on Annulment until the date of effective payment.*[13]

32. The Claimant requests that:

> *(1) the Respondent's application for annulment be dismissed in its entirety; and*

[13] Memorial ¶ 246; Reply ¶ 249

(2) the Tribunal order that the Claimant be reimbursed for all costs and expenses incurred in connection with defending these annulment proceedings, with interest as of the date of the Decision on Annulment until the date of effective payment.[14]

IV. THE PARTIES' POSITIONS ON GROUNDS FOR ANNULMENT

33. The Applicant invokes three grounds for annulment based on a number of annullable errors. It alleges that the Tribunal manifestly exceeded its powers when it assumed its competence and the Centre's jurisdiction as well as [redacted] (IV.A). The Application essentially argues that Article 9 of the BIT was inapplicable because of its incompatibility with the EU Treaties, and, [redacted] It further alleges that by these decisions, as well as when it concluded that [redacted], the Tribunal also departed seriously from fundamental rules of procedure (IV.B) Finally, it alleges that the Tribunal failed to state the reasons on which it based its decisions on its competence and the jurisdiction of the Centre with respect to the [redacted], and on the damages (IV.C).

34. The Claimant refutes these assertions in their totality.

A. MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B) CONVENTION)

35. Article 52(3) and (1)(b) of the ICSID Convention provides that *ad hoc* committees "*have the authority to annul the award or any part thereof*" if "*the Tribunal has manifestly exceeded its powers*".

(1) The Legal Standard

a) The Applicant's Position

36. The Applicant submits that "*the Parties agree that an excess of powers must be determined by reference to the scope of the tribunal's powers, and that a tribunal may exceed its powers in relation to* inter alia*: (i) the exercise of its jurisdiction or lack thereof; (ii) the applicable law; and (iii) the issues submitted to it*".[15]

[14] Counter-Memorial ¶ 256; Rejoinder ¶ 200

[15] Reply ¶ 45; Memorial ¶ 84

37. With respect to jurisdiction, the Applicant asserts that tribunals exceed their power when they assume jurisdiction that they do not have as well as when they accept jurisdiction over an issue that is beyond the consent of the parties.[16] It relies on the annulment decision in *Occidental v. Ecuador*, where the Committee held that

> *if arbitrators address disputes not included in the powers granted to them, or decide issues not subject to their jurisdiction or not capable of being solved by arbitration, their decision cannot stand and must be set aside.*[17]

It further insists that since the existence of jurisdiction is so fundamental, its establishment may "*call for a more rigorous approach than other grounds for annulment*," as correctly held by the *ad hoc* committee in *Venezuela Holdings v. Venezuela*.[18]

38. With respect to the non-application of the proper law, the Applicant argues that "*while mere misinterpretation or misapplication of the proper law does not amount to an excess of powers, a gross or egregious error in the interpretation or application of the law is tantamount to a failure to apply the proper law*", as confirmed by "*a long line of* ad hoc *committees*".[19] It equates errors of facts to the errors of law in as much as they are "*so egregious, or the weighing of evidence so irrational, as to constitute an independent cause for annulment*", as rightly held by the *ad hoc* committee in *Caratube v. Kazakhstan*.[20]

39. With respect to the issues submitted to the tribunal, the Applicant asserts that a tribunal exceeds its power if it fails to address the questions raised by the parties and thus – as

[16] Memorial ¶ 86; Reply ¶ 48

[17] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment (2 November 2015) ("*Occidental v. Ecuador*" or "*Occidental*") (Exhibit RLA-031), ¶ 49

[18] Reply, ¶ 48; the Applicant refers to *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (9 March 2017) ("*Venezuela Holdings v. Venezuela*") (Exhibit RLA-011), ¶ 110

[19] Reply ¶ 50; the Applicant relies – among others – on *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment (15 January 2016) (Exhibit RLA-014), ¶ 105; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment (5 June 2007) ("*Soufraki v. UAE*" or "*Soufraki*") (Exhibit RLA-005), ¶ 86

[20] Reply ¶ 51; the Applicant relies on *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application (21 February 2014) ("*Caratube v. Kazakhstan*" or "*Caratube*") (Exhibit RLA-009), ¶ 158

formulated by the *ad hoc* committee in *Helnan v. Egypt* – fails "*to fulfil the mandate entrusted to it by virtue of the parties*' *agreement*".[21]

40. As to the second requirement of Article 52(1)(b), the Applicant's position has evolved in the course of the proceeding. In its Memorial it submits that the excess "*will be manifest whenever it is evident, regardless of its gravity*",[22] while in its Reply it asserts that "*an excess of powers will be '*manifest*' either because it is obvious, clear or self-evident,* or *because it is serious or material to the outcome of the case, not as Laiki claims,* both *obvious and serious*".[23]

41. In its Reply, the Applicant submits that the term manifest must not be confounded with cursory or superficial. In fact, *ad hoc* committees have confirmed that "*in some cases an extensive argumentation and analysis may be required to prove that such a manifest excess of power has in fact occurred*".[24]

b) The Claimant's Position

42. The Claimant confirms that the Parties agree on the "*two-stage approach*"[25] according to which *ad hoc* committees have to consider, first, whether the tribunal has exceeded the scope of its powers, and, second, whether such excess was manifest, and that the "*excess of powers may relate to a tribunal's analysis of questions as regards (i) jurisdiction, (ii) applicable law, and (iii) the issues submitted to it*".[26]

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[21] Reply ¶ 52; the Applicant relies on *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee (14 June 2010) ("*Helnan v. Egypt*") (Exhibit CLA-010), ¶ 41; and *Soufraki v. UAE* (Exhibit RLA-005), ¶ 44

[22] Memorial ¶ 85

[23] Reply ¶ 46 (emphasis as quoted; footnotes omitted); the Applicant explains that the equal relevance of alternative and not cumulative criteria can be deduced from different legal authorities that emphasize one or the other criterion, such as *TECO,* which held that the excess is manifest "*if it is plain on its face, evident, obvious, or clear*" (*TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 April 2016) ("*TECO*" or "*TECO v. Guatemala*") (Exhibit RLA-020), ¶ 77) or *EDF*, which held that "'manifest' *refers to how readily apparent the excess is, rather than to its gravity*" (*EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision (5 February 2016) ("*EDF*") (Exhibit CLA-122), ¶ 192) on the one hand side, and the Commentary on the ICSID Convention by Schreuer *et al*. who summarize the view that the "word 'manifest' is a qualitative matter not concerned with the clarity of any excess but its extent", one the other hand side (C. Schreuer *et al*., *The ICSID Convention: A Commentary* (2009), Article 52 (Exhibit RLA-046), ¶ 139).

[24] Reply ¶ 47; Memorial ¶ 85; the Applicant relies – among others – on *Caratube v. Kazakhstan* (Exhibit RLA-009), ¶ 84

[25] Counter-Memorial ¶ 36

[26] Rejoinder ¶ 26

43. It insists, however, that the ground is "*extremely limited in scope*"[27] and that the notion of excess implies that the tribunal must have "*entirely stepped outside its authority*".[28] It relies on *Fraport v. Philippines*, where the committee found that there is "*necessarily a heavy burden upon the applicant to establish a manifest excess of powers*".[29]

44. With respect to jurisdiction, the Claimant submits that Article 52(1)(b) of the ICSID Convention does not distinguish between jurisdictional errors and errors on the merits, that the tribunal is the judge of its own competence (Article 41(1) ICSID Convention), and that the Committee does not have the authority to review the issue of jurisdiction anew.[30] As stated in *Soufraki*, "*findings on jurisdiction and findings on the merits*" must be scrutinized without distinction,[31] and the suggestion by the *ad hoc* committee in *Venezuela Holdings v. Venezuela*, that found "*some force*" in the argument to apply a more rigorous approach for jurisdictional errors than for others, had no consequences for its final determination and cannot be used to overcome the text of the Convention.[32]

45. With respect to the related issue of applicable law, the Claimant "*accepts that a failure to apply the proper law can amount to an excess of power*" if the applicable law is totally disregarded but rejects the Applicant's assertion that the construction of egregious errors in the interpretation of law or the appreciation of facts and evidence may have any practical meaning. Non-application must not be equated to erroneous application, as held in the *Occidental*, *Caratube* and *NextEra* cases, and the hypothetical exception that errors might be so gross that no reasonable person could accept it, is extremely unlikely to occur, has never occurred in practice and is certainly not present in the dispute at hand, where the Tribunal interpreted the applicable law correctly and, in any event, tenably.[33]

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[27] Counter-Memorial ¶ 37

[28] Rejoinder ¶ 26

[29] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment (23 December 2010) ("*Fraport v. Philippines*") (Exhibit RLA-018), ¶ 45

[30] Counter-Memorial ¶ 49; Rejoinder ¶¶ 30-31

[31] *Soufraki v. UAE* (Exhibit RLA-005), ¶ 118

[32] Rejoinder ¶¶ 30-31

[33] Counter-Memorial ¶¶ 55-60; Rejoinder ¶¶ 34-37; the Claimant relies on *Occidental v. Ecuador* (Exhibit RLA-031), ¶ 55; *Caratube v. Kazakhstan* (Exhibit RLA-009), ¶¶ 81, 143-158; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment (18 March 2022) ("*NextEra v. Spain*" or "*NextEra*") (Exhibit CLA-035), ¶ 84

46. With respect to the issues dealt with or not dealt with by the Tribunal, the Claimant asserts that this is either a topic to be examined under Article 52(1)(e) of the ICSID Convention or, if the Applicant wanted to complain that the Tribunal had omitted to decide a question, it should have introduced a request for supplementary decision in accordance with Article 49(2) of the ICSID Convention. Given the availability of Article 49 in the Convention, the Applicant is now precluded from requesting annulment.[34]

47. As to the second requirement – the manifest excess of powers – the Claimant asserts that the specification is meant to limit the annullability of errors to textually obvious ones, which can be readily discerned, and which are at the same time "*sufficiently serious or substantial*". It extends both to jurisdictional and merits questions. Where tribunals apply the law and interpret it, *ad hoc* committees must not scrutinize the correctness of the interpretation but are confined to examine whether it is tenable. Any further scrutiny would amount to an inadmissible appeal.[35]

(2) The Issue of Jurisdiction and Competence in Light of the EU Treaties

a) The Applicant's Position

48. The Applicant submits that the Tribunal manifestly exceeded its powers when it upheld its competence and the jurisdiction of the Centre based on the investor-State arbitration provision of Article 9 of the BIT, although it manifestly lacked such competence due to the inapplicability of Article 9 after Cyprus's accession to the EU in 2004 and the resulting conflict with the hierarchically superior EU Treaties. The Tribunal based its determination, the Applicant says, on a gross misrepresentation of the Applicant's argumentation as well as on a gross misinterpretation of the international law of treaty conflicts.[36]

49. The Applicant alleges that the Tribunal only addressed the consequences of the *Achmea* Judgment but not the inapplicability objection as pleaded,[37] and built its decision on the false premise that the Hellenic Republic had only invoked the inapplicability of Article 9 (and thereby of its offer to arbitrate) after the *Achmea* Judgment of the CJEU. Indeed,

[34] Counter-Memorial ¶ 39; Rejoinder ¶¶ 38-40

[35] Counter-Memorial ¶¶ 43-45; Rejoinder ¶¶ 27-29

[36] Memorial ¶¶ 108-141; Reply ¶¶ 53, 89-122

[37] Transcript hearing day 1, page 27

it states that although it pleaded that the CJEU had only *confirmed* the inapplicability of arbitration clauses in intra-EU BITs, the Tribunal interpreted that it was Greece's case that the *Achmea* Judgment had *created* the law and provoked the incompatibility of Article 9. The content of this authoritative decision had already become *ipso iure* relevant and binding for the BIT between the Hellenic Republic and the Republic of Cyprus on 1 May 2004, when Cyprus acceded to EU membership.[38] Since the offer to arbitrate contained in Article 9 was no longer valid after 2004, it could not be accepted by a later request for arbitration, and the consent to arbitrate was never perfected. Therefore, it could not be withdrawn, and the Hellenic Republic never argued as such, as insinuated by the Tribunal.[39]

50. This situation and arguments are fundamentally distinct from the situation and arguments of the parties in *UP and CD v. Hungary*, which centred around the effects of the *Achmea* Judgment and not on the issue of inapplicability of intra-EU arbitration provisions in BITs as such.[40]

51. Contrary to the Tribunal's mischaracterization, the inapplicability objection was not a unilateral declaration of the Hellenic Republic but the common position of the parties to the BIT, as expressed in a "Joint Information" note executed by the Hellenic Republic and Cyprus, dated 8 May 2019 and addressed to the attention of the Tribunal, that echoed a previous Declaration of the Governments of the Member States of the EU.[41]

52. As a consequence of its misguided assumptions, the Tribunal held that the offer to arbitrate as contained in the BIT, in force since 26 February 1993, continued to be applicable after Cyprus's accession to the EU and was validly accepted by Laiki's Request for Arbitration, dated 20 June 2014, and thus that the consent to arbitrate had been perfected.

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[38] Memorial ¶¶ 120-122

[39] Reply ¶ 101

[40] Reply ¶¶ 94-96; both Parties refer to *UP and CD Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Annulment (11 August 2021) ("*UP and CD v. Hungary*") (Exhibit CLA-011)

[41] Memorial, ¶ 124; the Applicant refers to "Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the *Achmea* Judgment on Investment Protection in the European Union", dated 15 January 2019 (Exhibit RA-003), and "Joint Information of the Hellenic Republic and the Republic of Cyprus regarding the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Encouragement and Protection of Investments of March 30, 1992", dated 8 May 2019 (Exhibit RA-004)

53. The Tribunal did not only egregiously misinterpret the *Achmea* Judgment but also grossly mischaracterized the Applicant's submissions during the initial proceeding when it found in paragraph 625 of its Decision that the "*contention by the Hellenic Republic that Art. 9 of the BIT is incompatible with Art. 267 and 344 TFEU, and that this incompatibility has retroactive effects as of 1 May 2004, was raised for the first time in 2018, upon the issuance of the* Achmea Judgment *by CJEU*". This is plainly wrong, since the Hellenic Republic had argued in detail in its Counter-Memorial of 2016, that "*Article 9 of the Hellenic Republic-Cyprus BIT is incompatible with EU law*" and "*that the Tribunal lacks competence and the Centre jurisdiction*".[42]

54. Based on its erroneous and misleading assumptions, the Tribunal drew the equally erroneous conclusion that the consent was perfected with the request for arbitration in 2014 and had become irrevocable, since Article 25(1) of the ICSID Convention provides unambiguously that "no party may withdraw its consent unilaterally" after the consent by both parties. The Tribunal failed to notice that as from Cyprus's accession to the EU in 2004 "*the offer was* already inapplicable *as a result of a treaty conflict*"[43] and could no longer be accepted.

55. Further, the Applicant asserts that the Tribunal failed to apply the proper law when addressing the conflict between Article 9 of the BIT and the EU Treaties.

56. In the original proceeding, the Hellenic Republic had argued that the conflict between the EU Treaties and Article 9 of the BIT had to be solved in accordance with the treaty conflict rule of Article 30 VCLT, which provides for situations of "*successive treaties relating to the same subject matter*" that "*the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*".

57. The Applicant submits that the Tribunal grossly misinterpreted and misapplied Article 30 in a number of ways, and "*that the Tribunal's analysis of Article 30(3) VCLT in the present proceedings was anything other than an effective disregard or non-application of the rules governing treaty conflicts*"[44] for the following reasons:

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[42] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶¶ 307 and 315; Reply ¶ 101

[43] Memorial ¶ 117 (emphasis in original); Reply ¶¶ 102-105

[44] Reply ¶ 107; Memorial ¶ 127

58. First, the Tribunal invented a notification requirement for the operation of Article 30(3) VCLT in applying Article 65 VCLT "*which is plainly not required in its text and is indeed entirely unsupported*" since Article 65 does not apply to inapplicability.[45]

59. Secondly, the Tribunal "*wrongly held*" that Article 30(3) operates only from the moment of a declaration of conflict, i.e., post *Achmea*, and not, as per "*the plain meaning of its terms*", from the moment a treaty conflict arises.[46]

60. Further, the Tribunal mischaracterized the quality of the EU Treaties and the conflict between these Treaties and the intra-EU BITs on several levels. The Tribunal (1) wrongly found that the Treaties and the BITs do not extend to the same specific subject matter for the purposes of Article 30(1) VCLT, basing its conclusion on irrelevant legal authorities,[47] (2) refused to assess the nature of the conflict by asserting that it did not have to apply EU nor Greek law but rather consider them as matters of fact while at the same time applying EU law extensively,[48] (3) refused to give effect to the EU Treaties as a source of international obligations but treated it instead as "*an internal conflict rule*",[49] and (4) wrongly asserted that (a) the principle of primacy of EU law merely imposed an obligation on EU member States to terminate or amend contradicting intra-EU treaties without affecting their inapplicability, and (b) – in that same vein – preceding rulings of the CJEU had "*in practice only increased benefits or rights of individuals*", while in reality numerous rulings had had retroactive adverse effects.[50]

61. Finally, the Applicant asserts that the Tribunal tried to establish its jurisdiction based on the generally mistaken premise of a perfected and then withdrawn consent, on concepts of vested rights and "*a party's subjective expectations, or the principles of acquired rights, legitimate expectations or estoppel*", although, as rightly explained by the *Oded Besserglik* tribunal, jurisdiction and competence are matters of law and cannot be based on parties' expectations.[51]

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[45] Memorial ¶¶ 128-131; Reply ¶¶ 108-111

[46] Memorial ¶ 132; Reply ¶¶ 112-113

[47] Memorial ¶¶ 133-134; Reply ¶¶ 114-116

[48] Memorial ¶¶ 135-137; Reply ¶¶ 117-119

[49] Memorial ¶ 138; Reply ¶ 120

[50] Memorial ¶¶ 139-140; Reply ¶ 121; the Applicant demonstrates the adverse retroactive effects by quoting *Republiken Polen v. PL Holdings Sàrl*, Case C-109/20, CJEU, Judgment (26 October 2021) (Exhibit RLA-030)

[51] Memorial ¶ 141; Reply ¶ 122

b) The Claimant's Position

62. The Claimant recalls that, in accordance with Article 41(1) of the ICSID Convention, the Tribunal is "the judge of its own competence". This power of tribunals is exclusive, and the *ad hoc* Committee does not have the authority to find on jurisdiction and competence anew. The Tribunal exercised its power properly to find on its competence.[52]

63. The Claimant further recalls that the Tribunal has come to its decision on the continued applicability of Article 9 of the BIT and thereby the continued validity of the Hellenic Republic's offer to arbitrate after Cyprus's accession to the EU and the valid acceptance of this offer by the Claimant after a "*careful and extensive consideration*".[53]

64. The Claimant asserts that the Tribunal, far from misrepresenting the Respondent's arguments on the inapplicability or the incompatibility of Article 9 in light of the EU Treaties and/or the *Achmea* Judgment of the CJEU, addressed these arguments before concluding that in 2014 the offer to arbitrate contained in Article 9 was still valid and could be and was accepted through the request for arbitration. It quotes a number of paragraphs of the Decision (paragraphs 508, 518, 542, 601)[54] where the Tribunal summarized the Respondent's position on the inapplicability of Article 9. It further asserts that the Respondent applied for and made submissions on the *Achmea* Judgment of the CJEU, where it argued that the judgment had established the inconsistency of Article 9 with EU law.[55]

65. Finally, the Claimant asserts that the Tribunal drew inferences from the fact that, contrary to the EC's advice to exchange notes on the inapplicability of the BIT after Cyprus's accession to the EU, the Hellenic Republic and Cyprus did not do so. The "Joint Information" note of both States came only after the Decision had been rendered.[56]

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[52] Counter-Memorial ¶ 137(3); Rejoinder ¶ 95; the Claimant refers to paragraph 571 of the Decision.

[53] Counter-Memorial ¶ 127

[54] The Committee notes that the Tribunal refers each time to the Respondent's "Observations on the *Achmea* Judgment" of 30 March 2018

[55] Rejoinder ¶¶ 94-99

[56] Counter-Memorial ¶¶ 49-50, 132(1); Rejoinder ¶ 30

66. In sum, the Claimant asserts that "*the Tribunal had the Inapplicability Objection very much in mind when it analysed whether consent was perfected under the BIT*" but finally rejected the objection after careful consideration.[57]

67. With respect to the Respondent's assertions concerning the Tribunal's alleged gross misapplication or non-application of the proper law, the Claimant asserts in an introductory remark that "*every other investment tribunal which has considered this point*" has interpreted the law of treaty conflicts and the inconsistencies between the BIT and EU Treaties like the Tribunal in the present dispute. This is a clear indication that the Tribunal's views are at least "*tenable*" and cannot be egregiously or grossly erroneous.[58]

68. The Claimant submits that the Tribunal (1) interpreted Article 65 VCLT convincingly, without error of law, and certainly not grossly erroneously,[59] (2) examined the applicability of Article 30(3) VCLT for both the '*pre*'- and '*post-Achmea*', thereby leaving no doubt that the validity of the offer to arbitrate contained in Article 9 was intact in 2014, in line with the findings of other tribunals,[60] (3) assessed in detail and in explicit reference to the partial award in *Eastern Sugar v. Czech Republic*, which had found identically, that the BIT and the EU Treaties do not relate to the same 'subject matter' for purposes of Article 30(3) VCLT,[61] (4) explained why it did not have to apply or to interpret EU law – contrary to the award underlying the *Achmea* Judgment – and, therefore, to pronounce itself on a conflict between the BIT and the ICSID Convention on the one hand, and the EU Treaties on the other,[62] (5) considered the alleged primacy of EU law in detail and found correctly that it operates as an internal conflict rule but not to limit the jurisdiction under the ICSID Convention and the BIT,[63] (6) did not misinterpret EU law when it found – in line with other arbitral tribunals –

[57] Counter-Memorial ¶ 136(1)

[58] Counter-Memorial ¶ 52; Rejoinder ¶ 102; the Claimant refers to *UP and CD v. Hungary* (Exhibit CLA-011), and *Infrastructure Services Luxembourg SARL and Energia Termosolar BV v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment (30 July 2021) ("*Infrastructure v. Spain*" or "*Infrastructure*") (Exhibit CLA-006)

[59] Counter-Memorial ¶¶ 141-143; Rejoinder ¶ 104

[60] Counter-Memorial ¶ 144; Rejoinder ¶ 105

[61] Counter-Memorial ¶¶ 145-146; Rejoinder ¶ 106; the Claimant refers to *Eastern Sugar BV (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (27 March 2007) ("*Eastern Sugar v. Czech Republic*" or "*Eastern Sugar*") (Exhibit RLA-190), ¶¶ 159-165

[62] Counter-Memorial ¶ 147; Rejoinder ¶ 107

[63] Counter-Memorial ¶ 148; Rejoinder ¶ 108

that it had to apply it as a fact, and that the BIT and the ICSID Convention were the basis of its competence and not EU law,[64] and (7) used correctly the Claimant's arguments of legitimate expectations and concepts of estoppel and acquired rights, when it held that, in the absence of public representations by either the European authorities or the Hellenic Republic to the contrary, Article 9 continued to apply, and that such concepts reinforced its determination based on the ICSID Convention and the BIT.[65]

(3) The Issue of Jurisdiction and Competence over [redacted]

a) The Applicant's Position

69. In paragraphs 150-154 of its Memorial and 134-145 of its Reply, the Applicant asserts that the Tribunal has failed to rule on the Hellenic Republic's jurisdictional objection that [redacted], and that by its failure "*the Tribunal manifestly exceeded its powers, failed to state reasons and seriously departed from fundamental rules of procedure*".[67] It argues that "*the Tribunal took brief note of the State Aid Objection in the summary of the Parties' arguments, but did not address it in substance*".[68]

[redacted]

71. It specifies that the State aid objection raised various questions of EU law, which went beyond the discussion of the conflict between Article 9 BIT and Articles 267 and 344 TFEU, and which were not answered, neither explicitly nor implicitly, as suggested by the Claimant. Applicant explains that these questions are not to be dealt with by

[64] Counter-Memorial ¶ 149; Rejoinder ¶ 109

[65] Counter-Memorial ¶ 150; Rejoinder ¶ 110

[redacted]

[67] Memorial ¶ 154

[68] Reply ¶ 136 (footnote omitted); Memorial ¶ 153

[redacted]

"*extrapolation*" or by the simple transfer of arguments from one objection to another, since each provision requires a specific treatment.[70]

b) The Claimant's Position

72. The Claimant refutes the Respondent's submissions on the three asserted grounds for annulment in paragraphs 156-165 of its Counter-Memorial and paragraphs 119-125 of its Rejoinder.

73. As regards the alleged manifest excess of powers, it argues that this can only happen "*when the Tribunal completely fails to address one of the parties' questions (as distinct from where it does not expressly deal with each and every argument which it is in any event not obliged to do)*".[71]

[redacted]

[70] Reply ¶¶ 137-138, 140; Memorial ¶ 153

[71] Rejoinder ¶ 125(1)

[redacted]

[redacted]

[redacted]

[redacted]

f

[redacted]

[redacted]

[redacted]

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

86. Article 52(3) and (1)(d) of the ICSID Convention provides that *ad hoc* committees "have the authority to annul the award or any part thereof" if "there has been a serious departure from a fundamental rule of procedure".

[redacted]

(1) The Legal Standard

87. The Parties agree that this ground for annulment protects the integrity and fairness of the arbitral process, and that from this perspective *ad hoc* committees have to determine essentially whether tribunals respected the following principles and rules: "*(i) equal treatment of the parties; (ii) the parties' right to present their case and to be heard; (iii) proper treatment of evidence and of the burden of proof; and (iv) impartiality of the tribunal*", and that this determination is "*highly fact-specific*" and "*involves an examination of the conduct of the proceeding before the Tribunal*", and, finally, that the departure from a fundamental rule of procedure "*must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide*".[86]

88. Given the consensus on the fundamental principles in the abstract, the difference of positions between the Parties is focused on the nuances, the scope and the appreciation of the Tribunal's factual determinations.

a) The Applicant's Position

89. With respect to the right to be treated equally, to be heard and to present the case, the evidence, the defences and the arguments in rebuttal, the Applicant asserts that a tribunal may violate a fundamental rule of procedure (1) when it relies on documents that were not introduced timely into the record and the parties are deprived of an opportunity to comment, (2) when it resorts to legal concepts at its own initiative and unforeseeably for the parties, or (3) when it fails to consider a question or a point raised by a party if it is of critical relevance to the decision. The Applicant concedes that not each argument made during the proceeding must be mentioned but the failure to decide outcome-decisive arguments breaches a fundamental rule of procedure.[87]

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[86] Reply ¶¶ 56-57; Memorial ¶¶ 89-90; Counter-Memorial ¶¶ 64-66; Rejoinder ¶¶ 42, 44, 51; both Parties rely on *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment (28 May 2021) ("*Perenco v. Ecuador*") (Exhibit RLA-017), ¶¶ 120, 122, 133; *Maritime International Nominees Establishment v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award (22 December 1989) ("*Maritime v. Guinea*") (Exhibit RLA-002) ¶ 5.05, and on other convergent decisions.

[87] Reply ¶ 59-66; Memorial ¶ 93; the Applicant relies – among others – on *Victor Pey Casado and President Allende Foundation v. Republic of Chile* , ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (18 December 2012) ("*Pey Casado v. Chile*") (Exhibit RLA-016), ¶ 184, and *Perenco v. Ecuador* (Exhibit RLA-017), ¶¶ 125, 127

90. With respect to the treatment of evidence and the burden of proof, the Applicant insists that a tribunal's discretion in weighing the evidence is not without limits but must be exercised "*reasonably and reasoned*", and that in any event relevant evidence must be addressed .[88]

91. Further, a tribunal violates a fundamental rule of procedure when it does not respect the generally accepted principle "*who asserts must prove*" and when it grants a claim for which the claiming party has not discharged its burden to prove the facts. A tribunal does not have the power to alleviate such burden nor to reverse it.[89]

92. With respect to the requirement of seriousness of the departure, the Applicant asserts that while agreeing with the principle that it "*must be substantial and* '*be such as to deprive a party of the benefit or protection which the rule was intended to provide*'", the Claimant adds a further hurdle by insisting that the departure must have had a material impact on the outcome of the case.[90] The Applicant submits that the latter position is far from generally accepted. Rather, it considers the approach of the *ad hoc* committee in *Tulip v. Turkey* more appropriate, which found that it is sufficient to demonstrate "*that the observance of the rule had the potential of causing the tribunal to render an award substantially different from what it actually decided*".[91] It alleges further that, once the seriousness of the departure from a fundamental rule of procedure is established, the committee has no discretion not to annul the award, since a serious departure has by definition an impact on the party and is therefore an infringement of the integrity and fairness of the proceeding.[92]

93. Finally, the Applicant refutes the Claimant's assertion that it has forfeited its right to seek annulment under Article 52(1)(d) because it failed to raise the objection when the alleged violations occurred, once the Decision on Jurisdiction and Liability was issued. The Applicant argues that, first, the Claimant's allegations are unsubstantiated, second, that it was not aware of the defects at that time, and that, in any case, it could not seek

[88] Reply ¶ 68; the Applicant quotes from *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment (24 January 2014) ("*Impregilo v. Argentina*") (Exhibit CLA-007); ¶ 176

[89] Reply ¶¶ 69-70

[90] Reply ¶¶ 69-71; the Applicant quotes from *Maritime v. Guinea* (Exhibit RLA-002), ¶ 5.05

[91] Reply ¶ 73; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (30 December 2015) ("*Tulip v. Turkey*") (Exhibit RLA-019), ¶ 78

[92] Reply ¶ 74

annulment based on those objections because its objections had been dismissed, and the Tribunal could not have revisited its findings regarding liability during the quantum phase, as the former were rendered with *res iudicata* effect.[93] It adds that the fact that it did not raise pointless objections during the quantum phase does not amount to a waiver to exercise its right to seek annulment.[94]

b) The Claimant's Position

94. The Claimant submits that the right to be heard has been correctly specified as being "*subject to 'reasonable and proportional' limitations provided that the fairness and integrity of the proceeding were maintained*".[95] The opportunity to be heard must be reasonable, fair and comparatively equal for both parties.[96]

95. The Claimant asserts that there is no departure from a rule of procedure when a tribunal bases its decision on documents that are publicly available and when they concern issues that have been extensively briefed by the parties, or when it develops its own arguments, as long as the "*reasoning can be fitted within the legal framework argued during the procedure*", as found by the *ad hoc* committee in *Perenco v. Ecuador*,[97] and does not introduce a new and undiscussed legal concept or head of claim.[98] Further, tribunals are not obliged to refer to each and every point or argument explicitly and give it an express consideration. In any event, if the Respondent had felt that a question had not been dealt with, it should have raised the point immediately after receiving the Decision on Jurisdiction and Liability, and not only during an annulment proceeding, and it should have made an application for rectification under Article 49(2) of the ICSID Convention.[99]

96. As to the treatment of evidence and the burden of proof, the Claimant submits that the tribunal is the judge of the evaluation of evidence and its "*probative value*", as stated in ICSID Arbitration rule 34(1), and that, in the absence of provisions on the standard and the burden of proof in the ICSID Convention, tribunals do not have to articulate

[93] Reply ¶¶ 77-80
[94] Reply ¶ 79
[95] Rejoinder ¶ 45, quoting *NextEra v. Spain* (Exhibit CLA-035), ¶ 102
[96] Counter-Memorial ¶¶ 71-73; Rejoinder ¶¶ 49-50
[97] *Perenco v. Ecuador* (Exhibit RLA-017), ¶ 127
[98] Counter-Memorial ¶¶ 74-83; Rejoinder ¶¶ 45-50
[99] Counter-Memorial ¶¶ 84-86; Rejoinder ¶¶ 46-47

any specific principle, as stated correctly by the *ad hoc* committee in *Continental Casualty v. Argentina.*[100] It is not for *ad hoc* committees to evaluate and reconsider the tribunals' analysis and appreciation of the evidence to which it has no direct access. The Claimant accepts that under certain conditions a tribunal might depart from a rule of procedure when it fails completely to address highly relevant evidence or in cases of a plain reversal of the burden of proof, but that the threshold for such failure is high and must be substantiated, which cannot be done by unparticularized assertions.[101]

97. With respect to the seriousness of the tribunal's procedural errors, the Claimant asserts that, in addition to being substantial, the departure from a fundamental rule of procedure must have "*had a material impact on the outcome of the Award*" and caused prejudice.[102] Even if this position has been attenuated by other *ad hoc* committees, the bottom line is that it must be established that a tribunal's departure from a rule of procedure must have had the potential to influence the outcome of the award, i.e., that "*if the rule had been observed the tribunal could have reached a different conclusion*".[103]

98. Finally, the Claimant submits that the Respondent has forfeited its right to seek annulment under Article 52(1)(d) of the ICSID Convention because it waived its rights to object in accordance with ICSID Arbitration Rule 27.

99. It asserts that a party that becomes aware of the tribunal's conduct and determinations through a decision in bifurcated proceedings, has the duty under Rule 27 to raise objections that it may have against such conduct and determinations "*promptly*", i.e., a the latest when receiving the decision. It cannot wait for the final award to be rendered to make allegations that concern exclusively the first phase of the proceedings that ended with a decision which contains the incriminated procedural errors.[104] Objections

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[100] Counter-Memorial ¶ 94; Rejoinder ¶¶ 56-57; the Claimant refers to *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the application for partial annulment of Continental Casualty Company (16 September 2011) ("*Continental Casualty v. Argentina*") (Exhibit RLA-024), ¶ 135

[101] Counter-Memorial ¶¶ 87-94; Rejoinder ¶¶ 51-58

[102] Counter-Memorial ¶ 67; Rejoinder ¶ 60; *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 (5 February 2002) ("*Wena Hotels*" or "*Wena Hotels v. Egypt*") (Exhibit CLA-016) ¶ 58: the Claimant relies on *Wena Hotels*, where the committee found that "*the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed*".

[103] *Pey Casado v. Chile* (Exhibit RLA-016) ¶ 80

[104] Counter-Memorial ¶ 63; Rejoinder ¶¶ 65-74

against alleged errors that concern only the initial phase and are part of the Decision "*should have been raised with the Tribunal upon publication of the Decision*". A party that does not raise the objections in a timely manner is deemed to have waived them and cannot assert them in annulment proceedings.[105]

(2) The Issue of Jurisdiction and Competence in Light of the EU Treaties

a) The Applicant's Position

100. With respect to the Tribunal's allegedly erroneous assumptions on jurisdiction and competence, the Applicant bases its argumentation regarding a violation of a fundamental rule of procedure on the one used for a manifest excess of power, as presented here in Section IV.A(2)(a).[106] In its Reply, the Applicant asserts that "*the Tribunal seriously departed from fundamental rules of procedure, namely the right to be heard, because it grossly misrepresented the Hellenic Republic's position as an attempt to withdraw perfected consent retroactively based on the Achmea Judgment, effectively ignoring the Inapplicability Objection that the Hellenic Republic had pled*", thus failing to consider an issue that was crucial for the decision and to analyse the inapplicability of Article 9 BIT.[107]

101. The Applicant submits further that its right to be heard and to present its case was violated when the Tribunal referenced and relied on more than two dozen documents that neither party had submitted into the record, which is not contested.[108]

102. Nineteen documents concern EU law, such as CJEU judgments, a regulation issued by the EC and EC communications.[109] These documents must be considered as factual exhibits and not legal authorities since the Tribunal decided to treat EU law as a matter of fact.

103. A tribunal seriously departs from a fundamental rule of procedure when it relies on factual evidence which the parties have not seen and not been given an opportunity to comment on. This is all the more so since the Tribunal used the documents to develop

[105] Rejoinder ¶ 75

[106] Reply, Section III.B.1

[107] Reply ¶¶ 98-99

[108] Memorial ¶¶ 142-148; Reply ¶¶ 123-133

[109] Cf. Annex A to Memorial "New Documents Introduced by the Tribunal in the Award"

a case that the Claimant itself had not made. If the Hellenic Republic had been given such an opportunity, it would have been able to demonstrate that the documents did not even always support the Tribunal's reasoning. Some of these documents are dated after the last submissions of the Parties, which aggravates the violation.[110]

104. Eight of the documents are, indeed, legal authorities, two of which were admitted by the Tribunal in clear violation of its own Procedural Order No. 1.[111]

b) The Claimant's Position

105. With respect to the Tribunal's allegedly erroneous assumptions on jurisdiction and competence, the Claimant submits that the Respondent has failed to explain how an alleged mischaracterization of its submissions "*somehow amounts to a failure by the Tribunal to consider a critical point*"[112] and "*what rule the Respondent claims has been seriously departed from*".[113] In any event, the Respondent's objections have been carefully considered by the Tribunal and not been mischaracterized nor misrepresented.[114]

106. With respect to the alleged violation of the right to be heard and comment on documents used by the Tribunal, the Claimant asserts that all of the documents concerned issues that had been pleaded extensively by both Parties and did not introduce any new or surprising aspects that might have induced any Party to make different additional submissions, that all of the documents were in the public domain, with one even quoted by the Respondent in its Observations on the *Achmea* Judgment and two incorporated into the record. Nothing prevented either Party to rely on them.[115]

107. The Claimant relies on *Daimler v. Argentina*, where the *ad hoc* committee held that

> *...an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, sua sponte, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the*

[110] Reply ¶¶ 127-129, 132; Memorial ¶¶ 145-146
[111] Reply ¶¶ 130-132
[112] Rejoinder ¶ 98
[113] Counter-Memorial ¶ 133
[114] Counter-Memorial ¶ 134; Rejoinder ¶ 99
[115] Counter-Memorial ¶¶ 74-79, 151-155; Rejoinder ¶¶ 111-117

tribunal and the parties were provided an opportunity to address it.[116]

and that such reliance "*does not constitute a serious departure from a fundamental rule of procedure*".[117]

108. Finally, the Claimant alleges that the Respondent was aware of the Tribunal's use of the documents at the latest upon receipt of the Decision. In case it found the Tribunal's conduct procedurally improper, it could and should have objected "*promptly*", as required by Arbitration Rule 27. By failing to do so, the Respondent has forfeited its right to seek annulment.[118]

(3) The Issue of Jurisdiction and Competence [redacted]

a) The Applicant's Position

109. The Applicant bases its assertion that the Tribunal seriously departed from a fundamental rule of procedure on identical facts that it used for the assertion of a manifest excess of powers, as presented in Section IV.A(3)(a) above.

110. It submits that the Tribunal "*seriously departed from fundamental rules of procedure, namely the right to be heard, by refusing to decide the State Aid Objection, which could have been crucial or decisive to its decision*".[119]

111. Indeed, it submits that the jurisdictional objection with respect to [redacted] including the claim which was finally granted, was critical to the Tribunal's decision-making process, and it could have meant their disposal. The failure to consider it although raised by the Hellenic Republic amounts to a serious departure from a fundamental rule of procedure.[120]

[116] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment (7 January 2015) ("*Daimler v. Argentina*" or "*Daimler*") (Exhibit CLA-021) ¶ 295

[117] *Daimler v. Argentina* (Exhibit CLA-021) ¶ 296

[118] Rejoinder ¶¶ 65, 70, 117

[119] Reply ¶ 136

[120] Reply ¶ 142

b) The Claimant's Position

112. The Claimant refutes the Respondent's factual presentation and insists – reiterating the arguments presented in Section IV.A(3)(b) – that "*the Tribunal did in fact address the 'State Aid Objection', albeit* [redacted] It did so in the context of the issue of incompatibility and ICSID's jurisdiction, after having referred to the specific aspect of State aid in the introduction.[122] In addition, "*the Tribunal is not required expressly to deal with every argument or issue raised by a party*".[123]

113. Finally, the Claimant asserts that the Respondent should have raised the objection at the latest when the Decision was rendered or should have filed an application for rectification under Article 49(2) of the ICSID Convention. It is precluded from raising it in the annulment proceeding.[124]

(4) [redacted]

a) The Applicant's Position

114. The Applicant submits that the Tribunal seriously departed from fundamental rules of procedure (1) when it developed the Claimant's compensation claim for [redacted] *ex proprio motu*, although the Claimant itself had neither asserted such claim nor adduced any evidence for it,[125] (2) when it found that [redacted] in alleviation of the Claimant's burden of proof[126] and (3) when it failed to consider critical evidence concerning [redacted]

115. [redacted]

[redacted]

[122] Counter-Memorial ¶¶ 161-163

[123] Counter-Memorial ¶ 157(2)

[124] Rejoinder ¶ 125(3)

[125] Memorial ¶¶ 165-171; Reply ¶¶ 153-158

[126] Memorial ¶¶ 148, 159-162, 166-167; Reply ¶¶ 155-161, 172-178

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b) The Claimant's Position

119. The Claimant refutes both allegations on the departure from a fundamental rule of procedure as being "*wrong in law and in fact*".[132]

[redacted]

[redacted]

[redacted]

[redacted]

[131] Reply ¶ 175; Memorial ¶190; the Applicant relies on *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment (13 April 2020) (Exhibit RLA-051), ¶¶ 318-319

[132] Counter-Memorial ¶¶ 171-181, 188-196; Rejoinder ¶¶ 133-138, 140-147, 154-157

[redacted]

(5) The Tribunal's Adjudication of Damages

a) The Applicant's Position

125. The Applicant asserts that the Tribunal seriously departed from fundamental rules of procedure when it ignored evidence and alleviated the Claimant's burden of proof [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

133. In sum, the Respondent asserts that the Tribunal departed seriously from fundamental rules of procedure on four critical occasions when determining the quantum of damage.

b) The Claimant's Position

134. The Claimant alleges that the Respondent ignores on all four issues that the evaluation, weighing and assessment of the probative value of evidence is under the exclusive authority of the Tribunal and that the Committee has no power to re-evaluate its decision. Such an approach would inevitably amount to an inadmissible appeal. This is particularly so for the determination of quantum, where tribunals have a "*considerable measure of discretion*".[151] Only "*a complete failure to address evidence which is highly relevant to the Tribunal's decision*" could possibly amount to a serious departure from a fundamental rule of procedure,[152] which is not the case here, where the Tribunal has treated the evidence with care and has exercised its discretion diligently.[153]

[redacted]

[redacted]

[redacted]

[redacted]

[151] Counter-Memorial ¶ 217

[152] Rejoinder ¶ 176

[153] Counter-Memorial ¶¶ 214-218; Rejoinder ¶¶ 170-171

[redacted]

[redacted][redacted] [redacted][redacted]

[redacted] [redacted][redacted] [redacted][redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

C. FAILURES TO STATE REASONS (ARTICLE 52(1)(E) CONVENTION)

145. Article 52(3) and (1)(e) of the ICSID Convention provides that *ad hoc* committees "*have the authority to annul the award or any part thereof*" if "*the award has failed to state the reasons on which it is based*".

[redacted]

[161] Award ¶ 214

[162] Rejoinder ¶ 197

(1) The Legal Standard

146. "*In broad terms*", the Parties agree that a total failure to state reasons may provide a ground for annulment under Article 52(1)(e), as well as reasons so contradictory as to cancel each other out, reasons that are so insufficient as not to allow a reader how the tribunal reached its decision, while implicit reason may be acceptable under certain circumstances.[163] The controversy is again one of nuances and scope of the different elements.

a) The Applicant's Position

147. The Applicant submits that

> *Claimant does not appear to contest that each of a total absence of reasons for an award, including the giving of merely frivolous reasons; a total failure to state reasons for a particular point, which is material for the solution; contradictory reasons; and reasons that are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal, can constitute a failure to state reasons within the meaning of Article 52(1)(e) of the Convention. However, once again, Claimant advances an interpretation of the standard for failure to state reasons that would essentially deprive the ground of any meaning or purpose.*[164]

148. In particular, it asserts that even if *ad hoc* committees do not have the authority to scrutinize the adequacy of tribunals' reasons, they are "*nevertheless tasked with ensuring that the tribunal provided sufficient reasons in its award for a reader to understand how it reached the conclusions therein*".[165] While reasons may be implicit, they must be understandable and deducible without speculation.[166]

149. Further, a tribunal's "*disregard of crucial evidence in the record or incorrect conclusion that no evidence in the record exists on a particular issue may amount to a failure to state sufficient or adequate reasons*".[167]

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[163] Reply ¶¶ 81-82, 86; Rejoinder ¶¶ 76, 78, 81

[164] Reply ¶ 82 (footnote omitted)

[165] Reply ¶ 83, Memorial ¶ 95; the Applicant relies – among others – on *Maritime v. Guinea* (Exhibit RLA-002), ¶ 5.08; *Wena Hotels v. Egypt* (Exhibit CLA-016), ¶ 79.

[166] Reply ¶ 86; the Applicant relies – among others – on *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Poštová Banka's Application for Partial Annulment of the Award (29 September 2016) ("*Poštová v. Hellenic Republic*") (Exhibit CLA-125), ¶ 142

[167] Reply ¶ 85; the Applicant relies – among others – on *TECO v. Guatemala* (Exhibit RLA-020), ¶¶ 131, 133

150. Finally, the Applicant asserts that tribunals are not exempt from stating the reasons for their decisions on the fact and/or the amount of damages, even if they have a margin of appreciation in their determination. That is why *ad hoc* committees in cases such as *Rumeli v. Kazakhstan* verified whether the tribunal took adequate care to examine the damages and explain its decision in sufficient detail.[168]

b) The Claimant's Position

151. The Claimant refers to Article 53(1) of the ICSID Convention according to which *ad hoc* committees should not argue like a court of appeal would or criticize awards for applying inappropriate standard of review, for errors of fact and law, for deficiencies or superficiality. As long as the reasoning can be followed and presents a rationale, even if it is implicit, as a logical consequence of what is expressly stated, it is not possible to find a lack of reasons and the award must not be annulled for those grounds. Indeed, *ad hoc* committees do not have the authority to re-examine the award.[169] This is all the more valid for the determination of quantum with its "*inherent difficulties involved in the calculation of damages*",[170] where tribunals have, therefore, "*a considerable measure of discretion*".[171]

152. Further, the Claimant asserts that a possible failure to state reasons "*must relate to an issue that was outcome-determinative*".[172] In this context, not every piece of evidence on the record must be addressed, if it is not deemed by the tribunal to be highly relevant for the case. This is part of the tribunal's discretion to evaluate the evidence.[173]

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[168] Reply ¶ 88; the Applicant quotes from *Rumeli Telekom A.S. and Telsim Mobil v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* committee (25 March 2010) ("*Rumeli v. Kazakhstan*") (Exhibit CLA-023), ¶ 178.

[169] Counter-Memorial ¶¶ 98, 100, 112; Rejoinder ¶¶ 77-79

[170] Rejoinder ¶ 82

[171] Counter-Memorial ¶ 113; the Claimant also quotes *Rumeli v. Kazakhstan* (Exhibit CLA-023), ¶ 146

[172] Counter-Memorial ¶ 101; the Claimant relies – among others – on *Poštová v. Hellenic Republic* (Exhibit CLA-125), ¶ 124, 143

[173] Counter-Memorial ¶¶ 116-118; Rejoinder ¶ 80; the Claimant relies also on *TECO v. Guatemala* (Exhibit RLA-020), ¶ 125

(2) The Issue of Jurisdiction and Competence over [redacted]

a) The Applicant's Position

153. The Applicant bases its assertion that the Tribunal failed to state reasons on identical facts that it used for the assertions of a manifest excess of powers and of a serious departure from a fundamental rule of procedure, as presented in Section IV.A(3)(a) and Section IV.B(3)(a) above.

154. It submits that the Tribunal "*failed to state reasons by providing no reasoning whatsoever for any conclusions with respect to the State Aid Objection*".[174]

155. It asserts that the Tribunal did not touch upon the Hellenic Republic's jurisdictional objection with regard to State aid, neither explicitly nor implicitly. The Tribunal addressed only the (in-)compatibility of investor-State arbitration with Articles 267 and 344 TFEU, which does not encompass the (in-)compatibility of Articles 108, 263, 271(d) TFEU and 35 ESCB Statute.[175]

b) The Claimant's Position

156. The Claimant reiterates its position on the State aid objection as presented in Section IV.A(3)(b) and Section IV.B(3)(b) above.

157. It specifies that the Tribunal has, indeed, identified the argument "*in the form that it was made by the Respondent*", and dismissed it for the same reasons as the wider "Incompatibility Objection".[176] The Tribunal had no obligation to explain in detail every argument. It did address the specific issue of State aid as part of the more general issue of applicability of EU law and came to conclusions which encompass both. This is apparent to any reader and can be followed without difficulty. "*In any event, if and to the extent that those reasons have not been expressly stated, they are implicit*".[177]

[174] Reply ¶ 136
[175] Reply ¶¶ 143-144
[176] Rejoinder ¶ 125(2); Counter-Memorial ¶ 157(3)
[177] Counter-Memorial ¶ 157(4)

[redacted]

[redacted]

a) The Applicant's Position

159. The Applicant submits that the Tribunal failed to state the reasons on which its decision was based with regard to [redacted] when it did not address [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b) The Claimant's Position

164. The Claimant refutes the Respondent's three allegations concerning the Tribunal's failure to state reasons as an untruthful representation of the Award. It says that the Tribunal has in fact presented its reasons on all points.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

The Tribunal's Adjudication of Damages

a) The Applicant's Position

168. The Applicant presents its arguments for the alleged lack of reasons together and overlapping with the ones for the alleged serious departure from fundamental rules of procedure, as presented under Section IV.B(5)(a). It asserts that the Tribunal failed to state the reasons on which the Award is based when it ignored evidence and arrived at speculative findings, by failing to state any reasons or by stating contradictory and irreconcilable ones [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b) The Claimant's Position

174. The Claimant submits that throughout the Award the Tribunal has stated the reasons on which its decisions are based, that the reasons are consistent, and that there are no

[redacted]

"*irreconcilable findings in the Award, and in particular no findings which cancel each other out*".[206]

[redacted]

[206] Rejoinder ¶ 170(4); Counter-Memorial ¶ 218(4)

[redacted]

[redacted]

179. In sum, the Claimant submits that since the Tribunal stated the reasons on which it based its decisions consistently and free of contradiction, the Respondent's application must be rejected.

V. THE COMMITTEE'S ANALYSIS AND DETERMINATION

180. The Committee recalls that the ICSID Convention is "*for the most part self-explanatory*".[213] It provides in unambiguous terms that awards are not "subject to any appeal", and that the remedies enumerated in Articles 50-52 of the ICSID Convention are "*exceptional*" in the sense that no other remedies are available (Article 53(1) ICSID Convention). It does not specify that the intrinsic character of each one of the remedies is exceptional and that, therefore, they have to be applied restrictively.

181. Article 52(3) of the ICSID Convention provides in equally unambiguous terms that *ad hoc* committees "*shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)*". Article 52(1) enumerates these grounds. They are exclusive. Annulment requires that "*one or more of the five grounds under Article 52(1) of the ICSID Convention is established*".[214] The requirements for each ground are specific.

182. An *ad hoc* committee would exceed its authority if it applied additional grounds, including by transgressing the scope of one or several of the grounds as provided for in Article 52(1).

183. The ICSID Convention must be interpreted in accordance with the rules established in Articles 31 to 33 VCLT. The interpretation is not without limits and must be exercised "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*" (Article 31(1) VCLT).

[redacted]

[213] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 14

[214] Memorial ¶ 81

[redacted]

184. Where, as here, there are no circumstances begging the application of Articles 31(3), 31(4) or 32 VCLT, the interpretation of Article 52(1) must not be burdened by an *a priori* presumption either in favour of annulment or of the finality of the award nor by a methodology of restrictive or extensive application. As a further methodological implication, *ad hoc* committees are not allowed to make "*merely a cursory review of challenged awards*" as apprehended by the Applicant.[215]

185. On this level of abstraction, the Parties are not in disagreement and accept the principles, not without emphasizing different nuances of criteria, which develop their relevance in the appraisal of concrete circumstances.[216]

186. It is true that (1) the Applicant recalls with particular insistence that the application for the annulment of an award is the legitimate right of a party and critical for the legitimacy of ICSID arbitration, that there is no presumption in favour of the validity of an award, that *ad hoc* committees need to review the complexity of the tribunals' reflection and must not content themselves with cursory views,[217] and (2) the Claimant recalls with particular insistence that the annulment mechanism is an exceptional and narrowly circumscribed remedy demanding an extremely high standard, that the interpretation of Article 52 must neither be restrictive nor broad, that "*a review of factual findings or re-evaluation of the evidence is generally outside the scope of the role of an ad hoc committee*",[218] that annulment is not concerned with the correctness of the award, that *ad hoc* committees have discretion to annul or uphold an award even if a ground for annulment is identified, and that the process must not be used to delay the payment of an award.[219] At the same time, the Parties, despite the difference of nuances, have a common and correct understanding of the annulment mechanism, as specified in the preceding paragraphs.

187. The Committee does not find it necessary to opine on the difference of nuances in the abstract but will take them in consideration when addressing the concrete issues. However, the Committee confirms that it has found both Parties' conduct and

[215] Memorial ¶ 80
[216] Memorial ¶¶ 78-81; Reply ¶¶ 37-42; Counter-Memorial ¶¶ 32-35
[217] Memorial ¶¶ 78, 80-81; Reply ¶¶ 37-39
[218] Counter-Memorial ¶ 33(3)
[219] Counter-Memorial ¶ 33

argumentation helpful, appropriate and a legitimate exercise of their procedural rights. They do not allow the Committee to infer that the Applicant is using the proceeding to delay payment of the Award.

188. Both Parties have studied the Award, which incorporates the Decision on Jurisdiction and Liability, in great and adequate detail, quite naturally from a different perspective and with a different objective. The Applicant has sensed "*the Tribunal's unsettling tendency to advance (and improve) the Claimant's case, while grossly misrepresenting or disregarding crucial arguments, factual evidence and legal authorities presented by the Hellenic Republic*".[220] The Claimant refutes this reproach as being "*wholly unsupported in terms of evidence but are far-fetched and, to be frank, should not have been made*", because it is "*entirely misplaced and misleading*".[221]

189. The Committee has equally studied the Award and the documentation of the original proceeding with great detail. It has found no evidence to confirm the Hellenic Republic's apprehension.

A. MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B) CONVENTION)

(1) The Legal Standard

190. An arbitral tribunal's power is based on and confined by the agreement between disputing parties. The agreement extends to the institutional setting and to the procedural rules attached to such setting, as well as to the law under which the dispute shall be decided. Further, the parties determine which issues are brought before the tribunal, which in turn has the duty to address them.

191. The agreement must be valid under the law applicable to it.

192. Consequently – and that is common ground between the Parties – a tribunal exceeds its power, (1) if it does not respect the parties' valid agreement, fails to determine the jurisdictional prerequisites, or assumes the jurisdiction of an arbitral institution and its own competence, in the absence of an agreement, (2) if it does not apply the law as agreed by the parties or, absent such agreement, that is applicable in accordance with

[220] Memorial ¶¶ 103-106

[221] Counter-Memorial ¶ 120

the pertinent rules, or (3) if it fails to address and decide the issues in dispute brought before it.

193. *Ad hoc* committees have the authority to examine whether the tribunal has established all the requirements for its jurisdiction. If, as in the present case, the proceedings are conducted under the auspices of the ICSID Convention, the tribunal is "*the judge of its own competence*" (Article 41 ICSID Convention). It has the exclusive power to determine its competence and the jurisdiction of the Centre. *Ad hoc* committees do not have the authority to determine the competence anew. Rather, they must determine whether the tribunal came to its decision by interpreting the agreement, including its validity, and the requirements as provided for in the ICSID Convention. Thus, the excess of power committed through the usurpation of competence is the result of the non-application of the law applicable to jurisdiction.

194. Thus, an excess of powers through the usurpation of competence and an excess of powers through the disregard of the applicable law with respect to the merits both result from the non-respect of the parties' fundamental agreements, and they both generally emerge from the non-application of the relevant law.

195. The Parties hold different views on the ad hoc committee's *obiter dictum* in *Venezuela Holdings v. Venezuela*, according to which there "*is some force in the argument advanced by Venezuela that matters of jurisdiction may call for a more rigorous approach than other grounds for annulment*", which, however, the committee did "*not have to decide*".[222]

196. The Committee does not find a reason to make such a distinction, since it is not present in the text of Article 52(1)(b) of the ICSID Convention. Also, the parties have not advanced arguments aimed at establishing such a distinction. The Applicant essentially submits that the applicable law was EU Law and it was wholly disregarded by the Tribunal on the matter of jurisdiction.

[222] *Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (9 March 2017) (Exhibit RLA-011), ¶¶ 110-111

197. In line with the *jurisprudence constante* and as agreed by the Parties, an erroneous application and a misinterpretation of the applicable law must be distinguished from its non-application and does not lead to an excess of power.

198. As explained in Section IV.A(1), the Applicant points to a 'long line of *ad hoc* committees' that have argued that a gross or egregious error in the interpretation of the law or the appreciation of facts is tantamount to a failure of application and appreciation, while the Claimant underlines the practical irrelevance of this opinion.

199. Two uncontroversial considerations provide guidance in this matter. First, as unambiguously established in Article 53 of the ICSID Convention, the arbitral award is not subject to an appeal. Second, the objective and purpose of the annulment mechanism is the protection of the integrity of the system. Taken together, it is evident that *ad hoc* committees do not have the authority to substitute their interpretation of the law and/or their appreciation of the facts to the interpretation or appreciation of the tribunals. Competing interpretations and judgment of *ad hoc* committees over the quality of work of tribunals do not contribute to the integrity of the system and necessarily blur the line between an appeal and an annulment. That is all the more so since the Committee presumes that it is rare that arbitrators, who are appointed on the basis of their "*high moral character and recognized competence in the fields of law*", as requested in Article 14 of the ICSID Convention. would produce a misinterpretation or misapplication of the proper law which no reasonable person could accept in a tribunal of three.[223] It does not exclude the possibility of such conduct completely but believes that the probability is extremely low that a tribunal with recognized competence in the fields of law misinterprets it in a way unacceptable to any reasonable person. Committees must resist the temptation to assume that their own interpretation of the law and appreciation of the facts are superior to the ones of the tribunal and to replace them.

200. Tribunals have the mandate and duty to examine and to decide the issues that the parties bring before them. It is not controversial that a failure to do so may amount to an excess of powers, as long as the issues are not addressed in one way or another. The failure is not to be confounded with an omission to decide a question without violating the

[223] *Soufraki v. UAE* (Exhibit RLA-005) ¶ 86

mandate. Such omission gives rise to a request in accordance with Article 49(2) of the ICSID Convention, which addresses the situation where a tribunal, acting within the limits of its mandate, left a gap which can be supplemented by the same tribunal within its mandate.

201. Article 52(1)(b) of the ICSID Convention provides unequivocally that not every erroneous assumption of jurisdiction, not every non-application of the proper law on the merits, and not every failure to deal with an issue, which an *ad hoc* committee believes to exist, justify the annulment of the award. Indeed, if an *ad hoc* committee finds that the tribunal has exceeded its powers, it is authorized to annul the award only if it also finds that the excess is manifest. The textual clarity of the provision is supported by the purpose of the ICSID Convention: the remedy of annulment is focused on the integrity of the arbitral proceedings the finality of awards. It does not extend to corrections of awards in circumstances where one "instance", an *ad hoc* committee, has an opinion different from another "instance", a tribunal.

202. The use of the term "manifest" confirms the exceptional character of an annulment as opposed to an appeal. It is general. Efforts of specification remain often not less general, as referred to by the Parties, when they explain "manifest" by "evident", "self-evident", or "obvious". The Committee subscribes to these qualifications, although they are of limited help when formulated *in abstractu*. It believes that a concretization requires the analysis of the concrete award. This implies that the analysis cannot content itself with a cursory look at the award. Complex cases may lead to complex decisions, which in turn may necessitate a complex appraisal, at the end of which a manifest excess of power may emerge. The Committee agrees with the *ad hoc* committee in *Tenaris*, which held that

> *[t]wo levels of reflection have to be distinguished. The first level concerns the ease with which the tribunal's analysis can be understood. Once understood, the second level concerns the ease with which the excess of powers can be detected. Only if the tribunal's extensive argumentation and analysis represent an 'obvious', 'clear', 'evident', 'serious', or in other words, a 'manifest' non-application of the proper law (and therefore a usurpation of jurisdiction), will it be justified to annul the award. A tribunal's argumentation and analysis can be complex, extensive,*

> *deep and at the same time obviously, clearly and seriously outside the scope of application of the proper law.*[224]

203. As to the controversy with respect to an alternative (Applicant) or cumulative (Claimant) presence of the elements of obviousness and/or seriousness in a manifest excess of power, the Committee shares the *ad hoc* committee's view in *Soufraki*, which held that

> *a strict opposition between two different meanings of "manifest" – either "obvious" or "serious" – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.*[225]

(2) The Issue of Jurisdiction and Competence in Light of the EU Treaties

204. The Tribunal assumed the jurisdiction of the Centre and its competence in application of Article 9 of the BIT, the ICSID Convention and Conventions of International Law. It did not apply EU Law, although it held that the EU Treaties "*also form part of international law*".[226] The Applicant believes that the Tribunal exceeded its power in a number of ways when deciding so. The *ad hoc* Committee will examine them one by one.

Article 9 of the BIT reads in relevant parts:

> *1. Any dispute between a Contracting Party and an investor of the other Contracting Party concerning an investment, expropriation or nationalization of an investment, shall, as far as possible, be settled between the disputing parties in an amicable way.*
>
> *2. If such dispute cannot be settled within six months from the date on which either party requested amicable settlement, the investor concerned may submit the dispute either*
>
> *• before the competent court of the Contracting Party or*
>
> *• before the "International Centre for Settlement of Investment Disputes" which was established with the Convention of 18 March 1965 "for the Settlement of Investment Disputes between States and Nationals of Other States".*

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[224] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, (28 December 2018) ("*Tenaris v. Venezuela*" or "*Tenaris*") (Exhibit CLA-013) ¶ 76

[225] *Soufraki v. UAE* (Exhibit RLA-005), ¶ 40

[226] Decision ¶ 309

The Contracting Parties hereby declare that they accept this arbitration procedure.

a) The Hellenic Republic's Pleadings

205. First, the Applicant argues that "*the Tribunal addressed an objection different from the one that the Hellenic Republic had actually pled*" thereby failing *to* "*address a claim or question submitted to it*".[227] The Applicant alleges that the Tribunal gravely mischaracterized its reliance on the *Achmea* Judgment and came to the conclusion that it had pled a retroactive effect where in reality it had already raised the objection of the inapplicability of Article 9 BIT and its offer to consent to arbitration in its request for bifurcation on 4 November 2015,[228] and "*in its Counter-Memorial in October 2016 – a year and a half* before *the* Achmea *Judgment*".[229]

206. The Committee has reviewed the submissions in the original proceeding and found that, indeed, the Hellenic Republic pled unambiguously that Article 9 of the BIT was incompatible with EU law:

> *308. Arbitration of Claimant's claims under Article 9 of the Hellenic Republic-Cyprus BIT is incompatible with EU law, since it requires the adjudication of basic questions of EU law, including the existence of EU treaty breaches, the conditions attached to the Hellenic Republic's adjustment programs pursuant to Article 125(1) TFEU, the prohibition of monetary financing under Article 123 TFEU, and State aid rules under Articles 107 and 108 TFEU.*
>
> *309. The determination of these matters is within the exclusive jurisdiction of the Court of Justice of the European Union over claims for breaches of EU law and/or the definitive interpretation of EU law and/or within the exclusive jurisdiction of the European Commission, subject to review by the General Court and the Court of Justice of the European Union, to determine whether State aid is compatible with the internal market. The adjudication of Claimant's* [redacted] *Claim would also* [redacted] *Moreover, to the extent that Claimant's claims call into question measures taken pursuant to obligations arising under EU law and agreements among Euro Area Member States and the acts of EU institutions, adjudication of the present dispute would also be incompatible with the principle of sincere*

[227] Transcript hearing day 1, page 9, lines 19-21 and 11-12

[228] Transcript hearing day 1, page 23, lines 18-19

[229] Memorial ¶ 123

> *cooperation enshrined in Article 4(3) of the Treaty on European Union ("TEU").*
>
> *310. The Tribunal therefore lacks competence, and the Centre jurisdiction, over this dispute.*[230]

207. In its observations on the *Achmea* Judgment, the Hellenic Republic stated that the "Achmea *Judgment therefore conclusively establishes that Article 9 of the Hellenic Republic-Cyprus BIT, and the arbitration of Claimant's claims pursuant to that provision, is incompatible with EU law*", only to draw the conclusion that it "*definitively confirms that the Tribunal lacks competence*". It underlines that "*[t]he* Achmea *Judgment therefore conclusively establishes that Article 9 of the Hellenic Republic-Cyprus BIT, and the arbitration of Claimant's claims pursuant to that provision, is incompatible with EU law*".[231]

208. The Committee has no doubt that the Hellenic Republic has argued as from its Counter-Memorial of 3 October 2016 and not only from the *Achmea* Judgment of 6 March 2018 that Article 9 of the BIT had become incompatible with EU law in 2004, at the date of Cyprus's adhesion to the EU. Indeed, even if the term 'conclusively established' used by the Hellenic Republic can be interpreted as meaning that the incompatibility was introduced only with the CJEU Judgment, such an interpretation is contradicted by the term 'confirm' as well as by the argument in paragraphs 308-310 of the Counter-Memorial as quoted above.

209. The Tribunal states in paragraph 625 of the Decision that "*[t]he contention by the Hellenic Republic that Art. 9 of the BIT is incompatible with Art. 267 and 344 TFEU, and that this incompatibility has retroactive effects as of 1 May 2004, was raised for the first time in 2018, upon the issuance of the Achmea Judgment by CJEU*".

210. This statement is wrong, as correctly pointed out by the Applicant.

211. However, the Tribunal's statement is contradicted by other statements relating to the Applicant's position.

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[230] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶¶ 308-310; also: Respondent's Responses to the Questions of the Tribunal on the EU Law Objection, dated 8 June 2018, ¶ 17

[231] Respondent's Observations on the *Achmea* Judgment, dated 30 March 2018, ¶¶ 6-7, 19

212. In Section VII.3.1 of its Decision, the Tribunal summarizes the Respondent's submissions on which it based its analysis as follows:

> *Initially – from Respondent's Counter-Memorial until the Parties' PHBs – the Parties discussed the compatibility of the BIT by reference to the EU Treaties. Respondent argued that there is an incompatibility between Art. 9 of the Greece-Cyprus BIT (the offer to ICSID arbitration) and several provisions of the TFEU, that grant exclusive jurisdiction on EU law to EU institutions.[…]*
>
> *On 6 March 2018, more than two years after these proceedings had been initiated, the CJEU issued its Achmea Judgment. The CJEU ruled that Arts. 267 and 344 TFEU preclude the application of certain intra-EU BIT arbitration clauses. Thereafter, the Parties made additional submissions on the effect of Achmea to the present dispute. The Tribunal posed a number of questions, which the Parties answered. The issues coalesced around the consequences of the Achmea Judgment, if any, on this Tribunal's jurisdiction, or exercise of jurisdiction.*[232]

213. In a different context but not less clearly, the Tribunal notes that the "*Hellenic Republic says that a host State may revoke an offer of ICSID arbitration* ***before its acceptance by an investor, and avers that it did so on 1 May 2004***". It expresses its difficulties with the Hellenic Republic's position by stating "*that it was never voiced* in tempore insuspecto *– it was submitted for the first time in this arbitration (and more specifically, only in Greece's last submission)*".[233]

214. Further, the Tribunal argued that

> *[b]y 20 June 2014 consent had been locked and Claimant had accrued its entitlement to investment arbitration, in accordance with Art. 25 of the Convention […]*
>
> *By then, neither Greece (nor the European Commission) had ever voiced the argument that Art. 9 of the Treaty had become inapplicable ten years before, on 1 May 2004.*[234]

215. All these statements and arguments taken together leave no doubt to the Committee that the Tribunal's central focus was, on the one and, the date 20 June 2014, i.e., the Request for Arbitration and, on the other, the question whether the offer of the consent to

[232] Decision ¶¶ 467-468, 481-483 (footnotes omitted)

[233] Decision ¶¶ 685, 687 (emphasis added)

[234] Decision ¶¶ 693-694

arbitrate, as provided for in Article 9 of the BIT, was no longer valid and applicable after Cyprus' accession to the EU in 2004, as submitted by the Hellenic Republic and "*confirmed*" and "*conclusively established*" by the *Achmea* Judgment, or whether it was still valid and applicable, with the consequence of the subsequent perfection of the consent to arbitrate contained in the Request for Arbitration as found by the Tribunal.

216. The date of the *Achmea* Judgment, i.e., 6 March 2018, is of no relevance in this analysis. This becomes clear from the preceding quotes and the Tribunal's observation in paragraph 692, "*that the Hellenic Republic never notified Cyprus of the Position it raised for the first time when these proceedings had already been initiated: that on 1 May 2004 Art.9 of the BIT had become inapplicable. Greece failed to notify Cyprus in 2004 (when the Accession Treaty was concluded), in the period 2005-2009 (when Laiki was investing), nor at any time before 20 June 2014 (when consent was perfected)*".[235]

217. This is also consistent with the Tribunal's reasoning that it did not take joint declarations of Greece and Cyprus on the (non-)applicability of the BIT into consideration, which post-dated the *Achmea* Judgment.

218. The fact that these findings and statements were made in different parts of the Decision does not deprive them of their reality. There is no rule that confines a tribunal to present its findings within a chosen structure of its text so that a deviation might be considered an excess of power, as the Applicant seems to believe.[236]

219. When embedded into the repeated correct statements on the Respondent's submissions, the Decision as a whole has not misrepresented the Hellenic Republic's position egregiously nor grossly. In fact, the Tribunal addressed the Hellenic Republic's claim that Article 9 of the BIT had become inapplicable with Cyprus's accession to the EU in 2004 and rejected it.

b) Treaty Conflict

220. Second, the Applicant asserts that the "*Tribunal further manifestly exceeded its powers when it grossly misinterpreted the applicable rules governing treaty conflicts*".[237] In its

[235] Decision ¶ 692

[236] Transcript hearing day 1, pages 27 ss.

[237] Memorial ¶ 125

Counter-Memorial in the original proceedings, the Hellenic Republic has presented these rules, in particular Article 30(3) VCLT according to which "*in the event of successive treaties relating to the same subject matter, an existing treaty that is incompatible with a later treaty concluded by the Contracting Parties* 'applies only to the extent that its provisions are compatible with those of the later treaty '".[238]

221. The Committee notes that the Tribunal developed its determination as to the ongoing validity, applicability and compatibility of Article 9 of the BIT in almost 200 paragraphs, from paragraph 541 to paragraph 735 of the Decision. It applied and interpreted Article 30(3) VCLT in paragraphs 633 - 658, after having presented the Respondent's position in paragraphs 476 – 480 and the Claimant's position in paragraphs 487 - 492.

222. The Tribunal begins its analysis by stating that the Hellenic Republic has not pled the termination of the BIT through the conclusion of the EU Treaties in conformity with Article 59(1) VCLT, which provides that a "*later treaty relating to the same subject matter*" may terminate the earlier treaty under certain circumstances. The Tribunal states that neither Greece nor Cyprus nor, for that matter, the instances of the EU held the position that intra-EU BITs were terminated, before or after the *Achmea* Judgment.[239] Rather, the State Parties consented in 2013, i.e., nine years after Cyprus's accession to the EU, to extend the validity of the BIT for ten years.[240] It was finally terminated on 29 October 2021 by consent. The Tribunal indicates that the eventuality of such termination, which at the date of the Decision was not yet acted, would have *ex nunc* effects, per Article 70 VCLT.[241]

223. Thereafter, the Tribunal examines Article 30(3) VCLT, as pleaded by the Respondent, which provides for a partial inapplicability of an earlier treaty to the extent that its provisions are incompatible with the provisions of a later the later treaty "*relating to the same subject matte*r", as specified in Article 30(1) VCLT.

[238] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016 ¶ 311
[239] Decision ¶¶ 637-639, 611-614, 568-600
[240] Decision ¶¶ 614-615
[241] Decision ¶¶ 627-632

224. The Tribunal opines first that such implicit derogation of a provision "*should always be viewed with caution*" relying on a statement of one of the drafters of the VCLT.[242]

225. Thereafter, it finds that the application of Article 30(3) must fail because "*Greece never notified Cyprus of its claim that Art. 9 of the BIT had become inapplicable*" in 2004, a "*behaviour is incompatible with Art. 65 VCLT, a provision which requires that States invoking the invalidity or inapplicability of a treaty notify the other contracting State of their position*".[243]

226. The Applicant has criticized the Tribunal for creating a "*declaration or notification requirement for the operation of Article 30(3) VCLT, which is plainly not required*",[244] because it "*impermissibly extended the scope of Article 65 VCLT from '*invalidity, termination [and] suspension*' to '*incompatibility*'*".[245]

227. The Applicant proposes a strictly textual and narrow interpretation of Article 65, as against an interpretation of the Tribunal which is wider and inspired by one of the purposes and objects of the treaty, i.e., to codify the law of treaties so as to provide certainty and stability. It is not the Committee's role to support one or the other interpretation. However, it realizes that the Tribunal's interpretation is not egregiously or grossly erroneous.

228. As a next step the Tribunal asks whether the BIT and the TFEU relate to the "*same subject matter*". It examines other decisions that that the subject matter is not the same and agrees with these findings. It finds support in the opinion of the Advocate General in the *Achmea* proceeding before the CJEU, who also believes that disputes under the BIT are different from disputes over the application and interpretation of the EU Treaties. It also weighs opposite opinions and does not find them persuasive. At the end and after a discussion in paragraphs 646-658 of the Decision, the Tribunal concludes that the BIT remains applicable in light of the EU Treaties since they do not relate to the same subject matter.

[242] Decision ¶¶ 642-644

[243] Decision ¶ 645

[244] Memorial ¶ 128

[245] Reply ¶ 111 (footnote omitted)

229. Again, it is not the Tribunal's role to judge whether the Tribunal's interpretation of Article 30 VCLT is 'correct' but to decide whether it misinterpreted the norm egregiously or grossly erroneously. Based on the foregoing summary of the Tribunal's argumentation, The Committee finds that is not the case.

230. The Tribunal states clearly that "*it has already concluded that in its opinion Art. 30(3) VCLT is not applicable to the present situation*" and adds "*ad arguendum*" thoughts about an alternative argumentation asserting relevance of the *Achmea* Judgment.[246] The Tribunal confirms thereby that the effect of its findings operates at all times when both treaties are in force. It distinguishes a pre- and post-*Achmea* period only *ad arguendum*. Therefore, the Committee does not understand the Applicant's assertion that "*the Tribunal grossly misinterpreted and misapplied Article 30(3) VCLT by limiting the effects of the incompatibility between Article 9 of the BIT and the EU Treaties to the "*post Achmea*" period*".[247] That is not what the Tribunal did.

c) EU Law

231. Third, the Applicant asserts that the Tribunal mischaracterized the quality of the EU Treaties, the conflict between them and Article 9 of the BIT, and grossly erroneously rejected the free-standing invocation of the primacy of EU law.[248]

232. In paragraphs 476-481 of the Decision, the Tribunal presents the Hellenic Republic's position that Article 9 of the BIT is inapplicable in accordance with both Article 30(3) VCLT and the "Primacy of EU Law", and that this position is confirmed by the *Achmea* Judgment. It is therefore evident to the Committee that the Tribunal understood that, for the Hellenic Republic, EU law has to apply because it is both posterior and superior to Article 9 of the BIT and that this position is not established but rather confirmed by the *Achmea* Judgment.

233. As to the asserted primacy of EU Law, the Tribunal first distinguishes the circumstances of the present dispute from the ones prevailing in the arbitration proceeding examined by the CJEU in *Achmea*. While in *Achmea* the place of arbitration was Frankfurt am Main, i.e., in an EU member State, the procedural rules were the BIT

[246] Decision ¶ 670

[247] Memorial ¶ 132

[248] Memorial ¶¶ 135-140; Reply ¶¶ 117-121; Transcript hearing day 1, pages 52-55

and the UNCITRAL Rules, and Article 8(6) of the applicable Czechoslovakia-Netherlands BIT provided that the arbitral tribunal had to take account of the law of the State involved, which encompasses EU Law, as explicitly stated by the CJEU,[249] in the present case the seat of arbitration is Washington D.C., United States of America, the institutional and procedural rules are the BIT and the ICSID Convention, and Article 9 of the BIT does not refer to EU law.

234. The Tribunal deduces after a lengthy and careful discussion that

> *[u]nder the principles of international law, the only guidelines to which this Tribunal may look to assess its jurisdiction and competence are the ICSID Convention, the BIT and general principles of international law. Neither Greece nor the EU can invoke their own legislation, seeking to deprive protected investors of their international law protection under the ICSID Convention and the BIT.*
>
> *[…]*
>
> *(Only the EU Treaties (TEU and TFEU) – as public international law instruments that contain Greece's consent under international law – could hypothetically have an impact on the validity or applicability of Greece's consent to ICSID arbitration under the BIT. But this could only happen by applying the international law rules on termination and succession of treaties (Art. 59 or 30(3) VCLT) – a possibility which the Tribunal has analyzed and dismissed in Section **D**. supra).*[250]

235. The Tribunal believes that the primacy of EU law is not applicable in the present case and "*cannot affect this Tribunal's jurisdiction*", because it "*has internal effects only*", that it is bound to apply the BIT, the ICSID Convention and customary international law, and "*that it will not interpret or apply Greek or EU law, and will not express a view on the legality under such laws of measures adopted by the Hellenic Republic or the EU authorities*".[251] Rather, it will consider and establish EU law "*as a matter of fact*".[252]

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[249] Decision ¶¶ 575-598

[250] Decision ¶¶ 714 and 716; as the Committee has found in paragraphs 220-230 above, the Tribunal's analysis in "Section D. supra" is free from a manifest excess of power.

[251] Decision ¶¶ 700, 711, 663

[252] Decision ¶¶ 663, 669

236. The Applicant takes issue with the Tribunal's statement that it does not and must not apply EU law. It asserts that contrary to this statement, the Tribunal did apply EU law, indeed, and that this was an egregious misapplication. The Applicant refers to paragraphs 702-725, 1154-1159, 1235, 1245, 1251 of the Decision and paragraphs 174, 175, and 180 of the Award.[253]

237. The Committee has examined the quoted paragraphs and cannot confirm that the Tribunal (mis-)applied EU law: In paragraph 725 of the Decision, in summing up the preceding discussion, it states that "*even if the Tribunal were to apply EU law in order to establish its jurisdiction and competence (*quod non*)*", clearly reiterating that it does not apply EU law; in paragraphs 1154-1160 of the Decision, it describes the EU and Greek mechanism of ELA without applying it to the facts of the case; [redacted]

238. When the Tribunal refers to "internal effects" of the EU Treaties, it describes a chronology where the evolution of intra-EU BITs and of the EU Treaties and their validity co-existed for years undisturbed, where intra-EU BITs were even encouraged, where no termination of BITs such as the BIT of 2004 was ordered or executed, where the EC recommended the termination in 2006 without retroactive effect, where during the *Achmea* proceeding the Advocate General did not see a conflict between the BIT arbitration clause and the EU Treaties.[254]

239. The Tribunal continues to state that the general attitude and opinion changed only with the *Achmea* Judgment and that in a "*Copernican turn*" the EC now holds "*that an arbitral tribunal in any pending arbitrations was required, as a matter of law, to decline*

[253] Memorial ¶¶ 135-137; Reply ¶¶ 117-118

[254] Decision ¶¶ 556-586

jurisdiction and that national courts 'are under an obligation to annul any arbitral award'".[255]

240. Despite *Achmea* and despite the new position of the EU Commission, the Tribunal holds – as said – that tribunals under the auspices of the ICSID Convention, applying an arbitration clause that does not refer to the law of an EU member State in a BIT that was not terminated at the moment of the request for arbitration and the corresponding perfection of the consent to arbitrate, must not decline its jurisdiction. It agrees with the partial award in *Eastern Sugar*,[256] where the tribunal held in 2007 that intra-EU BITs and the EU Treaties are not incompatible, including the provisions on international arbitration being their "*essential feature*".[257]

241. In that same vein, in 2021, the *ad hoc* committee in *Infrastructure* lists 56 arbitral decisions that have dismissed the intra-EU objection with none being in support of it.[258]

242. The Applicant points out that "*each tribunal must establish that it has jurisdiction over the specific dispute before it […] [and cannot] rely on the findings of other tribunals*", which may amount to a manifest excess of powers.[259] That is as correct as it is correct that tribunals are entitled and held to pay due consideration to previous decisions. The Tribunal's approach in the present dispute did not exceed such consideration in a way as to substitute its own findings with the findings of other tribunals; therefore, the Committee finds that the Tribunal did not exceed its powers.

243. To the Committee's knowledge, the first arbitral award that accepted the new position of the EC based on the *Achmea* Judgment and declined jurisdiction because of *inter alia* the primacy of EU Law, was *Green Power Partners K/S SCE Solar Don Benito APS v. the Kingdom of Spain* ("Green Power") rendered on 16 June 2022. The tribunal in that case sat in Stockholm, capital of the EU member State Sweden, worked under

[255] Decision ¶ 600

[256] Decision ¶ 572

[257] *Eastern Sugar v. Czech Republic* (Exhibit RLA-190), ¶¶ 180, 168 ss.

[258] *Infrastructure v. Spain* (Exhibit CLA-006), ¶¶ 154-155

[259] Transcript hearing day 1, page 20, lines 03-07; page 48, lines 12-18

the auspices of the SCC and had to decide whether the arbitration provision in Article 26 ECT was inapplicable because it contradicted the European Treaties.[260]

244. The tribunal underlined that it had to apply Swedish and thereby European law, Stockholm being the place of arbitration;[261] it found "*that the primacy of EU law in the relations between member States […] is not a matter of* lex specialis *or* lex posterior *but one of* lex superior", and subscribed to the *Achmea* Judgment of the CJEU confirming the primacy of EU law over arbitration provisions in intra-EU BITs;[262] it acknowledged that "*some doubt may have persisted*" whether the *Achmea* Judgment was relevant for not only intra-EU BITs but also for "*ECT-based tribunals and/or arbitral tribunals operating under the ICSID Convention*" and found "*these doubts dispelled by the CJEU Grand Chamber* Komstroy Judgment", which "*specifically addressed the question in regard of Article 26 ECT*" and decided that the *Achmea* principles are applicable for the ECT and its Article 26.[263]

245. The Committee notes that the *Green Power* tribunal recognized that the *Komstroy Judgment* addressed in its *obiter dictum* only the ECT issue and not the jurisdiction of arbitral tribunals operating under the ICSID Convention. This is consistent with the tribunal's general and repeated recognition of "*significant differences between ICSID proceedings and arbitration proceedings such as the present one*".[264]

246. The Committee agrees with the *Green Power* tribunal that "*the scope of review of an Ad Hoc Committee under the ICSID Convention*"[265] does not encompass an interpretation of legal provisions in contradiction to the interpretation of the same legal provisions by the tribunal, to the extent that the issues remain open to different interpretations. Such an approach would invariably qualify as an appeal decision for which *ad hoc* committees have no authority.

[260] *Green Power Partners K/S SCE Solar Don Benito APS v. the Kingdom of Spain*, SCC Arbitration V(2016/135), Award (16 June 2022) ("*Green Power v. Spain*" or "*Green Power*") (Exhibit CLA-042)

[261] *Green Power v. Spain* (Exhibit CLA-042) ¶¶ 161-166

[262] *Green Power v. Spain* (Exhibit CLA-042) ¶¶ 416-430, 468-469

[263] *Green Power v. Spain* (Exhibit CLA-042) ¶¶ 430-431, 435

[264] *Green Power v. Spain* (Exhibit CLA-042) ¶¶ 161, 441

[265] *Green Power v. Spain* (Exhibit CLA-042) ¶ 441

247. The Tribunal applied the BIT and the ICSID Convention in accordance with the VCLT, and applied relevant principles of international law in a detailed analysis. It rejected the assertion that the EU Treaties had a direct and retroactive influence on the applicability of the BIT and the ICSID Convention; it held, again after a detailed analysis, that the EU Treaties as interpreted by the CJEU had the internal effect of obliging the member States to terminate the intra-EU BITs *ex nunc*, and the EU instances to supervise this process. The Hellenic Republic and Cyprus decided to do so in 2021.

248. The Committee finds that these analyses are an application of the law and not egregiously or grossly erroneous, and that the Tribunal fulfilled its duty under Article 41 ICSID Convention to judge on its own competence.

d) Hypothetical Retroactive Effect

249. Fourth, once having done that, the Tribunal embarked on a short hypothetical debate:

> *Even if it is accepted arguendo that the Achmea Judgment and the principle of primacy could have some relevance for adjudicating this jurisdictional objection, it is far from certain that it would result in the Tribunal's lack of jurisdiction and competence, as argued by Greece.*[266]

250. It explored the Hellenic Republic's argument that preliminary rulings of the CJEU might have an *ex tunc* effect and stated that it remained "*unconvinced*". It quoted CJEU judgments and found that "*[t]here are indeed precedents where the CJEU refused to give retroactive effects to its preliminary rulings on considerations of res iudicata, legal certainty, good faith, behaviour of EC institutions or legitimate expectations*". It deduced from there that "*even if the Tribunal were to apply EU law in order to establish its jurisdiction and competence (*quod non*), the result would be far from certain*".[267] The Tribunal does not state that there may also be preliminary rulings that did give retractive effects.

251. The Applicant does not criticize these quotes for stating that the result is far from certain. It rather says that the Tribunal grossly misinterpreted EU law because it

[266] Decision ¶ 717

[267] Decision ¶¶ 720, 724-725

"*overlooked numerous CJEU preliminary rulings*",[268] which are different from the ones quoted by the Tribunal.

252. The Committee does not see in what way the Tribunal grossly misinterpreted or misapplied the law by referring to CJEU judgments and omitting others, after having found on its jurisdiction and finding that a different result would be far from certain if it were to apply EU law. At the end, it considered that it did not have to decide the question as EU law was not applicable. Therefore, the Committee rejects the Applicant's assertion.

e) Reinforcing Arguments

253. Fifth, and in the same vein, the Applicant submits "*that the Tribunal established jurisdiction by reference to Claimant's supposed expectations and the principles of acquired rights, legitimate expectations, and estoppel, when none of these concepts can form the basis for jurisdiction*".[269]

254. That is not what the Tribunal did, as explained in paragraph 678 of the Decision, where it states that its "*conclusions have been reached on the basis of the applicable rules of international law, and specifically of the VCLT, to which the BIT and the TFEU are both subject*",[270] and not, as the Applicant insinuates, on the basis of the chronology of events.[271] It found comfort in the idea that generally accepted principles of fairness such as "*the rule that a State is estopped from resiling from a representation on which another party has relied*", the principle of legitimate expectations and the principle of acquired rights support the material correctness of the result and conclusions and reinforce its conclusion.[272]

255. In conclusion, the Committee holds that the Tribunal did not manifestly exceed its power when it decided that the Centre has jurisdiction and the Tribunal has competence to hear and decide the dispute.

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[268] Memorial ¶ 139, last two sentences; Reply ¶ 121, last sentence

[269] Reply ¶ 122, Memorial ¶ 141

[270] Decision ¶ 678

[271] Reply ¶ 122

[272] Decision ¶¶ 679-694

(3) The Issue of Jurisdiction and Competence over [redacted]

[redacted]

257. The *ad hoc* Committee has studied the Applicant's submissions in the original proceedings and has a different appreciation.

258. Both in its Counter-Memorial and in its Rejoinder, the Applicant had structured its arguments on its assertion that "**The Tribunal Lacks Competence Over This Dispute, The Arbitration Of Which Is Incompatible With European Union Law**", the headline of Section III.C., each time with a sub-section 2 or 3 respectively "Arbitration Of The present Dispute Under Article 9 Of The Hellenic Republic-Cyprus BIT Is Incompatible With EU Law". In four sub-sections of this subsection, the Applicant developed that Articles 258 and 259 TFEU,[276] Article 344,[277] Article 267,[278] and

[redacted]

[276] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶¶ 348-350; Respondent's Rejoinder on Jurisdiction and Liability, dated 10 May 2017, ¶¶ 357-358

[277] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶¶ 350-361; Respondent's Rejoinder on Jurisdiction and Liability, dated 10 May 2017, ¶¶ 359-364

[278] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶¶ 362-370; Respondent's Rejoinder on Jurisdiction and Liability, dated 10 May 2017, ¶¶ 365-371

Articles 108/107[279] establish the exclusive jurisdiction of the CJEU and that, therefore, "*adjudication by this Tribunal of the EU law questions arising in the present dispute would be incompatible with EU law for the reasons set forth above*".[280]

259. In these submissions, the issue of State aid is just another element within the Applicant's jurisdictional objection that Article 9 of the BIT is incompatible with European law and that, therefore, the Hellenic Republic's consent to arbitration was not valid after Cyprus's accession to the EU in 2004. It is true that in the context of Articles 107/108 the Applicant refers to the "*exclusive jurisdiction of the European Commission […] subject to review by the General Court and the Court of Justice of the European Union*".[281] However, the Committee has no doubt that the Applicant is aware that the EC is not an adjudicative body and has no "jurisdiction", and that the sentence is certainly a shorthand to express that the EC has competence and the CJEU has exclusive jurisdiction, as unequivocally provided for in Article 108(2) TFEU.

260. Neither from the structure of the submissions nor from their content emerges a "State aid" objection, which is distinct from the general jurisdictional objection according to which Article 9 BIT is inapplicable since Cyprus's accession to the EU. It is argued that EU law, and in particular Articles 107, 108, 258, 259, 267, 344 TFEU establish the exclusive jurisdiction of the CJEU. It is one objection, based on these Articles, or one issue in the sense of Article 41(2) ICSID Convention.

261. Evidently, this is what the Tribunal understood: the Applicant arguing that since the interpretation and application of EU law is required, which is within the exclusive jurisdiction of the CJEU, arbitration is incompatible with EU law, in particular with the following provisions of the EU Treaties: Articles 258 and 259, Article 344, Article 267, and Articles 107/108 TFEU.[282]

262. The Tribunal rejected the assertion of incompatibility of Article 9 with EU law, found that it was not terminated in 2014, as part of the BIT, and also rejected the application

[279] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶¶ 371-376; Respondent's Rejoinder on Jurisdiction and Liability, dated 10 May 2017, ¶¶ 372-375

[280] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶ 377

[281] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶ 372; Respondent's Rejoinder on Jurisdiction and Liability, dated 10 May 2017, ¶ 372

[282] Decision ¶¶ 472-474

of the concept of primacy of EU law in relation to the BIT. The focus was on European law and not on one or the other Article of the EU Treaties. The Tribunal thus accepted the Claimant's argument that the State aid objection was "*no more than a variation*" of the Hellenic Republic's general position on EU law[283] However, the relevance of Articles 107/108 TFEU was clearly dealt with. The Committee's role does not extend to an analysis of the correctness of the Tribunal's findings. It verified that the Tribunal applied the applicable law, and found that it did not exceed its powers.

263. Of course, it was not surprising that the Tribunal mentioned Articles 267 and 344 TFEU, which were the focus of the *Achmea* Judgment, and of course it paid prominent attention to this Judgment, which the Applicant is not alone in calling a "*landmark decision*",[284] and which was rendered in the period of the arbitral proceedings. However, the Tribunal did not limit its arguments to these provisions but extended them to EU law in general.

264. Articles 107/108 TFEU and the Protocols to the TFEU are part of European law. During the original proceedings, the Hellenic Republic presented them as such, in parallel to other provisions of the TFEU. In the Committee's view, the Hellenic Republic did not single them out to animate a distinct jurisdictional objection, and the issue put before the Tribunal was still the exclusive jurisdiction of the CJEU in general. The Tribunal dealt with this issue in detail . Therefore, the Committee finds that the Tribunal did not exceed its powers by not ruling on an issue that was not brought before it.

[redacted]

265. The Applicant submits that the Tribunal encroached on the exclusive competence of the EU Commission, established in Articles 108/107 TFEU, [redacted]

[redacted]

[redacted]

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293. Therefore, the Tribunal did not manifestly exceed its power when it awarded compensation based on [redacted]

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

(1) The Legal Standard

294. Neither a serious departure from a rule of procedure nor a departure from a fundamental rule of procedure by a tribunal justify the annulment of an award: the departure must

[redacted]

be serious and the rule of procedure must qualify as fundamental. A failure "*to observe ordinary arbitration rules*" is not included in the ground.[319]

295. It is common ground that the objective of the ground is to guarantee the integrity and fairness of the procedure. These objective guides the interpretation of Article 52(1)(d) ICSID Convention.

296. The Committee agrees with the Parties that the departure is serious when the tribunal's procedural conduct is clearly inappropriate, in that it "*deprive[s] a party of the benefit or protection which the rule was intended to provide*" **and** when it has the potential to influence the outcome of the award, described by the Claimant as the "*very minimum*".[320] Indeed, the Committee subscribes to the appreciation of the *ad hoc* committee in *Tulip*, that it would lead to almost insurmountable difficulties to insist on the proof that the departure did in fact alter the outcome of the dispute.[321]

297. Further, the Committee agrees with the Parties and adheres to the wide consensus that the respect of due process, equal treatment of the parties, their right to be heard , tribunals acting independently and impartially, the appropriate treatment of evidence and the burden of proof, and deliberations before decisions are crucial elements of fairness and integrity of the procedure. These are fundamental rules of procedure.

298. As the Parties rightly say, the examination of the assertion of serious departures from fundamental rules of procedure is highly "*fact-specific*" and requires a careful analysis of the conduct of the tribunal and the parties.[322] The Committee will, therefore, deal with them mostly in the sections on application of the standard. However, the Applicant submits a number of arguments of a general nature, which, as it says, add to and specify the principles of procedural integrity and fairness. The Committee will address these general assertions in this Section on the legal standard.

299. First, the Applicant submits that a tribunal's total failure to deal with a claim, a crucial question, or, conversely, to introduce and develop a claim *ex propio motu*, and to

[319] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council, 5 May 2015, (Exhibit RLA-008) ¶ 98

[320] Reply ¶ 71; Rejoinder ¶ 60; the Applicant quotes *Maritime v. Guinea* (Exhibit RLA-002), ¶ 5.05

[321] *Tulip v. Turkey* (Exhibit RLA-019), ¶ 78

[322] Reply ¶ 56; Rejoinder ¶ 44

develop legal arguments that have not been put forward by the parties and the ensuing surprise to the parties, may amount to a serious departure from fundamental rules of procedure.[323]

300. As to the first part of the assertion, the Committee believes that both alternatives are foremost issues of a potential manifest excess of powers: the parties define with their claims, counter-claims and defences the subject matter and the scope of the dispute, and thereby the mandate of the tribunal. A tribunal that transgresses the subject matter transgresses at the same time its mandate and may exceed its powers. That is why the Committee has partly dealt with these issues in the section on a manifest excess of powers.

301. However, the Committee recognizes that the disrespect of the claims as presented by the parties or the development of a claim that has not been asserted may at the same time amount to a serious departure from a fundamental rule of procedure, because adjudication of claims *extra petita* as well as *infra petita* may discredit the integrity of the procedure. The Committee has to determine whether, indeed, the Tribunal developed a claim *ex proprio motu* and/ or whether it failed to deal with a claim or a crucial argument.

302. As to the second part of the assertion, the Committee recalls that ICSID proceedings are built on the premise that arbitrators are appointed because they have a recognized competence in the field of law (Article 14(1) ICSID Convention), and that the parties may be represented by legal or other counsel (Arbitration Rule 18).

303. In such institutional setting, the principle "*iura novit curia*" is of evident relevance. The parties, whether represented or not by (legal) counsel, must put forward their respective cases and present the evidence to prove them. They may agree on the applicable law, and they are certainly welcome to develop the legal argumentation. However, it is the learned tribunal's authority and duty to subsume the facts under the law and to apply the applicable law comprehensively and with their professional knowledge. It is obvious that they approach their task in activating all of their legal knowledge. They must not be bound and limited in the exercise of their professional duties by legal

[323] Memorial ¶¶ 93-94; Reply ¶ 60

argument presented by the parties and their counsel, as it may be convenient in systems of jury trials.

304. Therefore, a procedural rule limiting the tribunal's authority of the application of law to arguments previously introduced by the parties and/or obliging the tribunal to confer with the parties and present their legal argument with an invitation to comment would not correspond to the structure of ICSID arbitral proceedings and does not exist. This does not undermine the tribunal's obligation to treat the parties equally and hear both of them, as stated before.

305. Second, the Applicant asserts that the Tribunal introduced *sua sponte* more than two dozen documents, of which 19 factual ones, "*[i]n an effort to improve – and indeed remake – Claimant's case*", without informing the Parties that it would rely on such documents as essential building blocks for its analysis and without giving them an "*opportunity to demonstrate that these documents do not support the positions for which the Tribunal referenced them*".[324]

306. It is not entirely clear whether the Applicant submits that the reference to the documents constitutes *per se* a serious departure from a fundamental rule of procedure or whether it has to be considered together with its allegations that the Tribunal acted in favour of the Claimant and, therefore, not impartially, and/or that it denied the Applicant the right to be heard. When the Applicant suggests that "*a tribunal's reliance on documents not in the record, without giving the parties a chance to comment, can amount to a serious departure from a fundamental rule of procedure, and specifically, the right to be heard*", it indicates that it favours the second alternative.[325] In any event, the first alternative can be dealt with in this section as a matter of the standard, and the second is heavily fact-specific with respect to each document and will be dealt with in the section on the application of the standard.

307. As a preliminary matter, the Committee refutes the Applicant's opinion that as the Tribunal decided not to apply EU law but treat it "*as a matter of fact*",[326] all legal documents emanating from EU institutions such as CJEU judgments, EU regulations

[324] Memorial ¶¶ 137, 142-143; Reply ¶¶ 65, 123-132

[325] Transcript hearing day 1, page 18, lines 6-10

[326] Decision ¶¶ 328, 663, 669

and communications must be considered as factual exhibits.[327] The Committee disagrees: the quality of these legal authorities is inherent in the documents and does not depend on the use made by a third party.

308. Thus, counted correctly, the Tribunal introduced 27 legal authorities and one factual exhibit. Twenty-seven of the documents were referenced in the Decision on Jurisdiction and Liability, of which the factual exhibit, and one legal authority in the Award.

309. With respect to the legal authorities, a tribunal's right to refer to them and to make this reference public is an extension of tribunals' right to develop their legal reasoning fully without being limited by the submissions of the parties. The Committee agrees with the *ad hoc* committee in *Daimler*, which held:

> *This Committee is of the view that an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, sua sponte, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it. This is exactly the case here. Daimler had the opportunity to make submissions on all the relevant issues related to objections to jurisdiction. Once such an opportunity was provided the Tribunal was not obliged to confine itself to only those authorities, which had been cited by the parties. No rule of law or procedure or requirement of due process prevented it from referring to or relying upon other authorities that were in the public domain. Such reliance did not violate any rule of natural justice including the right to be heard.*[328]

310. As to the factual exhibit, the Committee holds equally that no 'rule of natural justice' is violated when a tribunal reference one which is not in the record. In accordance with Arbitration Rule 34(4), tribunals in ICSID proceedings may play a proactive role of cooperation in the production of evidence. Thus, the production of a document by the tribunal cannot be considered as a serious departure from a fundamental rule of procedure *per se*. The issue is not one of reference to a document but of procedural fairness which requires that the parties' right to be heard and taken seriously be respected. The tribunal must not refer to a document *sua sponte* with the intention to favour one of the parties, and it must guarantee that both parties have an opportunity to

[327] Reply ¶ 127

[328] *Daimler v. Argentina* (Exhibit CLA-021) ¶ 295

present their position on the issue to which the document refers. This issue will be dealt with for all documents in the section on the application of the standard.

311. Third, the Applicant asserts that the unproper treatment of evidence and allocation of the burden of proof such as its "reversal" qualifies as a serious departure from a fundamental rule of procedure. It lists seven incidences of such unproper treatment by the Tribunal: the development of a claim *ex proprio motu*; a positive finding of a fact when no party had introduced evidence; the failure to engage with critical evidence; ignoring critical evidence; speculation about hypothetical developments; ignoring an argument; the development of a new and unsupported theory of loss.[329]

312. However, the Parties agree correctly that the failure to address evidence will only amount to a serious departure from a fundamental rule of procedure when its "*consideration could have had a significant impact on the award*".[330]

313. The Committee will address the fact-specific elements of the assertions in the following sections. As to the standard, a number of observations seem appropriate.

314. First, the issue of evidence relates to the facts of the case and not to legal arguments or procedural decisions. The decision of the Tribunal to develop a claim *ex proprio motu*, as asserted by the Applicant, or the alleged lack of argument fall outside the treatment of evidence. They are being dealt with elsewhere.

315. Second and relatedly, tribunals must determine whether the facts of the dispute meet the requirements of the law to support the parties' claims, counter-claims and defences. It is the tribunal's duty to apply the law in function of the evidenced facts.

316. The Applicant points correctly to the widely recognized general principle that "*who asserts must prove*",[331] inherited from Roman law *(actori incumbit probatio*), which implies two elements: the party that alleges the existence or the non-existence or even the hypothetical, the "but-for" existence of facts has the 'burden' to obtain and present the necessary evidence to prove that facts, and it is the tribunal's duty to weigh the

[329] Memorial ¶ 92; Reply ¶¶ 67, 70, 76; Transcript hearing day 1, pages 93-96
[330] Reply ¶ 68; Rejoinder ¶ 54
[331] Reply ¶ 69

probative value of the evidence independently and impartially and to freely form its conviction on the facts in light of the applicable law that supports the claims.

317. If the tribunal comes to the conclusion that the evidence is not sufficient to prove a fact, it must refer to rules that provide for a solution of such *non liquet*. As the Applicant rightly submits, the "*party [that] has failed to prove its case […] loses*".[332] That is the basic rule and the second meaning of the term 'burden' of proof.

318. However, the rule is less unequivocal and general than its powerful short formulation as a maxim conveys. General observations seem appropriate, especially because the Parties have debated extensively on the intricacies of the "alleviation", "reversal" and "elimination" of the burden of proof.

319. Professor Schreuer explains that "*ICSID tribunals have applied several rules regarding the burden of proof concerning the facts on which the parties rely*". He enumerates the *actori incumbit probatio* principle and, on the same level of relevance, the rule that "*if a party adduces evidence that proves* prima facie *the facts alleged, the burden of proof may shift to the other party, who needs to produce evidence to rebut the presumption*".[333] This is an important inroad into the principle that "who asserts must prove".

320. Further, the Tribunal here was confronted with the same problem that plagues most tribunal that have to assess "but-for" scenarios when ascertaining damages. It presents its approach, which is shared by most such tribunals, and also by the Committee:

> *Calculating the precise amount of loss or damage suffered by Claimant as a consequence of Respondent's wrongful acts is not an entirely straightforward task. It requires the definition of a counterfactual "but for" scenario, a hypothetical conjecture as to how the situation would have unfolded, and how the Claimant's economic position would have evolved, assuming that Respondent had not adopted the wrongful measures.*
>
> *The necessity of a counterfactual scenario does not undermine the general principle actori incumbit probatio: the burden of proof rests on Claimant, who must prove that but for the breach of the State's obligations certain scenarios would have occurred. That said, proving a hypothesis is fraught with difficulties; therefore, in*

[332] Reply ¶ 69

[333] C. Schreuer *et al*., *The ICSID Convention: A Commentary* (2009) Article 43 (Exhibit RLA-046), ¶ 116

> *weighing the evidence marshalled by Claimant, the Tribunal must show some flexibility. Applying reasonableness and experience, the Tribunal must gauge whether there is a fair possibility that the hypothesis raised by Claimant would have materialized. Claimant cannot be placed in the situation of facing an insurmountable burden of proving with exact certainty what would have occurred.*[334]

321. The Tribunal continues to define as its task to "*determine whether there is a fair probability that this contrafactual scenario would actually have materialized*".[335]

322. Again, this is a generally accepted inroad into the principle "who asserts must prove".

323. The Committee believes that the treatment of evidence is part of the fundamental rules of procedure in the sense that tribunals have to evaluate the evidence independently and impartially, that they have the duty to receive and appraise the evidence of both parties and weigh it without discrimination, and that they have to apply the rules on the consequences of a *non liquet* even-handedly. However, it is not convinced that the rule 'who asserts must prove' is a fundamental rule of procedure without further qualifications. There are too many exceptions to the rule, also based on considerations of procedural fairness. Therefore, to qualify as a fundamental rule of procedure, it needs to be complemented to express that the principle is valid to the extent that it is not rectified by alleviations and reversals of the burden of proof, as established by law and jurisprudence.

(2) The Issue of Jurisdiction and Competence in Light of the EU Treaties

324. In addition to asserting that the Tribunal mischaracterized the Applicant's pleadings, misrepresented the conflict of law rules as well as the status of EU law, and misapplied the law when developing hypothetical and reinforcing alternatives, as rejected in Section V.A(2) above, the Applicant submits that the Tribunal made "*an effort to improve – and indeed remake – the Claimant's case*" by introducing and relying on dozens of documents as essential building blocks of its analysis "*that neither Party had*

[334] Decision ¶¶ 213-214; the Tribunal relies on *Marco Gavazzi and Stefano Gavazzi v. Romania,* ICSID Case No. ARB/12/25, Award, 18 April 2018, which states at paragraph 224: "*the wrongdoer should not be permitted to escape liability for compensation as a direct result of the difficulty or resulting uncertainty for which that wrongdoer is responsible. At that point, the evidential burden regarding uncertainty shifts from the innocent party to the guilty party. Otherwise, the guilty party would profit unfairly from its own wrong.*"

[335] Award ¶ 216

submitted into the record of the arbitration", without providing the Parties "*an opportunity to comment*".[336]

325. Further, the Applicant alleged in its Memorial that the Tribunal had also relied on excerpts of secondary sources and new documents to construct "*a selective and misleading chronology of "*publicly available information*" regarding the applicability of Article 9 of the BIT*".[337] It seems that the Applicant abandoned this allegation, as it is not mentioned or further developed in its Reply nor during the hearing, where the Applicant refers to the "chronology of events", developed in the Tribunal's Decision,[338] without referring to secondary sources and/or making qualifying remarks.[339] In fact, the so-called secondary sources were documents "*reproduced in the partial award*"[340] in *Eastern Sugar v. Czech Republic*, that had been introduced into the record by the Applicant as exhibit RLA-190. It is evident that the documents were not introduced by the Tribunal to remake the Claimant's case, and the Applicant had all opportunities to comment.

326. Also on a preliminary basis, the Committee notes that the Applicant does not contest that two of the incriminated documents – the decision in *Vattenfall v. Germany* and the award in *UP and U. and C.D. Holding* – were on record but rather alleges that they were introduced in an inappropriate way. The Applicant did not complain at the convenient time about this "*procedural incident*", does not assert that it amounts to a serious departure from a fundamental rule of procedure, and admits that it was given the opportunity to comment.[341] Therefore, the Committee does not see a reason to examine further whether the introduction of these two documents amounted to a serious departure from a fundamental rule of procedure.

327. Further, an essay by *Ripinsky* and *Williams* that the Applicant qualifies as a newly introduced document, the only one mentioned in the Award and not in the Decision,[342]

[336] Memorial ¶ 142; Reply ¶¶ 65, 70
[337] Memorial ¶ 144-148
[338] Decision ¶¶ 547-602
[339] Reply ¶ 122; Transcript hearing day 1, pages 27, 46
[340] Decision ¶ 568
[341] Reply ¶¶ 130-132
[342] Memorial, Annex A, No. 28 (in B. Sabahi, N. Rubins, *et al., Investor-State Arbitration* (2019))

was in fact introduced by the Claimant as exhibit CLA-221.[343] In that same vein, the Applicant does not contest the Claimant's assurance that an essay by *Aron Broches* was used by it but reproduced from a different source.[344] The Committee agrees with the Claimant that an identical text referred to by quoting different published sources is not a new document.

328. In its "*chronology of events*", the Tribunal retraces the evolution of central international conventions, of which BITs, and the accession process of a certain number of States to the EU, including association agreements. That is straightforward and uncontested. It refers to the equally uncontested opinion of the Advocate General in the *Achmea* proceeding before the CJEU that for a certain period BITs were encouraged. To illustrate the Advocate General's opinion, the Tribunal refers to three such association agreements that are in the public domain but not on record.[345] The Committee does not see how the reference to such generic international agreements have the potential to influence the outcome of the dispute, how they may privilege the Claimant and how they may violate the right to be heard. The same observation holds true for the reference to the Constitution for Europe, which the Tribunal quotes to complete the tableau of fundamental EU texts, only to add that the Constitution was aborted and was of no practical relevance.[346] In any event, the Constitution would have favoured the position of the Applicant on the primacy of European law. Nonetheless, its quotation cannot be considered a sign of the partiality of the Tribunal.

329. In footnotes 652 (not 625 as referenced by the Applicant) and 655, the Decision cites a Communication of the Commission to the European Parliament and the Council, which calls upon the Member States to terminate all intra-EU BITs, implying that they are not automatically terminated by the accession to the EU, and confirming the judgment of the CJEU in *Achmea* on the inapplicability of arbitration agreements in intra-EU BITs. The Applicant relied on this document during the hearing but mischaracterized the Tribunal's appreciation of the document: the Tribunal had not cited to the Communication as stating that "*Article 9 remains applicable*"[347] but as stating that

[343] Transcript hearing day 2, page 115, lines 7-13

[344] Transcript hearing day 1, page 208; Transcript hearing day 2, page 115-116

[345] Decision, footnotes 606 and 608

[346] Decision, footnote 689

[347] Transcript hearing day 1, page 57, lines 20-21

arbitral tribunals were required in any pending arbitration to "*to decline jurisdiction and that national courts* 'are under an obligation to annul any arbitral award'".[348] These issues were central in the original proceedings and have been briefed extensively by both Parties,[349] and the EU Commission reiterates the position of the CJEU in *Achmea*. The Committee does not believe that the Communication adds a new aspect to the previous briefings, and finds that its introduction as a new document does not amount to a serious departure from a fundamental rule of procedure. Again, if at all, the Communication supports the position of the Applicant and cannot be qualified as partial in favour of the Claimant.

330. In paragraph 704 of the Decision, the Tribunal recalls the position that in "*a conflict between national legislation and EU law, the latter prevails*". In such cases, the Member States are under an obligation, based on the principle of sincere cooperation, not to apply the national law and to amend it so that it complies with EU law. This position was developed by the CJEU; it is uncontroversial between the Parties. The Tribunal specifies the position of the CJEU by referring to four judgments in the public domain but not in the record, quoted in footnotes 691, 692, and 693 of the Decision. The position is uncontroversial between the Parties, it does not favour either of them, and it is not an issue of relevance for the outcome of the dispute. Therefore, the reference does not threaten the integrity nor the fairness of the procedure.

331. In paragraph 705 of the Decision, the Tribunal extends the foregoing principle to conflicts between EU law and international agreements that bind Member States. The Member States have an obligation not to apply the international agreements. The Tribunal refers to three judgments of the CJEU that have developed this position, of which one is not on record, as stated by the Applicant.[350] Again, the position is uncontroversial between the Parties, it does not favour either of them, and it is not an issue of relevance for the outcome of the dispute. Therefore, the reference does not threaten the integrity nor the fairness of the procedure.

[348] Decision ¶ 600

[349] Respondent's Counter-Memorial on Jurisdiction and Liability, dated 3 October 2016, ¶¶ 311 ss.; Respondent's Observations on the *Achmea* Judgment, dated 30 March 2018, ¶ 7; Claimant's Reply on Jurisdiction and Liability, dated 6 February 2017, ¶¶ 313 ss.

[350] Memorial, Annex A, No. 12

332. In paragraphs 706 and 707 of the Decision, the Tribunal concludes that the Member States have an obligation, in accordance with the principle of sincere cooperation, to terminate conflicting international agreements but that this is not the prerogative of the CJEU. The Committee notes that this position is reflected in the *Achmea* Judgment, where the CJEU refrained from terminating or even suspending the BIT and limited the effect of its judgment to the preclusion of applicability of the arbitration provision. The BIT was terminated by the parties, in accordance with the position of the CJEU, by consent of the parties on 29 October 2021. Again, the position is uncontroversial between the Parties, it does not favour either of them, and it is not an issue of relevance for the outcome of the dispute. Therefore, the reference does not threaten the integrity nor the fairness of the procedure.

333. In paragraphs 717 to 725 of the Decision, the Tribunal develops the hypothetical question, "*arguendo*", what would happen if its determination on the lack of primacy of EU law in the context of pending ICSID proceedings were wrong and CJEU judgments would apply. The Tribunal had presented this issue to the Parties by way of a series of questions, of which the following: "*What are the legal effects (*ex tunc *or* ex nunc*) of the declaration by the CJEU of the incompatibility of the provisions contained in an anterior treaty between EU Member States, with the provisions of the TFEU?*" Both the Respondent and the Claimant responded to this (and other) questions on 8 June 2018. The Respondent had insisted on the *ex tunc* effect.[351]

334. The Tribunal had considered three judgments of the CJEU as presented by the Respondent and had added an additional judgment, not on record (footnote 704). It stated that in all these cases the rulings had increased the benefits for the individuals. The Tribunal has distinguished these cases from the one at hand where a restrictive effect would have deprived the party from benefits of the international agreement. It had extended the question and found precedents where the CJEU had refused to give retroactive effects to its rulings when "*considerations of res iudicata, legal certainty, good faith, behaviour of EC institutions or legitimate expectations*" were concerned.[352]

[351] Respondent's Responses to the Questions of the Tribunal on the EU Law Objection, dated 8 June 2018, where the question is reproduced.

[352] Decision ¶ 724

335. The Committee notes that the judgments of the CJEU referred to by the Tribunal in footnote 705 are not on record. It further notes that the Tribunal does not allege that the list of cases is exhaustive and there are no judgments with a different result.

336. The Committee agrees with the Claimant that the issues discussed by the Tribunal correspond to the questions that the Tribunal had asked, as partly reproduced above.[353] Therefore, the Applicant had an opportunity to present its case. Further and more importantly, the Tribunal evoked these issues hypothetically, **after** having found that the issue of EU law was not present under the institutional setting of the case, as an additional consideration to have done the right thing. Like in the preceding constellations, the documents were not "*essential building blocks*" for the Tribunal's analysis, as asserted by the Applicant.[354] In so doing, the Tribunal has not violated the fundamental principles of impartiality and equal treatment of the parties by referring to legal authorities in footnotes 704 and 705 that supported its legal analysis and determination further. The documents did not have the potential to influence the outcome of the dispute.

337. In paragraphs 823 and 879 of the Decision, the Tribunal refers to three decisions of ICSID tribunals in footnotes 764, 814 and 815.

338. In the first case (paragraph 823), the Tribunal finds comfort in a decision that confirms Article 46 of the ICSID Convention and ICSID Arbitration Rule 40. Such confirmation is not surprising. It does neither favour one or the other Party nor does it impair their procedural rights. In addition, the issue of incidental and additional claims had been discussed by the Parties and decided by the Tribunal as meaning "*claims form[ing] part of a single and continuous narrative underpinning the dispute*".[355] Only after the decision had it looked for support and found it in a decision not in the record. This does not endanger the integrity and fairness of the procedure.

339. In the second case (paragraph 879), the Tribunal, after having presented the Parties' positions, agreed with several other tribunals that have found that the term "*investment*" requires that assets must meet "*objective and inherent features*" to be protected as

[353] Transcript hearing day 2, pages 120-121
[354] Memorial ¶ 142
[355] Decision ¶ 820

investment.[356] For this unspectacular finding, the Tribunal referred to six decisions, of which four on record and two not on record. Such reference without consequence cannot be considered a serious departure from a fundamental rule of procedure.

340. Finally, another legal authority has been referred to in the context of a discussion whether the Claimant had validly waived its access to arbitration with respect to a specific claim. In paragraph 1003 of the Decision, the Tribunal refers to an essay, which is not on the record, to reason that (a) there is no requirement of form for a waiver, and (b) the inequality of bargaining power should be taken into consideration. The Tribunal examines these points and finds in favour of the Hellenic Republic. Obviously, that is not an indication that the Tribunal favoured the Claimant. Further, the Parties had submitted their opinions on the matter, as summarized by the Tribunal.

341. The only factual exhibit referred to by the Tribunal that is not on the record is an Annual Financial Statement of the Bank of Cyprus Group.[357] The Statement does not evidence a new fact but indicates, by the presentation of the assets in 2014, that the Commercial Bank of Cyprus did not have the intention to pursue BIT claims against the Hellenic Republic. The decisive piece of evidence in that question is a letter by the Bank to the Claimant that, indeed, it would not pursue such claims. The letter was initiated by the Tribunal's instruction and is on the record. Evidently, the letter and the Statements were not constructions to harm the Hellenic Republic and favour the Claimant. No serious departure from a fundamental rule of procedure is recognizable.

342. The Committee has examined the 28 documents that the Tribunal introduced into the record. In sum, it did not find any indication that the Tribunal has pursued an intention to "remake" or to develop the Claimant's case, or that the Parties were treated unequally. Further, it did not find that the documents were "essential building blocks" for the Tribunal's analysis, were misinterpreted and had the potential to influence the outcome of the dispute. They did not introduce issues on which the Tribunal has failed to hear either of the Parties. Therefore, the Applicant was not deprived of the right to present its case. For that reason, the Tribunal did not seriously depart from a

[356] Decision ¶ 879

[357] Decision, footnote 488

fundamental rule of procedure when it referred to the documents that were not in the record, as presented and analyzed in this section.

343. Given this determination, the Committee does not have to examine the Claimant's allegation that the Applicant waived its right to assert rights based on the introduction of and reference to documents by the Tribunal that were not in the record. However, the Committee states that it has sympathy for the Claimant's case. The Applicant was aware that these documents were referred to, at the latest with the rendering of the Decision, except for one essay that was introduced only with the Award.

344. There was no reason nor impediment to object to the Tribunal's conduct, and it would have been far from futile to discuss that issue during the second phase of the proceeding, and be it to clarify the contours of procedural integrity and the rights and duties of the Tribunal in view of its conduct in the second phase. [redacted]

The Issue of Jurisdiction and Competence over [redacted]

345. The Applicant bases its request for annulment for a serious departure from a fundamental rule of procedure in the context of an alleged State aid objection on identical arguments as used for an alleged manifest excess of powers.[359]

346. The Committee's rejection of the arguments is identical for both grounds. It is developed in Section V.A(3) above. Thus, the Tribunal did not seriously depart from a fundamental rule of procedure when it did not deal with an issue that had not been brought before it.

[redacted]

[359] Memorial ¶ 154; Reply ¶ 142; Transcript hearing day 1, page 64, lines 11-13

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

355. At the outset, the Committee recalls that it is not within its authority to re-evaluate the probative value of the evidence. However, it does have the authority to confirm that the burden of proof for the existence of the fact of a [redacted] lied in principle with the Claimant, as it had based [redacted] claim on the denial of the granting of [redacted], and had to prove that the requirements for [redacted], of which the presence of a liquidity problem, were met.

[redacted]

[redacted]

[redacted]

[redacted]

358. The Committee rejects the Applicant's assertion that the reliance on "*a single source*" of evidence alleviates the burden of proof.[374] The Committee does not have the authority to substitute its own evaluation of the evidence to that of the Tribunal. However, it realizes that that there was no total absence of evidence, and that the evidence presented in the form of [redacted] was not contested. The Tribunal analyzed the letter as well as the fact that its content was not contested. The analysis led it to the conclusion that the fact of [redacted] was undisputed. The Committee is not empowered to refute this analysis.

[redacted]

[redacted]

361. As a result, the Committee finds that the Tribunal did not seriously depart from a fundamental rule of procedure, when it relied on one crucial piece of evidence when forming its conviction that [redacted] fulfilled the requirements for [redacted] as from April 2012, and when it reinforced this conviction by analysing further circumstances.

362. [redacted]

[redacted]

[374] Memorial ¶ 176; Reply ¶¶ 159, 162

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

367. [redacted] It is widely accepted that a tribunal does not seriously depart from a fundamental rule of procedure when it does not take each piece of evidence into account, when it is not considered relevant by the parties.

[redacted]

[redacted]

[redacted]

[redacted]

370. In light of these circumstances, the Committee cannot confirm that the Tribunal failed to consider relevant evidence.

371. Having said that, the Committee is conscious of the fact that it is operating dangerously closely to a re-evaluation of evidence, for which it has no authority. It has tried to understand why the Tribunal reviewed some and not other evidence. In this process, the Committee came to the conclusion that the Tribunal did not totally disregard crucial evidence and that it weighed it in a comprehensible way. The Committee must not go further in its assessment of evidence and the Tribunal's dealing with it.

372. There is no fundamental rule of procedure that obliges tribunals to present every piece of evidence in their decisions, when they find that it does not have a decisive influence on their conviction. Therefore, the Tribunal did not seriously depart from a fundamental rule of procedure, when it only gave probative value to [redacted] and when it did not explicitly deal with secondary evidence that it did not find relevant and convincing.

(5) The Tribunal's Adjudication of Damages

[redacted]

[redacted]

374. The Tribunal engaged with the Parties' contradictory arguments on the method to establish the amount of compensation when "*it is difficult to establish the precise damage suffered*".[393] In relying on Articles 31 and 36 of the ILC 'Articles on Responsibility for Internationally Wrongful Acts' and on case law, it determined that the "*damage must be proved with reasonable certainty, even if the precise quantification of such damage may be subject to some degree of approximation*".[394] It agreed with the tribunal in *Lemire* that held

> *that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.*[395]

375. The Committee does not find that the standard as described in *Lemire* and adopted by the Tribunal presages a serious departure from a fundamental rule of procedure. It will examine the Applicant's assertions on four different serious departures one by one.

[redacted]

[393] Award ¶ 194

[394] Award ¶ 195

[395] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011¶ 246

[redacted]

[redacted]

[redacted]

380. As mentioned, the Committee is not authorized to re-evaluate the evidence on which the Tribunal based its findings. It must confirm, however, whether evidence was considered, which it does. Indeed, some evidence was rejected and some was accepted. Evidently, the Tribunal came to conclusions that were in favour of Claimant (while in the context in other heads of claim the Tribunal's conclusions favoured the Respondent). However, no partiality nor errors and inconsistencies are discernible that might amount to a serious departure from a fundamental rule of procedure.

[redacted]

[redacted]

385. It is not the Committee's role to arbitrate between the positions of the Tribunal and the Respondent and to examine whether the Tribunal's decision is incorrect. Rather, it has

[redacted]

to determine whether the Tribunal seriously departed from a fundamental rule of procedure when it held, based on evidence, that it was reasonably certain that an alleviation of Laiki's burden to fund its subsidiary Laiki, and [redacted] ability to reimburse intercompany loans would have led to the [redacted] decision not to include [redacted] assets in the [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

396. The Committee determines that the Tribunal's decision not to deal with an argument that that it did not find relevant for its ascertainment of the claim does not amount to a serious departure from a fundamental rule of procedure.

[redacted]

[redacted]

[redacted]

[redacted]

403. The Committee finds that the Tribunal has addressed the issue and has analyzed the expert evidence presented by the Parties. It has not seriously departed from a fundamental rule of procedure.

[redacted]

C. FAILURE TO STATE REASONS (ARTICLE 52(1)(E) CONVENTION)

(1) The Legal Standard

404. The statement of reasons is one of the central duties of the Tribunal. The legitimacy of arbitral decisions hinges upon the documentation of the process of weighing the evidence and applying and interpreting the law. The Committee subscribes to the *ad hoc* committee's statement in *Wena Hotels v. Egypt*, that it is "*the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision*".[437]

405. The legitimacy does not depend on the assertion of the correctness of awards. As unequivocally provided in Article 53(1) of the ICSID Convention, awards "shall not be subject to any appeal". Therefore, "*Article 52(1)(e) does not allow a committee to assess the correctness or persuasiveness of the reasoning in the award or to inquire into the quality of the reasons*".[438] Only when the reasons given are "*are so incoherent and/or contradictory that they cannot be understood and followed*",[439] will a committee be authorized to find on a failure to state reasons. As held in *Vivendi I*:

> *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.*[440]

406. There is wide consensus on these considerations, and the Parties do not disagree. Their disagreement is one of nuances and the application of the standard to the facts. As to the nuances, the Committee clarifies certain issues.

407. First, the Tribunal's duty to state reasons is not limited to the merits of the case. As correctly held by the *ad hoc* committee in *Tenaris v. Venezuela*, it "*concerns the totality of the reasons in the Award, encompassing those presented for the Tribunal's*

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[437] *Wena Hotels v. Egypt* (Exhibit CLA-016), ¶ 79

[438] *Impregilo v. Argentina* (Exhibit CLA-007) ¶ 181; *Compañia de Aguas del Aconquija SA and Vivendi Universal v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) ¶ 64

[439] *Tenaris v. Venezuela* (Exhibit CLA-013) ¶ 114

[440] *Compañia de Aguas del Aconquija SA and Vivendi Universal v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) ¶ 65

competence and jurisdiction, for the merits of the claim, the quantum of compensation, and the allocation of the costs".[441] However, this does not mean that the specificities of the determination of quantum, which often implies a contrafactual scenario, must not be taken into account. The Committee agrees with the *ad hoc* committee in *Rumeli v. Kazakhstan*, which held:

> *The tribunal must be satisfied that the claimant has suffered some damage under the relevant head as a result of the respondent's breach. But once it is satisfied of this, the determination of the precise amount of this damage is a matter for the tribunal's informed estimation in the light of all the evidence available to it.*[442]

408. Second, the underlying purpose of the statement of reasons as a means of legitimacy and acceptability does not require that "*all of a tribunal's reasons need to be set out explicitly, as long as they can be understood from the rest of the award*".[443] The purpose is met when parties are able to understand the tribunals' reasoning. "*This goal does not require that each reason be stated expressly. The tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision*".[444]

409. Third and as said, tribunals have a duty to set out the factual and legal premises that motivated their decision. That includes reasoning on evidence relating to the factual premises. This must not be confounded with the issue of the impartial, unbiased and equal treatment of evidence, which is part of the fundamental rules of procedure. The *ad hoc* committee in *TECO v. Guatemala* clarified this point as follows:

> *The Committee wishes to clarify that it is making no finding or observation with regard to the Tribunal's assessment of the expert testimony. It was within the Tribunal's discretion to assess whether that testimony was relevant or not, material or not, and that view is not censorable on annulment. However, that is not what is at stake here. The Committee takes issue with the complete absence of any discussion of the Parties' expert reports within the Tribunal's analysis of the loss of value claim. While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the*

[441] *Tenaris v. Venezuela* (Exhibit CLA-013) ¶ 114

[442] *Rumeli v. Kazakhstan* (Exhibit CLA-023), ¶ 147

[443] *TECO v. Guatemala* (Exhibit RLA-020), ¶ 88

[444] *Wena Hotels v. Egypt* (Exhibit CLA-016), ¶ 81

> *Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.*[445]

410. As found in the discussion on the fundamental rules of procedure, the Committee reiterates that the assessment of the probative value of evidence is within the remit of tribunals, which does not have a duty to reference each piece of evidence. This implies that tribunals do not have a duty to give reasons each time a piece of evidence is not referred to. In contrast, the weighing of evidence without stating any reasons that serve to identify and communicate the factual and legal premises of the decisions in the award may warrant the annulment of the award in accordance with Article 52(1)(e) of the ICSID Convention.

(2) The Issue of Jurisdiction and Competence over [redacted]

411. The Applicant bases its request for annulment for a serious departure from a fundamental rule of procedure in the context of [redacted] on identical arguments as used for an alleged manifest excess of powers.[446]

412. The Committee's rejection of the arguments is identical for the three grounds. It is developed in Section V.A(3) above. Thus, the Tribunal did not fail to state reasons when it did not deal with an issue that had not been brought before it.

[redacted]

413. The Applicant asserts, first, that, in addition to manifestly exceeding its power and seriously departing from a fundamental rule of procedure, the Tribunal failed to state the reasons on which the Award is based when it determined that [redacted]

[445] *TECO v. Guatemala* (Exhibit RLA-020), ¶ 131

[446] Memorial ¶ 154; Reply ¶¶ 143-144; the Applicant seems to have abandoned its assertion of a failure to state reasons during the hearing: cf. Transcript hearing day 1, page 66 lines 24-25 and page 67, line 01 [redacted]

[redacted]

[redacted]

[redacted]

416. These are reasons that have to be seen in context, and they are more than a single sentence, although even a single sentence can contain a decisive reason. In any event, the Committee had no problem to understand the reasoning and the conclusion that the Tribunal drew from it. It is not contradictory. The Applicant believes that the reasoning is inadequate. It is not for the Committee to judge.

[redacted]

[redacted]

[redacted]

[redacted]

421. A tribunal does not fail to state the reasons on which the award is based when in bifurcated proceedings it contents itself to a cursory argument in the first phase, and develops the full argument in the succeeding phase, when the concrete issue is under discussion in that second phase. That is what the Tribunal did in the present case. It pursued its argumentation in respecting principles of procedural economy in bifurcation

[redacted]

proceedings. It found sufficient to affirm in the first phase that [redacted] – as the Applicant concedes[455] - and that it would [redacted] and to develop and calculate [redacted] in the quantum phase. Thereby, the Tribunal did state the reasons on which this aspect of the Award is based.

[redacted]

(4) The Tribunal's Adjudication of Damages

[redacted]

[redacted]

[redacted]

425. In Section V.B(5)(a), the Committee determined that the Tribunal did not seriously depart from a fundamental rule of procedure. The Applicant's reliance on alleged disregard of the evidence as well as identical facts and arguments to also assert a failure to state reasons leads forcibly to the dismissal of the assertion.

[redacted]

[redacted]

[redacted]

428. The Applicant submits that the Tribunal findings on the Claimant's [redacted] in a counterfactual scenario were contradictory. [redacted]

[redacted]

430. The Committee had no problem understanding the Tribunal's reasoning and detecting the misunderstanding. Therefore, the Tribunal has not failed to state the reasons for its decision.

[redacted]

VI. COSTS

(1) The Parties' Cost Submissions

[redacted]

432. The Applicant requests an order "*that the Hellenic Republic be reimbursed for all costs and expenses incurred in connection with the present annulment proceedings*" because it "*was compelled to seek annulment of the Award in light of its serious shortcomings*".[462]

[redacted]

434. The Claimant requests that "*that it should be awarded all the costs which it has incurred in these annulment proceedings, including but not limited to those of its legal counsel*".[464]

435. The Claimant submits that "*[a]lthough neither the Convention nor the ICSID Arbitration Rules make express provision in this regard, ICSID tribunals and annulment committees regularly follow the 'loser pays' or 'costs follow the event' principle so as to make whole the party which suffered the loss, in the absence of particular circumstances warranting a different allocation of costs*". Applying this principle, it says, is all the more appropriate, since both parties were in agreement on it during the first phase of the proceedings, and the Tribunal accepted it in its decision of costs in the Award. The principle implies that costs should be allocated in proportion to the relative success of each party.[465]

[461] Applicant's Submission on Costs ¶ 7
[462] Applicant's Submission on Costs ¶¶ 3-4
[463] Claimant's Submission on Costs ¶ 1
[464] Claimant's Submission on Costs ¶ 4
[465] Claimant's Submission on Costs ¶¶ 5-10

(2) The Costs of the Proceeding

436. The costs of the annulment proceeding, including the Committee's fees and expenses, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Prof. Dr. Rolf Knieper	131,393.57
Ms. Dyalá Jiménez Figueres	61,716.61
Mr. Michael D. Nolan	51,189.12
ICSID's administrative fees	84,000.00
Direct expenses (estimated)	38,526.91
Total	**366,826.21**

(3) The *ad hoc* Committee's Decision

437. Article 61(2) of the ICSID Convention provides, in its relevant part, that:

> *The Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.*

438. Under this provision, applicable to this Annulment Proceeding by virtue of Article 52(4) of the ICSID Convention, the Committee has broad discretion in allocating the costs of the proceeding and the Parties' legal costs and expenses.

439. The Committee is mindful of the fact that the Tribunal applied, indeed, the "*costs follow the event*" rule and allocated the costs in proportion to the relative success of each Party, with certain qualifications for the allocation of the costs of arbitration.[466]

440. However, the Committee believes that in these annulment proceedings it is appropriate to accommodate the rule by another rule of cost allocation according to which "*costs lie where they fall*".

441. The Committee recalls that the proceedings concern consequences of one of the most dramatic financial crises in decades, which forced national, European, global actors in

[466] Decision ¶¶ 455-471

the public and the private spheres to act under enormous and permanent stress. It was extremely challenging to translate the economic, financial and political dimensions of this crisis into the terms of a legal dispute. At the same time, national governments of the EU member States and private investors were confronted with a shift of position of EU institutions, including the CJEU and the EU Commission, *vis-à-vis* intra-EU BITs and investor-State-dispute settlement, which found one of its expressions in the *Achmea* Judgment of the CJEU. All this provoked exceptional challenges, and the Committee highly appreciates the remarkable work and accomplishments of the Parties and the Tribunal.

442. It is evident under such extraordinary circumstances, that not all issues are settled law, for instance the solution of conflicts between international treaties in general and the EU treaties in particular, or [redacted] The Committee believes that the characterisation of 'loser' and 'winner' does not grasp the full dimension of the outcome of the proceeding. It is true that the Claimant prevailed with its request to dismiss the request for annulment. At the same time, the Applicant's application for annulment was credible. Further, both Parties have greatly assisted the Committee to analyse the issues and reach its conclusions through their diligent written and oral submissions and presentations.

443. Therefore, the Committee decides that all costs and expenses should lie where they fall, meaning that the costs of the proceeding, including the fees and expenses of the Committee and the costs of the Centre are to be paid out of the advances made by the Applicant, and that each Party is to bear its own legal fees and expenses.

VII. DECISION

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

(1) The Application for Annulment of the Award is rejected.

(2) Each Party bears its own costs and fees.

(3) The Applicant bears the costs of the annulment proceeding, including the fees and expenses of the Committee and the costs of the Centre.

[redacted]

Ms. Dyalá Jiménez Figueres
Member of the *ad hoc* Committee

Date: 30 November 2022

Mr. Michael D. Nolan
Member of the *ad hoc* Committee

Date:

Prof. Dr. Rolf Knieper
President of the *ad hoc* Committee

Date:

[redacted]

Ms. Dyalá Jiménez Figueres
Member of the *ad hoc* Committee

Date:

Mr. Michaél D. Nolan
Member of the *ad hoc* Committee

Date: 30 November 2022

Prof. Dr. Rolf Knieper
President of the *ad hoc* Committee

Date:

Ms. Dyalá Jiménez Figueres
Member of the *ad hoc* Committee

Date:

Mr. Michael D. Nolan
Member of the *ad hoc* Committee

Date:

[redacted]

Prof. Dr. Rolf Knieper
President of the *ad hoc* Committee

Date: 30 November 2022