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

BETWEEN

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

AND

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

Respondent's Counter-Memorial on Annulment

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1 November 2024

BEFORE:

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

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

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A. INTRODUCTION

1. Respondent submits its Counter-Memorial on Annulment, in response to Applicant's Memorial on Annulment of 19 July 2024, alleging that the Tribunal, in rendering its Award of 29 June 2023, committed a failure to state reasons with respect to its decision on quantum and a manifest excess of powers when it rejected jurisdiction over certain claims presented by Claimants.

2. Respondent's submission contains a detailed explanation why Applicant's contentions are completely meritless and should be dismissed in their entirety. Applicant's assertions are founded on distortions of the Tribunal's reasoning and misinterpretations of the law.

B. GENERAL CONSIDERATIONS WITH RESPECT TO THE ANNULMENT PROCEDURE AND GROUNDS FOR ANNULMENT INVOKED BY APPLICANT

3. The annulment mechanism was designed with the purpose of preserving the fundamental goal of the ICSID system: finality of ICSID arbitration awards. This is confirmed by the drafting history of the Convention as well as by principles refined through the practice of ICSID ad hoc committees.[1] Two of those principles, also identified by the latest update of the ICISID Background paper on Annulment,[2] are of particular importance for the case at hand.

4. **First, annulment is an exceptional remedy**. It offers to the parties only a limited possibility to attack the finality of ICSID awards, envisaged by Article 53 of the Convention. As a result, the role of *ad hoc* committees is strictly defined – their function is to assess the legitimacy of the process leading up to the tribunal's decision, not its substantive correctness in terms of law or facts.[3]

[1] ICSID Updated Background Paper on Annulment, March 2024, paras. 77-80, **RLA-256**.
[2] Ibid., para. 80.
[3] *Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7*, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 20, **RLA-257;** *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October, 2009, para. 34, **RLA-35**; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, para. 56, **RLA-259**.

5. The ICSID Convention favors the finality of awards[4] and grounds for annulment must be strictly construed in accordance with their purpose, *i.e.* safeguarding the fundamental procedural integrity of the proceedings.[5] Setting aside the principle of finality is possible only when relevant grounds for annulment are clearly identifiable, "*with doubts resolved in favor of the arbitral tribunal*."[6]

6. The exceptional nature of the remedy and the notion that the annulment should not occur easily[7] is highlighted also by the fact that *ad hoc* committees enjoy a measure of discretion in deciding whether to annul the award, even when they find an annullable error: annulment does not follow automatically and committees should establish that the fault is grave enough[8] before deciding to erode the binding force and finality of the award.

7. **Second, *ad hoc* committees are not courts of appeal** and annulment is not a remedy against incorrect decisions.[9] An *ad hoc* committee cannot annul an award on the ground that its understanding of facts, interpretation of law or appreciation of evidence is different from that of the tribunal.[10] The exclusion of appeal has another important implication: the annulment proceeding is not an opportunity to raise new arguments that were not part of the record in the arbitration.[11]

8. As it is further explained below in relevant parts of Respondent's submission, Mr. Rand's contentions in the annulment proceeding invite the Committee to partially annul the Award over his grievances about the Tribunal's understanding of facts, interpretation of law and appreciation of evidence. Likewise, Mr. Rand's submission

[4] *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Decision on Annulment, 31 July 2023, para. 84, **RLA-213**; *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, para. 105, **RLA-214**.

[5] *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, para. 107, **RLA-214**.

[6] Ibid.

[7] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru, ICSID Case No. ARB/03/4 (*, Decision on Annulment, 5 September 2007, para. 101, **CLA-209**.

[8] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 47**,** **RLA-212**.

[9] ICSID Updated Background Paper on Annulment, March 2024, para. 80(3), **RLA-256**.

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

[11] *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain,* ICSID Case No. ARB/15/36, Decision on Annulment, 2 March 2023, para. 74, **RLA-216**.

frequently introduces new legal arguments, developed only in the present proceeding, in an attempt to prove that the Tribunal erred in the application of law.

9. The first ground for annulment invoked by Applicant – the alleged failure to state reasons – requires an exceptionally high threshold. A committee must not engage into evaluation of quality, persuasiveness and correctness of the tribunal's reasoning.[12] Annulment must be refused as long as a good faith and informed reader of the award can understand the motives that led the tribunal to reach its decision, considering the entirety of the award.[13] The reasoning may be implicit or be reasonably inferred from the decision read as a whole[14] and a tribunal does not need to expressly state its evaluation with respect to each individual item of evidence,[15] or to give reasons for preferring some evidence over the other.[16] If a party argues that the reasoning is inconsistent or contradictory, a contradiction must be genuine and lead to a point in which reasons are "*incapable of standing together on any reasonable reading of the decision*."[17]

10. The crux of Applicant's case on Article 52(1) (e) of the Convention rests upon the alleged inconsistency and contradiction of the Tribunal's reasoning with regard to the evaluation of damage. However, Mr. Rand's argument relies on a peculiar reading of the Award and purported contradictions are construed and sometimes even invented in order to serve Applicant's purpose. To give just one example – Applicant introduces a list of the Tribunal's "*key principles*" for evaluation of the Construction Land, that is

[12] *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, 14 July 2015, para. 64, **RLA-217**.

[13] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, para. 209, **RLA-162**.

[14] *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment, 7 May 2021, para. 216, **RLA-218**.

[15] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment, 13 April 2020, para. 245, **RLA-260**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 222, **RLA-232**.

[16] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, para. 228(c), **RLA-219**; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, 12 February 2015, para. 110, **RLA-261**.

[17] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 103, **RLA-210**; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, 30 July 2021, para. 231, **RLA-262**.

nowhere to be found in the Award itself, and from that point on argues that the Tribunal's reasoning contradicts those "*principles*."[18] On another occasion, Applicant invites the Committee to reevaluate the evidence with respect to the Construction Land, already considered by the Tribunal, in a way that in reality represents an appeal against the Tribunal's decision.[19] Respondent addresses those issues in more detail in **Chapter D**.

11. The Tribunal's decision to deny jurisdiction over certain claims of Mr. Rand does not represent a manifest excess of powers under Article 52(1) (b) of the Convention, which is discussed in **Chapter E**. Why the Tribunal's decision with respect to Applicant's indirect shareholding in BD Agro is not only tenable and reasonable but in fact the correct one is demonstrated in **Section E.II**. Respondent explains how Applicant's contentions with regard to Mr. Rand's payments for the benefit of BD Agro are equally meritless in **Section E.III**.

12. In order to provide a necessary background and context to the claims advanced in the present proceeding, Respondent will start with the summary of crucial facts and conclusions reached by the Tribunal in its Award in **Chapter C**.

C. FACTUAL BACKGROUND AND THE AWARD

I. INTRODUCTION

13. **Summary of the factual background**. The heart of the matter in the case at hand was a contractual dispute between the Privatization Agency ("**Agency**") and Mr. Djuro Obradovic, a dual Serbian and Canadian national, who purchased 70% of socially owned capital in company BD Agro, a dairy farm located near Belgrade, based on the Privatization Agreement that he and the Agency concluded on 4 October 2005 ("**Privatization Agreement**").[20] The dispute arose due to Mr. Obradovic's persistent refusal to honor his obligations under the Privatization Agreement. Specifically, Mr. Obradovic pledged BD Agro's real estate for securing the loans that were used by third parties, which was forbidden under the terms of the Privatization Agreement. The

[18] Memorial on Annulment, para. 144.
[19] Memorial on Annulment, para. 138.
[20] Privatization Agreement, **CE-17**.

Agency patiently waited for almost five years for Mr. Obradovic to remedy this breach, warning him that otherwise it will terminate the Privatization Agreement. After Mr. Obradovic failed to remedy the breach he made, the Agency terminated Privatization Agreement on 28 September 2015[21] and rendered a decision on transfer of BD Agro's capital from Mr. Obradovic to the Agency, as required by the relevant legislation.[22]

14. Few weeks before the Privatization Agreement was terminated, Mr. Obradovic wrote to the Agency claiming that he was entitled to protection as a Canadian investor and threatening to commence arbitration under the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments[23] ("**Canada-Serbia BIT"**).[24] In February 2018 the arbitration proceeding was indeed initiated against the Republic of Serbia ("**Respondent**" or "**Serbia**") – but not by Mr. Obradovic, but by Mr. William Rand ("**Mr. Rand**" or "**Applicant**"), his children, his Canadian company Rand Investments Ltd ("**Rand Investments**") and his Cypriot company Sembi Investment Limited ("**Sembi**", and all together "**Claimants**").[25]

15. In the arbitration proceedings *Rand Investments Ltd. and others v. Republic of Serbia,* ICSID Case No. ARB/18/8 ("**Arbitration**"), Claimants argued that they, not Mr. Obradovic, were beneficial owners of the shares in BD Agro. They asserted that Mr. Rand was protected under the Canada-Serbia BIT not only because he was a beneficial owner of 70% of the shares purchased by Mr. Obradovic but also because he had made certain payments for the benefit of BD Agro and that he was an indirect owner of 3.9% shareholding in the BD Agro through his company Marine Driving Holding d.o.o. ("**MDH Serbia**"). Their core argument was that the Agency's termination of the Privatization Agreement and subsequent transfer of the privatized shares in BD Agro to the Agency violated their rights under the Canada-Serbia BIT and the Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion

[21] Notice on Termination of the Privatization Agreement 28 September 2015, **CE-50**.
[22] See Respondent's Counter-Memorial with Request for Bifurcation dated 19 April 2019 ("**Respondent's Counter-Memorial**"), Section II.A; Respondent's Rejoinder dated 24 January 2020 ("**Respondent's Rejoinder**"), Section I.B.
[23] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, **CLA-1**.
[24] Letter from Mr. Obradovic to the Privatization Agency dated 8 September 2015, **CE-48**; Respondent's Counter-Memorial, para. 14; Respondent's Rejoinder, para. 65.
[25] See Request for Arbitration dated 9 February 2018.

and Protection of Investments[26] ("**Serbia-Cyprus BIT**" and, with the Canada-Serbia BIT, the "**Treaties**").[27] As a result, they requested to be compensated for the lost investment.[28]

16. During the Arbitration, Serbia raised a number of jurisdictional objections. Among others, Serbia explained that Claimants never obtained ownership or control over Mr. Obradovic's shares in BD Agro, nor did they acquire any interest in BD Agro recognized under Serbian law that would be eligible for protection under the Treaties. Purported arrangements between Mr. Obradovic and Mr. Rand were not only concealed from the Agency but, more importantly, were made in violation of Serbian law. For that reason, they would have never conferred any legal effect on Claimants' alleged rights.[29]

17. Serbia also showed that Claimants' story was compromised by the lack of documentary evidence. Claimants have failed to produce any documents, such as wire transfer records or bank account statements, that would suggest that the capital used to purchase BD Agro and invested in the company originated from Mr. Rand, or any of Claimants. Rather, it was Mr. Obradovic who obtained the funds through the loan taken from the Swedish financiers, the Lundin family.[30] Mr. Obradovic also used the funds of BD Agro itself to finance its privatization.[31] According to Claimants, however, credit for the payment of the purchase price for BD Agro goes to Mr. Rand, because he had "*arranged*" loans that Mr. Obradovic received from the Lundins. Yet again, Claimants failed to file any documents indicating existence of an arrangement between the Lundins and Mr. Rand, or of Mr. Rand's efforts to arrange loans for Mr. Obradovic.[32]

18. Faced with the lack of documentary evidence, Claimants heavily relied on testimonies provided by persons that were interested in the outcome of the Arbitration, including Mr. Rand, one of Claimants, and Mr. Obradovic, who is in debt of almost EUR 3 million

[26] Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, **CLA-2**.
[27] See Claimants' Memorial dated 16 January 2019 ("**Claimants' Memorial**"), Sections IV and VI; Claimants' Reply dated 4 October 2019 ("**Claimants' Reply**"), Sections III and V.
[28] See Claimants' Memorial, Section VII; Claimants' Reply, Section VI.
[29] See Respondent's Counter-Memorial, Section III; Respondent's Rejoinder, Section II.
[30] See Agreement between Dj. Obradović and Sembi dated 22 February 2008, Recitals, para. C, **CE-29**; Respondent's Counter-Memorial, para. 320; Respondent's Rejoinder, para. 1015. Lundins are a wealthy entrepreneurial family of Swedish descent residing in Geneva and Mr. Rand's long-time friends and business associates. See e.g. Claimants' Reply, paras. 4, 38, 495 and 675.
[31] Respondent's Rejoinder, Sections I.F.1. and I.F.3.
[32] Respondent's Post-Hearing Brief dated 28 September 2021, para. 154.

owned to another Claimant, Sembi.[33] Importantly, the Hearing showed that Mr. Obradovic's word cannot be trusted since he lied before the Tribunal that he did not owe money to any of Claimants.[34] Unfortunately, Claimants' lack of documentary evidence was not seen as a concern in the Award rendered by the majority of the Tribunal on 29 June 2023 ("**Award**"). Neither was the credibility of Mr. Obradovic, whose testimony turned out to be one of the decisive pieces of evidence for the majority, when establishing existence of the investment.[35]

19. Serbia also disputed that there was a breach of the Treaties, explaining *inter alia* that the termination of the Privatization Agreement was justified and in accordance with Serbian legislation. In support of its arguments, Serbia provided evidence demonstrating that the Agency's actions in the BD Agro case were consistent with its conduct in other privatization proceedings.[36] Most importantly, Serbia proved that prior to terminating the Privatization Agreement, the Agency had already terminated other privatization agreements for the same breach.[37] It also submitted the court practice which confirmed that the Agency's conduct in the BD Agro case, and in the termination of the Privatization Agreement in particular, was lawful and consistent with the established practice.[38] Claimants, on the other hand, were unable to offer any proof that the Agency

[33] See Respondent's Post-Hearing Brief dated 28 September 2021, para. 351 and fn. 681. Claimants also relied on testimonies by other individuals who have been working together for years, and who all received, or at the time of the Arbitration Proceeding were still receiving and/or were about to receive significant funds from Mr. Rand, i.e. Claimants. Specifically, Claimants relied on testimony of (i) Mr. Markicevic who works for Mr. Rand in several of his (allegedly owned) companies; (ii) Mr. Broshko who has been directly employed with Rand Investments for years; (iii) Mr. Jennings who has been working for the Ahola Family Trust, the owner of one of the Claimants, Sembi. The only witness who did not seem to be directly working for Mr. Rand is Mr. Azrac, although they appear to be long-time friends who were still doing business together through the Lundin Group. See Hearing on Jurisdiction and Merits, Transcript, Day 3, 15:5-16:1 (Mr. Markicevic); Hearing on Jurisdiction and Merits, Transcript, Day 3, 71:6-8 (Mr. Broshko); Witness Statement of Mr. Robert Jennings dated 3 October 2019, paras. 5-7; Witness Statement of Mr. Aksel Azrac dated 16 January 2019, paras. 3-4.

[34] Respondent's Post-Hearing Brief dated 28 September 2021, para. 354; Hearing on Jurisdiction and Merits, Transcript, Day 2, 82:10-12 and 83:12-14 (Mr. Obradovic); Hearing on Jurisdiction and Merits, Transcript, Day 3, 7:3-12 (Mr. Markicevic).

[35] See e.g. Award, paras. 238, 240, 245, 256.

[36] See Respondent's Counter-Memorial, paras. 124-125; Respondent's Rejoinder, Section I.B.3.3; Notice on termination of privatization agreement for subject of privatization Betonjerka of 30 December 2008, **RE-97**; Notice from the Privatization Agency to Jugotehnika, 9 September 2009, **RE-363**; Notice from the Privatization Agency to Mr. Pera Jovanovic Krusik-plastika and NPCO, 31 December 2009, **RE-364**; Notice from the Privatization Agency to Mr. Milenko Zimonjic, 15 December 2010, **RE-368**; Letter from the Agency to Mr. Obradovic, 27 December 2010, **RE-389**; Letter from the Agency to Mr. Obradovic, 28 January 2011, **RE-409**; Letter from the Agency to Mr. Obradovic, 18 March 2011, **RE-473**.

[37] See Respondent's Rejoinder, para. 215; Notice on termination of privatization agreement for subject of privatization Betonjerka of 30 December 2008, **RE-97**; Notice on Termination from the Privatization Agency to Jugotehnika, 20 November 2009, **RE-562**.

[38] See Respondent's Counter-Memorial, Sections II.A.3.2.1. and II.A.3.3; Respondent's Rejoinder, Sections I.B.2.1.3. and I.B.5.2. and para. 207; Judgment of the Commercial Court in Belgrade, No. 4.P 1744/10, dated

treated the BD Agro privatization and termination of the Privatization Agreement any differently than other privatizations.[39]

20. Additionally, Serbia provided sufficient evidence that the destruction of BD Agro, Claimants' purported investment, could not be pinned on Serbia, but rather on BD Agro's disastrous management in the period following the privatization, which ultimately drove BD Agro to bankruptcy.[40] The hallmark example of this mismanagement included the permanent blockade of BD Agro's accounts for more than two years before the termination of the Privatization Agreement.[41]

21. **The Award and the Dissenting Opinion**. The majority of the Tribunal, consisting Prof. Gabrielle Kaufmann-Kohler and Mr. Baiju S. Vasani ("**Majority**" or "**Tribunal**"), decided that the Tribunal had jurisdiction over Mr. Rand's claim relating to his interest in beneficially owned shares in BD Agro.[42] They also found that, by terminating the Privatization Agreement and subsequently seizing of the shares in BD Agro, the Agency, i.e. Respondent, violated the standard of fair and equitable treatment.[43] Consequently, the Majority awarded Mr. Rand compensation of EUR 14,572,730 plus interest.[44]

22. Professor Marcelo Kohen disagreed with the Majority and provided a Dissenting Opinion ("**Dissenting Opinion**"), expressing serious concerns regarding the Majority's conclusions.[45] He noted that "*Mr. Rand has not proven that he was the beneficial owner of the 70% of shares in BD Agro that were purchased by Mr. Obradovic*"[46], as well as

3 June 2011, **RE-370**; Judgment of the Commercial Appellate Court No. Pž 8687/2011, 18 December 2012, **CE-722**; Judgment of the Supreme Court of Cassation of 30 September 2010, **RE-25**; Judgment of the Supreme Court of Cassation of 12 July 2018, **RE-29**; Judgment of the Supreme Court of Cassation of 19 October 2017, **RE-30**; Judgment of the Supreme Court of Cassation of 14 November 2013, **RE-62**; Judgment of the Supreme Court of Cassation of 18 May 2017, **RE-94**; Decision of the Constitutional court of Serbia of 6 October 2016, **RE-95**.

[39] Respondent's Counter-Memorial, para. 104; Respondent's Rejoinder, para. 216.

[40] See Respondent's Counter-Memorial, Section V; Respondent's Rejoinder, Section IV.

[41] Respondent's Counter-Memorial, para. 803; Respondent's Rejoinder, paras. 441-442; Original pre-pack reorganization plan, November 2014, p. 8, **CE-321**. See, also, Respondent's Rejoinder Section I.F.4.

[42] Award, Section VI.

[43] Award, Section VII.

[44] Award, para. 708.

[45] See Dissenting Opinion of Professor Marcelo G. Kohen.

[46] Dissenting Opinion of Professor Marcelo G. Kohen, para. 27.

that "*nothing proves that there was a State's concerted collusion in order to deprive Mr. Obradovic, or allegedly concealed owner Mr. Rand, of his property*".[47]

23. Probably the most important criticism made by Professor Kohen concerns the Majority's stance that the origin of funds is irrelevant:

> "*In times in which States and the international community are making all efforts to avoid money laundering and fiscal fraud, when even for minor transactions the explanation of the origin of the money is required at all levels, to affirm that that requirement does not exist in investment arbitration, is not only regrettable, but also legally contrary to the object and purpose of the investment treaties concerned.*"[48]

24. Serbia does not agree with the ruling on its liability and compensation made by the Majority in the Award. However, recognizing limited grounds and the high threshold required for the annulment of awards under Article 52 of the ICSID Convention, Respondent decided not to seek annulment of the Award and duly paid the amount awarded to Mr. Rand on 12 January 2024.

25. But, in order to provide context to the present annulment proceeding, Respondent will in the following sections highlight some of the salient points of the Arbitration: Mr. Rand's bad faith during privatization of BD Agro (**Section II.**); illegality of Mr. Rand's alleged beneficial ownership and interest in Privatization Agreement (**Section III.**); the lack of evidence related to financing of the privatization of BD Agro (**Section IV.**); lawfulness of the termination of the Privatization Agreement (**Section V.**), and devastating management of BD Agro and its subsequent bankruptcy (**Section VI.**).

II. MR. RAND'S BAD FAITH DURING PRIVATIZATION OF BD AGRO

26. If any credibility is to be given to Mr. Rand's narrative about his alleged beneficial ownership of BD Agro's shares, it would be impossible to overlook the fact that Mr. Rand blatantly disregarded national laws governing privatization. By acting through Mr.

[47] Dissenting Opinion of Professor Marcelo G. Kohen, para. 28.
[48] Dissenting Opinion of Professor Marcelo G. Kohen, para. 18.

Obradovic in the public auction for purchase of shares in BD Agro, Mr. Rand violated the Serbian legal framework intended to ensure transparency of the privatization process. In this way, he gained the benefit of paying the purchase price in instalments otherwise exclusively available to Serbian nationals.[49]

27. As Respondent explained in the Arbitration, the transparency is one of the four main principles of privatization under Serbian law.[50] An interested buyer was required to fulfil certain criteria to appear as the buyer,[51] which meant that the identity of the potential buyers of BD Agro's shares had to be transparently communicated to the Agency which was required to check whether the buyer indeed fulfilled these criteria. In the present case, however, it was Mr. Obradovic and not Mr. Rand who appeared as an interested buyer of the shares in BD Agro. The Agency thus was only able to check whether he had fulfilled the required criteria, while Mr. Rand avoided this scrutiny.[52] Even afterwards, following the conclusion of the Privatization Agreement, during the numerous meetings between the Agency and Mr. Obradovic, and subsequently also at the Agency's meetings with Mr. Igor Markicevic and Mr. Erinn Broshko,[53] Mr. Rand was not mentioned as the beneficial owner of shares. These gentlemen also exchanged numerous letters with the Agency, and yet, none of them mentioned Mr. Rand as the owner of BD Agro.[54]

28. As pointed out by Professor Kohen, "*a basic legal reasoning imposes that, in order to protect a foreign investment on the basis of the obligations accepted by a State in a BIT, the State must know with whom it is dealing*".[55] The Majority, however, considered that the transparency principle set forth in Article 2 of the Law on Privatization was not the "*rule under Serbian law which required Mr. Rand to disclose his investment*

[49] Respondent's Rejoinder, para. 4.
[50] Respondent's Rejoinder, para. 2; 2001 Law on Privatization, Article 2 **CE-220**.
[51] Respondent's Counter-Memorial, para. 6; 2001 Law on Privatization, Article 12-12b, **CE-220**; Regulation on the Sale of Capital and Property at a Public Auction (52/2005), Articles 18-20, **RE-218**.
[52] Respondent's Rejoinder, para. 19.
[53] Mr. Markicevic was a director of Sembi, whereas Mr. Broshko was a director of Rand Investments – both of which were Claimants in the Arbitration. See Respondent's Counter-Memorial, para. 191; First Witness Statement of Mr. Erinn Broshko dated 5 February 2018, para. 3; Second Witness Statement of Mr. Igor Markicevic dated 16 January 2019, para. 11.
[54] Respondent's Rejoinder, Section I.A.5. Only one person – Mr. Ljubiša Jovanovic, the Assistant Minister overseeing privatization auction of BD Agro, communicated with both Mr. Obradovic and Mr. Rand during the privatization process. However, Mr. Jovanovic was promised position of the CEO of BD Agro. Immediately after the auction, the promise was fulfilled, and Mr. Jovanovic became the CEO of BD Agro. There is no evidence indicating that the Agency or any Serbian official were aware of any of communications and of a deal between these three gentlemen. See Respondent's Rejoinder, Section I.A.4.
[55] Dissenting Opinion of Professor Marcelo G. Kohen, para. 6.

structure".[56] In this way, Mr. Rand was excused from following one of the basic principles of the privatization process in Serbia.

29. The Majority further stated that Mr. Rand "*advanced good reasons for involving Mr. Obradovic*" as the nominal owner of BD Agro's shares.[57] These "good reasons" were, according to the Majority, explained in Mr. Rand's witness statement, where he openly admitted disregarding the requirements provided in Serbian law because that suited his personal "*flexibility and convenience*."[58] Not only was it "*extremely onerous and inefficient*" for Mr. Rand to take on the duties of owner of BD Agro personally,[59] but it was allegedly "*extremely cumbersome if not outright unworkable*" for him to appoint Mr. Obradovic only as his representative.[60] Serbian practice of executing notarized and apostilled authorizations seemed "*very formalistic*" to Mr. Rand, and thus both gentlemen preferred Mr. Obradovic to be the nominal owner to whom Mr. Rand would give instructions informally, mostly over the phone.[61] Conveniently, this preferred method of communication between two gentlemen left no written trail of their alleged multimillion arrangement.

30. Mr. Obradovic's motives for a decade-long involvement with BD Agro also remain a mystery, since there is no evidence that he ever received any compensation for his efforts. Mr. Rand testified that he would pay "*some money*" to Mr. Obradovic from time to time but was unable to confirm even an approximate amount of that money.[62] The Majority, nevertheless, concluded that they do not "*see the relevance of Mr. Obradovic's motivation to operate BD Agro on Mr. Rand's behest.*"[63]

31. Further, while recognizing that "*it is true that only Serbian natural persons were permitted to pay for privatized companies in instalments*" and that "*by acting through Mr. Obradovic, Mr. Rand did, of course, receive the benefit of paying the purchase price in instalments*", the Majority went on to conclude that "*these facts in and of themselves*

[56] Award, para. 395.
[57] Award, para. 396.
[58] Third Witness Statement of Mr. William Rand dated 5 March 2020, para. 11-14.
[59] Third Witness Statement of Mr. William Rand dated 5 March 2020, para. 11.
[60] Third Witness Statement of Mr. William Rand dated 5 March 2020, para. 12.
[61] Third Witness Statement of Mr. William Rand dated 5 March 2020, para. 12.
[62] Respondent's Post-Hearing Brief dated 28 September 2021, para. 20.
[63] Award, para. 245.

do not meet the high threshold set for an abuse".[64] However, as noted by Professor Kohen:

> *"… one of the purposes of the privatization legislation, which is to facilitate nationals participating in the privatization policy through the advantage of paying in installments, can simply be bypassed by foreigners just by making a citizen appear as the owner even if he is not so. This manner to perceive things deprives national legislation of any relevance.*"[65]

32. As emphasized by Serbia, had the other foreign participants in the privatization process enjoyed the same advantage as Mr. Rand, one could only guess the highest amount they might have offered for BD Agro and whether Mr. Rand would even have prevailed at the auction. His privileged position and bad faith conduct secured his success.[66]

III. MR. RAND'S ALEGED BENEFICIAL OWNERSIP OF THE SHARES AND INTEREST IN PRIVATIZATION AGREEMENT ARE NOT PERMITED UNDER SERBIAN LAW

33. According to Claimants' narrative, Mr. Rand acquired the beneficial ownership of BD Agro's shares[67] based on the agreement concluded between Marine Drive Holding, a company owned by Mr. Rand ("**MDH**"), and Mr. Obradovic ("**MDH Agreement**"), a few weeks before privatization of BD Agro.[68] According to the MDH Agreement, Mr. Obradovic guaranteed that, after the successful bid in the auction for BD Agro shares, he (and not Mr. Rand) would become the sole and beneficial owner of the shares. The MDH Agreement provided that the acquisition of both registered and beneficial ownership over the shares by the MDH was preconditioned upon the exercise of a call option.[69] As Claimants confirmed, the call option was never exercised,[70] meaning that MDH never acquired any rights over the BD Agro shares and that ownership remained

[64] Award, para. 396.
[65] Dissenting Opinion of Professor Marcelo G. Kohen, para. 8.
[66] Respondent's Rejoinder, para. 808.
[67] Claimants' Memorial, para. 41.
[68] Claimants' Memorial, paras. 69-70; Share Purchase Agreement dated 19 September 2005, **CE-15**.
[69] Respondent's Counter-Memorial, paras. 226-228; Share Purchase Agreement dated 19 September 2005, Recitals, para. C and paras. 1 and 3, **CE-15**.
[70] Claimants' Reply, para. 67.

in Mr. Obradovic's hands.[71] The Award does not deal with this issue at all. Instead, the Majority simply accepted Claimants' explanation that the structure of the entire investment changed on 22 February 2008, when Mr. Obradovic concluded a new agreement with another company in Mr. Rand's ownership,[72] Sembi ("**Sembi Agreement**").[73] According to Sembi Agreement, Mr. Obradovic retained all interest in BD Agro and Privatization Agreement and agreed to transfer that interest to Sembi.[74]

34. As extensively discussed in the Arbitration, Serbian law does not allow for the split of ownership between the legal, *i.e.* the registered owner, and the beneficial owner.[75] Although the Majority did not explicitly find Serbian law to be relevant for determining existence of beneficial ownership, they also did not state that Mr. Rand was ever a beneficial owner of BD Agro, as wrongly stated in Mr. Rand's Memorial on Annulment.[76]

35. What Majority concluded was that Mr. Rand acquired *a contractual interest* in shares of BD Agro through the Sembi Agreement[77] which states that Mr. Obradovic assigns all of his "*right, title and interest*" in the Privatization Agreement to Sembi.[78] This, however, is contrary to Serbian Law on Privatization which conditioned the assignment of rights and duties under the Privatization Agreement upon the previous approval of the Privatization Agency.[79]

36. As put by Professor Kohen, both the MDH Agreement and the Sembi Agreement were "*aimed at circumventing the legal conditions*" which was "*contrary to the legal*

[71] Respondent's Counter-Memorial, para. 230. In any event, the MDH Agreement could not have been executed since it was concluded contrary to the Serbian legislation regulating acquisition and transfer of shares. Respondent's Counter-Memorial, para. 232.
[72] Respondent's Rejoinder, para. 541. Mr. Rand owns 97.5% of the shares in Sembi through his Canadian company Rand Investments. See Claimants' Memorial, para. 54.
[73] Claimants' Memorial, para. 42-43; Agreement between Dj. Obradovic and Sembi dated 22 February 2008, **CE-29**.
[74] Respondent's Rejoinder, paras. 542-543; Agreement between Dj. Obradovic and Sembi dated 22 February 2008, Recitals, para. C and para. 4, **CE-29**.
[75] Respondent's Rejoinder, para. 571; Second Expert Report of Professor Mirjana Radovic, paras. 58-59.
[76] Memorial on Annulment, para. 32.
[77] Award, para. 317.
[78] Agreement between Dj. Obradovic and Sembi dated 22 February 2008, paras. 1-4, **CE-29**; Respondent's Counter-Memorial, para. 321; Respondent's Rejoinder, para. 632.
[79] Respondent's Counter-Memorial, para. 300; Respondent's Rejoinder, para. 643; 2001 Law on Privatization, Article 41ž, **CE-220**.

requirement for the privatization of BD Agro and, as a result, they are not opposable to the Respondent".[80]

IV. THE LACK OF EVIDENCE ABOUT FINANCING OF THE PRIVATIZATION OF BD AGRO

37. The Majority noted that there ought to be an economic link between the funds and investor and that what mattered was that the investor was the one ultimately bearing the financial burden of the contribution.[81] Despite the lack of crucial documentation, the Majority wrongly recognized the existence of such economic link between Mr. Rand and BD Agro.[82]

38. Claimants argued that the financial burden for the privatization of BD Agro was ultimately borne by Mr. Rand.[83] Allegedly, Mr. Obradovic was only a "vehicle" whose purpose was to play the role of the nominal owner of BD Agro. Mr. Rand allegedly arranged that Mr. Obradovic obtain funds for the purchase of BD Agro shares from the Lundins, his generous billionaire friends. However, there is no single agreement between Mr. Rand, Mr. Obradovic and the Lundins on the record, which would confirm this arrangement.[84] Moreover, available financial documents confirming some payments made by the Lundins towards Mr. Obradovic do not contain **any** reference to BD Agro, nor is there document that would explain these payments to Mr. Obradovic.[85]

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[80] Dissenting Opinion of Professor Marcelo G. Kohen, para. 8.
[81] Award, para. 237.
[82] Award, paras. 238-250.
[83] Claimants' Reply, para. 625; Claimants' Rejoinder on Jurisdiction, para. 474.
[84] Respondent's Rejoinder, para. 1017.
[85] Mr. Lundin, Longdale Assets, Mr. Adolf Henrik Lundin, and some Oil Company, paid Mr. Obradovic EUR 10.5 million. According to documents on the file, these payments were made for different purposes, including "real estate investment", "purchasing real estate in Serbia" and even three payments were referenced as payment of "dividend". No reference to payment for BD Agro was ever made. See Confirmation of transfer EUR 399,950 from Oil Company to Mr. Obradović, 2 January 2006, **CE-385**; Bank confirmation of transfer of EUR 399,950 from Oil Company to Mr. Obradović,2 January 2006, **CE-386**; Confirmation of transfer of EUR 100,000 from Oil Company to Mr. Obradović, 20 January 2006, **CE-387**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 1 February 2006, **CE-388**; Confirmation of transfer of EUR 500,000 from Mr. Lundin to Mr. Obradović, 20 February 2006, **CE-389**; Confirmation of transfer of EUR 400,000 from Mr. Lundin to Mr. Obradović, 23 February 2006, **CE-390**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 6 March 2006, **CE-392**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 7 April 2006, **CE-393**; Confirmation of transfer of EUR 700,000 from Mr. Lundin to Mr. Obradović, 20 April 2006, **CE-394**; Confirmation of transfer from Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 5 May 2006, **CE-395**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović,11 May 2006, **CE-396**; Confirmation of transfer from Longdale Assets Ltd of EUR 50,000 to Mr. Obradović,13 June 2006, **CE-397**; Confirmation of transfer from Longdale Assets Ltd of EUR 130,000 to Mr. Obradović, 11 July 2006, **CE-399**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović, 17 July 2006, **CE-400**; Confirmation of transfer from

As a matter of fact, documents on record in the Arbitration show that the initial installment under the Privatization Agreement of approximately EUR 2 million had been paid **before** Mr. Obradovic even received the first payment from the Lundin family.[86] In addition, Mr. Obradovic used the funds belonging to BD Agro to effectuate the payment of at least four out of five installments for the privatized shares.[87]

39. In any event, the agreement concluded between Mr. Obradovic, the Lundin family, Mr. Rand and Sembi ("**Lundin Agreement**"), and the Sembi Agreement (concluded between Mr. Obradovic and Sembi), both from 22 February 2008, confirm that it was Mr. Obradovic and not Mr. Rand who borrowed EUR 9 million from the Lundin family,[88] and another EUR 4.8 million from some unidentified "*institutions from Geneva"*.[89] These agreements also state that it was Mr. Obradovic who owed approximately EUR 2 million to the Agency for the payment of the purchase price for the shares.[90]

Longdale Assets Ltd of EUR 100,000 to Mr. Obradović, 7 August 2006, **CE-401**; Confirmation of transfer of EUR 1,000,000 from Mr. Lundin to Mr. Obradović, 28 August 2006, **CE-402**; Confirmation of transfer from Longdale Assets Ltd of EUR 1,200,000 to Mr. Obradović, 2 November 2006, **CE-403**; Confirmation of transfer from Longdale Assets Ltd of EUR 200,000 to Mr. Obradović, 28 December 2006, **CE-404**; Confirmation of transfer of EUR 800,000 from Mr. Lundin to Mr. Obradović, 29 December 2006, **CE-405**; Confirmation of transfer of EUR 250,000 from Mr. Lundin to Mr. Obradović, 5 April 2007, **CE-406**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 4 May 2007, **CE-407**; Confirmation of transfer from Longdale Assets Ltd of EUR 230,000 to Mr. Obradović, 30 May 2007, **CE-408**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović, 7 June 2007, **CE-409**; Confirmation of transfer from Longdale Assets Ltd of EUR 350,000 to Mr. Obradović, 1 November 2007, **CE-410**; Confirmation of transfer from Longdale Assets Ltd of EUR 150,000 to Mr. Obradović dated 1 February 2008, **CE-411**. All these payments to Mr. Obradovic were made between January 2006 and February 2008. During that time, Mr. Obradovic made payments for investments and the purchase price in BD Agro but also in other privatized companies. See Respondent's Post-Hearing Brief dated 28 September 2021, paras. 23-24; Respondent's Rejoinder, para. 327; Privatization Agreement (PIK Pester), 3 March 2006, **RE-210**; Privatization Agreement (Crveni Signal), 21 February 2003, **RE-219**; Privatization Agreement (Inex), 26 November 2004, **RE-220**; Privatization Agreement (Beotrans), 14 March 2007, **RE-221**; Privatization Agreement for Uvac Gazela from 2013, **CE-814**.

[86] Confirmation of transfer EUR 399,950 from Oil Company to Mr. Obradovic, 2 January 2006, **CE-385**; Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic, 15 October 2015, **RE-33**; Respondent's Rejoinder, para. 1015.

[87] See Respondent's Rejoinder, Sections I.F.1. and I.F.3.1.

[88] Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, Recitals, para. B, **CE-28**.

[89] Agreement between Dj. Obradovic, and Sembi dated 22 February 2008, Recitals, para. C, **CE-29**. According to Claimants, this 4.8. million also came from the Lundins. The problem with this is that there is simply no document that would prove this. In fact, when it mentions 9 million claim, the Sembi Agreement explicitly refers to Lundin family. On the other hand, in the next sentence, when it refers to 4.8 million claim it says "other institutions in Geneva". Why would it be drafted like that if both claims belonged to Lundins?

[90] Agreement between Dj. Obradović, The Lundin Family, W. Rand and Sembi dated 22 February 2008, Recitals, para. B, **CE-28**; Agreement between Dj. Obradovic, and Sembi dated 22 February 2008, Recitals, para. B, **CE-29**.

40. While concluding that Mr. Rand was the one ultimately bearing the financial burden of the contribution, the Majority failed even to comment on this. They also did not comment on the fact that, according to the Sembi Agreement, **Mr. Obradovic remained jointly liable for returning the loan** to the Lundin family and "*institutions from Geneva"*, alongside Sembi.[91] It thus cannot be denied that Mr. Obradovic was also the one ultimately bearing the financial burden of the contribution.

41. What is equally important, is what happened after the conclusion of these two agreements. Claimants stated that Sembi fulfilled all the obligations it assumed – it paid EUR 5.6 million to the Lundins who waived the remaining EUR 8.2 million[92] and paid the remaining part of the purchase price amounting to approximately EUR 2 million to the Agency.[93] However, there is no documentary evidence, whatsoever, to confirm this.[94]

42. Thus, out of EUR 15.8 million that Mr. Obradovic should have been released from, we have documents showing that only EUR 5.6 million were paid by Sembi to Mr. Ian Lundin and two other companies. In the words of Professor Kohen:

> *"It is deeply troublesome that Mr. Rand was unable to prove with concrete evidence the manner in which his money ended up in BD Agro. All the evidence furnished is indirect: personal testimonies and contracts the ("Agreements") mentioning that this was done. Not a single bank transfer including the specific and appropriate indication of the sender and the beneficiary and the reason for it - which is the normal manner in which these*

[91] Respondent's Post-Hearing Brief dated 28 September 2021, para. 154; Agreement between D. Obradovic, Lundins, W. Rand and Sembi, 22 February 2008, para. 1, **CE-28**.
[92] Claimants' Memorial, paras. 89-94.
[93] Third Witness Statement of Mr. Djuro Obradovic dated 5 March 2020, paras. 40, 74-80.
[94] Two payments from 2008 amounting to EUR 3.6 million were indeed made by reference to the agreement from 22 February 2008, Confirmation of wire transfer from Sembi to Mr. Ian Lundin for EUR 1,200,000.00 dated 16 July 2008, **CE-57**; Confirmation of wire transfer from Sembi to FBT Avocats for EUR 2,400,000.00 dated 16 July 2008, **CE-58**. However, the amount of EUR 2 million was made towards some company Tacll Asset Corporation without the reference to the agreements from 22 February 2008 (Claimants did not prove any connection between that company and the Lundin family), Confirmation of wire transfer from Sembi to Tacll Asset Corp. for EUR 2,000,000.00 dated 15 October 2010, **CE-59**. As for EUR 4.8 million owed to institutions from Geneva, there is no evidence that Sembi ever assumed that debt towards anyone, or that it ever paid this debt. Finally, EUR 2 million owed to the Privatization Agency was paid by Mr. Obradovic personally and there is no documentary evidence that Mr. Obradovic received that money from Sembi. See Banking excerpts confirming payment of installments of purchase price by Mr. Obradovic dated 15 October 2015, **RE-33**; Respondent's Counter-Memorial, paras. 10 and 108; Section I.F.3.1.

important amounts of money must be transferred was filed as evidence to prove that Mr. Rand transferred money to BD Agro".[95]

43. Yet, the Majority accepted that the companies and individuals from several different countries have exchanged millions of euros between them without a written contract: there is no contract for the initial payment of EUR 10.5 million from the Lundins to Mr. Obradovic; there is no contract, nor any other documents, concerning payment of EUR 4.8 million to Mr. Obradovic by "*some institutions in Geneva"*; there is no contract concerning Sembi assuming full responsibility for the payment of EUR 4.8 million to "*some institutions in Geneva"*; there is no contract or any other documents for waiving of EUR 8.2 million of Lundins claims; etc. What was the role of each of these gentlemen and companies, who was the investor, who owed money to whom - all this remains completely unclear because Claimants withheld the documents that are most certainly in their possession. Interestingly enough, they also withheld testimonies of the Lundin family.

V. TERMINATION OF THE PRIVATIZATION AGREEMENT WAS LAWFUL

44. Mr. Obradovic committed several breaches of the Privatization Agreement[96] and, eventually, the Privatization Agreement was terminated due to the breach of Article 5.3.4,[97] which provided that Mr. Obradovic was not allowed to encumber with pledge company's fixed assets, except for the purpose of securing claims towards the company stemming from its regular business activities, or for the purpose of acquiring funds to be used by the company.[98]

45. In December 2010 BD Agro indebted itself with Agrobanka loan of 221 million Serbian dinars and pledged its real estate as security for this debt.[99] At the same time, a large

[95] Dissenting Opinion of Professor Marcelo G. Kohen, para. 20.
[96] Respondent's Rejoinder, paras. 88-92.
[97] See Notice on Termination of the Privatization Agreement, **CE-50**; Respondent's Counter-Memorial, Sections II.A.1. and II.A.2; Respondent's Rejoinder, Section I.B.2.
[98] Article 5.3.4. of the Privatization Agreement, **RE-12**; Respondent's Counter-Memorial, para. 85; Respondent's Rejoinder, para. 97.
[99] See Respondent's Counter-Memorial, para. 21; Respondent's Rejoinder, para. 95; Short Term Loan Agreement no. K-571/10-00 of 22 December 2010, **RE-6**; Request for registration of pledge in accordance with the Short Term Loan Agreement no. K-571/10-00, **RE-7**; Statement of pledge no. Ov-37246/2010 of 28 December 2010, **RE-8**; Decision of the First Basic Court in Belgrade no. Dn-14124/10 of 14 January

part of that money was used for the benefit of other two companies also privatized by Mr. Obradovic and allegedly beneficially owned by Mr. Rand.[100] Already at the beginning of 2011, the Agency determined that this constituted a breach of Article 5.3.4. of the Privatization Agreement and requested removal of the pledges and that the companies which received the funds return the money to BD Agro, or otherwise the Agency would terminate the Privatization Agreement.[101] The Agency kept repeating the same request for the next four years,[102] however aforementioned companies never repaid the loans to BD Agro.[103] Eventually, the Agency terminated the Privatization Agreement.[104]

46. In other words, if Claimants' narrative of beneficial ownership is adopted, the termination of the Privatization Agreement happened because Mr. Rand's companies did not return the money to his allegedly owned third company – BD Agro.

47. What is important to note is that the Agency acted the same in other privatization cases: (i) it requested a breach of Article 5.3.4. to be remedied under the threat of

2011, **RE-9**; Excerpt from the Land Register no. 4031, cadastral municipality Dobanovci of 13 March 2019, **RE-45**.

[100] See Second Witness Statement of Mr. William Rand dated 3 October 2019, para. 6; Respondent's Rejoinder, para. 116. Specifically, on 28 December 2010, allegedly Mr. Rand's company Crveni Signal, Agrobanka and BD Agro concluded the Agreement on Assumption of Debt under which BD Agro assumed the entire debt of Crveni Signal towards Agrobanka from the loan Agreement Crveni Signal previously concluded with Agrobanka, in the amount of RSD 65,000,000 (approximately EUR 600,000) plus interest, whereas Crveni Signal was released from the said debt. At the same time, on 29 December 2010 BD Agro and another company purportedly owned by Mr. Rand – Inex concluded an Agreement on Interest-Free Loan to Inex by which BD Agro undertook to provide to Inex a cash loan in the amount of RSD 32,000,000 (approximately EUR 300,000). BD Agro ultimately paid EUR 959,719.60 in the name of these debts. See Agreement on Assumption of Debt of 28 December 2010, Articles 1 and 4, **RE-11**; Agreement on Interest-Free Loan of 29 December 2010, Articles 1 and 4, **RE-10**; Audit report by Auditor doo of 29 April 2011, **RE-13**; Respondent's Counter-Memorial, paras. 21-23.

[101] Notice of the Privatization Agency on Additional Time Period dated 24 February 2011, **CE-31**; Respondent's Counter-Memorial, paras. 393-394; Respondent's Rejoinder, para. 138.

[102] Notice of the Privatization Agency on Additional Time Period of 22 December 2011, **CE-32**; Letter from Privatization Agency to BD Agro of 20 July 2015, **CE-47**; Notice of the Privatization Agency on Additional Time Period of 31 July 2012, **CE-78**; Notice of the Privatization Agency on Additional Time Period of 8 November 2012, **CE-79**; Notice of the Privatization Agency on Additional Time Period of 22 June 2011, **CE-96**; Notice of the Privatization Agency on Additional Time Period of 6 October 2011, **CE-97**; Letter from the Privatization Agency to D. Obradovic of 27 April 2015, **CE-348**; Letter from the Privatization Agency to D. Obradovic and BD Agro of 23 June 2015, **CE-351**; Notice on Additional Time Period of 22 June 2012, **RE-15**; Respondent's Counter-Memorial, paras. 672; Respondent's Rejoinder, para. 125.

[103] Respondent's Rejoinder, para. 95 and Section I.B.3.2.

[104] Notice on Termination of the Privatization Agreement 28 September 2015, **CE-50**; Respondent's Counter-Memorial, para. 15; Respondent's Rejoinder, para. 461.

termination,[105] and (ii) when the breach was not remedied, the Agency terminated the privatization agreements in question.[106]

48. In particular, before the breach from 2010, the Agency already requested from Mr. Obradovic to remedy another breach of Article 5.3.4. of the Privatization Agreement that had occurred earlier, as well as to remedy the breach of the corresponding obligation in the privatization of another company, PIK Pester (which was also privatized by Mr. Obradovic). Mr. Obradovic acted as requested.[107] This, as well as contemporaneous letters sent by Mr. Obradovic and BD Agro to the Agency, confirms that Mr. Obradovic was well-aware that loaning BD Agro's money to his other companies was a breach of Privatization Agreement.[108] In one of these letters, sent shortly before the termination, Mr. Obradovic explicitly noted that BD Agro's auditors determined that the buyer (i.e. himself) fulfilled all contractual obligations, except in relation to the lending of BD Agro's funds to the third parties.[109]

49. The Majority did not examine whether the breach of the Privatization Agreement occurred or not, or whether that was the reason for its termination,[110] but resolved the issue of termination by endorsing the position of Claimants' expert that "*the Privatization Agreement could not be terminated after 8 April 2011* [when the purchase price for the shares was paid in full] *for an alleged breach of Article 5.3.4 that had occurred before that date*".[111]

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[105] Notice from the Privatization Agency to Jugotehnika, 9 September 2009, **RE-363**; Notice from the Privatization Agency to Mr. Pera Jovanovic Krusik-plastika and NPCO, 31 December 2009, **RE-364**; Notice from the Privatization Agency to Mr. Milenko Zimonjic, 15 December 2010, **RE-368**; Letter from the Agency to Mr. Obradovic, 27 December 2010, **RE-389**; Respondent's Rejoinder, paras.179-182.

[106] Notice on termination of privatization agreement for subject of privatization Betonjerka dated 30 December 2008, **RE-97**; Notice on Termination from the Privatization Agency to Jugotehnika dated 20 November 2009, **RE-562**; Respondent's Rejoinder, para. 215.

[107] Notice on additionally granted term for compliance with Article 5.3.4. of the Privatization Agreement of 24 February 2009, **RE-99**; Letter from BD Agro to the Privatization Agency dated 8 July 2009, **RE-405**; Email from BD Agro to the Privatization Agency dated 18 January 2010, **RE-406**; Letter from the Agency to Mr. Obradovic dated 27 December 2010, **RE-389**; Letter from Mr. Obradovic to the Privatization Agency dated 4 March 2011, **RE-390**; Respondent's Rejoinder, Sections I.B.3.3.2. and I.B.3.3.3.

[108] Letter from Mr. Obradovic and BD Agro to Auditor doo of 5 November 2012, **RE-20**; Letter from Mr. Obradovic and BD Agro to the Privatization Agency of 23 July 2012, **RE-21**; Letter from BD Agro to Privatization Agency of 2 July 2015, **CE-46**; Letter from Mr. Obradovic to the Privatization Agency attaching the statement from BD Agro's director of 9 November 2011, **RE-60**; Respondent's Rejoinder, para. 83.

[109] Letter from BD Agro to Privatization Agency of 2 July 2015, **CE-46**; Respondent's Rejoinder, para. 165.

[110] Award, fn. 418.1 See Respondent's Rejoinder, Section I.B.5.4; Respondent's Counter-Memorial, paras. 22-23.

[111] Award, paras. 613 and 615.

50. However, this conclusion is in stark contradiction to Serbian court practice.[112] The Supreme Court of Serbia confirmed that a privatization agreement is neither consummated, nor is its purpose achieved, by the payment of the purchase price, since all buyer's obligations in privatization are equally relevant,[113] and also there is "…*a legally valid reason which constitutes the right of the other party to declare the agreement terminated (…) regardless of the fact whether* [the buyer] *has and to which extent fulfilled the contractual obligations concerning payment of full purchase price*."[114]

51. The Agency's practice in other privatizations also confirms that it was terminating the privatization agreements even after the payment of the full purchase price, if the breach had occurred before the payment was made.[115] In other words, the Majority's conclusion has no support whatsoever in either court or Agency's practice.[116]

52. Finally, as Professor Kohen noted in his Dissenting Opinion:

> *"Another important element that deserves mentioning is the fact that Mr. Obradović did not challenge the termination of the*

[112] Respondent's Counter-Memorial, paras. 100-105; Respondent's Rejoinder, para. 216; Judgment of the Supreme Court of Cassation of 30 September 2010, **RE-25**; Judgment of the Supreme Court of Cassation of 18 May 2017, **RE-94**. The Majority found that an excerpt from a judgement produced by Claimants confirms that the Agency had "limited capacity" to terminate a privatization agreement, and that, once such an agreement was performed, it could not be terminated, see Award, para. 614. However, the Majority missed the key point raised by Serbia in its Respondent's Counter-Memorial, para. 104 - that the Agency's right to terminate the Privatization Agreement exists while "*there is a determined obligation of the buyer to comply with various obligations from the agreement*". Thus, the duty of the buyer to comply with the obligations from the agreement continues to exist if the buyer is put on notice and granted additional period to remedy its breach. In the present case, **before payment of the purchase price**, Mr. Obradovic was obliged to remedy the breach of Article 5.3.4., but he failed to do so, which means that he had not performed the Privatization Agreement, at the time of the payment of the purchase price. Thus, the payment of the purchase price could not prevent the Agency from terminating the Privatization Agreement.

[113] Respondent's Counter-Memorial, para. 102; Judgment of the Supreme Court of Cassation of 19 October 2017, **RE-30**; Judgment of the Supreme Court of Cassation of 14 November 2013, **RE-62**.

[114] Judgment of the Supreme Court of Cassation of 18 May 2017, **RE-94**.

[115] See Termination of Trayal korporacija privatization agreement of 6 December 2013, **RE-24**; Termination of Geodetski biro privatization agreement of 27 March 2013, **RE-31**; Termination of Zastava PES privatization agreement of 9 April 2013, **RE-59**; Respondent's Counter-Memorial, para. 109; Respondent's Rejoinder, para. 215. In this case, breach of Article 5.3.4. which ultimately lead to termination of the Privatization Agreement, was noted by the Agency in January 2011, while the first Notice on additional period for remedy of this breach was issued on 25 February 2011, i.e. all this happened prior to the payment of purchase price on 8 April 2011, Respondent's Counter-Memorial, para. 98.

[116] See Judgment of the Supreme Court of Cassation no. Prev. 132/13 of 29 May 2014, **RE-356**; Judgment of the Supreme Court of Serbia, Prev. 410/2005 from 1 March 2006, **RE-166**; Decision of the Constitutional court of Serbia of 6 October 2016, **RE-95**; Respondent's Rejoinder, Section I.B.5.1.

Agreement. The first challenge to it was made in this arbitration and by the Claimants."[117]

VI. DEVASTATING MANAGEMENT AND BANKRUPTCY OF BD AGRO

53. Mr. Rand tries to showcase BD Agro as an increasingly successful business enterprise in the period that followed conclusion of the Privatization Agreement.[118] However, instead of flourishing after privatization, BD Agro was mismanaged.[119] The record shows that Mr. Obradovic financed himself and his affiliated companies at the expense of BD Agro. Also, the bank account records of BD Agro prove that there was an outflow of funds from BD Agro to Mr. Obradovic, without any ostensible business reason,[120] while BD Agro's land was used as means of settling an alleged debt towards Mr. Obradovic, who later resold the land at a much higher price than the price for which he acquired it from BD Agro.[121] Also, it was BD Agro who paid the privatization purchase price for its own shares and financed investment in its business, although according to the Privatization Agreement this was an obligation of Mr. Obradovic.[122]

54. Mr. Obradovic also used BD Agro's funds to finance his other companies (also claimed to be beneficially owned by Mr. Rand). These companies still remain largely in debt towards BD Agro.[123] Mr. Rand also prides himself that significant funds were used to overhaul BD Agro's facilities.[124] However, what he repeatedly fails to mention is that

[117] Dissenting Opinion of Professor Marcelo G. Kohen, para. 25.
[118] Memorial on Annulment, paras. 35-38.
[119] See Respondent's Counter-Memorial, Section II.E.1; Respondent's Rejoinder, Section I.F.
[120] Third Expert Report of Dr. Hern, para. 127; Lists of transactions conducted through bank accounts owned by BD Agro, **RE-515**; Lists of transactions conducted through bank accounts owned by BD Agro Mlekara, **RE-516**; Lists of transactions conducted through bank accounts owned by Veterinarska sluzba BD Agro, **RE-517**. It is worthwhile mentioning that Dr Hern's results have been substantially manipulated and reduced at Claimants' instructions. Specifically, Claimants provided detailed instructions to their expert on how to analyze the transactions, telling him what he should consider as loans and what he should not consider as loans, what keywords should he use, what accounts should he look at, how should he interpret transaction codes, and so on. This led Dr. Hern to provide a significantly lower negative net balance than that determined by Mr. Sandy Cowan, Respondent's expert. See Third Expert Report of Dr. Hern, paras. 123-126; Second Expert Report of Mr. Sandy Cowan dated 24 January 2020, Appendix 3, Question 1.
[121] Respondent's Rejoinder, paras. 345-348.
[122] Respondent's Rejoinder, paras. 325-328 and 373-394.
[123] Respondent's Rejoinder, paras. 340-341.
[124] Memorial on Annulment, para. 34.

the funds in question substantially exceeded the value of the construction works actually conducted on the farm.[125]

55. Disastrous handling of BD Agro's assets during Mr. Obradovic's management led to the financial deterioration of the company, which became heavily indebted. Mr. Rand, however, alleges that the Agency is the one who should be blamed for leading BD Agro to bankruptcy.[126] The truth is that BD Agro's accounts were permanently blocked from 8 March 2013,[127] *i.e.* two and half years before the termination of the Privatization Agreement, at the time Mr. Obradovic managed the company. The accounts were blocked due to the enforced collection which is why the then-acting management of BD Agro had to commence its reorganization.[128] However, in the end, there were bankruptcy proceedings against BD Agro, due to refusal of commercial, privately owned creditors to vote for the adoption of the reorganization plan.[129] Therefore, the bankruptcy did not occur due to the Agency's management of BD Agro upon termination of the Privatization Agreement, but due to the fact that BD Agro's accounts were permanently blocked since 8 March 2013, i.e. two and half years before the termination of the Privatization Agreement.

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

56. Applicant seeks annulment of the Award due to the failure to state reasons on which the Tribunal based its conclusions on quantum. Applicant provides a short summary of the relevant legal standard for annulment due to the failure to state reasons and of the circumstances which entail such failure. Further, he alleges that the reasoning of the

[125] See Respondent's Rejoinder, para. 371 and Section I.F.4.1.3; Criminal Complaint against Mr. Jovanovic and others, 8 December 2014, p. 5, **RE-258**.

[126] Memorial on Annulment, Section II.G.

[127] Original pre-pack reorganization plan, November 2014, p. 8, **CE-321**; Respondent's Counter-Memorial, para. 803; Respondent's Rejoinder, paras. 441-442.

[128] BD Agro's submission accompanying the Pre-pack Reorganization Plan dated 25 November 2014, **CE-085**; Original pre-pack reorganization plan, November 2014, **CE-321**; Respondent's Rejoinder, paras. 442-443.

[129] Banca Intesa was against the proposed reorganization plan as it considered that BD Agro was trying to prevent creditor from settling their receivables, so it insisted on opening of bankruptcy proceedings and discontinuance of the proceedings based on reorganization plan. See Objections of Banca Intesa to Original pre-pack reorganization plan dated 6 January 2015, **RE-459**; Respondent's Rejoinder, para. 446-463. Eventually, in August 2016 the Commercial Court rendered the decision on opening of bankruptcy proceedings over BD Agro based on requests from Banca Intesa and company Imlek, Decision of the Commercial Court in Belgrade on opening bankruptcy proceedings over BD Agro dated 30 August 2016, **CE-109**; Respondent's Rejoinder, para. 471.

Award concerning valuation of the construction land contained a number of contradictions; that insufficient, inadequate and contradictory reasons were given about the 30% discount on the price of the construction land; and that the Tribunal also ignored key evidence when valuing the construction land. Further, Applicant alleges that the Tribunal failed to provide any reasons for its valuation of certain other BD Agro's assets. Finally, Applicant alleges that the Tribunal provided contradictory and insufficient reasoning with respect to its valuation of BD Agro's liabilities.[130]

57. In this Chapter, Respondent will demonstrate that Applicant's allegations about the lack of reasons for conclusions on quantum are without merit. This Chapter will first deal with the relevant legal standard for annulment due to the lack of reasons and will respond to Applicant's unjustified remarks in this regard (**Section I.**); then it will show that there are no contradictions in the Tribunal's reasoning concerning the valuation of the construction land, nor is its reasoning insufficient or inadequate (**Section II.**); that the Tribunal did not ignore key evidence when valuing the construction land (**Section III.**); and that it did not fail to provide any reasons for its valuation of certain BD Agro's other assets (**Section IV.**); and, finally, that the Tribunal did not provide contradictory and insufficient reasoning with respect to its valuation of BD Agro's liabilities (**Section V.**).

I. APPLICABLE LEGAL STANDARD

58. In the following, Respondent will first provide its general remarks about applicable legal standard for failure to state reasons in the context of Article 52(1)(c) of the ICSID Convention (**Section 1.**) and then it will respond to Applicant's summary of the circumstances in which it is considered that there is a failure to state reasons (**Section 2.**).

1. In general

59. Applicant briefly discusses legal standards applicable in the context of failure to state reasons as a ground for annulment. He points to the decision of *ad hoc* committee in *MINE v. Guinea* as the leading authority on the issue and concludes that "*the requirement to state reasons can be satisfied only if the award enables the reader to*

[130] Memorial on Annulment, paras. 79-251.

follow the tribunal's reasoning".[131] Here, Applicant quotes the famous pronouncement in *MINE* that the requirement is satisfied "*as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or law*".[132] Applicant also notes that other *ad hoc* committees have expressed similar views.[133]

60. Respondent agrees with this standard but would also like to emphasize another salient point in the *MINE* decision:

> ***"[t]he adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e)****, because it almost inevitably draws an ad hoc committee into an examination of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention".*[134]

61. The famous adages from *MINE* decision were not only quoted, but also developed in the subsequent practice of *ad hoc* committees. The decision of the *ad hoc* committee in *Vivendi v. Argentina* in particular stands out. It stated that

> *"It bears reiterating that an ad hoc committee is not a court of appeal.* ***Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point*** *in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.*
>
> *In the Committee's view, annulment under Article 52(1)(e) should only occur in a* ***clear case****.* ***This entails two conditions****: first,* ***the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale****; and*

[131] Memorial on Annulment, para. 80.
[132] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, para. 5.09, **CLA-184** quoted in Memorial on Annulment, para. 80.
[133] Memorial on Annulment, para. 81.
[134] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, para. 5.08, **CLA-184** (emphasis added).

> *second, **that point must itself be necessary to the tribunal's decision**."*[135]

62. As noted by the leading commentary of the ICSID Convention,

> "*The* MINE *standard, as now restated in* Vivendi v. Argentina, *merely requires that the reasons enable the reader to understand what motivated the tribunal. As long as the* ad hoc *committee can follow the reasons it is irrelevant what it thinks of their quality.*"[136]

63. This continues to be the position. As noted by the *ad hoc* committee in *Global Telecom*,

> *"*Ad hoc *committees have explained that the requirement to state reasons is intended to ensure that the reader can understand the reasoning of the tribunal, meaning the reader can understand the facts and law applied by the tribunal in coming to its conclusion. The correctness of the reasoning or whether it is convincing is not relevant.*"[137]

64. Considering the above, the threshold for annulment due to the lack of reasons is very high and an applicant bears the burden of showing that this threshold has been reached. In the words of the ad hoc committee in *Alapli v. Turkey*,

> *"In light of these considerations, the ad hoc Committee finds that the threshold for annulment under Article 52(1)(e) of the ICSID Convention is very high. Indeed, the Applicant bears the burden of proving that the Tribunal's reasoning on a point which is essential to the outcome of the case was either unintelligible or contradictory or frivolous or absent."*[138]

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[135] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 64-65, **RLA-155.**

[136] Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds., *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 3rd ed. Cambridge University Press; 2022, p. 1349, **CLA-206**.

[137] *Global Telecom Holding S.A.E., v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022, para. 79, **RLA-172.**

[138] *Alapli Elektrik B.V. v. Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para. 202, **RLA-247.**

65. Further, an *ad hoc* committee should not enter into assessment of correctness of the reasons in the award, because that amounts to appellate review. According to ICSID Background Paper on Annulment, "*The correctness of the reasoning or whether it is convincing is not relevant*"[139] in the annulment context. This also applies to the tribunal's assessment of facts. As noted by the *Tidewater ad hoc* committee,

> *"... the Committee will abstain from scrutinizing whether the Tribunal has established the facts correctly, has interpreted the applicable law correctly and has subsumed the facts as established correctly under the law as interpreted. It must also not concern itself as to whether the Tribunal has used its discretion erroneously. That would necessarily imply a substitution of the Tribunal's interpretation and discretion by its own interpretation and discretion and amount to an inadmissible decision on appeal."*[140]

66. The point that the tribunal's assessment of facts is not a matter for annulment procedure is reinforced by Arbitration Rule 34(1), which makes the tribunal sole judge of the probative value of evidence. As noted by the *ad hoc* committee in *Wena*:

> "*... it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party. Arbitration Rule 34(1) recalls that the Tribunal is the judge of the probative value of the evidence produced.*"[141]

67. It has also been recognized that discretion of tribunals in assessment of evidence is particularly wide when determining compensation. This is of particular importance in

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[139] ICSID Updated Background Paper on Annulment, para. 111, **RLA-256** and arbitral practice in note 223 therein.

[140] *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 172, **CLA-188; see, also,** *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 65, **CLA-185**.

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

the present annulment case which, *inter alia*, concerns a request for annulment of part of the Award dealing with quantum.[142] As noted by the *ad hoc* committee in *Wena*,

> *"With respect to determination of the quantum of damages awarded, it may be recalled that the notion of "prompt, adequate and effective compensation" confers to the Tribunal a certain margin of discretion, within which, by its nature, few reasons more than a reference to the Tribunal's estimation can be given, together with statements on the relevance and the evaluation of the supporting evidence.*"[143]

68. More recently, the *ad hoc* committee in *Perenco v Ecuador* noted that

> "Ad hoc *committees have consistently recognized that tribunals have a considerable measure of discretion in deciding issues of quantum.*"[144]

69. The consensus that tribunals have wide margin of discretion in the estimation of compensation was recently also confirmed in the *NextEra* annulment decision:

> *"As an initial mater, the Committee reiterates that it agrees with the general consensus that exists among committees that tribunals have a wide margin of appreciation to assess the parties' positions on damages and determine a reasonable approximation of damages."*[145]

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[142] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, paras. 412,417, **CLA-5**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 91,93, **CLA-185**; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 192, **CLA-188;** C*ompañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 64, **RLA-155**; *UABE Energija v. Republic of Latvia,* ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, para. 215, **RLA**- 211; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 363, **CLA-193**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, paras. 273 & 389, **CLA-205**.

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

[144] *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 363, **CLA-193.**

[145] *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 389, **CLA-205**.

70. The *NextEra* committee also noted that "[*a]n annulment application based on damages must meet a higher bar*".[146]

71. As will be seen in the discussion that follows, Applicant's Memorial is often oblivious to this practice of *ad hoc* committees and fails to recognize that the Tribunal enjoyed a wide discretion in its valuation of BD Agro.

2. Applicant's summary of reasons for annulment is inaccurate or incomplete

72. According to Applicant, it is "*widely accepted in ICSID annulment jurisprudence*" that an award falls short of the requirement to state reasons, among others, in the following circumstances: (i) absence of reasons for an award or its particular aspect; (ii) contradictory reasons; (iii) insufficient or inadequate reasons; and (iv) failure to observe relevant evidence. Further, Applicant argues that all these circumstances arise in the present case, but provides no discussion of the relevant jurisprudence.[147] In the following, Respondent will show that Applicant's presentation of the circumstances which amount to failure to state reasons is inaccurate and/or incomplete.

73. *First*, *a*s regards the absence of reasons for an award or its particular aspect, it is important to note that practice of *ad hoc* committees strongly supports the position that motivation for an award may be provided not only expressly but also *implicitly*, either by inference from the express terms of the award or by reference to evidence.[148]

74. As noted by the *ad hoc* committee in *Wena v. Egypt*

[146] *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 273, **CLA-205**.

[147] Memorial on Annulment, para. 84.

[148] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 81, **CLA-185**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, para. 127, **RLA-152**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 75, **RLA- 232**; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, para. 97, **CLA-184***; Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 189, **CLA-188;** *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 124, **CLA-186**; *NextEra Global Holdings et al. v. Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 132, **CLA-205**.

> *"Neither Article 48(3) nor Article 52(l)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning.* ***This goal does not require that each reason be stated expressly****. The Tribunal's reasons may be in the considerations and conclusions contained in the award, provided* ***they can be reasonably inferred from the terms used in the decision****."*
>
> *"With respect to any further reasons supporting the Tribunal's determination of the amount awarded to Wena, the appropriate information is contained in Wena's documentary evidence.* ***The reasons relevant for the Tribunal's findings are thus stated implicitly by reference to such documentation.***"[149]

75. This was also the position of the *ad hoc* committee in *Vivendi*, which stated that

> *"No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with."*[150]

76. As will be seen, the present request for annulment in part concerns relatively minor points with regard to which Applicant argues the Tribunal failed to provide any reasoning,[151] while in fact this reasoning may easily be inferred from the Award.

77. *Second,* as far as contradictory reasons are concerned, this question was addressed by the *ad hoc* committee in *Vivendi*:

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[149] *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, paras 81 & 93 (emphasis added), **CLA-185.**

[150] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 87, **RLA-155**;

[151] See Section IV below.

> "*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."*[152]

78. This warning, that only "*genuine contradictions*" in the award, rather than "*conflicting considerations*" of the tribunal, amount to the lack of reasons, was heeded by other *ad hoc* committees.[153] Such genuine contradictions "*must be such as to be incapable of standing together on any reasonable reading of the decision*".[154]

79. *Third,* Applicant is wrong to argue that insufficient or inadequate reasons in the award are a ground for its annulment. This is already clear from the general standard for annulment due to the lack of reasons expounded by *MINE* and *Vivendi (I),* which only requires that a reader should understand the award and nothing more. According to Schreuer's commentary of the ICSID Convention,

> "MINE, *the second annulment in* Amco v Indonesia, Wena Hotels v Egypt, CDC v Seychelles, MTD v Chile *and* Vivendi v Argentina *each* ***specifically dismiss the concept of the adequacy of reasons*** *subject only to the rejection of contradictory or frivolous reasons. The standard of 'sufficiently relevant' or 'sufficiently pertinent' reasons left it to the* ad hoc *committee to judge whether the award was well-founded enough to be convincing. The* MINE *standard, as now restated in* Vivendi v Argentina*, merely requires that the reasons enable the reader to understand what motivated the tribunal. As long as the* ad hoc

[152] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 65, **RLA-155;**

[153] See, e.g. *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para 170, **CLA-188**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para 101, **CLA-186**

[154] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 103, **RLA-210.**

> *committee can follow the reasons it is irrelevant what it thinks of their quality.*"[155]

80. On this basis, Schreuer's commentary defines the accepted position in the following way:

> *"*Ad hoc *committees have* ***consistently*** *confirmed that Art. 52(1)(e) does not permit any inquiry into the quality or persuasiveness of reasons other than to ascertain whether the reasoning was frivolous.* Ad hoc *committees may be dissatisfied with the adequacy of reasons, but provided they meet the conditions set out in* MINE, *and confirmed in* Vivendi I, *there will not be grounds for annulment."*[156]

81. Therefore, insufficient or inadequate reasons in an award do not amount to the lack of reasons as the ground for annulment.

82. *Fourth,* Applicant mentions failure to observe relevant evidence as a ground for annulment.[157] As will be seen from the discussion below, Applicant in fact seeks to annul the Award because his assessment of evidence is different from the Tribunal's assessment. However, considering Arbitration Rule 34(1), an *ad hoc* committee should not question the tribunal's assessment of relevance and probative value of evidence.[158] It should also be noted that the tribunal is not required to address each argument made by a party and provide reasons about it.[159] In this context, Applicant refers to *Teco v.*

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

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

[157] Memorial on Annulment, para. 83(d).

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

[159] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155** ("*No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with*"); see, also *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, paras. 72 & 221, **RLA-232,** *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the

Guatemala. In that case, the tribunal decided that that there was no sufficient evidence for a claim for loss of value but entirely ignored expert reports provided by the parties.[160] This makes it clear that a failure to observe evidence may be the reason for annulment only in rare cases. It would be only exceptionally that the tribunal would completely fail to consider major pieces of evidence, as in *Teco*.

II. THE REASONING RELATED TO THE VALUATION OF THE CONSTRUCTION LAND IS NOT CONTRADICTORY

83. Applicant alleges that there were a number of contradictions in the Tribunal's reasoning related to the valuation of the construction land. Respondent will address these allegations *seriatim* below and will demonstrate that none of them stands scrutiny.

1. Alleged contradiction between exclusion of the "Batajnica transactions" and accepting Serbia's reliance on an asking price for the land in the same area

84. According to Applicant, the Tribunal's reasoning was contradictory because

> "… *while the Tribunal refused to rely on prices of land in Batajnica because they were, allegedly, not comparable to the Construction Land, the Tribunal accepted asking prices from the same area identified by Serbia*".[161]

85. Applicant argues that, in this way, the Tribunal made the same error as the tribunal in *Tidewater v. Venezuela*, which adopted one element for determination of the market value of the business (14.75% risk premium) and rejected another as unreasonable (1.5% risk premium), but in its calculation of quantum applied the element it hitherto rejected. The *Tidewater* annulment committee annulled the award in the part pertaining to this calculation because it contained "*a genuinely contradictory reasoning*" to another part of the same award. Nothing of the sort occurred in the present case.

Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 98, **RLA-210.**

[160] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para 130 (footnote omitted), **CLA-186.**

[161] Memorial on Annulment, para. 97, see, also, *ibid.*, para. 91(a).

86. The Tribunal rejected Claimants' and their experts' reliance on the so-called Batajnica transactions as the main source of evidence for price of Zones A, B and C land on the basis of several factors:[162]

(1) The Batajnica transactions were based on value assessments by the tax administration for determining the tax on property transfers, so they were different from property valuations based on international standards – for this the Tribunal in a footnote relied on a report by Respondent's property expert. This point was also accepted by Claimants' property expert at the Hearing.[163]

(2) The Batajnica assessments did not meet the valuation requirement that they originate on or before the valuation date of 21 October 2015. While it was not clear when these assessments actually took place, the Tribunal concluded, with reference to applicable legislation and the date of the relevant documents evidencing the Batajnica transactions, that it was likely that the assessments took place in 2016, because "the tax administration is required to base its assessments of the property value on its most recent tax decisions concerning real estate sales".[164]

(3) As far as the location of the Batajnica transactions was concerned, the Tribunal noted that it was Claimants' financial expert, Dr. Hern, who initially made the reservation about the compatibility of the Batajnica land with Zones A, B and C land.165 The Tribunal then pointed to several differences between the two, which were identified during the Hearing, by Ms. Ilic Respondent's expert.[166]

87. It should be emphasized here that the location was listed as the last among the reasons behind the Tribunal's decision not to accept Dr. Hern's and Claimants' reliance on the Batajnica transactions prices in valuing Zones A, B and C land. Each of the other two reasons given by the Tribunal– that the Batajnica value assessments did not meet international standards and that it was likely they took place in 2016 – was in itself a sufficient basis for the conclusion that the Batajnica transactions were an unsuitable

[162] Award, para. 693 (third bullet point).
[163] Award, para. 693 (third bullet point (i)).
[164] Award, para. 693 (third bullet point (ii)).
[165] Award, para. 693 (third bullet point (iii)). Here, the Tribunal relied on First Expert Report of Dr. Richard Hern, para. 69, which stated that Batajnica region is "broadly comparable" with BD Agro's land but noted several differences. Applicant misstates Dr. Hern's position when it states that he "concluded that the land in Batajnica was comparable to the Construction Land", see Memorial on Annulment, para. 94.
[166] Award, para. 693 (third bullet point (iii)).

comparator. In other words, even if Applicant's allegation about contradictory reasoning concerning the Tribunal's acceptance of asking prices from the same area were correct (*quod non*), this would not affect the outcome of the case since the Batajnica transactions were incompatible with Zones A, B and C land on the basis of two other grounds mentioned by the Tribunal.[167] As noted by the *ad hoc* committee in *Watkins Holdings v Spain*, "*a lack of reasons that would not affect the outcome should not justify annulment*".[168]

88. As far as the location is concerned, it should be emphasized that the Tribunal noted incompatibility between the location of the *specific* land in Batajnica invoked by Dr Hern and Claimants and identified at the Hearing ("**the Batajnica land**"[169]) with Zones A, B and C. It never made a broad ruling that all land "from the same area" was incompatible with Zones A, B and C, as Applicant alleges.[170] For this reason alone, Applicant's argument about contradictory reasoning fails, because it relies on a contradiction that in fact does not exist, since the Tribunal found that the specific land in the Batajnica transactions was incompatible with Zones A, B and C, which obviously does not exclude *all* the land in Batajnica municipality as incompatible.

89. One out of five asking prices considered in the valuation by Respondent's property expert, Ms Ilic, was related to the land in Batajnica municipality. However, there is no indication that the advertised land was in the same exact area as the land in the Batajnica transactions. On the contrary, there was no mention of the highway in the vicinity of the advertised land, while the highway is adjacent to the land pertaining to the Batajnica transactions. Needless to say, the proximity of a highway is a major factor in the pricing of land.[171]

90. There are also other important differences. Unlike the Batajnica transactions, the asking price for the land in Batajnica used by Ms. Ilic was sought in 2013, i.e., before the Valuation Date. Also, the asking price for the land in Batajnica constituted evidence that corresponded to international standards and, as such, was substantially different in

[167] One of these grounds (incompatibility of the Batajnica valuations with international standards) is not even challenged by Applicant.
[168] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain,* ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para .134, **CLA-207**.
[169] Award, para. 693 (third bullet point).
[170] Memorial on Annulment, para. 97.
[171] First Expert Report of Danijela Ilić, Appendix, p. 28 and Asking prices for KO Dobanovci, p. 4, **RE-561**;

quality from the Batajnica transactions, which were based on valuations for the purpose of calculating property sale tax conducted by tax authorities.[172]

91. To be sure, this advertisement for Batajnica land, whose inclusion in the asking prices Applicant flags as evidence of the Tribunal's contradictory reasoning, has actually raised the price of the construction land in the valuation for the benefit of Mr. Rand.

2. Alleged contradiction between rejection of the Batajnica transactions because they post-dated the Valuation Date and acceptance of asking prices with unknown dates

92. According to Applicant, the Tribunal's reasons are also contradictory because it rejected the use of the Batajnica transactions on the basis that they were after the Valuation Date, while it accepted Serbia's valuation of the construction land based on evidence with unknown dates.[173] Specifically, Applicant states that, for two out of five asking prices on which Ms. Ilic and Mr. Cowan rely in their valuations, documentary evidence on the record does not indicate any date, while Ms. Ilic representation that these advertisements were from 2015 is insufficient to conclude whether this evidence pre-dates or post-dates the Valuation Date (21 October 2015).[174]

93. Applicant's contentions fail for several reasons:

1) Applicant in fact does not challenge the Tribunal's reasoning but challenges correctness of its assessment of evidence, i.e. whether the Tribunal was justified in relying on Ms. Ilic's representations or not, which is not a reason for annulment.

2) Claimants never raised the issue of the dates of the transactions in question during the Arbitration, so Applicant cannot do so now.

3) Even if Applicant were right, this would not affect the outcome of the dispute, because there is unchallenged evidence of three more asking prices.

94. *First*, Applicant avers that the Tribunal accepted "*Serbia's valuation based on evidence with unknown dates*" because Ms. Ilic's "*unsubstantiated representation*" that the

[172] Award, para. 693 (third bullet point (i)).
[173] Memorial on Annulment, paras. 107.
[174] Memorial on Annulment, paras. 103-106.

advertisements were from 2015 was "*insufficient to conclude*" whether they pre-date or post-date the Valuation Date.[175] In this way, Applicant questions the Tribunals' assessment of evidence on the record, in particular its acceptance of the evidence of asking prices presented by Ms. Ilic,[176] and of her representations that the advertisements in question were from 2015 and that she based her valuation on 21 October 2015 as the valuation date.[177] As previously discussed, assessment of evidence is the sole prerogative of the Tribunal, while correctness of this assessment is irrelevant in the annulment procedure.[178] Accordingly, the *Ad hoc* Committee should abstain from assessing the correctness of the Tribunal's reading of evidence, including its reliance on Ms. Ilic's expert report and her representations.

95. In addition, it has been accepted that tribunals have considerable discretion in the assessment of evidence, and especially so in the quantum context.[179] This is an additional reason why the *Ad hoc* Committee should refuse to engage in the assessment of the Tribunal's reasoning proposed by Applicant.

96. *Second*, until the Memorial on Annulment, neither Applicant nor other Claimants have challenged the asking prices relied upon by Ms. Ilic on the basis that their *date* was undetermined or that they post-dated the Valuation Date. Claimants have raised other challenges to Ms. Ilic's report and evidence of asking prices, but never this one. According to the *Wenna* committee,

> *"The award cannot be challenged under Article 52(1)(e) for a lack of reasons in respect of allegations and arguments, or parts thereof, that have not been presented during the proceeding before the Tribunal."*[180]

[175] Memorial on Annulment, para 105.
[176] Asking prices for KO Dobanovci, **RE-561**.
[177] First Expert Report of Danijela Ilić, p. 65, paras. 9.1-9.3 & Appendix 2, p. 28.
[178] ICSID Updated Background Paper on Annulment, para. 111, **RLA-256** and arbitral practice in note 223 therein; see, also, para.66 above.
[179] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 91, **CLA-185;** *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 192, **CLA-188**; *UABE Energija v. Republic of Latvia*, ISCID Case No. ARB/12/23, Decision on annulment, 8 April 2020, paras. 221**, RLA-211.**
[180] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 82, **CLA-185.**

97. Clearly, Applicant is precluded from seeking annulment of the Award on the basis of a challenge concerning the date of the asking prices in Ms. Ilic's report, since Claimants never raised this challenge in the Arbitration.

98. *Third*, Applicant's challenge, if accepted, would have a negligeable effect on the outcome of the dispute. This effect would not correspond to the difference between the valuation of the construction land on the basis of the Batajnica transactions and the one adopted by the Tribunal, as Applicant contends.[181] Rather, the effect of this challenge would be to exclude evidence concerning 2 asking prices from the calculation, which would leave intact and unchallenged the remaining 3 asking prices. On the basis of the remaining asking prices, the median price per square meter for the construction land would eventually be only EUR 0.3 higher than the one established by Mr. Ilic and accepted by the Tribunal.[182]

99. According to the *Vivendi* committee, even if an annullable error is found, an *ad hoc* committee has "*a certain measure of discretion as to whether to annul an award*" which gives it "*some flexibility in determining whether annulment is appropriate in the circumstances*". Among other things "*it is necessary for an ad hoc committee to consider the significance of the error relative to the legal rights of the parties*".[183] It is submitted that the significance of the error alleged by Applicant is negligible and should under no circumstances lead to the annulment of the Award.

3. Alleged contradiction between the Tribunal's refusal of Dr. Hern's reliance on the First Confineks Valuation and its acceptance of Serbia's valuation, both of which were not based on comparable transactions

100. According to Applicant, Dr. Hern supported his lower bound valuation of the Zones A, B and C land by reference to the First Confineks Valuation, but the Tribunal refused to

[181] Memorial on Annulment, para. 101.

[182] If two asking prices challenged by Applicant were excluded from the calculation, the median of the remaining prices (EUR 13.5, EUR 21.5 and EUR 22.5) would be EUR 21.5, which, when reduced by 30% discount adopted by Ms. Ilic, comes to EUR 15 per square meter, as compared to the price of EUR 14.7 determined by Ms. Ilic's valuation, see Ilic ER1, Appendix 2, p. 28 and Asking prices for KO Dobanovci, **RE-561**.

[183] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 66, **RLA-155**; with a footnote referring to Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds., *Schreuer's Commentary on the ICSID Convention*: *A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 3rd ed. Cambridge University Press; 2022, **CLA-206** and references to the authorities therein.

rely on the First Confineks Valuation because it did not refer to comparable transactions. At the same time, the Tribunal accepted Serbia's valuation which was also not based on comparable transactions but on asking prices.[184]

101. This challenge is based on a misreading of the Award. The principal reason for the Tribunal's rejection of Dr. Hern's lower bound land price, reflecting the valuation of BD Agro's land as determined by Serbian tax authorities for calculating property taxes, was that it fell into a category of "mass appraisals" which, as noted by Claimants' expert Mr. Grzesik, carried "*little evidentiary weight when valuing specific individual properties*".[185] In the second step only, the Tribunal considered Dr. Hern's argument that his lower bound price was "broadly consistent" with the First Confineks Valuation. Here, again, the Tribunal turned to Claimants' own expert Mr. Grzesik, who treated the First Confineks Valuation as "secondary evidence" because "*it did not refer to evidence of comparable transactions*".[186]

102. It appears that the Tribunal's was mentioning the First Confineks Valuation in order to fully respond to all arguments Dr. Hern provided in support of his lower bound price. It is clear, however, that the Tribunal rejected this price primarily because it did not correspond to international valuation standards, as it was based on mass appraisals by tax authorities.[187] The First Confineks Valuation was of secondary importance, both in Dr. Hern's discussion of his lower bound price and in the Tribunal's analysis of it.

103. To be sure, the Tribunal's remarks about the land price in the First Confineks Valuation, repeating Mr. Grzesik's observations, do not contradict its decision to accept the price from Ms. Ilic's valuation, which was based on asking prices. As will be discussed in the next section, none of the experts, including Mr. Grzesik, rejected asking prices as a source for valuation of land in accordance with international standards. The problem with the First Confineks Valuation however was that it simply did not provide any evidence for its determination of the price of construction land.[188]

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[184] Memorial on Annulment, para. 109-112.
[185] Award, para. 693 (first bullet point).
[186] Award, para. 693 (first bullet point).
[187] Award, para. 693 (first bullet point).
[188] First Expert Report of Krzystof Grzesik, para. 6.6 ("*As regards the Confineks report, as a reviewing valuer I am only able to treat it as secondary evidence because the valuation does not refer to evidence of transactions of comparable properties to support its conclusions.*", footnote omitted). See, also, First Expert Report of Danijela Ilić, para. 8.1.

104. In conclusion, there is no contradiction between the reasons adduced by the Tribunal for accepting Ms. Ilic's valuation of the construction land in Zones A, B and C, which was ultimately based on asking prices, and its discussion of the First Confineks Valuation and adoption of Mr. Grzesik's criticism of it, on the basis that its prices of construction land were not based on comparable transactions.

4. Alleged contradiction between the Tribunal's rejection of Mr. Mrgud's valuation and its acceptance of Ms. Ilic's valuation, although both were based on asking prices

105. According to Applicant, the Tribunal rejected Dr. Hern's reliance on Mr. Mrgud valuation, which was based on asking prices, with reference to Mr. Grzesik's testimony at the Hearing that asking prices were at "the lowest level" of evidence one can use in a valuation. At the same time, the Tribunal based its valuation of the construction land in Zones A, B and C on the valuation proposed by Ms. Ilic, which was also based on asking prices. Applicant avers that, in this way, the Tribunal contradicted its own analysis and reasoning, in the same way as the *Tidewater* tribunal, because it in fact used the valuation criterion it had rejected as unreasonable.[189]

106. However, while it is true that the Tribunal rejected Dr. Hern's reliance on Mr. Mrgud's valuation, the reason for this was not the fact that the latter was based on asking prices, but that it did not provide **any information whatsoever** about the sources of the asking prices used or when they were published. This is clear if one simply reads the relevant part of the Award:

> *"Dr. Hern states that his upper bound price of 30 EUR/m2 is based on weighted average price used in Mr. Mrgud's valuation. However, Mr. Grzesik opined that Mr. Mrgud's valuation, based on asking prices, was flawed,* ***because it provided no information about the sources of these prices or when they were published****."*[190]

[189] Memorial on Annulment, paras. 115-120.
[190] Award, para. 693 (second bullet point) (emphasis added).

107. It appears that Applicant's challenge to the Award based on the alleged contradiction concerning simultaneous rejection of Mr. Mrgud's and acceptance of Ms. Ilic's respective valuations, which were both based on asking prices, is patently without merit.

108. Further, as far as asking prices as a source of evidence of market price is concerned, both Claimants' and Respondent's experts agreed that it was in accordance with international standards to use asking prices as evidence.[191] Also, while Mr. Grzesik stated at the Hearing that it was "*the lowest level of evidence that you can use in a valuation*", it is important to note here that he agreed that asking prices constitute legitimate evidence of market price, in accordance with international standards.[192] Indeed, he mentioned that it was a common practice of valuers in Serbia to rely on asking prices.[193] Therefore, there is nothing wrong in using asking prices, what is wrong is not to give any information about their sources, as Mr. Mrgud's valuation did, which was noted by Mr. Grzesik at the Hearing[194] and accepted by the Tribunal in the Award.

109. Unlike Mr. Mrgud's valuation, Ms. Ilic's provided asking prices with clearly stated source and time of publishing, none of which was challenged by Claimants during the Arbitration.[195]

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[191] First Expert Report of Danijela Ilic, para. 4.9, quoting "Comparable evidence in property valuation", RICS information paper, 1st edition (IP 26/2012), Section 4.4. – Comparable evidence in property valuation, RICS information paper, 1st edition (IP 26/2012), **RE-325.** According to Ms. Ilic, "*Based on the characteristics of the representative sample, a valuer seeks comparable sales and/or asking prices, where sales are not available or not appropriate, and completes all adjustments necessary to estimate market value* ", First Expert Report of Danijela Ilic, para. 9.20. According to Dr. Hern, "*All of my evidence relies directly or indirectly on market transactions and other market data (e.g. asking prices) and hence falls under the broad definition of "market-derived inputs" under IVS (2013).*" Third Expert Report of Dr. Richard Hern, para. 34.

[192] Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 80:25 – p. 81:2 (Mr. Grzesik).

[193] First Expert Report of Krzystof Grzesik, para. 6. 10; Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 77:7-9 (Mr. Grzesik).

[194] Hearing on Jurisdiction and Merits, Transcript, Day 7, pp. 80:16-81:2 (Mr. Grzesik), referred to in Award, para. 693 (first bullet point).

[195] In this context, Claimants also argue that Ms. Ilic disregarded two actual transactions that were available to her, Memorial on Annulment, para. 118. This argument will be addressed below, Section III.3, since it has also been formulated as a separate challenge to the reasoning of the Tribunal, see Memorial on Annulment, paras. 144 *et seq.*

5. Allegedly insufficient, inadequate and contradictory reasoning for the Tribunal's acceptance of a 30% discount on the price of the construction land

110. According to Applicant, the Tribunal's acceptance of a 30% discount to the value of the construction land is annullable because (i) it provided insufficient reasoning for the magnitude of the discount (set at 30%); (ii) the Tribunal itself suggested at the Hearing that a discount based solely on an expert's judgment is arbitrary, and (iii) provided inadequate, insufficient and contradictory reasonings for applying a discount.[196]

111. These allegations do not stand scrutiny. At the outset, it should be recalled that it has been widely accepted that tribunals have a certain degree of discretion when determining compensation.[197] Applying various discounts in calculating compensation is a very common example how this discretion is exercised. What is required, however, is that a tribunal must "*explain [] the process leading to the estimation*".[198] But there is no requirement to provide detailed reasons, rather "*few reasons more than a reference to the Tribunal's estimation can be given, together with statements on the relevance and the evaluation of the supporting evidence.*"[199] This is understandable considering discretion that tribunals have when determining compensation.

112. As will be demonstrated below, the Tribunal provided its motivation for accepting the 30% discount on the price of the construction land, both as regards the basis and *rate* of discount. In the following, Respondent will demonstrate that the Tribunal provided reasons for applying the discount that are easy to follow (**Section 5.a)**), while, in any case, there can be no annulment on the basis of inadequacy or insufficiency of reasons

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[196] Memorial on Annulment, para. 122.

[197] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, paras 412 & 417, **CLA-5**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, paras. 91 & 93, **CLA-185;** *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para 192, **CLA-188;** *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 64, **RLA-155;** *UABE Energija v. Republic of Latvia,* ISCID Case No.ARB/12/23, Decision on annulment, 8 April 2020, paras. 221, **RLA-211;** *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 363, **CLA-193**.

[198] *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, 192.

[199] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 91, **CLA-185;**

(**Section 5.b)**); and that the Tribunal provided reasons for setting the discount at 30% (**Section 5.c)**).

a) The Tribunal provided tenable reasons for applying a discount on the price of the construction land

113. According to Applicant, the Tribunal "*did not provide any tenable reasons for its acceptance of any discount*" but provided only "purported reasons"[200] which do not justify the Tribunal's decision.[201] Specifically, the reasons the Tribunal allegedly provided for the discount – the size of the land and access to infrastructure – are not tenable.[202] On this basis, Applicant argues that the reasons presented by the Tribunal with regard to the discount are insufficient or inadequate, which is a reason for annulment. As will be demonstrated in this subsection, the reasons for application of a discount are clear and easy to follow

114. At the outset, it should be recalled that annulment does not concern the correctness of the reasoning in an award or its quality.[203] Therefore, Applicant's claim that the reasons in the Award are "purported", which goes to the quality and correctness of its reasoning, is out of place in the annulment context and should be disregarded. The scope of the inquiry is limited to the question of whether one can follow and understand the reasoning of the Tribunal.[204]

115. The Award first deals with size as the factor in determining discount:

> *"While the Claimants oppose this 30% discount, the Tribunal notes that the representative comparables chosen by Ms. Ilić and BD Agro's land were of a different size. Dr. Hern himself*

[200] Memorial on Annulment, para. 130 (emphasis in the original).
[201] Memorial on Annulment, para. 131.
[202] Memorial on Annulment, para. 130.
[203] "*The correctness of the reasoning or whether it is convincing is not relevant*", ICSID Updated Background Paper on Annulment, para. 111, **RLA-256**, and arbitral practice in note 223 therein. *"Either a reasonable, attentive and willing reader is able to understand a tribunal's motivation, in which case the reasons are not 'frivolous', whatever may be their quality, or the same reader is not enabled to understand the motivation, in which case the tribunal has failed to state reasons." Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 169, **CLA-188;**
[204] *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para 169, **CLA-188**; see, also *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, para. 5.8, **CLA-184** (*"... the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that."*).

accepted that size does matter when commenting that, in one transaction, the large area of BD Agro's land on sale may have pushed the price down. That said, BD Agro may have been able to split its land in smaller parcels before selling it, making any discount on the sale of the land as a whole inapposite."[205]

116. The Tribunal's reasoning in this part is clear and easy to understand: (i) it noted that Ms. Ilic and Dr. Hern considered size to be a factor justifying discount on the price in case of large parcels, but (ii) it considered that BD Agro could split its land in smaller parcels before selling it, (iii) which made "*any discount on the sale of the land as a whole inapposite*". It follows that the Tribunal refused to apply discount on the basis of size of BD Agro's land.

117. After rejecting the size of the land as a relevant factor for accepting the discount, the Tribunal continued its analysis of other possible reasons for a discount:

However, even if it had done so, it remains that there were other important differences between the comparators chosen by Ms. Ilić and BD Agro's land. While the comparators had access to the roads and other infrastructure, this was not the case for BD Agro's land, which still needed to be developed. Moreover, although the Claimants argue that it is not possible to establish the exact location of the comparators and to determine the differences between the comparators chosen by Ms. Ilić's and BD Agro's land, the descriptions of the comparators make clear that they were equipped with infrastructure and had access to roads. Ms. Ilić's testimony that these differences justify a discount was not seriously rebutted. To the Tribunal, applying a discount appears reasonable as any buyer would incur costs and spend time in developing BD Agro's land and would factor the development costs and time into the price offered. Failing more precise indications in the record about the size of this deduction,

[205] Award, para. 697.

it appears reasonable to the Tribunal to accept the 30% discount applied by Ms. Ilić."[206]

118. While Applicant seemingly accepts the Tribunal's finding that the difference in infrastructure and access to roads may justify a discount, it considers that the Tribunal failed to state reasons with respect to the alleged differences in access to infrastructure between the advertised land and Zones A, B and C land, which makes its reasoning insufficient and inadequate.207 Applicant's arguments in this regard are without merit.

119. Applicant argues that it was not possible to establish the exact location of Ms. Ilic's asking prices comparators and refers to testimony of Mr. Cowan, Respondent's financial expert.[208] However, Mr. Cowan was presented with the exhibit containing advertisements of asking prices for sale of the land, which were in the Serbian language, and asked to identify the location of one land parcel where Google map depicted Belgrade instead of the parcel in question.[209] He rightly responded that he was not a land expert and that he could not identify the exact location of the land.[210]

120. In this regard, the Tribunal noted Claimants' argument that it was not possible to establish the exact location of the comparators, but concluded that "*the descriptions of the comparators make clear that they were equipped with infrastructure and had access to roads*" and that "*Ms. Ilic's testimony that these differences justify a discount was not serious rebutted*".[211] Therefore, the Tribunal rejected Claimants' argument and provided its reasons. Applicant now attempts to challenge the Tribunal's conclusion, but this is nothing else but a challenge to the Tribunal's assessment of evidence, which amounts to an appeal that cannot be entertained in the annulment procedure.

121. In any case, Applicant's challenge is without merit, as can be seen from a comparison of his allegations[212] with Exhibit RE-561, which is the exhibit containing asking prices advertisements collected by Ms. Ilic:

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[206] Award, para. 697 (footnotes omitted).
[207] Memorial on Annulment, para. 136.
[208] Memorial on Annulment, para. 137.
[209] Two other advertisements contained maps with the location of the land put for sale, see Asking prices for KO Dobanovci, **RE-561**, pp. 3 & 5 (pdf).
[210] Hearing on Jurisdiction and Merits, Transcript, Day 8, p. 146:01 (Mr. Cowan).
[211] Award, para. 697, with reference to Asking prices for KO Dobanovci, **RE-561**.
[212] Memorial on Annulment, para. 138.

1) "*a. the first announcement only states that an asphalt road leads to the plot—it does not mention any infrastructure on the plot;"*[213] However, the existence of infrastructure is implied in the fact that the advertisement states that the land is in the industrial zone, at Dobanovci highway bypass.[214]

2) "*b. the second announcement only states that infrastructure is in the vicinity of the plot;*"[215] However, the advertisement more precisely states that infrastructure is "*close to the plot*" (the Serbian original states "*immediately close*", "*u neposrednoj blizini"*). Further, the location in the industrial zone implies that infrastructure is available. Finally, the advertisement states that the land is near the highway and bypass, which implies a road connection (the Serbian original states that the land is "*first by the highway"*, "*prvi uz autoput"*).[216]

3) *"c. the third announcement states that there is a dirt road leading to the plot and infrastructure is 100 meters away;*"[217] Obviously there was a road to the parcel, while the distance of only 100 meters to infrastructure is negligible.

4) *"d. the fourth announcement states that there is an asphalt road leading to the land plot and that there is electricity, but it does not mention any other infrastructure;*"[218] This is a hair-splitting remark, and it is unclear what other infrastructure Applicant has in mind, since electricity is a crucial element of land infrastructure. In any case, the advertisement mentions that there are "*premises*" ("*prostorije*") on the land, which implies that there is also water supply to the land.[219]

5) *"e. the fifth announcement only mentions a highway 1 km away from the plot*".[220] However, the map reproduced in the advertisement indicates that the land plot is near the road connecting the highway and nearby township. It also states that

[213] Memorial on Annulment, para. 138 (a).
[214] Asking prices for KO Dobanovci, p. 1 (pdf), **RE-561**.
[215] Memorial on Annulment, para. 138 (b)
[216] Asking prices for KO Dobanovci, p. 2 (pdf), **RE-561**.
[217] Memorial on Annulment, para. 138 (c).
[218] Memorial on Annulment, para. 138 (d).
[219] Asking prices for KO Dobanovci, p. 4 (pdf), **RE-561**;
[220] Memorial on Annulment, para. 138 (e).

the land plot is in the close vicinity of industrial facilities, which indicates existence of infrastructure.[221]

122. In conclusion, Applicant's contention that the Tribunal's reasoning based on Exhibit RE-561 is insufficient and inadequate does not stand scrutiny. As can be seen, all advertised land plots in fact had access to the road and infrastructure, as the Tribunal correctly concluded.

123. Further, Applicant argues, with reference to Ms. Ilic's testimony, that Zones A, B and C land is adjacent to BD Agro's farm that has access to infrastructure, so that there was no justification for a discount on the basis of their lack of infrastructure in comparison with asking prices.[222] However, Applicant here mentions only the part of Ms. Ilic's testimony that suits his argument, since she also stated that the surface of Zones A, B and C land was many times bigger than the farm, meaning that the existence of infrastructure on the farm was irrelevant in the valuation of the construction land in Dobanovci:

> *"We are talking about A, B, C Zone, which has 279 hectares. The land of the farm as I explained in my report is around 15 hectares, yes, that part has infrastructure, has everything, but if you compare with the entire land of 279 hectares in Zone A, B, C, which doesn't even have access from the asphalt road, or in some points I just could not physically access the land, because it was just a meadow, a cornfield or wheat field."*[223]

124. According to Applicant, "*the clear arbitrariness*" of the discount is also confirmed by the fact that the Tribunal applied the same discount to the farm land itself, although it had infrastructure.[224] However, during the Arbitration, Claimants never raised the argument that the discount related to the infrastructure on BD Agro' land should be corrected because there was infrastructure on the insignificant part of that land, and cannot raise it now. In addition, the fact that Ms. Ilic applied the discount on the farm

[221] Asking prices for KO Dobanovci, p. 5 (pdf), **RE-561**.
[222] Memorial on Annulment, para. 139, referring to Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 155:19 (Ms. Ilic).
[223] Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 155:16-25 – p. 156:01 (Ms. Ilic).
[224] Memorial on Annulment, para. 140.

land itself does not say anything about the arbitrary nature of the discount, which was set on the basis of reasonable factors (access to roads and infrastructure).

125. Finally, it should be noted that this part of Applicant's argument is clearly an attempt to appeal the Tribunal's decision by questioning correctness of its assessment of evidence. For example, Applicant invites the *Ad hoc* Committee to assess whether Ms. Ilic's comparators have better access to infrastructure that the Zone A, B and C land. This would require assessment of evidence, which is the sole prerogative of the Tribunal.

126. It should be recalled that the correctness of the Tribunal's reasoning cannot be considered in annulment proceedings[225] Further, assessment of evidence is in the Tribunal's discretion, because under Arbitration Rule 34(1), it is "*the judge of the probative value of the evidence produced*".[226] For this reason alone, the *Ad hoc* Committee should refuse to consider this part of Applicant's submission.

b) <u>No annulment on the basis of inadequacy or insufficiency of reasons</u>

127. In this context, Applicant argues that the Award should be annulled because the Tribunal provided inadequate and insufficient reasons concerning the discount and its size, and relies on annulment decisions in *Soufraki v. United Arab Emirates* and *Mitchell v. Congo*[227]

128. Contrary to what Applicant argues, insufficient or inadequate reasons in an award do not constitute a ground for annulment, as discussed extensively above.[228]

129. Also, the two cases that Applicant relies upon do not support his argument. They both in fact make reference to the standard for annulment on the basis of failure to state reasons adopted in *MINE* and in *Vivendi I*, which refused to deal with quality of reasons given in awards.

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[225] ICSID Updated Background Paper on Annulment, para. 111, **RLA-256**and arbitral practice in note 223 therein.

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

[227] Memorial on Annulment, paras. 141-142.

[228] See paras. 79-82 above.

130. Indeed, the *ad hoc* committee in *Soufraki v. United Arab Emirates* defined insufficient and inadequate reasons in terms of their comprehension to the reader ("*which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal*"[229]), not in the terms of their quality or foundation.[230] The same goes for the *ad hoc* committee in *Mitchell v DR Congo*, which considered that a ground for annulment existed when reasons were "*so inadequate that the coherence of the reasoning is seriously affected*".[231] As can be seen, the *ad hoc* committee described inadequacy of reasoning in terms of its coherence and, notably, quoted *MINE*'s famous pronouncement that an award "*must enable the reader to follow the reasoning of the Tribunal on points of fact and law*".[232] In other words, adequacy of reasons is again related to their comprehension to the reader.

131. In conclusion, Applicant' challenge to the Award on the basis of alleged inadequacy or insufficiency of reasons is not in line with the practice of *ad hoc* committees, and is not even supported by the authorities invoked by Applicant.

c) <u>The Tribunal provided reasons for setting the discount at 30%</u>

132. Applicant argues that the Tribunal did not provide reasons for setting the discount on the price of the construction land at 30%. Applicant starts by quoting the Tribunal's pronouncement that since "*failing more precise indications in the record about the size of this deduction*", it "*appears reasonable to the Tribunal to accept the 30% discount applied by Ms. Ilic*".[233] Then, Applicant states that the Tribunal "*did not provide any further reasoning*",[234] thus admitting that it provided some reasoning (which it quotes). Subsequently, however, Applicant states that the Tribunal was expected to "*provide an understandable analysis*" and that the 30% size of the discount "*is without*

[229] *Houssein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 126 *in fine*, **CLA-190.**

[230] As noted by *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment, 22 November 2019, paras. 120-121, **RLA-251.**

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

[232] *Mr. Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para 21, **CLA-187**; (quoting *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, 22 December 1989, **CLA-184**).

[233] Memorial on Annulment, para. 123, quoting Award, para. 697.

[234] Memorial on Annulment, para. 124.

explanation".[235] Obviously, Applicant's argument in this regard is nebulous and contradictory.

133. It is submitted that the Tribunal's pronouncement on the size of the discount provides a sufficient explanation for the Parties to follow the reasoning of the Tribunal: (i) since there were no "more precise indications in the record about the size of this deduction", (ii) the Tribunal applied Ms. Ilic's discount size of 30%, because (iii) it appeared reasonable. As can be seen, the reasoning of the Tribunal can be easily followed, and each of its elements is easy to comprehend.

134. Further, as will be discussed below, Ms. Ilic testified about the considerations that led her to adopt 30% as an appropriate discount, which reinforces the Tribunal's ruling that "*it appears reasonable to the Tribunal to accept the 30% discount applied by Ms. Ilic*".[236]

135. In this way, the Tribunal exercised its discretion in the determination of compensation and provided explanation how it did so. The scope of its discretion was even wider in this instance, and the requirement to state reasons much weaker, because there were no "*more precise indications in the record about the size of this deduction*".[237] This is similar to the situation in *Wena* where the *ad hoc* committee noted that

> *"The requirement to state the reasons supporting the allocation of interests appears particularly weak when, like in these proceedings, as mentioned in paragraph 69 above, both Parties were not more determinative than referring to the allocation of appropriate interest, thus conferring to the Tribunal a wide discretionary power to assess interest. Under such circumstances, the Tribunal need not be more explicit than the Parties were in their respective positions taken on this particular matter. In addition, this Committee does not have to*

[235] Memorial on Annulment, para. 125.
[236] Award, para. 697.
[237] Award, para. 697.

> *entertain arguments and submissions a party has not developed before the Tribunal."*[238]

136. In the present case, Claimants failed to offer any indication about the size of discount and only argued that no discount whatsoever should be applied, while Respondent offered expert testimony of Ms. Ilic. In such circumstances, the Tribunal was entitled to exercise its discretion and rely on Ms. Ilic's 30%. Considering the Tribunal's wide discretion, it was sufficient that Ms. Ilic's figure appeared "*reasonable*".

137. In this context, Applicant invokes the decision of the *ad hoc* committee in *Perenco v Ecuador*, stating that the tribunal in that case disregarded approaches to the calculation of damages proposed by claimant and then decided to award "*a nominal value*", but provided no explanation whatsoever about this concept and why it chose to apply it. According to Applicant, the Award also "*failed to provide any explanation for why a 30% discount, rather than 'any other value', should apply*".[239]

138. Applicant's comparison with *Perenco v Ecuador* is inapposite. Unlike the *Perenco* tribunal, the Tribunal in the present case did not adopt, without any explanation, its own figure of the size of discount, but adopted the one suggested by Ms. Ilic and clearly explained why it has done so. Applicant may disagree with its explanation, but this is certainly not a reason for annulment. As discussed above, the reasoning of the Tribunal in this respect is easy to follow and comprehend.

139. Finally, in this context, Applicant invokes the following question posed by the President of the Tribunal at the Hearing:

> "*I know you are saying this is a matter of judgment, but then one exercises judgment in consideration of a number of factors, otherwise it becomes arbitrary, so how do you justify your 30%?*"[240]

[238] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 97, **CLA-185**;
[239] Memorial on Annulment, paras. 126-127.
[240] Memorial on Annulment, para. 128, quoting Hearing on Jurisdiction and Merits, Transcript, Day 8, p. 170:22-171:02.

140. According to Applicant, Ms. Ilic did not refer to any factors for the discount, so by accepting Ms. Ilic's "*arbitrary discount, the Tribunal directly contradicted the position it took during the hearing*".[241] However, this is a clear manipulation. Applicant tries to manipulate the reader into believing that the question was posed to Ms. Ilic and that she did not have any response to it. In reality, however, the question was posed to Mr. Cowan.[242]

141. As far as Ms. Ilic is concerned, she explained at the Hearing what were the considerations that lead her to apply the 30% discount:

> *"It is correct, the last sentence, it says I applied an adjustment of 30% as a reflection of my experience in valuation of land. This relates to the existence of infrastructure and access road."*[243]

142. Therefore, when accepting Ms. Ilic's view on the size of the discount, the Tribunal did not contradict the position of the President at the hearing that a judgment about discount may be arbitrary if it is not based on certain factors, because Ms. Ilic's testimony revealed what were her considerations when opting for 30% as the size of discount. This shows that the record provides additional support to the Tribunal's finding that the size of the discount proposed by Ms. Ilic appeared "*reasonable*".

143. The alleged contradiction (between President's statement at the Hearing and the Tribunal's acceptance of Ms. Ilic's allegedly unjustified discount of 30%) boils down to the question whether the Tribunal was justified in accepting Ms. Ilic's discount in light of all evidence at the record. However, the Tribunal's assessment of evidence is not an annullable matter.[244] Accordingly, whether or not the Tribunal's contradicted what its President stated at the Hearing and how it assessed Ms. Ilic's testimony, is irrelevant in the present context. What is, however, relevant is whether the Tribunal explained its acceptance of the 30% discount on the price of the construction land. As

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[241] Memorial on Annulment, para. 129.

[242] "*Well, I deemed 50% was too high, and in a bankruptcy Doing Business suggests 65.5% recovery rate so I deemed that to be too high. 30% to some extent was derived from the pre-pack plan in March, where management accepted that they would be willing to sell unencumbered assets at 70% of their market value, hence the 30% discount."* Hearing on Jurisdiction and Merits, Transcript, Day 8, p. 171:03-09 (Mr. Cowan).

[243] Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 166:04-07 (Ms. Ilic)

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

has been demonstrated, the Tribunal provided a clear reasoning of its ruling both as regards the discount and its size.

6. Alleged contradiction concerning the Tribunal's acceptance of Ms. Ilic's valuation although it contradicted the Tribunal's findings on appropriate valuation methodology

144. Finally, Applicant alleges that the Tribunal concluded that the proper methodology for valuation of the construction land must comply with certain "*key principles*" and then argues that the Tribunal's acceptance of Ms. Ilic's valuation of the construction land contradicted these "*principles*".[245]

145. However, as will be discussed below, Applicant's summary of the "*key principles*" allegedly enunciated by the Tribunal is simply a misrepresentation of the text of the Award and Applicant's invention. The same goes for the alleged contradictions between these "*key principles*" and Ms. Ilic's valuation, which are in fact nothing more but Applicant's repetition of arguments that have already been refuted above. For this reason, Respondent's answer to these allegations in this section will be brief in order to avoid repetition, but it explicitly incorporates previous rebuttals of Applicant's arguments. The answer will be structured around the alleged principles and their alleged contradictions with Ms. Ilic's valuation.

146. ***"1. the valuation should be based on actual comparable transactions as the primary, most relevant evidence"***.[246] In fact, the Tribunal never spelled out this principle, and the reference to the Award provided by Applicant[247] simply points to the part where the Tribunal rejected Dr. Hern's lower bound price primarily because it was based on mass appraisals by tax authorities, which Claimants' own real estate expert rejected as inappropriate evidence for valuation.[248]

147. At the same time, there was indeed a consensus among experts about the principle that a valuation should, to the extent possible, be based on actual comparable transactions.[249] However, from this it does not follow that a valuation *must* rely on such transactions *if*

[245] Memorial on Annulment, paras. 144-164.
[246] Memorial on Annulment, paras. 144(1) & 146-149.
[247] Memorial on Annulment, para. 144(1) and note 192 referring to Award, para. 693 (first bullet point).
[248] Award, para. 693 (first bullet).
[249] First Expert Report of Danijela Ilić, pp. 14-15, para. 4.9; Third Expert Report of Dr. Richard Hern, paras. 33-34.

there are none that could be used as comparables, as Applicant implies when he states that "*Ms. Ilic's valuation does not comply with the first key principle because it does not rely on* any *actual comparable transactions*".[250] Rather, as experts accepted, where there are no comparable transactions, it is in accordance with international standards to use asking prices.[251]

148. In this context, Applicant criticizes the Tribunal for ignoring two actual transactions for land in Dobanovci and accepting Ms. Ilic's valuation which was based on asking prices.[252] However, Applicant ignores the fact that Ms. Ilic started her analysis by examining actual transactions but concluded that none of them were comparables. As far as the two transactions in Dobanovci are concerned, she disregarded them because the land was "*located near urbanized residential area*" unlike Zones A, B and C land.[253] For this reason, she then turned to asking prices.[254]

149. Claimants argued that the two transactions for the land in Dobanovci were comparables because one property actually abuts the BD Agro's property, while another is in the close vicinity.[255] However, it should be noted that Claimants' experts also never used these properties for their valuations. They were invoked only in order to oppose Ms. Ilic's valuation. At the Hearing, Ms. Ilic withstood cross-examination about this issue.[256]

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[250] Memorial on Annulment, para. 146.

[251] First Expert Report of Danijela Ilic, para. 4.9, quoting "Comparable evidence in property valuation", RICS information paper, 1st edition (IP 26/2012), Section 4.4. – Comparable evidence in property valuation, RICS information paper, 1st edition (IP 26/2012), **RE-325.** According to Ms. Ilic, "*Based on the characteristics of the representative sample, a valuer seeks comparable sales and/or asking prices, where sales are not available or not appropriate, and completes all adjustments necessary to estimate market value* ", First Expert Report of Danijela Ilic, para. 9.20. According to Dr. Hern, "*All of my evidence relies directly or indirectly on market transactions and other market data (e.g. asking prices) and hence falls under the broad definition of "market-derived inputs" under IVS (2013).*" Third Expert Report of Dr. Richard Hern, para. 34.

[252] Memorial on Annulment, paras. 148-149.

[253] First Expert Report of Danijela Ilić, p. 113, para. 9.90.

[254] First Expert Report of Danijela Ilić, p. 114, para. 9.92.

[255] Memorial on Annulment, para. 146 and note 203 with references to Claimants discussion of this properties.

[256] *"Q. In any event, the remaining two transactions which survived the first step were comparable, were they not?*
A. (Interpreted) These two transactions that I looked at were not comparable with BD Agro land in Zones A, B, C and remaining construction parcels, because they had direct access from the road. For example, the one marked as A is located next to a hall, so it has full access to the infrastructure, it has access from the road, the picture shows this is asphalt road, so I thought they were not comparable -- in my opinion, they were not comparable.
Q. So we also have the transaction marked with a C, can you see it? On the left side of the picture.
A. (Interpreted) Yes.
Q. Do you maintain, Ms Ilic, that this is close to a residential area?

150. Who was right in this instance depends on assessment of evidence which is not a matter for annulment procedure. However, that Ms. Ilic was right not to rely on these two transactions is confirmed by the fact that Claimants' experts did not rely on them either. The Tribunal implicitly accepted Ms. Ilic's position on this issue, when it accepted her valuation of the land.[257] It was not required to rule explicitly on each argument presented by Claimants. As noted by the *ad hoc* committee in *Vivendi*,

> *"No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with."*[258]

151. In conclusion, Applicant's first alleged contradiction is based on misinterpretation of the Award and Ms. Ilic's report, and also concerns assessment of evidence. As such, it is without merit and must be rejected.

152. ***"2. Asking prices have the lowest evidentiary value and the valuation should not rely on asking prices with no corresponding information about dates and sources of these prices"***[259] Applicant alleges that the Tribunal contradicted this "principle" because it adopted Ms. Ilic's valuation of the construction land based on asking prices, while she should not have relied upon asking prices because she (i) had relevant comparable

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A. (Interpreted) Let me see. One uses this road to get to BD Agro farm, and there, there are a lot of residential facilities. "
Hearing on Jurisdiction and Merits, Transcript, Day 7, pp. 149:25-150:18 (Ms. Ilic). As Ms. Ilic noted, the properties in question were near urbanised residential area, unlike the vast tract of BD Agro's construction land (of which the farm was only a tiny part).

[257] See A.III.3 below.

[258] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para 87, **RLA-155**; See, also, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 93, **CLA-185**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, para 127, **RLA-152;** *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, paras. 71 & 221, **RLA-232;** *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, para. 181, **RLA-233**.

[259] Memorial on Annulment, paras. 144(2).

transactions and (ii) provided no proper information about data and sources of the asking prices.[260]

153. As discussed, Ms. Ilic did not rely on two Dobanovci transactions invoked by Claimants because they concerned the land in residential area, which was not comparable to Zones A, B and C land. Anyhow, this is a question of assessment of evidence and not a proper issue for annulment procedure.[261]

154. As far as the sources and dates of the evidence about asking prices are concerned, this has already been discussed above.[262] Ms. Ilic provided asking prices on the basis of screenshots of advertisements for land published on several different web sites.[263] The source of evidence was clearly stated. Three out of five advertisements contained the exact date of their publishing/update. For the remaining two, Ms. Ilic represented that they were published before the valuation date, by stating that she based her valuation on 21 October 2015 as the Valuation Date and by indicating "2015" as the year of the advertisements in her report.[264] It is submitted that this was more than sufficient to confirm the date of the asking prices.

155. To question and examine this evidence now, would go against the rule that assessment of evidence is a prerogative of the Tribunal and not a matter for annulment proceedings.[265]

156. In addition, it should be recalled that Claimants never questioned the authenticity of the advertisements or raised the question of whether two advertisements from 2015 were published before or after the Valuation Date. Applicant is precluded from challenging the Award on the basis of arguments and allegations that were not presented during the proceedings before the Tribunal.[266]

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[260] Memorial on Annulment, paras. 150-154.

[261] *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para 172, **CLA-188;** *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 65, **CLA-185**;

[262] See Section **A.II.2** above.

[263] Asking prices for KO Dobanovci, **RE-561**.

[264] First Expert Report of Danijela Ilić, p. 65, paras. 9.1-9.3 & Appendix 2, p. 28.

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

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

157. As for the merits of Applicant's allegations about Exhibit RE-561, he makes two arguments. First, Applicant repeats his allegation that the location of the land advertised for sale could not be determined and states that Mr. Cowan, Respondent's expert expressly confirmed this fact.[267] However, as already discussed above, Mr. Cowan was presented with the Serbian original of only one of the advertisements and was asked to identify the location of the land on the basis of a faulty Google map contained in it.[268] However, two other advertisements, which were not presented to Ms. Cowan during cross-examination, contained maps with the location of the land for sale. Most importantly, the text of *all the advertisements* contained sufficient information about the location in their textual part (e.g. "*Dobanovci Bypass*", "*near the bypass (Koridor 10), 1 km from OMV petrol station*" etc.).[269]

158. Second, Applicant alleges (without evidence) that the web links provided by Ms. Ilic do not lead to the specific advertisements she relies upon, and that these advertisements could not be found on individual web sites and verified. However, Ms. Ilic provided *screenshots* of the advertisements in question, whose authenticity was never questioned during the proceedings. Second, the links provided are links to the web sites on which these advertisements were published, and obviously not the links to the advertisements. It is also not surprising that Applicant has not been able to locate these advertisements at present, since years have passed since they had been published.

159. ***"3. the valuation should only rely on evidence from comparable areas – the Tribunal specifically identified Batajnica as a noncomparable area"***.[270] According to Applicant, one of the five asking prices used by Ms. Ilic concerns a land plot located in Batajnica, "*even though the Tribunal identified Batajnica as non-comparable area*", so the Tribunal contradicted itself by accepting Ms. Ilic's valuation based on evidence from the Batajnica area.[271]

160. However, as already discussed in detail,[272] the Tribunal noted incompatibility between the location of the *specific* land in Batajnica ("the Batajnica land"[273]) with Zones A, B

[267] Memorial on Annulment, para. 153.
[268] Hearing on Jurisdiction and Merits, Transcript, Day 8, p. 144:8-25
[269] Asking prices for KO Dobanovci, Exhibit **RE-561**.
[270] Memorial on Annulment, para. 144(3).
[271] Memorial on Annulment, para. 155.
[272] See **Section A.II.1** above.
[273] Award, para. 693 (third bullet point).

and C. In other words, the Tribunal never excluded all the land in Batajnica municipality as incompatible. Further, there is no indication that the advertised land whose asking price Ms. Ilic used was in the same exact area as the Batajnica transactions. Finally, unlike the Batajnica transactions, the asking price for the land in question was sought in 2013, i.e. before the Valuation Date.

161. ***"4. the valuation should only rely on evidence pre-dating the Valuation Date"***.[274] At the outset, it should be noted that Applicant's summary of this "principle" is wrong, because, as will be discussed in detail below,[275] the Tribunal considered that the valuation should rely on *information* pre-dating the Valuation Date, while this information could be contained in evidence post-dating it. Further, according to Applicant, the date of two out of five asking prices used by Ms. Ilic cannot be determined and, by accepting her valuation of the construction land, the Tribunal also contradicted itself. This has already been discussed above and the *Ad hoc* Committee is respectfully directed to that discussion.[276] In sum, Ms. Ilic represented in her expert report that the date of two advertisements with asking prices challenged by Applicant was before the Valuation Date. In any case, Applicant cannot raise this argument now as Claimants had not raised it before the Tribunal.[277]

162. ***"5. a discount is justified where evidence used in the valuation relates to comparable land with better access to infrastructure"***.[278] According to Applicant, Ms. Ilic's valuation does not comply with this "principle" adopted by the Tribunal, because she applied a 30% discount, although there is no evidence of differences between the construction land and the land whose asking prices Ms. Ilic used that would warrant

[274] Memorial on Annulment, para. 144(4).
[275] See Section V.1.a) below.
[276] See para. 154 above.
[277] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 82, **CLA-185;**
[278] Memorial on Annulment, para. 144(5).

such discount.[279] By adoption Ms. Ilic's valuation of the construction land, the Tribunal contradicted its own position.[280]

163. Applicant's allegations about this contradiction have already been extensively refuted and the *Ad hoc Committee* is respectfully directed to that discussion.[281]

164. ***"6. smaller land plots are more valuable per m2 than comparable larger land plots"***.[282] According to Applicant, the Tribunal's acceptance of Ms. Ilic's valuation contradicts this "*principle*" because the size of the parcels constituting the construction land is actually smaller than the median size of the comparators used by Ms. Ilic.[283]

165. As extensively discussed above, Applicant's argument utterly fails here as it misinterprets the Award and invents a contradiction between its reasons where there is none.[284] As already mentioned, the Tribunal considered but rejected the idea that bigger size of land plots in comparison with comparables justifies a price discount.[285] Ultimately, however, the Tribunal accepted that the discount on price was based on access to infrastructure. Therefore, it did not adopt any "principle" in this regard, and especially not the one that Applicant formulates for the sake of his argument.

166. In conclusion, Applicant's argument that the Tribunal contradicted "principles" of its own reasoning when it adopted Ms. Ilic's valuation utterly fails. It is basically a recycled version of Applicant's arguments that have already been extensively refuted, while most of the "principles" invoked by Applicant are misstatement of the Award, if not outright inventions.

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

167. According to Applicant, the Tribunal completely ignored certain relevant evidence relied on by Claimants for the valuation of the construction land, namely, documents

[279] Memorial on Annulment, para. 157.
[280] Memorial on Annulment, para. 159.
[281] See Section II.5 above.
[282] Memorial on Annulment, para. 144(6).
[283] Memorial on Annulment, paras. 160-161.
[284] See Section II.5.a) above.
[285] Award, para. 697 ("*That said, BD Agro may have been able to split its land in smaller parcels before selling it, **making any discount on the sale of the land as a whole inapposite.***" (emphasis added)).

concerning so-called Pazova transactions, the Second Confineks Valuation, and the two actual comparable transactions with construction land in Dobanovci presented by Ms. Ilic. [286]

168. Applicant's contentions are without merit because Claimants and their experts did not base their valuations of the construction land on this evidence, while the Tribunal implicitly refused to use this evidence in its valuation of the construction land. This will be demonstrated with regard to the Second Confineks Valuation (**Section 1.**), the "Pazova" transactions (**Section 2.**), and the two land transactions invoked by Claimants (**Section 3.**).

1. The Second Confineks Valuation

169. As far as the Second Confineks Valuation is concerned, Dr. Hern in fact never relied upon it in his valuation of the construction land, as can be seen from the part of his report to which Applicant refers:

> *"I have been provided with a second report prepared by Confineks in January 2016… **In [my] report, I refer to the values presented by Confineks in the December 2015 report**, as it has been prepared closed to the expropriation date 21 October 2015, but I note that **the valuations in the two reports are not substantially different**."*[287]

170. On their part, Claimants accepted Mr. Hern's report. Mr. Grzesik also did not rely on the Second Confineks Valuation in his report. Neither Respondent, nor its real estate expert Ms. Ilic, relied on the Second Confineks Valuation in their valuation of the

[286] Memorial on Annulment, para. 166.
[287] First Expert Report of Dr. Richard Hern, para. 79 (emphasis added).

construction land. Therefore, there was no reason why the Tribunal would discuss this document in the context of valuation of the construction land.

2. The "Pazova" Transactions

171. As far as the so-called "Pazova" transactions are concerned, Dr. Hern did not base his valuation of the construction land on them, but only used them as secondary evidence confirming his evidence of higher bound price:

> "*The upper bound of 30 EUR m2* ***is based*** *on the weighted average price used in Mr. Mrgud's valuation… The upper bound* ***is also consistent*** *with the comparable transactions evidence, which ranges from 20 to 37 EUR/m2*."[288]

172. As Mr. Grzesik testified at the Hearing, Mr. Hern "dismissed that one, the comparison to Stara Pazova and Nova Pazova".[289]

173. Dr. Hern mentioned the "Pazova" transactions only as secondary evidence confirming his reliance on the Mr. Mrgud's valuation. Indeed, Dr. Hern did not consider that "Pazova" transactions were comparable to Zones A, B and C land, but that they were "broadly comparable" and voiced reservations.[290] Importantly, he did not actually calculate the price of the construction land on the basis of the "Pazova" transactions. Therefore, once the Tribunal rejected Mr. Mrgud's valuation, there was no reason why it would discuss the "Pazova" transactions in the Award.

174. Further, it should be noted that the document evidencing the "Pazova" transactions does not indicate that they were actual transactions but rather refers to "valuation[s] of immovable[s]" presented by the Tax Administration. Since the Tribunal noted that "*value assessments by the tax administration for determining the tax on property transfer*" were unsuitable for valuation because they were "*different from property valuations based on international standards*",[291] it implicitly also rejected evidentiary value of the "Pazova" transactions in the valuation of the construction land. Finally, all but one of the "Pazova" transactions originated from 2016, which means that their use

[288] First Expert Report of Dr. Richard Hern, para. 89 (B).
[289] Hearing on Jurisdiction and Merits, Transcript, Day 7, p. 169:12-13 (Mr. Grzesik).
[290] First Expert Report of Dr. Richard Hern, para. 68.
[291] Award, para. 693 (third bullet point (i)).

in the valuation was also implicitly rejected by the Tribunal because they post-dated the valuation date.[292]

3. Two Transactions Invoked by Claimants

175. Applicant complains that the Tribunal did not comment about the evidence of two Dobanovci transactions which Claimants argued were comparables, and as such relevant evidence in valuation.[293]

176. As already discussed above,[294] Ms. Ilic considered the two transactions, but concluded that they were not suitable comparables since they were near a residential area, and for that reason she used asking prices.[295] Claimants used these two transactions in order to challenge her report but to no avail. Interestingly, however, none of Claimants' experts relied on these two transactions in their valuations of Zones A, B and C land.

177. In the present proceedings, Applicant recycles arguments that Claimants had already raised in their post-hearing brief,[296] namely (i) that Ms. Ilic admitted that there were no residential buildings near the two land plots in question,[297] and (ii) that municipal road that runs next to the land plot near BD Agro's farm, also extends to Zones A, B and C land, thereby making the former plot comparable with it.[298] Both these arguments were refuted in Respondent's Reply Post-Hearing Brief. [299]

178. Ms. Ilic in fact disregarded these transactions because they were "*located near urbanized residential area*",[300] not because there were no residential buildings next to them, as Applicant contends. She maintained the same position at the Hearing.[301]

179. Indeed, one of the land plots is located near BD Agro's farm buildings on an asphalt road with all infrastructure, and next to other buildings, with Dobanovci settlement just

[292] Award, para. 693 (third bullet point (ii)).
[293] Memorial on Annulment, paras. 169-175.
[294] See para. 148 above.
[295] First Expert Report of Danijela Ilić, p. 113, para. 9.90 & p. 114, para. 9.92.
[296] Claimants' First Post-Hearing Brief, paras. 308-309.
[297] Memorial on Annulment, paras. 171-172.
[298] Memorial on Annulment, para. 173.
[299] Respondent's Reply Post-Hearing Brief, para. 108.
[300] See First Expert Report of Danijela Ilic, para. 9.90.
[301] "*Q. In any event, the remaining two transactions which survived the first step were comparable, were they not?*

down the road,[302] so it is clearly "*located near urbanized residential area*" as Ms. Ilic concludes. The same goes for another land plot, which has houses across the street. This can be seen from the following map:[303]

A. (Interpreted) These two transactions that I looked at were not comparable with BD Agro land in Zones A, B, C and remaining construction parcels, because they had direct access from the road. For example, the one marked as A is located next to a hall, so it has full access to the infrastructure, it has access from the road, the picture shows this is asphalt road, so I thought they were not comparable -- in my opinion, they were not comparable.

Q. So we also have the transaction marked with a C, can you see it? On the left side of the picture.

A. (Interpreted) Yes.

Q. Do you maintain, Ms Ilic, that this is close to a residential area?

A. (Interpreted) Let me see. One uses this road to get to BD Agro farm, and there, there are a lot of residential facilities. "

Hearing on Jurisdiction and Merits, Transcript, Day 7, pp. 140:25-150:18 (Ms. Ilic).

[302] See First Expert Report of Danijela Ilic, para. 9.90, Figure 35; Hearing on Jurisdiction and Merits, Transcript, Day 7, 150:16-22 (Ilic) (*"One uses this road to get to BD Agro farm, and there, there are a lot of residential facilities… But yes, at the very entrance to the farm there are residential facilities. On both sides of this road there are residential facilities."*).

[303] First Expert Report of Danijela Ilić, Figure 35.

180. Further, it is clearly incorrect that Ms. Ilic conceded the asphalt road in question extends to the huge area of Zones ABC land, as can be seen when one reads the whole discussion.[304] In particular, Ms. Ilic put the things in a perspective by emphasizing that Zones A, B and C land has 279 hectares and that the road does not extend to most of this land.[305]

181. In any case, all this, and in particular the relevance of the two transactions invoked by Applicant, goes to assessment of evidence which was the Tribunal's prerogative and is not subject to annulment review.

182. Applicant's argument that the Tribunal "simply ignored" this key evidence is without merit.[306] As discussed above, the reasons relevant to the Tribunal's findings may be stated implicitly.[307]

183. When assessing Ms. Ilic's valuation, the Tribunal mentioned various steps in her valuation including that Ms. Ilic "*compared construction land sale transactions with BD Agro's land*".[308] Her analysis included the two Dobanovci transactions now invoked by Applicant.[309] The Tribunal ultimately concluded that it "*finds Ms. Ilic's overall approach reasonable*".[310] In this way, the Tribunal accepted her exclusion of the two Dobanovci transactions and the decision to base the valuation on asking prices. It also implicitly rejected Claimants' arguments that Ms. Ilic was wrong to exclude the two

[304] See Hearing on Jurisdiction and Merits, Transcript, Day 7, 155:11-157:9 (Ms. Ilic).

[305] As Ms. Ilic testified: "*... the entire land of 279 hectares in Zone A, B, C, which doesn't even have access from the asphalt road, or in some points I just could not physically access the land, because it was just a meadow, a cornfield or wheat field.*" Hearing on Jurisdiction and Merits, Transcript, Day 7, 155:22-156:01 (Ms. Ilic). She also stated:
"Q. Are you aware, Ms Ilic actually, that this asphalt road, which is here named as Ulica Ive Lole Ribara, then extends to Zones B and C?
A. (Interpreted) Yes, it does not extend to the entire zones. It goes partly through the farmland, but not until the end of the plot." Hearing on Jurisdiction and Merits, Transcript, Day 7, 157:04-09 (Ms. Ilic).

[306] Memorial on Annulment, para. 175.

[307] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 93, **CLA-185**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, para. 97, **RLA-152.**

[308] Award, para. 695.

[309] First Expert Report of Danijela Ilić, para. 9.90 & 9.92

[310] Award, para. 696.

transactions. Therefore, there is no merit in Applicant's claim that the Tribunal ignored key evidence.

184. Applicant's reliance on the decision of *ad hoc* committee in *Teco v. Guatemala* in the present context is inapposite. In that case, the tribunal decided that that there was no sufficient evidence for a claim for loss of value but ignored expert reports provided by the parties.[311] This is completely different from the Award in the present case and even from the challenge to it as formulated by Applicant. That Applicant was aware of this difference transpires from the fact that he quoted from *Teco* but omitted one sentence before the quoted part, which highlights this crucial difference:

> *"**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**."*[312]

185. Applicant cannot seriously claim that *Teco* is similar to the present case, because unlike in *Teco*, the Tribunal did discuss the Parties' expert reports in its valuation of the construction land and accepted Ms. Ilic's valuation. By doing so, it implicitly rejected Claimants' argument about two Dobanovci transactions.

186. In conclusion, the Tribunal has not ignored "key evidence" as Applicant contends. Its rejection of this evidence is implicit in its express rulings about the relevance of valuation by tax authorities, about the requirement that information should originate before or on the valuation date, and in its specific pronouncements about Ms. Ilic's valuation. Last but not least, the evidence that Applicant alleges was ignored was not

[311] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para 130, **CLA-186**; (footnote omitted).

[312] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para 131, **CLA-186**; (the sentence omitted by Applicant in bold letters, compare with the Memorial on Annulment, para. 177).

the basis for valuations of the construction land presented by Claimants' experts, so it could not possibly lead to acceptance of their valuations by the Tribunal.

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

187. Applicant alleges that the Tribunal failed to state reasons as regards six categories of BD Agro's assets,[313] but citing the Parties' similar valuations of four categories,[314] he in fact requests annulment only of the parts of the Award addressing valuation of the following two categories of assets: (i) current assets and (ii) "Novi Becej".[315] Accordingly, Respondent will address only these two categories of assets and will show that this part of Applicant's annulment request is without merit, because the Tribunal explained how it included these (and other) categories of BD Agro's assets in its valuation. For avoidance of doubt, Respondent's analysis below is also in large part applicable to other four categories of assets mentioned by Applicant, against which he does not make an annulment request.

188. In the following, Respondent will demonstrate that case law invoked in this context by Applicant is inapposite (**Section 1.**), and that the Tribunal has provided implicit reasons in the Award for both "Novi Becej" land and castle (**Section 2.**), and BD Agro's "current assets" valuation (**Section 3.**).

1. Case law invoked by Applicant in this context is inapposite

189. In the context of his allegations that the Tribunal failed to provide any reasons for its valuation of certain BD Agro's assets, Applicant briefly discusses applicable legal

[313] Memorial on Annulment, para. 186.

[314] Specifically, agricultural land, "*other fixed assets*", "*other construction land*" and deferred tax assets, see Memorial on Annulment, para. 189. However, it should be noted that, contrary to what Applicant states, the Parties' valuations of some of these assets were widely different. For example, Respondent's valuation of agricultural land was EUR 6.4 million (without bankruptcy discount), while Claimant's valuation on the basis of Dr. Hern's upper bound price was EUR 15.5 million, compare Second Expert Report of Sandy Cowan, para. 4.3 and First Expert Report of Dr. Richard Hern, para. 110; the same goes for "other construction land", which Respondent valued at EUR 1.3 million and Claimant at EUR 3.4 million, and for "other fixed assets", which Respondent valued at EUR 18.8 million and Claimant at EUR 19.6 million.

[315] Memorial on Annulment, para. 190.

standards. It starts from an uncontroversial statement, that a "total absence of reasons" is a reason for annulment, but it a common place that this will rarely be the case.[316]

190. However, Applicant never mentions that there is ample practice holding that reasons may not only be expressly given, but may be implied in the award, especially through reference to evidence.[317]

191. Instead, Applicant invokes the decision of the *ad hoc* committee in *Pey Casado v Chile* in this context, specifically, its pronouncement that there must be "*an express rationale for the conclusions with respect to a pivotal or outcome-determinative point*".[318] However, the *ad hoc* committee never elaborated on what this means in the context of failure to state reasons as ground for annulment, because it decided that the tribunal stated ample reasons leading to its conclusion that Chile's Decision No. 43 discriminated against claimants.[319] For this reason, the pronouncement invoked by Claimant must be treated as *obiter dicta*.

192. Additional reason for doing so is the practice of *ad hoc* committees that reasons may also be implicit in an award, discussed above,[320] which has not been disproved by the *ad hoc* committee in *Pey Casado.* This practice includes the annulment decision in

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[316] Schill SW, Malintoppi L, Reinisch A, Schreuer CH, Sinclair A, eds., *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (3rd ed. Cambridge University Press; 2022), p. 1337, **CLA-206**.

[317] *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 81***, **CLA-185**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 86, **RLA-155;** *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 75, **RLA- 232;**

[318] Memorial on Annulment, para. 187, quoting *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* I, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, para 86, **CLA-192;**

[319] *Víctor 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, para. 86, CLA-192. The committee however addressed the question of what is an outcome-determinative point in a different context, when discussing a serious departure from a fundamental rule of procedure. In that context, it noted that "*The impact will most likely be material and require an annulment if the departure affects the legal right of the parties with respect to an outcome-determinative issue. In other words, a finding that if the rule had been observed the tribunal could have reached a different conclusion. As indicated earlier, the Committee does not consider, however, that an applicant is required to prove that the tribunal would necessarily have changed its conclusion if the rule had been observed. This requires a committee to enter into the realm of speculation which it should not do. The Committee will therefore first seek to determine if there is a departure from a fundamental rule of procedure and, if so, then examine the impact of the violation to decide whether or not it is serious*." *Ibid*, para. 80.

[320] See paras. 73-76 above.

Vivendi,[321] which is referred to in *Pey Casado* annulment decision, in the context of discussion of the legal standard for annulment in the case of absence of reasons.[322]

193. Applicant also relies on the decision of *ad hoc* committee in *CMS v. Argentina*, which in fact confirmed that reasons may be implied in the award. However, Applicant deliberately avoids to note (and quote) the relevant statement in the award, although it is contained in a sentence that follows immediately after the one quoted by Applicant:

> *"In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point.* ***It is not the case that answers to the question raised "can be reasonably inferred from the terms used in the decision"****; they cannot."*[323]

194. Finally, Applicant relies on the annulment decision in *Watkins Holdings v Spain* and quotes its pronouncement that "*[a] mere statement by the tribunal of its findings without more would not constitute reasons in an award*". This, again, is a selective quote, because Applicant omits to quote part of the text that does not suit him:

> *"Reasons, however, need not be a long narration of the full technical aspects of the considerations resulting in a decision* ***as long as the key points or pivots are identified and connected to the finding or ruling****, and* ***they do not need to address every single argument or point made by the parties*** *but rather respond to the parties' underlying positions and theories that support their respective cases."*[324]

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[321] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87**, RLA-155**; "*No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or* ***implicitly*** *dealt with*." (emphasis added).

[322] *Víctor 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, para. 86, **CLA-192**;

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

[324] *Watkins Holdings Sàrl. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para 133, **CLA-207**; (omitted part in bold).

195. Thus, a tribunal need not deal with each single argument or point made by parties, as long as it addresses the key points and connects them to the ruling, so that an informed reader can follow and comprehend the tribunal's reasoning.

2. The "Novi Becej" castle and land

196. The BD Agro's assets in Novi Becej included co-ownership of the castle and land surrounding it, which is not disputed.[325]

197. With respect to the "Novi Becej" castle and land, Applicant alleges that the Tribunal did not provide any reasoning as to why it valued this category at EUR 2 million value, and whether it included only the land, or also the castle.[326] Applicant further mentions that Respondent's valuation did not take into account BD Agro's ownership of the castle, because its expert, Ms. Ilic, estimated the value of BD Agro's land in Novi Becej, without the castle, at EUR 0.2 million, but Mr. Cowan, its quantum expert, then simply adopted the number, again ignoring BD Agro's ownership of the castle.[327] Applicant's allegations are without merit because they are based on a misinterpretation of experts' valuation reports and, eventually, on a misreading of the Award, as will be discussed below.

198. At the outset, it is not disputed that Claimants' expert, Dr. Hern, relied on the First Confineks Valuation to value the "Novi Becej" castle and land together at EUR 0.8 million.[328]

199. Respondent's expert, Mr. Cowan, relied on Ms. Ilic's valuation with respect to the land assets, but on the Second Confineks Valuation with respect to other assets.[329] Unlike Dr. Hern, he did not value the "Novi Becej" land and castle together. Rather, he adopted Ms. Ilic's valuation of EUR 0.2 million ***just* for the land**.[330] As far the castle is concerned, Mr. Cowan valued it as part of the "other fixed assets" category, which, as

[325] Memorial on Annulment, para. 193.
[326] Memorial on Annulment, paras. 191-192 & 195.
[327] Memorial on Annulment, para. 194.
[328] Memorial on Annulment, para. 193; First Expert Report of Dr. Richard Hern, para. 118.
[329] Second Expert Report of Sandy Cowan, para. 1.5 (second bullet point) & para. 7.58. Mr. Cowan considered that it was more appropriate to rely on the Second Confineks Valuation than on the First Confineks Valuation because the balances included in the former were valued at the closest point to the expropriation date.
[330] Third Expert Report of Sandy Cowan, para. 4.8 ("BD Agro – Comparison of Dr Hern's and my valuations").

a whole, amounted to EUR 18.8 million.[331] This category was based on the Second Confineks Valuation, specifically, its part dealing with "property, plant and equipment", but excluded the land (which was valued by Ms. Ilic).[332] This part of the Second Confineks Valuation specifically included the castle.[333]

200. Therefore, the castle was included in Mr. Cowan's valuation but was not listed separately, but as part of "other fixed assets". Likewise, it was also not listed jointly with the land, as in Dr. Hern's valuation.[334]

201. The Tribunal listed its valuations of various assets of BD Agro in a table reproduced in the Award, and explained that this table was based on a table in Mr. Cowan's third expert report "*after adjusting it as necessary in light of the Tribunal's conclusions above*".[335] Since the Tribunal's table was prepared on the basis of Mr. Cowan's, it also included the "Novi Becej" castle as part of the category of "other fixed assets", because the Tribunal did not find it necessary to make any adjustments to this category. As far as the "Novi Becej" land is concerned, it was listed separately, again, the same as in Mr. Cowan's table.

202. By stating that it based its table on Mr. Cowan's table with necessary adjustments which were explained previously in the Award and which did not affect the "Novi Becej" castle and land valuation by Mr. Cowan, the Tribunal provided sufficient reasoning for its valuation of "Novi Becej" castle and land separately, as Mr. Cowan did.

203. Contrary to what Applicant avers, the answer to the question of whether and how the Tribunal valued the "Becej" castle can easily be inferred from the Award and its reference to Mr. Cowan's report.[336] He clearly distinguishes valuation of the land and other fixed assets, and valuates the latter on the basis of the Second Confineks Valuation, which Claimants regarded as credible.[337] This is then followed in the Tribunal's table of assets, with necessary adjustments, as expressly noted in the

[331] Third Expert Report of Sandy Cowan, para. 4.8 ("BD Agro – Comparison of Dr Hern's and my valuations").
[332] Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci, p. 29, 52 & p. 131 (pdf), **CE-172**.
[333] Confineks d.o.o. Beograd, Report on the Valuation of Assets, Liabilities and Capital of BD Agro AD Dobanovci, p. 52 (pdf), **CE-172**.
[334] Third Expert Report of Sandy Cowan, para. 4.8. ("BD Agro – Comparison of Dr Hern's and my valuations").
[335] Award, para. 707 and note 593.
[336] Award, para. 707 & note 593.
[337] Claimants' Reply, para. 1300.

Award.[338] Accordingly, there is no lacuna in the Award. As already discussed, the reasons to be given for the Award need not be explicit on any given point, but may be implicit, as well, especially when the Tribunal is referring to the record.[339]

204. Finally, even if Applicant were right and the Tribunal had failed to include the valuation of the "Novi Becej" castle in the Award, (*quod non*), this would be an omission of the Tribunal to decide a question in the sense of Article 49(2) of the ICSID Convention, not an omission to state reasons.[340] In such case, Claimants could have requested the Tribunal to decide this question within 45 days after the Award was rendered, but had failed to do so.

3. The "Current assets"

205. Applicant also contends that the Tribunal did not provide any reasons for its valuation of "current assets" at EUR 5 million.[341] In this context, Applicant mentions that Mr. Cowan also valued "current assets" at EUR 5 million, but comments that "*it cannot be known whether the Tribunal simply adopted the valuation of Mr. Cowan – which is flawed and based on evidence post-dating the Valuation Date (i.e. the Second Confineks Report) – or calculated the value in some other way.*"[342]

206. This assertion is not accurate. As explained in the previous sub-section, the Award indicates that the Tribunal indeed adopted Mr. Cowan's valuation reproduced in a table in his second report, "*after adjusting it as necessary*".[343] Since the Tribunal did not find it necessary to adjust the item "current assets" from Mr. Cowan's table, it remained the

[338] Award, para. 707 and note 593.
[339] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 93, **CLA-185**; see, also, *Vivendi Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 87, **RLA-155**; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, para. 127, **RLA-152**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 75, **RLA- 232;**
[340] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 80, **CLA-185** ("*In the case where the Tribunal omitted to decide on a question or where the award contains an error, either party may request the award be rectified, according Article 49(2).*")
[341] Memorial on Annulment, para. 199.
[342] Memorial on Annulment, para. 199.
[343] Award, para. 707 and note 593.

same in the one adopted by the Tribunal. The Tribunal's use of and reference to an expert's report is also a presentation of reasons.[344]

207. Importantly, Respondent has not been able to identify any challenge that Claimants might have raised against the "current assets" item in Mr. Cowan's export reports during the Arbitration. Mr. Cowan's use of the Second Confineks Valuation was also never challenged by Claimants, although they had criticized his expert reports extensively. On the contrary, Dr. Hern, who based his own valuation on the First Confineks Valuation, noted that the First and Second Confineks Valuations "*are not substantially different*".[345] Similarly, Claimants regarded both Confineks reports as "*credible*".[346] Indeed, they extensively argued that Serbia in fact accepted the First and Second Confineks Valuations.[347]

208. As already discussed above, Applicant is precluded from challenging the Award on the basis of arguments and allegations that were not presented during the proceedings before the Tribunal.[348] Accordingly, Applicant is precluded from challenging the Tribunal's reliance on the item "current assets" from Mr. Cowan's report and also Mr. Cowan's reliance on the Second Confineks Valuation, since Claimants have not done so during the Arbitration.

209. In any case, Applicant's challenge to the Second Confineks Valuation on the basis of the Valuation Date cannot stand. Namely, there is no substantial difference between the values of "current assets" in the Second Confineks Valuation, whose date is 31 December 2015 (RSD 597,723,000), and in the First Confineks Valuation, whose date is 31 December 2014 (RSD 612,858,000).[349] It is also submitted that the Second Confineks Valuation relies on the information about BD Agro's assets and business performance originating from the whole of 2015, which in large part consists of

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[344] *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, 10 June 2022, Decision on Annulment, para. 694, **RLA-209** ("*To adopt the technical arguments of one expert in detriment of the other does not amount to a failure to state reasons but is in fact the presentation of reasons that do not correspond to the arguments of the other expert.*")

[345] First Expert Report of Dr Richard Hern, para. 79.

[346] Claimants' Reply, para. 1300.

[347] Claimants' Counter-Memorial, para. 517; Claimants' Reply, para. 1312.

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

[349] According to the exchange date of Serbian dinar against EUR at the valuation date, 21 October 2015, this difference is EUR 126,230, see National Bank of Serbia Website - Exchange Rate EUR to RSD (2019), **CE-137.**

information originating before the BD Agro's Valuation Date in the arbitration. It is incumbent upon Applicant to point to the specific information relied upon by the Tribunal which post-date the Valuation Date.

210. In view of the above, Applicant's annulment request on the basis that the Tribunal failed to provide any reasons for its valuation of certain categories of BD Agro's assets does not stand scrutiny and should be rejected.

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

211. In the Award, the Tribunal determined that BD Agro's liabilities consist of the following six categories: (i) total estimated liabilities, (ii) conversion fee, (iii) payments to Canadian suppliers, (iv) court proceedings liabilities, (v) capital gains tax ("**CGT**"), and (vi) redundancy payments.[350] Applicant argues that the Tribunal's reasoning regarding valuation of these liabilities (except for the payments to Canadian suppliers) falls short of the requirement to state reasons, alleging that its reasoning was either contradictory, insufficient, or both.[351]

212. In the following paragraphs Respondent will explain that the Tribunal's reasoning related to valuation of total estimated liabilities (**Section 1**), court proceeding liabilities (**Section 2**), redundancy payments (**Section 3**), conversion fee (**Section 4**), and CGT (**Section 5**), does not provide grounds for annulment.

1. The Tribunal's reasoning related to the calculation of the total estimated liabilities is not contradictory or insufficient

a) <u>Reasoning related to calculation of the total estimated liabilities is not contradictory</u>

213. Applicant notes that the Tribunal "*made it clear that it would not rely on any evidence post-dating the Valuation Date*"[352] and that it contradicted its position when it:

[350] Award, para. 707.
[351] Memorial on Annulment, paras. 203-251.
[352] Memorial on Annulment, para. 203.

1) accepted Serbia's calculation of BD Agro's debt *vis-à-vis* Banca Intesa; and

2) relied on the Second Confineks Valuation dated January 2016, and BD Agro's financial statements prepared on 31 December 2015 ("**BD Agro's 2015 Financial Statements**"), related to total estimated liabilities.[353]

214. These allegations are erroneous. The Tribunal has never stated that it would not rely on the "*evidence"* post-dating Valuation Date but noted that it is "*well accepted that the **information** used for valuation should originate on or before the valuation date*".[354] As will be explained hereunder, the Tribunal indeed acted in line with this position when it accepted Mr. Cowan's report which calculated BD Agro's debt *vis-à-vis* Banca Intesa, and referred to the Second Confineks Valuation and BD Agro's 2015 Financial Statements.

215. **BD Agro's debt *vis-à-vis* Banca Intesa**. Based on the loan agreement from 2007, Banca Intesa provided an EUR 9 million loan to BD Agro.[355] Since BD Agro failed to repay this loan, Banca Intesa initiated bankruptcy proceeding against BD Agro requesting payment of principal amount of the debt and the default interest.[356] Banca Intesa subsequently sold its claim to a company Agrounija,[357] which then provided an amended calculation of the default interest accrued before and after the Valuation Date.[358] Mr. Cowan was thus instructed by the Respondent to recalculate the default interest and to include only information that originates before Valuation Date:

> *"I understand from counsel that the calculation of default interest for non-payment on the aforementioned loan prepared by Banca Intesa in its initial submission in the bankruptcy proceedings was incorrect and that it was subsequently amended*

[353] Memorial on Annulment, para. 205.
[354] Award, para. 693, third bullet point (ii).
[355] "*Banca Intesa ad Belgrade is proposer's creditor, i.e. secured creditor, on the basis of: the Agreement on long-term loan, no. 00-420-1302310.1 of 29.12.2007 with 7 accompanying annexes. Banca Intesa performed its contractual obligation and transferred to the proposer the loan funds in the amount of EUR 9.900.000,00"* Objections of Banca Intesa to Original pre-pack reorganization plan dated 6 January 2015, p. 2 (of PDF), **RE-459**.
[356] Registration of Banca Intesa's receivables in BD Agro's bankruptcy, 25 October 2016, p. 1, **CE-812**.
[357] Agrounija's Registration of Claim with Enclosures dated 13 January 2016, p. 3 (of PDF), **RE-646**.
[358] Agrounija's Registration of Claim with Enclosures dated 13 January 2017, p. 4 (od PDF), **RE-646**. Agrounija recalculated the value of the default interest based on the principal of RSD 1,048 million given that this amount of the principal debt was determined in the decision of the Commercial Court of Belgrade rendered on 25 March 2014 (i.e. before the Valuation Date), see First and Second Instance Judgments in Intesa Court Claim dated 25 March 2014 and 20 August 2015, p. 1, **RE-605**.

by Agrounija which bought the claim from Banca Intesa. The amended claim was accepted by the bankruptcy trustee.

I have been instructed ***to recalculate the default loan interest between the dates of 8 November 2013 and the valuation date of 21 October 2015*** *based on a principle of RSD 1,048.0 million and to include the recalculated default loan interest in my valuation"*[359]

216. The chart that Mr. Cowan provided with his Third Expert Report clearly shows that he did not include the interest accrued after 15 October 2015 in his calculation:[360]

Default Interest on Banca Intesa Loan

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

217. Therefore, when relying on Mr. Cowan's calculation of BD Agro's debt *vis-à-vis* Banca Intesa, the Tribunal did not rely on the information post-dating the Valuation Date, i.e. it did not contradict its stance that "*the* ***information*** *used for valuation should originate on or before the valuation date*".[361]

218. **Calculation of the total estimated liabilities in Second Confineks Valuation and BD Agro's 2015 Financial Statements**. Applicant argues that the Tribunal relied on the Second Confineks Valuation and BD Agro's 2015 Financial Statements for the valuation of the total estimated liabilities.[362] This is incorrect.

[359] Third Expert Report of Sandy Cowan, paras. 2.21 and 2.22 (emphasis added).
[360] Third Expert Report of Sandy Cowan, para. 2.22.
[361] Award, para. 693, third bulletin point (ii).
[362] Memorial on Annulment, para. 205.

219. The Tribunal did not rely on the valuations of the total estimated liabilities presented in these two documents, but instead accepted the valuation prepared by Mr. Cowan (and explained why it did so)[363] which differs from the calculations presented in the Second Confineks Valuation and BD Agro's 2015 Financial Statements:

> *"I rely on the Feb 16 Confineks Report* ***as a starting point*** *for valuing BD Agro's total liabilities at the valuation date, as this was the basis for the asset and liability values in BD Agro's 31 December 2015 Financial Statements."*[364]

220. Therefore, as the Tribunal correctly observed, Mr. Cowan did not use only "*the figures included in the Second Confineks Valuation*", but relied also on "*his own analysis"*, as a corrective of the calculations included in the Second Confineks Valuation.[365] Here, it should also be recalled that Claimants themselves considered the Second Confineks Valuation to be "*credible*" and never questioned Mr. Cowan's use of it. Therefore, Claimants are precluded now from raising a challenge to the Tribunal's reliance on Mr. Cowan valuation which used this evidence.[366]

221. BD Agro's 2015 Financial Statements, on the other hand, were only mentioned by Mr. Cowan to explain why he considered that the Second Confineks Valuation should be used as a starting point for his calculation – because that report was the basis for the asset and liability values in BD Agro's 2015 Financial Statements.[367] In any case, Applicant did not explain, let alone prove, which information that Mr. Cowan used from these two documents originated after the Valuation Date.

222. Interestingly, while arguing that the Tribunal should not rely on BD Agro's 2015 Financial Statements, Applicant also suggests that the Tribunal should have relied on Dr Hern's calculation of the total estimated liabilities which was based solely on BD

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[363] "*The Tribunal finds Mr. Cowan's approach reasonable*". Award, para. 699 (i).
[364] Third Expert Report of Sandy Cowan, para. 2.17.
[365] "*Relying on the figures included in the Second Confineks Valuation and* ***his own analysis****, Mr. Cowan submits that BD Agro's estimated liabilities were EUR 42.2 million."* Award, para. 699 (i).
[366] See Section D. IV. 3. above.
[367] Third Expert Report of Sandy Cowan, para. 2.17.

Agro's 2015 Financial Statements.[368] Applicant does not explain this contradiction in his argument.

223. Having in mind the above, the arbitration practice invoked by Applicant is inapplicable to this case. In the *Pey Casado* case, the tribunal explicitly stated that an "*expropriation-based damage calculation is irrelevant and that all evidence and submissions relevant to such calculation could not be considered*", but subsequently decided to use such damage calculation.[369] In the case at hand, however, Applicant did not offer any evidence that the Tribunal stated that it would not use the **evidence** post-dating the Valuation Date, nor that, when relying on Mr. Cowan's report, the Tribunal abandoned its position that the ***information*** *used for valuation should originate on or before the valuation date.*

b) <u>The Tribunal's reasoning related to calculation of the total estimated liabilities is sufficient</u>

224. Applicant alleges that the "*deferred tax liabilities*" in BD Agro's case represent deferred payments of the CGT. He also argues that it is unclear whether the final value of total estimated liabilities adopted by the Tribunal included deferred tax liabilities or not.[370] He states that if the final value of total estimated liabilities adopted by the Tribunal includes deferred tax liabilities, this would indicate that the Tribunal contradicted its previous conclusion that total estimated liabilities should be calculated without deferred tax liabilities[371] and that the Tribunal counted the value of the CGT twice: once as a separate item valued at EUR 5.7 million, and then again[372] as part of deferred tax liabilities.[373] This purported double counting was addressed by Dr. Hern but the

[368] "*The Tribunal's use of the evidence post-dating the Valuation Date for the valuation of BD Agro's total estimated liabilities inflated the result by EUR 4.4 million*". Memorial on Annulment, para. 210. Applicant therefore alleges that the Tribunal should have accepted value of EUR 37.8 million for the total estimated liabilities, as proposed by Dr. Hern. However, Applicant forgets to mention that Dr. Hern adopted this value from BD Agro's 2015 Financial Statements. See First Expert Report of Richard Hern, para. 47 and fn. 28.

[369] Memorial on Annulment, paras. 206-209; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, para. 285, **CLA-192**.

[370] Memorial on Annulment, para. 242.

[371] Memorial on Annulment, para. 242.

[372] Memorial on Annulment, para. 243. This is in line with Dr. Hern's position in the arbitration, which was rejected by the Tribunal.

[373] Memorial on Annulment, paras. 242-246.

Tribunal allegedly ignored this *"outcome-determinative argument*."[374] Applicant is wrong.

225. As it is clear from the Award's reasoning, the final calculation of the total estimate liabilities does not include deferred tax liabilities. When explaining its approach in relation to the valuation of the total estimated liabilities, the Tribunal explicitly stated that its calculation excluded deferred tax liabilities, and that it adopted Mr. Cowan's calculation of these liabilities amounting to EUR 42.2 million:

> *"**Total estimated liabilities (excluding deferred tax liabilities)**: Relying on the figures included in the Second Confineks Valuation and his own analysis, Mr. Cowan submits that BD Agro's estimated liabilities were **EUR 42.2 million**. Dr. Hern reaches a lower figure of EUR 37.8 million…The Tribunal finds Mr. Cowan's approach reasonable."*[375]

226. Subsequently in the Award, where the final valuations of BD Agro's liabilities are given, the Tribunal also mentioned the said amount of EUR 42.2 million that represents the total estimated liabilities, excluding deferred tax liabilities:[376]

Total estimate liabilities	(42.2)
Conversion fee	(3.1)
Payment to Canadian suppliers	(2.2)
Court proceedings	(0.2)
Capital Gains Tax	(5.7)
Redundancy payments	(0.7)
Total liabilities	**54.1**

227. Having in mind the above, it is clear that the final value of total estimated liabilities adopted by the Tribunal did not include deferred tax liabilities. Therefore, Applicant's allegation that the Tribunal counted the value of the CGT twice (once as a separate item

[374] Memorial on Annulment, paras. 249- 251.
[375] Award, para. 699 (i).
[376] Award, para. 707.

valued at EUR 5.7 million, and then again as part of deferred tax liabilities[377]) is incorrect.

228. As to Applicant's argument that the double counting was addressed by Dr. Hern but that the Tribunal ignored it, is utterly untrue. Dr. Hern pointed out to Mr. Cowan's double-counting irregularity in his Second Expert Report.[378] Mr. Cowan addressed Dr. Hern's observations in his Second Report and explicitly stated that he agreed with Dr. Hern and corrected his calculation.[379] When adopting Mr. Cowan's calculation, the Tribunal therefore also accepted reasoning given by Mr. Cowan, including his view on the double-counting issue raised by Dr. Hern.

229. Several *ad hoc* committees have found that accepting a particular document is tantamount to stating the reasoning set forth in that document:

> *"With respect to any further reasons supporting the Tribunal's determination of the amount awarded to Wena, the appropriate information is contained in Wena's documentary evidence.* ***The reasons relevant for the Tribunal's findings are thus stated implicitly by reference to such documentation****. The ground for annulment of Article 52(1)(e) does not allow to argue further that the Tribunal evaluated erroneously the evidence submitted by Claimant and thus decided without stating sufficient reasons. This Committee therefore concludes that the quantification of the damages awarded to Wena cannot be challenged for a failure to state reasons in the Award."*[380]

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[377] Memorial on Annulment, paras. 243. Applicant alleges that the "*deferred tax liabilities*" in BD Agro's case represent deferred payments of the CGT.

[378] Memorial on Annulment, para. 248-250.

[379] "*In my First Report, I added a CGT liability of €3.1 million to the liabilities of the Feb 16 Confineks Report. Dr Hern has stated that I have double counted the CGT liability, leading to an understatement of the value of BD Agro… I agree with Dr Hern and I have removed the additional CGT liability of €3.1 million. I have calculated an additional CGT liability of €5.7 million under a going concern scenario at paragraph 6.10 above…"*. Second Expert Report of Sandy Cowan, para. 7.42-7.45.

[380] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 Februar 2002, para. 93, **CLA-185**. See also *Enron vs. Argentine*. "*Contrary to what Argentina has argued in the present annulment proceedings,* ***the Committee considers that there is no reason why a tribunal cannot state sufficient reasons for its decision by referring to, and expressing agreement with, the reasoning in a previous ICSID case****, or indeed, the reasoning in any other arbitration or judicial decision…****or in any other source****", Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3I, (also known as: Enron Creditors Recovery Corp. and Ponderosa

230. Respondent has already explained that if the reasoning in the document relied on by the Tribunal contains certain errors, that would mean that the Tribunal's reasoning on that matter is also flawed, however, an *ad hoc* committee may not annul an award on the ground that the tribunal's reasoning is factually or legally flawed:

> *"Finally, the control of the existence of reasons is exclusive of any review of the award on the merits, and a committee may not annul an award for failure to provide reasons on the basis that the reasoning is incorrect in fact or in law."* [381]

231. Therefore, whether or not Mr. Cowan's calculation, adopted by the Tribunal, is correct *i.e.* whether it involves double-counting of the CGT (and it does not), is irrelevant for the annulment of the Award, given that this question pertains solely to the correctness of the expert's calculation adopted by the Tribunal.[382]

2. The Tribunal's reasoning related to the calculation of the court proceedings liabilities is not contradictory

232. Applicant argues that the Tribunal's reasoning in relation to the court proceedings liabilities was contradictory for the following reasons:

Assets, L.P. v. The Argentine Republic), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 94, **RLA-232**.

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

[382] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Decision on Annulment, 18 March 2022, para. 391, **CLA-205**.

1) the Tribunal allegedly referred to the Second Confineks Valuation and BD Agro's 2015 Financial Statements, but adopted a different value for the court proceeding liabilities than those indicated in these documents;[383] and

2) the Tribunal relied on the aforementioned documents for the purpose of valuating court proceeding liabilities, despite stating that it would not rely on any evidence post-dating the Valuation Date. [384]

233. First, the Tribunal never stated that it adopts the value of the court proceedings liabilities as indicated in Second Confineks Valuation and BD Agro's 2015 Financial Statements. It merely noted that it agrees with Mr. Cowan's including of valuation of the court proceedings liabilities in the calculation of BD Agro's liabilities because the court proceeding liabilities, as a category of liabilities, was also included in the BD Agro's 2015 Financial Statements (and Second Confineks Valuation).[385] In this way the Tribunal explained why these liabilities were included among BD Agro's liabilities and not that they should be included in the amount given in BD Agro's 2015 Financial Statements.[386] Therefore, there is no contradiction in the Tribunal's reasoning.

234. As for Applicant's argument that with the reliance on the aforementioned documents the Tribunal contradicted its previously taken position that it would not rely on any "*evidence"* post-dating the Valuation Date,[387] Respondent has already showed above that the Tribunal never adopted this position, but that instead it noted that the valuation "*information"* should originate on or before the Valuation Date.[388] Mr. Cowan explained that his court proceeding analysis was "*based upon the contingent liabilities in BD Agro's notes to the 31 December 2015 Financial Statements, in which BD Agro*

[383] Memorial on Annulment, paras. 226-229.
[384] Memorial on Annulment, paras. 203, 205 and 230.
[385] "*Court proceedings: Mr. Cowan includes EUR 200,000 in BD Agro's liabilities. The Tribunal agrees, as the item was included in BD Agro's 2015 financial statements*". Award, para. 699 (iv).
[386] The Tribunal had to explain why it included "*court proceeding liabilities*" in the list of BD Agro's liabilities given that Claimants' expert, Dr. Hern, omitted this category from the list of BD Agro's liabilities: "*Dr Hern has not included a provision for court proceedings according to note 41 of the 31 December 2015 Financial Statements."* Second Expert Report of Sandy Cowan, para. 7.31; The comparative analysis of valuations prepared by Dr. Hern and Mr. Cowan clearly shows that Dr. Hern did not include court proceeding liabilities as a category of liabilities. Third Expert Report of Sandy Cowan, table chart under para. 4.8.
[387] Memorial on Annulment, paras. 203-210 and 230.
[388] Award, para. 690, first bulletin point.

was likely to be the net payer in proceedings" noting that he included only those liabilities which he believed "*were probable at the valuation date*".[389]

235. In any event, only the Tribunal is competent to evaluate the significance of the evidence put before it, and therefore, its decision to adopt Mr. Cowan's reasoning related to the court proceeding liabilities is beyond the scope of the *ad hoc committee*'s assessment.[390]

3. The Tribunal's reasoning related to the calculation of the redundancy payments is not contradictory

236. Parties held differing views on the inclusion of redundancy payments in the valuation of BD Agro's liabilities – Respondent argued that these payments were mandatory, while Claimants argued that they were not. Eventually, for the reasons discussed below, the Tribunal decided to accept Respondent's position. [391] Applicant argues that the Tribunal included redundancy payments in the valuation of BD Agro's liabilities because these payments were obligatory under the Privatization Agreement and that with this it contradicted its previously adopted stance that the Privatization Agreement ceased to apply in April 2011.[392] This argument is misplaced.

237. First of all, it should be noted that the redundancy payments were included in BD Agro's March 2015 Pre-pack Reorganization Plan,[393] i.e. they were recognized as mandatory by the management of BD Agro at the time it was under the control of Mr. Obradovic, i.e. Mr. Rand.

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[389] Third Expert Report of Sandy Cowan, para. 2.1. There was uncertainty regarding the Banca Intesa claim, as BD Agro's 2014 and 2015 Financial Statements included the Banca Intesa loan as both a liability on the balance sheet and a contingent liability in the notes to the financial statements, which turned out to be an error. Therefore, Mr. Cowan explained that he had to remove EUR 9.0 million (in the name of the Banca Intesa contingent liability) from his calculation of the of the court proceeding liabilities. See Third Expert Report of Sandy Cowan, paras. 2.4-2.16 and 4.4.

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

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

[392] Memorial on Annulment, para. 212-213.

[393] Redundancy payments (translated as "*severance*") were included in the chart no. 5. 10 titled "*Projected salary costs*". See the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 168 (of PDF), **CE-101**.

238. Second, during the Arbitration, Claimants failed to demonstrate that these payments were voluntary under the applicable legislation. [394] As the Tribunal noted:

> *"Redundancy payments: The experts disagree whether certain redundancy payments should be included in BD Agro's valuation. While the Claimants submit that the redundancy program was voluntary,* ***they offer no authority in support****."*[395]

239. Applicant now argues that Claimants provided authorities which support their allegation that the redundancy program was voluntary, and that the Tribunal incorrectly concluded otherwise. [396] However, he fails to identify a single authority that Claimants purportedly offered in support of this argument, and merely cites Dr. Hern's position on this issue which is completely unsubstantiated by any authorities.[397] In other words, the Tribunal rightly concluded that Claimants have failed to offer any authority in support of their allegation.

240. In any case, this argument is also immaterial for the annulment proceeding, as it pertains solely to the correctness of the Tribunal's reasoning and, as noted above, correctness of the Tribunal's reasoning does not represent an adequate basis for the annulment of the award.[398]

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[394] Mr. Cowan noted that, in accordance with Article 153 of the Serbian Labour Law, employers are obliged to prepare a program of employees' redundancy if they plan to terminate at least 10% of employees hired on a permanent basis, provided that the employer has between 100 and 300 such employees. BD Agro was therefore obliged to prepare such program as the Pre-pack Reorganization Plan from March 2015 envisaged that the employment agreements shall be terminated for 58 out of 158 BD Agro's permanently hired employees. Second Expert Report of Sandy Cowan, para. 6.17; Amendment to the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 124 (of PDF**), CE-101**.

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

[396] Memorial on Annulment, para. 214.

[397] Second Expert Report of Richard Hern, para. 182; Memorial on Annulment, para. 214.

[398] "*…a committee may not annul an award for failure to provide reasons on the basis that the reasoning is incorrect in fact or in law*" *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, para. 211, **RLA-162**; "*In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. And eventually to its conclusion, even if it made an error of fact or of law*" *Maritime International Nominees Establishment v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award, 22 December 1989, para. 5.09, **CLA-184**; "*However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons*" *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 64, **RLA-155**.

241. When it comes to the Tribunal's reference to the Privatization Agreement, it mentioned the existence of this obligation under the Privatization Agreement only as an **additional reason** for their inclusion/payment:

> *"**In any event**, BD Agro was obliged to prepare a redundancy program in accordance with Annex 1 of the Privatisation Agreement."*[399]

242. Moreover, the Tribunal never asserted that this specific obligation ceased to exist with the payment of the purchase price, as it expressly stated with respect to certain other obligations.[400]

243. Finally, it is worth noting that the Award can be annulled on the grounds of a contradiction only if the contradiction is clear and indisputable, which certainly is not the situation in this case:

> *"In cases where it is merely arguable whether there is a contradiction or inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument. Nor is it the role of an annulment committee to express its own view on whether or not the reasons given by the tribunal are logical or rational or correct."*[401]

244. Applicant repeats its allegation that the Tribunal "*clearly contradicted its previous conclusion that BD Agro's valuation should not rely on any evidence post-dating the Valuation Date*" when it included redundancy payments which were made after the Valuation Date in the calculation of BD Agro's liabilities.[402] Respondent recalls that the Tribunal has never contended that it would not rely on "*evidence"* which post-date the Valuation Date but that the "*information"* for valuation should predate the Valuation

[399] Award, para. 699 (vi) (emphasis added).

[400] It appears that the Tribunal was aware that not all obligations need to be tied to the duration of the Privatization Agreement, which is why it specifically addressed its individual obligations: "*As the obligation contained in Article 5.3.4 ceased on that date, it could not be breached thereafter… The wording of Article 5.3.4 is clear in that it is limited to the term of the agreement, which, in turn is linked to the payment of the purchase price."* Award, para. 612.

[401] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for the Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 103 (emphasis added), **RLA-210.**

[402] Memorial on Annulment, para. 215.

Date. Having in mind that the Pre-pack Reorganization Plan prepared on 6 March 2015 (i.e. before the Valuation Date) envisaged that BD Agro would terminate employment agreements to 58 of its employees[403] and included redundancy payments costs in the category of the employment-related costs,[404] it is clear that the obligation of the payment of the redundancy fees existed (or at least was understood by BD Agro to exist) before the Valuation Date. When the payment was executed is utterly irrelevant.

4. The Tribunal's reasoning related to the calculation of the conversion fee is not contradictory

245. As the Tribunal correctly observed, both parties' experts agree that the development of BD Agro's land necessitated its conversion from agricultural to industrial use, accompanied with payment of an adequate conversion fee. However, the difference between the experts arose with respect to the amount of that fee.[405] Mr. Cowan, who relied on Ms. Ilic's calculation, estimated this fee at EUR 3.1 million, while Dr. Hern estimated it to be between EUR 0.59 and 2.3 million.[406] The Tribunal accepted Mr. Cowan's valuation on this matter. Applicant argues that, in this way, the Tribunal acted in contradiction with its own reasoning as it first *"made an unequivocal conclusion that the conversion fee should be calculated based on the previous year's tax assessment*" and then accepted Ms. Ilić's valuation that allegedly did not follow this approach.[407] This allegation is completely misleading.

246. When addressing this issue, Applicant omitted to note the reason behind the Tribunal's decision to adopt Ms. Ilić's calculation:

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[403] "*On August 31, 2014, the Company permanently employed 158 workers…working agreements shall be terminated for 58 employees*…", Amendment to the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 124 (of PDF), **CE-101**.

[404] Redundancy payments (translated as "*severance*") were included in the chart no. 5. 10 titled "*Projected salary costs*". See the Pre-pack Reorganization Plan of BD Agro, dated 6 March 2015, p. 168 (of PDF), **CE-101**. Mr. Cowan explained that he included "*redundancy payments*" as a liability category because they were part of the March 2015 Reorganization Plan. Mr. Cowan, however, relied on the value of these liabilities from the January 2016 Reorganisation Plan, as he believed that the costs from the January 2016 Reorganisation Plan relate to the 58 redundancies previously identified in the March 2015 Reorganization Plan: "*The Pre-Pack Reorganisation Plan at March 2015 Pre-Pack Planned for 58 redundancies out of a total of 158 employees…I assumed that the redundancy payments of RSD79.3 million (c.€0.7 million) in the January 2016 Pre-Pack Plan related to the 58 redundancies (out of a total of 158 employees) envisaged in the March 2015 Pre-Pack Plan*." Second Expert Report of Sandy Cowan, fn. 75 and para.7.53.

[405] Award, para. 699 (ii).

[406] Third Expert Report of Sandy Cowan, para. 4.8; Hern's updated analysis, Assets, **CE-908**.

[407] Memorial on Annulment, para. 222.

> *"In her first report and at the hearing, Ms. Ilić furnished a detailed explanation for her approach and explained why the fee must be calculated on the basis of the previous year's tax assessment. Mr. Cowan then used Ms. Ilić's conversion fee amount in his expert report.* ***The Tribunal finds Ms. Ilić's reasons plausible. In the absence of any contrary indications provided by the Claimants, it adopts the conversion fee used by the Respondent's experts****."*[408]

247. Therefore, the Tribunal found Ms. Ilić's calculation plausible, and then, because Claimants failed to provide any "*contrary indications*", accepted it.[409] There is nothing improper in the Tribunal's decision to accept one party's assertions because the other party failed to provide arguments to the contrary.

248. The question of whether Ms. Ilić applied the "*previous year's tax assessment*" method, as well as whether the Tribunal believed she did, holds no relevance in the annulment proceeding. Even if Ms. Ilić did not employ this method and the Tribunal mistakenly thought she did, it would only mean that the Tribunal arrived at an incorrect conclusion on the factual issue, and numerous *ad hoc* committees confirmed that an error in facts does not constitute sufficient grounds for annulment.[410]

249. Specifically, when addressing allegations concerning inaccuracy of the method applied by one of the experts, the *NextEra ad hoc* committee reached the following conclusion:

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[408] Award, para. 699 (ii) (emphasis added).

[409] Award, para. 699 (ii).

[410] "*…a committee may not annul an award for failure to provide reasons on the basis that the reasoning is incorrect in fact or in law*" *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, para. 211, **RLA-162**; "*In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law*" *Maritime International Nominees Establishment v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Decision of the Ad Hoc Annulment Committee, 22 December 1989, para. 5.09, **CLA-184**; "*However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons*" *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 64, **RLA-155**; "*It is generally accepted that this ground for annulment only applies in a clear case when there has been a failure by the tribunal to state any reasons for its decision on a particular question, and not in a case where there has merely been a failure by the tribunal to state correct or convincing reasons.*" *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, 16 September 2011, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, para. 100, **RLA-210.**

> *"Spain claims that the Tribunal included the Claimants' damages experts' "incorrect quantification" of the capitalization of historical damages that should have included a riskfree rate instead of the cost of equity used. The Committee considers that even if the quantification was, as Spain argues, incorrect it would not constitute an annullable error."*[411]

250. Similarly, *ad hoc* committee *in Watkins Holdings* has established that:

> *"... while the Tribunal could have undertaken a better check of its final computation when it was brought up by Spain in the rectification process, the Tribunal's error in computation remains, merely a mistake, and not one that comes within the meaning of Article 52(1) (e) – for failure to state reasons."*[412]

251. Respondent reiterates that there is also a consensus among *ad hoc* committees that tribunals enjoy broad discretion in evaluating the parties' positions on damages and determining a reasonable estimate of the compensation.[413]

252. Finally, Applicant asserts that the Tribunal referred to values of agriculture land that were never used by either of the parties. In particular, the Tribunal stated that:

> *"In his expert report, Mr. Grzesik reaches an agricultural land price of EUR **1.85 million**, to which he applies a conversion fee of EUR 1.5 million. By contrast, Ms. Ilić arrives at an agricultural land price of EUR **3.4 million** to which she applies a conversion fee of EUR 3.1 million."* [414]

253. These figures were, in fact, used by parties' experts: Dr. Grzesik's indicated EUR 1.85 as a per square meter price of agricultural land, while Ms. Ilić indicated EUR 3.4 as a

[411] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, 18 March 2022, Decision on Annulment, para. 391 (footnotes omitted), **CLA-205**.

[412] *Watkins Holdings v. Spain Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, 21 February 2023, Decision on Annulment, para. 257, **CLA-207**.

[413] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, 18 March 2022, Decision on Annulment, para. 273, **CLA-205**. See also Section D. I. 1. above.

[414] Memorial on Annulment, para. 224; Award, para. 699(ii).

per square meter price of equivalent agricultural land.[415] Therefore, it is evident that the Tribunal made a technical oversight when it wrote that the price is given in millions instead *"per square meter".* Obviously, this is not an annullable matter, but an error which could be rectified by the Tribunal upon request of a party made within 45 days after the date on which the award was rendered, as provided by Article 49(2) of the ICSID Convention. Applicant has never made such request.

5. The Tribunal's reasoning related to calculation of the CGT is sufficient

254. When it comes to the calculation of CGT, both experts, Mr. Cowan and Dr. Hern, agreed that the CGT should be applied to any increase in the value of BD Agro's assets compared to the original purchase price. However, experts were in a disagreement over the final amount of CGT.[416]

255. Dr. Hern contended that, due to the absence of information on the original purchase price necessary for calculating the CGT, the most appropriate method was to estimate the CGT value using the deferred tax liabilities reported in BD Agro's 2015 annual accounts. This approach led to the CGT in the amount of EUR 3.1 million.[417] Mr. Cowan, on the other hand, applied a different approach,[418] and deducted book value of tangible assets as of 31 December 2013 (used as purchase price) from the land value calculated by Ms. Ilić on the Valuation Date, and then applied a 15% CGT rate on this amount, arriving at the value of EUR 5.7 million.[419]

256. The Tribunal adopted Mr. Cowan's approach:

> *"Capital gains tax: Dr. Hern and Mr. Cowan disagree on the applicable capital gains tax. Dr. Hern calculates capital gains tax by using the "deferred tax liabilities" in BD Agro's 2015 balance sheet as a proxy for the capital gains, based on the*

[415] Expert Report of Mr. Krzystof Grzesik, para. 6.25; Transcript, Hearing on Jurisdiction and Merits, Day 7, dated 19 July 2021, 178:04-178:16.
[416] Second Expert Report of Mr. Sandy Cowan para. 6.12; First Expert Report of Richard Hern, para. 34.
[417] First Expert Report of Richard Hern, para. 34.
[418] Claimant's allege that Mr. Cowan admitted that he did not have all necessary information for calculation of the CGT, but this allegation is misplaced. Namely, in his Second Expert Report, Mr. Cowan explained that **at the time of preparing his first report he** „*did not have enough information to calculate CGT accurately*". However, in his Second Expert Report he amended his calculation taking into account the value of land proposed by Ms Ilic. Memorial on Annulment, para. 234; See Second Expert Report of Mr. Sandy Cowan, paras. 6.11-6.14;
[419] Second Expert Report of Mr. Sandy Cowan, para. 6.12.

> *Claimants' instruction. By contrast, Mr. Cowan deducts the book value of BD Agro's tangible assets (i.e. BD Agro's land, plant, equipment and biological assets) as of 31 December 2013 as a proxy for the purchase price, from the value of land according to Ms. Ilić and applies a 15% capital gain tax rate. The Tribunal adopts Mr. Cowan's approach, which it finds objective and logical."*[420]

257. Applicant contends that the Tribunal's reasoning was insufficient, because it allegedly failed to offer explanation for why it deemed Mr. Cowan's approach "*objective and logical.*"[421] This, however, is no valuable reason for annulment because "*the tribunal is required to state reasons for its decision, but not necessarily reasons for its reasons*."[422]

258. Applicant also asserts that "*adopting an expert's opinion without any explanation, especially where the other party specifically takes an issue therewith, constitutes a failure to provide reasons*".[423]

259. As evident from the quotation above, the Tribunal provided a clear comparison of the methods used by Dr. Hern and Mr. Cowan in relation to the calculation of the CTG, demonstrating that it analyzed both. The Tribunal was under no obligation to further elaborate why it deemed Mr. Cowan's approach more "*objective and logical*". As already noted, *ad hoc* committees have continuously confirmed that the length (i.e. sufficiency) of the Tribunal's reasoning is of no importance in the annulment proceedings, for as long as an informed reader can comprehend the reasoning:

> *"Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning."*[424]

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[420] Award, para. 699 (v).
[421] Memorial on Annulment, para. 235.
[422] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3I, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 222, **RLA-232.**
[423] Memorial on Annulment, para. 237.
[424] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 64, **RLA-155**. This principle was also endorsed in *Enron v. Argentine* case. See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID

And

> *"It is not on an ad hoc committee to assess the quality, extension, or correctness of the reasons provided by a tribunal, much less to annul an award on that basis"*[425]

260. However, Applicant seeks to bring this situation under the principle articulated by the *ad hoc* committee in *Teinver v. Argentina*, arguing that the Tribunal failed to address any of Claimants' arguments raised in relation to Respondent's calculation of the CGT, albeit these arguments were "*clearly determinative"* for the calculation of the CGT and for the outcome of the arbitration. [426]

261. First of all, Applicant failed to identify Claimants' arguments related to the Respondent's calculation of the CGT that the Tribunal allegedly did not address, let alone to explain why these arguments would have been determinative to the outcome of the case.

262. Second, the fact that certain arguments were not explicitly addressed in the Award does not imply that the Tribunal failed to consider them. It should be recalled that there is a long-standing practice of *ad hoc* committees holding that reasons may also be implied in the award. For example, the *Wena ad hoc* committee was of the view that a tribunal's reasoning can be provided implicitly, by referencing documentation that contains appropriate reasoning.[427] Consequently, the Tribunal's reference to Mr. Cowan's report is sufficient to meet the requirement of providing the reasons. Recent arbitration practice demonstrates that the adoption of one expert's valuation over another's, even without any additional explanation in the Award (which however exists in this case), constitutes sufficient justification for the tribunal's approach:

> *"To adopt the technical arguments of one expert in detriment of the other does not amount to a failure to state reasons but is in*

Case No. ARB/01/3I, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 76, **RLA-232**.

[425] *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 164, **CLA-193**.

[426] Memorial on Annulment, paras. 237- 239.

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

fact the presentation of reasons that do not correspond to the arguments of the other expert."[428]

263. Based on the above, it follows that the Tribunal's approach to the CGT calculation does not, and cannot, amount to a "*failure to state reasons*" scenario under Article 52(1)(e) of the ICSID Convention.

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

I. THE MEANING OF MANIFEST EXCESS OF POWERS

264. Article 52(1) (b) of the ICSID Convention allows for the annulment of an award only in exceptional cases and in very limited circumstances. This follows from the ordinary meaning of the term "*manifest*" which clear majority of ICSID *ad hoc* committees[429] defines as "*obvious*"[430], "*clear and self-evident*"[431], capable of being identified „*with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award*",[432] or as "*a defect that is obvious, or so evident on a first reading of the document without need for further investigation or inquiry*".[433]

265. Applicant suggests that the manifest excess of powers can, alternatively, be regarded as an excess of powers that has serious consequences, *i.e.* that is substantial or serious, even if not obvious.[434] Even though Mr. Rand does not elaborate on what "*serious*" excess of powers would represent in particular, it seems that he implies that any alleged defect in the Tribunal's decision-making would need to affect its decision on jurisdiction.[435]

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[428] *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, para. 694, **RLA-209**.
[429] ICSID Updated Background Paper, March 2024, para. 89, **RLA-256.**
[430] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para. 68, **RLA-233**.
[431] *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 41, **RLA-220.**
[432] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 20, **CLA-187.**
[433] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, para. 22, **RLA-223.**
[434] Memorial on Annulment, paras. 255, 256.
[435] Memorial on Annulment, paras. 289, 305.

266. Respondent does not contest the proposition that any alleged excess of powers must necessarily be material to the outcome of the case in order to result in annulment. This follows from the nature of annulment as a limited remedy and from the principle of finality of the award.[436] However, a requirement that excess of powers must be outcome-determinative in order to be considered "*manifest*" does not exclude the fact that it necessarily must also be clear, obvious, self-evident and readily ascertainable, in accordance with the ordinary meaning of the word.

267. Manifest excess of powers must be simultaneously self-evident and material for the outcome of the case. This position was taken by a number of *ad hoc* committees, holding that "*a manifest excess of power implies that the excess of power should at once be textually obvious or substantially serious*"[437] or "*demonstrable and substantial and not doubtful.*"[438] The standard was summarized by the committee in *Kiliç v Turkmenistan*:

> "*The Committee concurs in that it is unnecessary to consider the two approaches as alternatives. The term 'manifest' would by itself seem to correspond to 'obvious' or 'evident', but it follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal's excess had serious consequences for a party*."[439]

268. As a result, in order to succeed with his request for annulment, Mr. Rand needs to prove that the alleged excess of powers was both evident on a first reading of the Award and that it was this lapse of the Tribunal that had led it to deny jurisdiction.[440] As it is demonstrated below, Applicant's submission fails on both accounts.

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[436] See *supra* para. 4-6.…

[437] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, ICSID Case No. ARB/03/3, Decision of the ad hoc Committee on the Application for Annulment, 24 January 2014, para. 127, **RLA-230**; *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, para. 40, **RLA-257**.

[438] *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, para. 44, **RLA-221**.

[439] *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, 14 July 2015, para. 53, **RLA-217**.

[440] See *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, para. 23, **RLA-223**; *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para. 74, **CLA-207**.

269. Finally, the term "*manifest*" also indicates the scope of review and defines "*the balance of power*" between the tribunal and the annulment body – limiting the scope of review of jurisdictional decisions by the *ad hoc* Committee.[441]

270. It is undisputable that an ICSID tribunal is empowered to decide on its own competence, under Article 41(1) of the ICSID Convention and that the request for annulment is not an appeal.[442] This is why *ad hoc* committees have been consistent in declaring that annulment should not be used as an opportunity for *de novo* jurisdictional analysis[443] or used as a "*back door*" attack on tribunals' substantive findings on their jurisdiction.[444] Limited scope of Article 52(1) (b) prevents an *ad hoc* committee from annulling an award simply because it has a different understanding of the facts, interpretation of the law, or appreciation of the evidence than the tribunal.[445] Put differently, a committee's function is not "*to purport to substitute its own view for that arrived at by the Tribunal.*"[446]

271. In its very essence the request submitted by Mr. Rand is an appeal posing as a request for annulment. This is nowhere more obvious than in Applicant's submissions aimed at attacking the Tribunal's jurisdictional decisions: Mr. Rand disagrees with the way in which the Tribunal interpreted and applied Article 1 of the Canada-Serbia BIT and

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[441] R. D. Bishop, S.M. Marchili, *Annulment under the ICSID Convention*, Oxford University Press, 2012, para. 9.91, **RLA-254**.

[442] ICSID Convention, Article 53(1).

[443] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, 1 February 2016, para. 242, **RLA-222**; *OI European Group B.V. (OIEG) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Application for Annulment, 6 December 2018, para. 183, **RLA-224**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Decision on Annulment, 26 April 2019, para. 71, **RLA-234**; *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment, 7 May 2021, para. 93, **RLA-218**; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 94, **CLA-193**; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, para. 19, **RLA-223**; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/18, Decision on Annulment, 12 October 2023, para. 71, **RLA-229;** *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022, para. 125, **RLA-231**.

[444] *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para. 73, **CLA-207**.

[445] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"),* ICSID Case No. ARB/10/18, Decision on Annulment, 12 October 2023, para. 73, **RLA-229**.

[446] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4 (also known as: Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru), Decision on Annulment, 5 September 2007, para. 112, **CLA-209**.

Article 25(1) of the ICSID Convention. While this might be a legitimate cause for an appeal, it is not a viable ground for annulment.

272. The only way in which the Tribunal's interpretation of law, including instruments establishing jurisdiction, could amount to manifest excess of powers would be an interpretation that was unreasonable and untenable. The standard of reasonable or tenable interpretation has been widely accepted by *ad hoc* committees in the context of Article 52(1) (b) of the ICSID Convention.[447] It establishes a high threshold, reached only in exceptional circumstances when a tribunal's decision was based on interpretation "*unacceptable to any reasonable person*"[448] or when it "*cannot be supported by any reasonable arguments.*"[449] If a tribunal's disposition on a question of law is tenable, an *ad hoc* committee must refuse to annul an award, even if it considers the tribunal's decision incorrect as a matter of law[450] and even if misinterpretation or misapplication of law was serious.[451]

273. As it is established *infra*, the Tribunal's decision to reject jurisdiction with regard to Mr. Rand's indirect shareholding in BD Agro and his payments for the benefit of BD Agro

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[447] *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, 30 November 2022, para. 199, **Annex-8**; *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Decision on Annulment, 14 October 2022, para. 104, **RLA-225**; *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para. 144, **CLA-016**; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, para. 129, **RLA-219**; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, 1 March 2011, para. 99, **RLA-226**; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, para. 193, **RLA-228**; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 85, **CLA-205**; *Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Decision on Annulment, 21 July 2023, para. 179, **RLA-227**.

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

[449] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, para. 129, **RLA-RLA-219**.

[450] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 February 2016, para. 193, **RLA-228**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 78, **CLA-186**.

[451] *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para. 237, **CLA-016**.

was not only reasonable and tenable, but in fact the correct one on points of law and fact.

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

274. Applicant asserts that the Tribunal manifestly exceeded its powers by rejecting jurisdiction over Mr. Rand's 3.9 % shareholding in BD Agro, held indirectly through his Serbian company, MDH Serbia.[452] This is clearly wrong.

275. The Tribunal rightly concluded that a mere nominal ownership of 3.9 % of shares in BD Agro did not constitute proof of allocation of resources by Mr. Rand[453] and that Claimants failed to prove that Mr. Rand had indeed paid EUR 0.2 million for this indirect ownership, resulting in lack of jurisdiction *ratione materiae* under Article 25(1) of the ICSID Convention.[454]

276. The Tribunal's decision was based on the fact that a contribution of resources is an inseparable element of the notion of investment under Article 25(1) of the ICSID Convention.[455] The reasoning is sound, based on conclusions adopted in numerous previous cases, supported by legal doctrine and cannot be considered an excess of powers, let alone manifest one.

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

277. Applicant reiterates his contention about the relationship between Article 25(1) of the ICSID Convention and Article 1 of the Canada-Serbia BIT: that an investment does not need to satisfy any requirements other than those contained in the BIT.[456]

[452] Memorial on Annulment, paras. 259-261.
[453] Award, para. 271.
[454] Award, para. 273.
[455] Award, para. 228.
[456] Memorial on Annulment, para. 269.

278. The argument advanced here has already been made,[457] considered and rejected by the Tribunal.[458] Reassessment of the Tribunal's position in that regard would effectively allow Mr. Rand to appeal the decision of the Tribunal.

279. However, Applicant's contention is not only inapposite in the context of annulment. It is also patently wrong. The so-called subjectivist approach has been rejected by large majority of ICSID tribunals. Numerous tribunals have found that the notion of investment from Article 25(1) has an objective meaning, independent from the instrument containing parties' consent to arbitration.[459] The stance that "*investment*" under the ICSID Convention has a meaning independent from those contained in various bilateral investment treaties has been described as beyond argument in ICSID jurisprudence.[460] It is also accepted by commentators, including those repeatedly referred to by Mr. Rand himself.[461]

280. The Tribunal's refusal to accept that the jurisdiction of ICSID depends solely on definition of investment contained in the Canada-Serbia BIT is therefore hardly surprising. The fact that the Tribunal rejected contention that contradicts the Report by the Executive Directors on the ICSID Convention[462] and the principle of effectiveness

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[457] Award, para. 227.

[458] Award, para. 228.

[459] See, for instance, *Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction*, 6 August 2004, para. 50, **RLA-94**; *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, 14 July 2010, para. 108, **CLA-90**; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 43, **RLA-172**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 211, **RLA-24**; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award of the Tribunal, 22 October 2018, para. 255, **RLA-23**; *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019, paras. 194-195, **RLA-235**; *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award of the Tribunal, 5 March 2020, para. 293, **RLA-236**.

[460] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, para. 43, **RLA-172**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSI D Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 214, **RLA-24**.

[461] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair (Eds.), *Schreuer's Commentary on the ICSID Convention*, 3rd ed., Cambridge University Press, 2022, Article 25, para. 181 (footnotes omitted), **RLA-258** ("*By contrast, the large majority of arbitral tribunals rightly has accepted that the notion of investment in Art. 25(1) has an objective meaning that is independent from the parties' consent*.").

[462] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 25 (emphasis added), **RLA-253** ("*While consent of the parties is an essential prerequisite for the jurisdiction of the Centre,* ***consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute*** *and the parties thereto*").

in treaty interpretation[463] cannot be seen as a failure by the Tribunal to apply Article 1 of the Canada-Serbia BIT, as Applicant would have it,[464] and it certainly cannot be regarded as a manifest excess of powers.

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

281. In rejecting jurisdiction over Mr. Rand's indirect shareholding in BD Agro, the Tribunal started from the proposition that the notion of investment under Article 25(1) must be given ordinary meaning, in its context and in light of the object and purpose of the ICSID Convention, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties. It held that the ordinary meaning of the term entails three elements: (a) contribution of resources, (b) certain duration and (c) risk, including the expectation of a profit.[465] It refused to include respect of good faith and compliance with the host State's laws as elements of the objective definition of investment under the ICSID Convention.[466]

282. The Tribunal applied the so-called three objective criteria approach, excluding the development of the host State's economy present in the *Salini* test.[467]

283. Indeed, there is an extensive list of ICSID tribunals employing the three criteria approach to define the notion of investment under Article 25(1),[468] demonstrating that

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[463] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 212 (footnotes omitted) (emphasis added), **RLA-24**. ("*First, as both Parties accept, the ICSID Convention must be construed in accordance with the Vienna Convention on the Law of Treaties. The Claimant s note that the drafting history of the Convention shows that "[n]o attempt was made to define the term 'investment'." **Yet, as the Respondent correctly points out, this does not mean that this term has no meaning. Rather, in the Tribunal's view, it means that the Contracting States to the ICSID Convention intended to give to the term "investment" an "ordinary meaning" as opposed to a "special meaning**.'"*"); *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, 14 July 2010, para. 108, **CLA-90**; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, para. 370, **CLA-111**.

[464] Memorial on Annulment, para. 261(a).

[465] Award, para. 228.

[466] Award, para. 229.

[467] Award, para. 228.

[468] *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, 14 July 2010, para. 110, **CLA-90**; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 151**, RLA-241**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 219, **RLA-24**; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 170, **RLA-095**; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 187, **CLA-32**; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29

the tribunal in *Electrabel v. Hungary* was right to conclude that "*there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment*".[469] Most recently, the test was used by tribunals in *Rasia FZE v. Armenia*[470] and *Orazul v. Argentina*.[471] The *Orazul* tribunal describes the three elements as *minimal features* of investment under the ICSID Convention:

> "*With respect to the notion of investment under the ICSID Convention, the Tribunal recalls that the ICSID Convention does not define such term. As held by a number of investment tribunals, the notion of investment must be given an objective definition, which cannot be circumvented by the Parties.* ***The Tribunal considers that the ordinary meaning of the term "investment" comprises at a minimum the features of (i) a contribution or allocation of resources, (ii) a duration; and (iii) risk***."[472]

284. Applicant argues that the Tribunal, by applying the three elements approach in order to define the objective meaning of "*investment*" under Article 25(1), committed an annullable error.[473] This is a contention that is simply untenable and cannot withhold even cursory scrutiny.

285. *Ad hoc* committees have recognized the right of ICSID tribunals to interpret the notion of an investment under the ICSID Convention and have repeatedly refused to annul awards over disagreement on requirements that form the notion and over their precise nature.

June 2018, paras. 188-189, **RLA-168**; *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award of the Tribunal, 5 March 2020, para. 293, **RLA-236**.

[469] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.43 (footnotes omitted), **RLA-242**.

[470] *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 January 2023, para. 376, **RLA-243**.

[471] *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, para. 446, **RLA-244**.

[472] *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, para. 446 (emphasis added) (footnotes omitted), **RLA-244**.

[473] Memorial on Annulment, paras. 261(a) and 264.

286. In *Caratube I* case, the tribunal extended requirements of contribution of capital and risk as elements of the inherent meaning of investment under Article 25(1), to US-Kazakhstan BIT in order to ascertain whether the underlying transaction was an investment of an US investor.[474] The *ad hoc* committee held that:

> "*[t]he term "investment", as used in the Convention and in different BITs, has been the object of much debate, and that there is no unanimous opinion on the precise requirements which an investment must meet. However,* ***the position adopted by the Tribunal – that an investment requires a contribution by the investor and some degree of risk – finds support in many previous awards and in legal doctrine. This position is therefore clearly tenable and the Award cannot on this point be considered to be based on a manifest excess of powers***."[475]

287. The committee in *Cortec Mining v. Kenya* found that the tribunal had not committed manifest excess of powers by including into definition of protected investment under the ICSID Convention and the relevant BIT a requirement of compliance with the host State's law,[476] based on reasoning in *Phoenix v. Czech Republic*.[477] The committee held that it did not have a mandate to annul the award based on tenable disposition, even if it is incorrect as a matter of law. Commenting on the tribunal's findings the committee stated:

> "*This is not to suggest that the Tribunal's interpretation of the BIT (or the ICSID Convention) is the correct one. It is an expansive interpretation, and some arbitrators – perhaps many*

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[474] *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para. 236, **CLA-016**.

[475] *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para. 163 (emphasis added), **CLA-016**.

[476] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, paras. 140-142. **RLA-219**.

[477] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 114, **RLA-5.**

– would likely disagree. But that is not the question before this Committee."[478]

288. As for the *Salini* test in particular, ICSID case law clearly demonstrates that a decision applying or failing to apply the test should not be annulled solely for that reason,[479] as it was confirmed by the *ad hoc* committee in *Teinver v. Argentina*.[480]

289. Applicant's reliance on the committee's decision in *Malaysian Historical Salvors v. Malaysia* cannot prove otherwise, for several reasons.

290. First, the committee in *Malaysian Historical Salvors* annulled the award primarily because the tribunal had, in analyzing criteria for the existence of an investment under Article 25(1), "*exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature*".[481] This is in stark contrast with the decision reached by the Tribunal here – rejecting contribution to the host State's economy as a component of an investment.[482]

291. Second, the decision of the committee in *Malaysian Historical Salvors,* reached by majority, has been severely criticized for confusing the notions of error of law and excess of powers and being incompatible with Article 52 of the ICISID Convention,[483] as well as for the majority's readiness to overrule the tribunal's findings on jurisdiction,[484] substituting the tribunal's interpretation of Article 25(1) with its own. The committee in *Cortec Mining v. Kenya* voiced its disagreement with the majority's

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[478] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, 19 March 2021, para. 141, **RLA-219**.

[479] R. D. Bishop, S. M. Marchili, *Annulment under the ICSID Convention*, Oxford University Press, 2012, para. 9.91, **RLA-254**; I. Marboe, "ICSID Annulment Decisions: Three Generations Revisited", in *Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, p. 208, **RLA-255**.

[480] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, 29 May 2019, para. 87, **RLA-162**.

[481] *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, para. 80(b), **CLA-194**.

[482] Award, para. 228.

[483] R. D. Bishop, S. M. Marchili, *Annulment under the ICSID Convention*, Oxford University Press, 2012, para. 6.82, **RLA-254**.

[484] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair (Eds.), *Schreuer's Commentary on the ICSID Convention*, 3rd ed., Cambridge University Press, 2022, Article 52, paras. 183-184, **CLA-206**.

decision in *Malaysian Historical Salvors*, describing the majority's approach to its corrective function as too broad:

> "*The Applicants rely heavily on the decision in Malaysian Historical Salvors v. Malaysia (MHS), where the committee, over the strenuous dissent of Judge Shahabuddeen, annulled an award that had denied jurisdiction under the ICSID Convention on the ground that the investment in question did not "contribut[e] to the economic development of the host State." While accepting that the underlying tribunal's decision in that case may well have been incorrect,* ***we consider that the MHS committee took a broader view of its corrective function, given in particular the word "manifest" in Article 52(1)(b), than this Committee is comfortable taking. We decline to follow the MHS majority's approach here".***[485]

292. Finally, the majority's decision in *Malaysian Historical Salvors* carries no more authority than the decision of the committee in *Mr. Patrick Mitchell v. Congo*. There, the committee held that four requirements under *Salini* represent characteristics of an investment under the ICSID Convention, and annulled the award for failure to explain how those requirements were fulfilled in the particular case.[486]

293. A manifest excess of powers does not exist if a tribunal's decision is "*susceptible of argument 'one way or the other*'"[487] or if "*reasonable minds differ as to whether or not the tribunal issued a correct decision*".[488] When a tribunal interprets a treaty based on a previous similar finding or interpretation, this demonstrates that an issue is open to different arguments and "*[o]ne interpretation of a treaty among many possible ones will*

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

[486] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, paras. 27 and 41, **CLA-187**.

[487] *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 41, **RLA-220**.

[488] *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO)*, ICSID Case No. ARB/10/20, Decision on the Application for Annulment, 22 August 2018, para, 183, **RLA-237**.

not qualify as a manifest excess of powers".[489] It seems that Applicant also accepted that the application of the *Salini* criteria is an issue at least open to different arguments, since Claimants during the Arbitration referred to the "*notoriety and persistency of the Salini test controversy*".[490]

294. In the case at hand, the Tribunal's decision to define the concept of investment under Article 25(1) using the three objective criteria is well founded in ICSID jurisprudence and in legal doctrine. The Tribunal's approach is at the very least tenable and reasonable by any conceivable standard and, as such, it cannot be deemed as a manifest excess of powers.

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

295. Even if accepted that the definitive nature of requirements used by ICSID tribunals to establish the existence of an investment under the ICSID Convention is still susceptible of different interpretations, the same cannot be said about the essential nature of contribution. There cannot be an investment under the ICISD Convention without proven commitment of resources.

296. Various ICSID tribunals have confirmed that a tribunal cannot accept jurisdiction if it is not possible to identify any, at least initial, contribution of capital. A list of cases in which jurisdiction was denied because claimants were unable to meet the burden of proof with regard to their contribution includes, *inter alia, KT Asia v. Kazakhstan*,[491] *Caratube v. Kazakhstan (Caratube I)*,[492] *Quiborax v. Venezuela*,[493] *Société Civile Immobilière v. Guinea*.[494] In fact, the proposition is so intuitive that even non-ICSID tribunals hold that the commitment of capital forms an inherent meaning of an

[489] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 81, **CLA-205**.
[490] Claimants' Rejoinder on Jurisdiction dated 6 March 2020, para. 469.
[491] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 206, **RLA-095**.
[492] *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award, 5 June 2012, paras. 455-456, **RLA-011**.
[493] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 233, **RLA-24**.
[494] *Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award, 21 December 2015, paras. 264 and 274, **RLA-245**.

investment under various bilateral investment treaties and deny jurisdiction when no contribution can be established.[495]

297. Even ICSID tribunals that explicitly reject application of the *Salini* test, investigate whether the requirement is fulfilled in particular circumstances of the case. For instance, in *Awdi v. Romania* case, relied on by Applicant in his submission,[496] the tribunal found that claimants made monetary contributions *via* share purchase and certain monetary injections and that the economic links between claimants and such expenditures were enough to form an investment under Article 25(1) and the relevant BIT.[497]

298. Similarly, in *Abaclat v. Argentina* the tribunal first rejected application of the *Salini* test, and then applied its own – whether claimants *made contributions* which led to the creation of the value protected under the Argentina-Italy BIT.[498]

299. Applicant argues that the Tribunal's reference to *Quiborax* and *Caratube* cases is inapposite because of the alleged significant differences in the factual background.[499] This is clearly wrong.

300. Just as in *Quiborax*, Mr. Rand was unable to demonstrate that he paid anything for his indirect shareholding in BD Agro. His alleged "*significant personal non-monetary contributions to BD Agro*"[500] were acknowledged by the Tribunal as contributions made for the so-called Beneficially Owned Shares in the company.[501] The same contributions cannot be used to justify acquisition of indirect shareholding, which was presented by Mr. Rand and analyzed by the Tribunal as a separate investment under the Canada-Serbia BIT.[502] In any event, rationale of the *Quiborax* tribunal remains applicable as a matter of principle – Mr. Rand was unable to prove that he actually paid for his indirect shareholding and his "*mere ownership of a share is, in and of itself, insufficient to prove*

[495] *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, paras. 207 and 221-222, **CLA-201**; *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. EA 2020/074, Final Award, 3 August 2022, paras. 151 and 167, **RLA-246**.
[496] Memorial on Annulment, para. 270.
[497] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, paras. 200-201, **CLA-26**.
[498] *Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic)*, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 363-366, **CLA-81**.
[499] Memorial on Annulment, para. 273.
[500] Memorial on Annulment, para. 276.
[501] Award, para. 238.
[502] Claimants' Reply, para. 631; Claimants' Rejoinder on Jurisdiction dated 6 March 2020, para. 447; Award, para. 202(a).

a contribution of money or assets"[503] and to qualify as an investment under Article 25(1).

301. Mr. Rand also argues against the Tribunal's reliance on the *Caratube II* case. It is, however, obvious that the Tribunal cited relevant paragraphs from the *Caratube I* case[504] and, in the footnote, mistakenly designated them as originating from *Caratube II* award.[505] This must have been clear to Applicant,[506] who does not dispute the relevance of the cited paragraphs for the case at hand.

302. The crux of Applicant's case against the Tribunal's reasoning is the contention that the Tribunal "*departed from established case law providing that there is no need to investigate whether the claimant satisfies additional conditions to the ownership of shares*".[507] In an effort to prove that the contribution is irrelevant, Mr. Rand relies on several cases[508] which is simultaneously off point and, after slightly closer inspection, actually speaks against Mr. Rand's contention.

303. In *Lopez-Goyne v. Nicaragua*, the tribunal held that natural persons who were shareholders in a company ("ION") which was holding the investment directly, did not need to prove that they had made *separate* contribution of resources, provided that the company in which they held shares could itself qualify as an investor.[509] Subsequently, the tribunal found that ION had indeed made the necessary contribution towards the investment (a concession contract).[510] Therefore, had Mr. Rand's Serbian company (MDH Serbia) made the contribution for the purchase of the investment (indirect shareholding), the *Lopez-Goyne* case could be used as an argument that Mr. Rand does not need to prove the existence of separate contribution. However, neither Mr. Rand nor

[503] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 233, **RLA-24**.
[504] *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award, 5 June 2012, paras. 455- 456, **RLA-11**.
[505] Award, para. 272 and fn. 197.
[506] One of the two paragraphs was cited correctly earlier by the Tribunal, as originating from the *Caratube* I award. Award, para. 235 and fn. 107.
[507] Memorial on Annulment, para. 261(a).
[508] Memorial on Annulment, para. 266 and fn. 345.
[509] *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, para. 322, **CLA-198**
[510] *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award, 1 March 2023, para. 339, **CLA-198**.

MDH Serbia were able to demonstrate that they actually paid for 3.9% shares in BD Agro and what was the purchase price allegedly paid.

304. In *Victor Pey Casado v. Chile*, the shares in question were transferred to the claimant (the Foundation) as a donation from Mr. Pey Casado, and with it, the status of an investor.[511] However, the initial investment was created as a result of a substantial contribution of capital by Mr. Pey Casado himself.[512]

305. In *Levy v. Peru*, the claimant received the shares as a gift from her father. The tribunal held that the claimant could rely on "*very significant investments*" previously made by her father who had purchased the shares.[513]

306. Finally, Applicant refers to the *RREEF v. Spain* decision which in cited paragraph does not deal with the issue of contribution at all, but simply proclaims that even the passive holding of an investment can entail risk.[514]

307. Clearly, the case law offered by Mr. Rand cannot support the proposition that there is an investment without contribution of recourses. All that these cases demonstrate is that an investor can, in certain circumstances, rely on a contribution made by other person or entity, or that an investment can be received as a donation. They do not stand as evidence that the investment can be created out of thin air, without some proven contribution, made at least initially.

308. Applying this principle to the facts of the dispute, the Tribunal rightly concluded that Mr. Rand did not meet the burden of proof in establishing that he had paid anything for the 3.9% shareholding in BD Agro, let alone that he had paid the sum of EUR 200,000.[515] As a consequence, the Tribunal found that it lacked jurisdiction *ratione materiae* with regard to the indirect shareholding.

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[511] *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 542, **CLA-199**.
[512] *Victor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 68, **CLA-199**.
[513] *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 148, **CLA-91**.
[514] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 158, **CLA-160**.
[515] Award, para. 273.

309. In order to succeed with his annulment claim, Applicant must prove that his interpretation of Article 25(1) of the ICSID Convention is not only the correct one, but that it is also the only reasonable interpretation. In other words, Mr. Rand needs to establish not only that the contribution of capital is not a requirement for an investment under the ICSID Convention and that a mere ownership of shares, without any proven expenditures for their acquisition, is sufficient to hold a protected investment under the ICSID regime, but he also needs to demonstrate that his interpretation of the law "*is a monolithic and firmly settled principle of law that is 'not subject to debate*'".[516] Respondent respectfully submits that, for plethora of reasons explained above, Applicant's case does not even come close to this threshold.

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

310. Mr. Rand contends that he was never put on notice by the Tribunal about the necessity to prove his contribution for the indirect shareholding and the Tribunal's intention to apply the requirement with respect to the shares.[517] Applicant's contention is incorrect and disingenuous.

311. First, the issue whether the *Salini* test was applicable and whether its requirements were fulfilled was extensively discussed during the arbitration. The test was introduced by Claimants themselves in their very first submission,[518] labeling requirements as "*typical hallmarks of investment*", and referred to in their Memorial[519] and other submissions.[520] The Parties debated the issue at some length not only in the context of Applicant's indirect shareholding in BD Agro, but also with regard to the other alleged investments of Mr. Rand and other Claimants.[521]

312. The Parties, therefore, had ample opportunity to comment on the legal theory that was a basis for the Tribunal's decision. To claim now, as Applicant does, that he is somehow

[516] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 81, **CLA-205**; *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para. 82, **RLA-247**.
[517] Memorial on Annulment, paras. 281 and 284.
[518] Request for Arbitration, para. 216.
[519] Claimants' Memorial, para. 329.
[520] Claimants' Reply, paras. 669-690; Claimants' Rejoinder on Jurisdiction dated 6 March 2020, paras. 470-495.
[521] Award, paras. 252-265.

surprised by the fact that the Tribunal took those comments into consideration while reaching its decision on jurisdiction is clearly untenable.

313. Second, Applicant's contention that he omitted to submit necessary evidence with respect to his contribution because he was never asked to do so[522] is equally unsustainable. Indeed, it is simply false.

314. Respondent has on different occasions pointed out that Mr. Rand failed to provide any evidence with regard to his alleged contribution for the indirect shareholding. However, after the issue was raised by Respondent,[523] Claimants submitted their Rejoinder on Jurisdiction without addressing the issue.[524] Respondent once again underlined the lack of proven contribution with respect to the indirect shareholding in its first Post-Hearing Brief of 28 September 2021:

> "*Fourth, some of Claimants' alleged expenditures still remain undocumented and unproven. This is, for example, the case with the remainder of the purchase price after the Sembi Agreement was concluded,* ***or with the price of EUR 200,000 allegedly paid for MDH Serbia's 3.9 % stock in BD Agro***."[525]

315. Once again, Claimants chose to ignore the matter in their subsequent submission.[526] As can be seen, Claimants had plenty of opportunity to rebut Respondent's contentions and to provide necessary evidence that would possibly put the issue of contribution to rest. They failed to do so and it should not come as a surprise for Applicant that the Tribunal, in such circumstances, refused to accept Mr. Rand's contribution towards the indirect shareholding as established.

316. Even without the context provided here, the proposition that a party in a dispute must submit evidence in support of its factual claims only when directly prompted by a tribunal or the opposing party is nothing short of absurd. The principle that "*he who asserts must prove*" (*onus probandi incumbit actori*) is firmly established in

[522] Memorial on Annulment, paras. 282 and 283.
[523] Respondent's Rejoinder, para. 1028.
[524] Claimants' Rejoinder on Jurisdiction dated 6 March 2020.
[525] Respondent's Post-Hearing Brief dated 28 September 2021, para. 158 (footnotes omitted) (emphasis added).
[526] Claimants' Second Post-Hearing Brief dated 22 October 2021.

international adjudication,[527] and Applicant does not seem to contest it. In simple terms – Claimants asserted that Mr. Rand had paid EUR 200,000 for the indirect shareholding and offered no evidence in support of that claim. That should be the end of the matter. The fact that the Tribunal took this into account in its jurisdictional analysis cannot be regarded as a manifest excess of powers.

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

317. Applicant asserts that the Tribunal manifestly exceeded its powers by refusing to accept Mr. Rand's contribution towards the beneficially owned shares as his contribution with regard to the indirect shareholding in BD Agro.[528] The argument clearly goes to the way in which the Tribunal assessed and evaluated evidence and it is fatally flawed for three main reasons.

318. First, as already discussed above,[529] ICSID annulment committees universally accept that they are not empowered to reassess and reevaluate evidence used by tribunals in reaching their decisions. It would be too burdensome and perhaps impossible to list all decisions that insist on this principle. For instance, the principle was explained by the committee in *Tenaris v. Venezuela*:

> "*The Committee notes that, pursuant to the Arbitration Rules and consistently with the purpose of Article 52 of the Convention, it is for the Tribunal, not the Committee, to weigh the evidence adduced. Annulment committees agree on this point. It would not be proper for this Committee to re-evaluate the evidence, nor is it in a position to do so without addressing the merits*."[530]

319. The firmly established rule has been followed by numerous committees. Its application is seen as a consequence of Rule 34(1) of ICSID Arbitration Rules – that the tribunal,

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[527] See, for instance, *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Award of the Tribunal, 5 July 2022, para. 504, **RLA-248**.
[528] Memorial on Annulment, paras. 286-290.
[529] See *supra* para. 82.
[530] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Application for Annulment, 8 August 2018, para. 207 (footnotes omitted), **RLA-249**.

and not a committee, is a judge of admissibility and probative value of evidence.[531] It is also supported by the argument that a reevaluation of evidence in the annulment proceedings would turn annulment committees into courts of appeal, in contravention with Article 53(1) of the ICSID Convention.[532]

320. In this context, Applicant essentially invites the Committee to asses and evaluate evidence *de novo* and to replace the Tribunal's findings on their probative value with its own assessment. This fact alone must defeat Mr. Rand's request at the onset.

321. Second, even if Applicant's attempt to introduce an appeal against the Tribunal's evaluation of evidence would be allowed (*quod non*), his assertions are simply wrong.

322. In his Memorial on Annulment, Mr. Rand relies on circumstantial evidence used by the Majority to recognize Mr. Rand's ultimate control and financial burden towards the beneficially owned shares in BD Agro, in order to prove that he had also made a contribution with respect to the indirect shareholding.[533] Such evidence include, for instance, an email sent by the Assistant Minister of Economy congratulating Mr. Rand on acquisition of BD Agro during the company's privatization[534] and the fact that Mr. Rand visited the farm himself in 2006.[535]

323. Based on such indicia, the Majority found that Mr. Rand had an ultimate control over contractual interests of his Cypriot company (Sembi Investment Limited) in the 70% of shares in BD Agro. The majority held that such contractual interest was created through the contract concluded between Sembi and Mr. Obradović, a Serbian citizen who

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[531] ICSID Arbitration Rules (2006); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para 65, **CLA-185;** *Mr. Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para 65(iii), **CLA-187;** *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para. 234, **RLA-247**; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, para. 239, **RLA-238**.

[532] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Application for Annulment, 8 August 2018, para. 207, **RLA-249**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee, 25 March 2010, para. 96, **RLA-250**; *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Decision on Annulment, 8 April 2020, para. 96, **RLA-211**; *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Decision on Annulment, 2 December 2020, para. 143, **RLA-239**.

[533] Memorial on Annulment, para. 287.

[534] Memorial on Annulment, para. 287(b).

[535] Memorial on Annulment, para. 287(c)(iii).

actually acquired the shares in privatization. It was the Majority's understanding that Mr. Rand bore financial burden of the acquisition, even though the funds for the acquisition of BD Agro in privatization were extended to Mr. Obradović by the third-party financiers (the Lundin Family) and even though the contractual arrangement between Mr. Rand and those financiers was never documented with a single piece of paper.[536]

324. Such circumstantial evidence are entirely unsuitable especially when it comes to the acquisition of nominal, indirect ownership in 3.9% of the company's shares. It is undisputed that BD Agro was a public joint stock company, with shares listed at the Belgrade Stock Exchange.[537] The only viable evidence of MDH Serbia's acquisition of the 3.9% shareholding would be sale and purchase agreements concluded between MDH Serbia and unidentified sellers of BD Agro's shares. No such contracts were ever submitted during the Arbitration.

325. Third, Mr. Rand now attempts to argue that his contribution towards the acquisition of the so-called beneficially owned shares should have been accepted by the Tribunal as a contribution for the shares acquired by MDH Serbia. This is an entirely new argument, conjured only in the present proceeding – all of the evidence that allegedly support Mr. Rand's contribution towards the acquisition of indirect nominal ownership of 3.9% of shares[538] were used by Claimants in the arbitration to prove Mr. Rand's beneficial ownership of shares acquired through the privatization of BD Agro. Claimants were free to argue that such "*contribution*" entitles Mr. Rand to the indirect shareholding as well, but they never made such contention. It follows that this is a blatant attempt of Mr. Rand to reargue his case on jurisdiction during the annulment proceedings.

326. If it is not allowed for parties to use the annulment as an appeal in disguise and to re-examine the tribunal's assessment of evidence, which it is not, it is also certainly impermissible for a party to reframe its contentions and arguments from the arbitration in order to achieve different decision on jurisdiction.

327. As persuasively formulated in the renowned Commentary:*[I]n the sense that annulment is 'directed against the Award and indirectly the Tribunal,'* ***an ad hoc committee may***

[536] See Dissenting Opinion of Professor Marcelo G. Kohen, paras. 9-17.
[537] Second Expert Report of Professor Mirjana Radovic, paras. 119-121.
[538] Memorial on Annulment, para. 287.

not impeach a tribunal for not addressing in its award arguments or evidence that were not put before it".[539] In other words, an annulment proceeding is "*not a place for a party to raise an argument that it did not make in the underlying arbitration proceeding*",[540] or to "*complete or develop an argument which it could and should have made during the arbitral proceeding*".[541] Respondent submits that, for this reason alone, Applicant's request must be denied.

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

328. Once again, Applicant's argument about the Tribunal's jurisdictional findings with respect to Mr. Rand's payments for the benefit of BD Agro is nothing more than a camouflaged appeal against the Tribunal's interpretation of the Canada-Serbia BIT and Article 25(1) of the ICSID Convention, as well as its appreciation of factual matrix of the dispute and available evidence, aimed at changing the substantive result of jurisdictional analysis.

329. Applicant's submission is plagued with misrepresentation of the Tribunal's reasoning and consistently ignores parties' pleadings and submissions during the Arbitration as a context for the Tribunal's decision.

330. Article 1(d) of the Canada-Serbia BIT lists "*a loan to an enterprise*" as an investment. The entire jurisdictional argument of Applicant, both in the Arbitration and in the present proceeding, is based on the false labeling of Mr. Rand's expenditures towards the BD Agro's business as loans, so they would fit into the provision of Article 1(d) of the BIT. However, as correctly held by the Tribunal, Mr. Rand's payments for acquisition of heifers and for retaining the services of the herd management experts are not loans in the sense of Article 1(d) of the BIT (**Section 1.**). Even if those transactions

[539] S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair (Eds.), *Schreuer's Commentary on the ICSID Convention*, 3rd ed., Cambridge University Press, 2022, Article 52, para. 13 (footnotes omitted) (emphasis added), **CLA-206**.

[540] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, 21 November 2018, para. 251, (footnotes omitted), **RLA-238**.

[541] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, para. 83, **CLA-189**; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 97, **CLA-185.**

could be classified as loans, they are expressly excluded from the Treaty's ambit, under Article 1(k) (ii) of the BIT (**Section 2.**). Finally, and in any event, payments for the benefit of BD Agro do not meet the requirements under Article 25(1) of the ICSID Convention (**Section 3.**).

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

331. Applicant contends that his payments for the benefit of BD Agro are "*loan(s) to an enterprise*" specifically recognized as "investment" under Article 1(d) of the BIT and adds that "*[T]he Tribunal's analysis should have stopped there*."[542]

332. The argument rests upon a false premise, already considered and rejected by the Tribunal. The Tribunal held that Mr. Rand's expenditures towards BD Agro are not loans and that all Mr. Rand had as a result of payments made, was claim to money against BD Agro.[543] The conclusion was based on the fact that, apart from Mr. Rand's testimony, there was no evidence that those payments were indeed loans granted to BD Agro by Mr. Rand.[544] In addition, Mr. Rand himself had previously reported, during the BD Agro's bankruptcy, the EUR 2.2 million payment for heifers as unofficial uncommanded agency,[545] *i.e.* as a claim arising from carrying out a transaction in the interest of another person, without mandate or authority.[546]

333. The Tribunal correctly concluded that such claims fit into the exception contained in Article 1(l) of the BIT, excluding from the notion of investment "*any other claim to money; that does not involve the kinds of interests set out in subparagraphs (a) to (j)*."

334. The Tribunal's reasoning is clearly based on understanding that the definition of "investment" in the Canada-Serbia BIT is definitive, in a sense that it does not include any other assets apart from those explicitly listed in subparagraphs (a) to (j) of Article 1. In response, Applicant argues, **for the first time**, that his payments are not affected by the carve-out provision contained in Article 1(l) of the BIT.[547]

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[542] Memorial on Annulment, para. 295.
[543] Award, para. 344.
[544] Award, para. 343.
[545] Award, para. 344.
[546] Law on Obligations, Article 220(1), **RE-32**.
[547] Memorial on Annulment, para. 298.

335. Mr. Rand apparently contends that his monetary claim against BD Agro is not excluded from the definition of investment since it is linked to and involves his investment (beneficially owned shares in BD Agro).[548] Such interpretation of Article 1(l) is too broad and would lead to absurd results – any payments made by an investor on behalf, and towards the day-to-day operation, of his investment would create monetary claims against his own assets and would simultaneously represent a distinct, separate investment under Article 1 of the BIT. Mr. Rand's payments were just that: money expended in expectation of a return through the increase of value of BD Agro, as it is once again acknowledge by Applicant in the present proceeding.[549] Those payments cannot represent separate investments since expenditures made in furtherance of an investment are not investments themselves.[550] This is why the *Inmaris* tribunal cautioned against confusing the notion of investment under a bilateral investment treaty and the ICSID Convention with "*the layman's financial or economic notion of an "investment" as money expended in expectation of a return*."[551]

336. Presumably aware of the difficulties in presenting payments for the benefit of BD Agro as a separate investment, Applicant continues to label those payments as loans to BD Agro, unbothered by the fact that the Tribunal unequivocally rejected such characterization in the Award. He relies on the NAFTA case law in an attempt to demonstrate that the "*loan*" to BD Agro is not a kind of contract that would be excluded from the notion of investment under the similar carve-out provision in NAFTA Article 1139 (i) and (j). However, findings in *Canadian Cattlemen v. USA*, *Apotex v. USA* and *Koch Industries v. Canada* are inapposite here for several reasons.

337. First, cases referred to above demonstrate that contractual claims created through simple cross-border trade contracts are not to be deemed investments under NAFTA Chapter 11.[552] Applicant's argument rests upon contention that the "*loans*" are not such

[548] Memorial on Annulment, paras. 298 and 299.

[549] "*[T]he Loans were intended to increase the value of the Beneficially Owned Shares and the Indirect Shareholding by making it possible for BD Agro to acquire new cows and more effectively manage its herd*." Memorial on Annulment, para. 300:

[550] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 101, **RLA-13**.

[551] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, para. 100, **RLA-13**.

[552] *The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America)*, UNCITRAL, Award on Jurisdiction, 28 January 2008, para. 144, **CLA-213**; *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction

contracts.[553] The problem with this argument remains the same: no contract was ever concluded between Mr. Rand and BD Agro and there was certainly no loan agreement between Mr. Rand and the company.[554] The fact that simple cross-border sale and purchase contracts might be excluded from the ambit of Article 1 of the Canada-Serbia BIT, does not necessarily mean that payments of an investor for the benefit of his investment are entitled to protection under the same provision.

338. Second, none of the cases relied on by Applicant relate to a transaction that would be even remotely similar to the one at stake. In *Canadian Cattlemen v. USA*, the investor claimed that its investment located in Canada was discriminated against by US import-restricting measures, preventing it to enter US cattle market on terms offered to its competitors.[555] In *Apotex v. USA* the tribunal found that the claimant's interests in submitting, maintaining, and using its applications for regulatory approval of two generic drug products, as well as gaining an economic benefit from selling the products in the US did not qualify as protected investment under NAFTA.[556] The same was held by the tribunal in *Koch Industries v. Canada* with respect to the claimant's interest to purchase emission allowances in Canada and to re-sell them in secondary market.[557] None of those cases may be used to demonstrate that an investor's payments on behalf of his own investment and aimed at improvement of its business performance can create separate and distinct investment protected under the BIT.

339. Most importantly, Mr. Rand was free to make the argument he is making now during the Arbitration and chose not to do so. Respondent argued that Mr. Rand's payments for the benefit of BD Agro were claims to money excluded from the notion of investment by virtue of Article 1(l) of the Canada-Serbia BIT already in its first written

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and Admissibility, 14 June 2013, para. 233, **CLA-214***; Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Award, 13 March 2024, paras. 367-370, **CLA-215**.

[553] Memorial on Annulment, para. 303.

[554] Award, paras 343-344; Commercial Court in Belgrade Decision number 9. St-321/2015, Decision on the List of Determined and Contested Claims dated 30 March 2018, p. 2 (of PDF), application number 305, **CE-136**.

[555] *The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America)*, UNCITRAL, Award on Jurisdiction, 28 January 2008, para. 39, **CLA-213**.

[556] *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, para. 235, **CLA-214**.

[557] *Koch Industries, Inc. and Koch Supply & Trading*, LP v. Canada, ICSID Case No. ARB/20/52, Award of the Tribunal, 13 March 2024, paras. 371-373, **CLA-215**.

submission.[558] It expended on this argument in its second written submission.[559] Claimants were consistent in ignoring the issue in all of their written submissions, including the one specifically dedicated to matters of jurisdiction, and maintained that Mr. Rand's payments on behalf of BD Agro were *loan(s) to an enterprise*.[560] Applicant put forward the argument about (non)applicability of the curve-out provisions in Article 1(k) and 1(l) of the BIT for the very first time in the present proceeding. Respondent respectfully reiterates that the Committee should not allow Mr. Rand to turn the annulment proceeding into appeal, by permitting him to raise an argument he failed to use in the Arbitration, to the obvious detriment of Respondent and the principle of finality of the Award.

340. For the forgoing reasons, the Tribunal's decision to deny jurisdiction with respect to Mr. Rand's payments for the benefit of BD Agro and to characterize such payments as claims to money excluded from the notion of investment under Article 1(l) of the BIT was a correct one, and cannot be seen as an excess of powers. Even if the Committee should find that the Tribunal's interpretation of the BIT was erroneous, it was not untenable or unreasonable by any applicable standard and thus not "*manifest*" as required by Article 52(b) of the Convention.

341. Finally, there is an additional reason why Applicant's contentions fall short of proving that the Tribunal manifestly exceeded its powers – the Tribunal's analysis of Article 1 of the BIT was given *obiter* and for the sake of completeness.[561] Primary reason for rejecting jurisdiction with regard to Mr. Rand's payments was the fact that transactions at stake could not qualify as an investment under Article 25(1) of the ICSID Convention.[562] As Respondent demonstrated above, the manifest excess of powers cannot occur if the alleged lapse of a tribunal did not lead it to deny jurisdiction.[563] This would precisely be the case with the Committee's potential finding that the Tribunal erred in its interpretation of the BIT: it would not carry any consequences for Applicant and it would not affect the outcome of the Tribunal's jurisdictional analysis.

[558] Respondent's Counter-Memorial, para. 309.
[559] Respondent's Rejoinder, paras. 743-745.
[560] Claimants' Rejoinder on Jurisdiction dated 6 March 2020, paras. 448-453.
[561] Award, para. 333.
[562] Award, paras. 274, 275.
[563] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10 June 2022, para. 23, **RLA-223**.

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

342. In the alternative scenario discussed by the Tribunal, even if Mr. Rand's payments for purchase of cows and services of herd-management experts were deemed to be loans, they would still be excluded from the protection under Article 1(k) (ii) of the BIT.[564] The provision excludes from the notion of investment ***a claim to money that arises solely from the extension of credit in connection with a commercial transaction****, such as trade financing*.

343. The Tribunal applied a two-step analysis. It held that, under the scenario offered by Claimants, "*loans*" were extended by Mr. Rand to BD Agro for purchase of heifers and certain services. Then it consulted the text of the BIT to establish the meaning of "*commercial transaction*" as a "*contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party*."[565] The only possible conclusion was that purported loans were *credit extended in connection with a commercial transaction* and thereby excluded from the ambit of the BIT.[566]

344. The Tribunal's finding is clearly based on the ordinary meaning of terms used in the Canada-Serbia BIT, in their context[567] and inspired by the Parties' submission in the underlying arbitration.

345. After initially labeling Mr. Rand's payments as a part of their "*investment operations*",[568] in their next written submission in the arbitration Claimants started to characterize the payments as loans extended to BD Agro,[569] latter on insisting that such "*loans*" are to be treated as a separate category of investment.[570] Respondent argued that alleged loans were excluded from the definition of investment as a claim for money arising solely from a commercial transaction, by virtue of Article 1(k)(ii) of the BIT and relied, *inter alia*, on the drafting history of the Treaty - The Report of the Serbian

[564] Award, para. 345.
[565] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Article 1(k)(i), **CLA-1**; Award, para. 345.
[566] Award, para. 345.
[567] Vienna Convention on the law of treaties, Article 31, **RLA-44**.
[568] Claimants' Memorial, para. 299.
[569] Claimants' Reply, para. 633.
[570] Claimants' Rejoinder on Jurisdiction dated 6 March 2020, para. 450.

Ministry of Trade from the negotiations between Canada and Serbia which records the understanding of the State Parties that the BIT does not offer protection for claims to money arising from loans that were taken out in order to perform commercial contracts.[571] The only response Claimants offered in three subsequent written submissions was a sentence from their Rejoinder on Jurisdiction, stating that Mr. Rand's payments were not a trade financing.[572] The argument entirely ignored the fact that Article 1(k) (ii) excludes credit extended for a commercial transaction and lists trade financing as just one example of such transactions.

346. Although Applicant still steadfastly insist, even now, that his payments for the benefit of BD Agro were loans, he does not explicitly contest the Tribunal's finding that such payments were loans extended for a commercial transaction, in terms with Article 1(k) (ii) of the BIT. Instead, Mr. Rand argues, for the first time only in the annulment proceedings, that the Tribunal erred in not considering that purported loans involved Mr. Rand's beneficially owned shares in BD Agro, in accordance with the last sentence of Article 1(l) of the BIT. In other words, Applicant argues that the last sentence of Article 1(l) equally applies to Article 1(k). [573]

347. Relevant provisions of the BIT read as follows:

> "*…but "**investment**" does not mean:*
>
> *[…]*
>
> *(k) a claim to money that arises solely from:*
>
> *(i) a commercial contract for the sale of a good or service by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or*
>
> *(ii) the extension of credit in connection with a commercial transaction, such as trade financing; or*

[571] Respondent's Rejoinder, para. 747; Report from the negotiations of the Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments held in Ottawa between 23 – 25 May 2013, **RE-271**.
[572] Claimants' Rejoinder on Jurisdiction dated 6 March 2020, para. 452.
[573] Memorial on Annulment, paras. 297, 304.

(l) or any other claim to money;

that does not involve the kinds of interests set out in subparagraphs (a) to (j);"

348. Apart from the fact that Applicant must not be allowed to conjure in the annulment proceedings a new argument that he had ample opportunity to make during the Arbitration, which was already demonstrated by Respondent,[574] Mr. Rand's contention is simply wrong. The last sentence of subparagraph (l) is just that: it is an integral part of this subparagraph and refers to general exclusion of any other claim to money that is not excluded by other provision of Article 1 of the BIT. Subparagraph (k) already explicitly excludes claims to money arising **solely** from the two types of contracts, and their exclusion is not subjected to a condition clearly applicable to "*any other claim to money*" under subparagraph (l).

349. Consequently, the Tribunal's decision to deny jurisdiction under the alternative proposition – that Mr. Rand's payments were loans explicitly excluded from protection by virtue of Article 1(k) (ii) of the BIT – was the correct one and it does not represent an excess of powers, let alone a manifest excess of powers.

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

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

350. Primary reason for the Tribunal's decision to reject jurisdiction with regard to Mr. Rand's payments on behalf of BD Agro was its conclusion that said payments did not fulfil the requirement of duration, based on Article 25(1) of the ICSID Convention.[575]

351. Respondent does not consider it necessary to repeat its submission on the objective nature of "*investment*" under the Convention and the three objective requirements that comprise the definition.[576] It suffice to state here that the case law on the matter "*has now settled to the point that it is possible to speak of a jurisprudence constante relating*

[574] See para. 96 above.
[575] Award, paras. 274 -275.
[576] See Section E.II.1 above.

to the inherent definition of an investment," encompassing core elements of the notion: contribution of money or assets, duration and risk, and applicable even in non-ICSID cases.[577] Contrary to Applicant's contention,[578] the Tribunal's reliance on the three objective criteria test cannot represent a manifest excess of powers.

352. Applicant also contends that the Tribunal applied the criterion erroneously, which allegedly led it to the conclusion that "*the Loans*" lacked sufficient duration.[579] The contention is manipulative and clearly untenable.

353. The entire Applicant's argument on the requirement of duration is even conceivable only because it purposely starts, once again, from a false premise: that the Tribunal had characterized Mr. Rand's expenditures as "*loan(s) to an enterprise*" in accordance with Article 1(d) of the BIT, and then refused to recognize that "*loans*" had necessary duration. This logical fallacy enabled Applicant to argue that his transactions lasted seven and two years prior to the Valuation Date, respectively.[580] This could not be further from the truth.

354. As explained earlier, the Tribunal unequivocally rejected Claimants' characterization of Mr. Rand's expenditures as loans and classified them instead as "*Mr. Rand's payments for the benefit of BD Agro*",[581] mainly since Claimants were unable to prove that Mr. Rand has ever concluded a loan agreement with the company.[582] This fact is indispensable for understanding the Tribunal's reasoning on the issue of duration.

355. Applicant is correct in stating that the ICSID Convention does not prescribe any specific duration for an investment to exist.[583] Rather, whether or not the requirement is fulfilled depends on particular circumstances of each case. However, it is undisputable that the purpose of the duration requirement is to exclude short-term, one-time transactions from

[577] *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Dissenting Opinion of Professor Brigitte Stern, 6 December 2022, paras. 77- 78, **RLA-252**.
[578] Memorial on Annulment, paras. 308-311.
[579] Memorial on Annulment, para. 313.
[580] Memorial on Annulment, para. 315.
[581] Award, Section VI.A.1.c.
[582] Award, para. 343.
[583] *KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8*, Award, 17 October 2013, para. 208, **RLA-095**; S.W. Schill, L. Malintoppi, A. Reinisch, C. H. Schreuer, A. Sinclair (Eds.), *Schreuer's Commentary on the ICSID Convention*, 3rd ed., Cambridge University Press, 2022, Article 25, para. 253, **RLA-258.**

the definition of an investment under the Convention.[584] As a result, one-off payments of costs incurred for the benefit of an investment do not meet the criterion.

356. Applicant's reliance on *Deutsche Bank v. Sri Lanka*[585] does not help his case. The fact that the tribunal in *Deutsche Bank* held the twelve-month period of a hedging agreement to be of sufficient duration has no relevance for the present case. Analogy with the case at hand is impossible for a simple reason: a payment is not a contract and Mr. Rand has never concluded a loan agreement with BD Agro.

357. Instead, circumstances of the present case closely resemble those in *Doutremepuich v. Mauritius*.[586] There, the claimants paid certain bills and invoices for goods and services received by the companies registered in Mauritius that they considered to be their investment.[587] The tribunal held that those "*one-off outlays made at the Claimants' initiative"* did not meet the requirement of duration in order to be considered an investment.[588] Similarly, Mr. Rand's payments of goods and services for the benefit of BD Agro were one-off outlays made on his own initiative and do not fulfil the criterion of duration for an investment under Article 25(1) of the ICSID Convention. A simple invoice payment is certainly not a transaction that lasts between two and five years – a time period which has been held, according to Applicant as well,[589] to represent a minimal duration of an investment under the ICSID Convention.[590]

358. Mr. Rand also argues that the Tribunal failed to consider that the payments for the benefit of BD Agro were made as a part of his overall economic venture embodied in Mr. Rand's shareholding in BD Agro. In support of this proposition, Applicant relies on *CSOB v. Slovak Republic* and *Sempra v. Argentina* as cases in which tribunals allegedly found that **loans** connected to or comprising a part of an economic operation were also

[584] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, para. 189, **RLA-168**.
[585] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 303, **CLA-067**; Memorial on Annulment, para. 314.
[586] *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, **RLA-171**.
[587] *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, paras. 122 and136, **RLA-171**.
[588] *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019, paras. 137and143, **RLA-171**.
[589] Memorial on Annulment, para. 323, fn. 415.
[590] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 208, **RLA-095**.

investments themselves.[591] Although it is unclear how this contention can compensate the lack of required duration with respect Mr. Rand's payments, it is also untenable for two reasons.

359. First, as already explained, payments for the benefit of an investment are not loans. This alone, coupled with the fact that the Tribunal decidedly refused to recognize Mr. Rand's payments as loans, must be enough to make Applicant's reliance on above cases inapposite.

360. Second, it was Claimants in the underlying arbitration who insisted that Mr. Rand's payments on behalf of BD Agro should be considered as a separate investment, distinct from Mr. Rand's shareholding in BD Agro.[592] Clearly, the Tribunal approached the analysis bearing that in mind[593] and found that the payments did not meet the requirement of duration under the ICSID Convention.[594]

361. If Mr. Rand now argues that those payments comprise a part of an "*overall economic venture*" (business operation of BD Agro), then the argument invoked by Respondent in the arbitration is equally applicable: expenditures made by Mr. Rand as the owner of BD Agro and aimed at increasing the value of his shareholding and operational efficiency of BD Agro cannot be considered as a separate "*investment*."[595] However, Respondent submits that the Committee, in any event, should refrain from entertaining Mr. Rand's claim that is tantamount to an appeal and as such prohibited in the annulment proceedings.[596]

362. In conclusion – the Tribunal's decision to deny jurisdiction over Mr. Rand's payments for the benefit of BD Agro for lack of necessary duration under the ICSID Convention is sound and follows logically from the Tribunal's previous finding that those payments are not loans, contrary to what has been argued by Claimants in the Arbitration and by Mr. Rand in the present proceeding. It is not merely tenable and reasonable, but the only

[591] Memorial on Annulment, paras. 316 and 317.
[592] "" *Shares" and "loans" are separate categories of "investment" and ought to be treated as such*." Claimants' Rejoinder on Jurisdiction dated 6 March 2020, para. 450.
[593] "*According to the Claimants,* ***their investments in Serbia consist of****: …e. Mr. Rand's direct payments to BD Agro's Canadian suppliers for the purchase and transport of heifers and other payments and loans for the benefit of BD Agro*." Award, para. 202 (emphasis added).
[594] Award, para. 274.
[595] Respondent's Rejoinder, para. 742.
[596] See paras. 7-10 above.

possible in given circumstances. Consequently, Applicant failed to carry his burden of proof with respect to the alleged manifest excess of powers.

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

363. The Tribunal's explanation why Mr. Rand's payments do not meet the requirement of duration[597] is adequate since it logically stems from the nature of transactions at stake. Those payments were characterized by the Tribunal as one-off expenditures and not "*loans"*, as Applicant suggests.[598] From such characterization follows a conclusion that is self-evident and inevitable: simple payments for goods and services do not last long enough to meet the requirement of duration under the Convention. The Tribunal illustrated its ruling by pointing to the payment of consulting fees by Rand Investment as an example of a transaction that does not have a significant duration.

364. Although the Tribunal's reasoning is given in concise terms, it is instantly apparent to any reasonable person why the payments, unlike loans or other contracts, do not meet the criterion. Such reasoning flows from the conclusion on the nature of transactions and no further explanation was needed and deemed warranted by the Tribunal. These are precisely circumstances in which "*a careful reader can follow the implicit reasoning of the Tribunal*…"[599]

365. The so-called *MINE* test, referred to by Applicant,[600] is satisfied since "*the reasoning of a tribunal on a particular point can be inferred without difficulty and without substantial speculation by the reader*."[601] The reasoning can easily be followed from the fact that Mr. Rand's expenditures were not loans, but simple payments for the benefit of BD Agro (point A) to the Tribunal's conclusion that such payments do not meet the requirement of duration (point B). As a result, there is no failure to state reasons in this instance.

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[597] Award, para. 274.
[598] Memorial on Annulment, para. 321.
[599] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 127, **RLA-152**.
[600] Memorial on Annulment, para. 323.
[601] *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Annulment, 29 September 2016, para. 142, **RLA-240**.

366. In any event, an *ad hoc* committee can further explain, clarify or supplement the reasoning given by the tribunal, rather than annul the award. This was held, for instance, by the committee in *Tulip v. Turkey*:

> "*Therefore, an award is not subject to annulment if the reasons for a decision, though not stated explicitly,* ***are readily apparent to the ad hoc committee. Implicit reasoning is sufficient as long as the committee can infer them reasonably from the terms and conclusions of the award as well as from the record before the tribunal. If the ad hoc committee can explain an award by clarifying reasons that may be only implicit, it may do so and need not annul***."[602]

367. Based on the foregoing reasons, it is unequivocally clear that the Tribunal did not commit manifest excess of powers by rejecting jurisdiction over Mr. Rand's indirect shareholding in BD Agro and his payments for the benefit of the company. Likewise, Applicant's claim that the Tribunal failed to state reasons with respect to the lack of duration of Mr. Rand's payments is equally unsustainable and must be dismissed.

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

368. Considering all the circumstances of the dispute, the Tribunal decided that each Party should bear half of the costs of the proceedings and its own legal and other costs.[603] Applicant now argues that the Tribunal's decision on costs must be annulled as a necessary consequence of the alleged manifest excess of powers and failure to state reasons with respect jurisdiction and quantum.[604] Mr. Rand's argument is clearly untenable.

369. First, as explained above, Applicant failed to demonstrate the existence of relevant grounds for annulment under Article 52(1) of the ICSID Convention. This renders moot his request with regard to the decision on costs.

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[602] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 108 (emphasis added), **RLA-212**.
[603] Award, para. 716.
[604] Memorial on Annulment, paras. 325 and326.

370. Second, even if the Committee should find that the Tribunal's decisions on jurisdiction and quantum are annullable, *quod non*, the decision on costs would still survive.

371. It is beyond dispute that an *ad hoc* committee, in exercising its authority to annul the award or any part thereof,[605] should not annul any part of the award that has an independent basis and that is detachable from other parts affected by the annullable error.[606] This is precisely that case with the decision on costs rendered by the Tribunal.

372. Applicant implies that the Tribunal's decision on costs is based exclusively on its previous decisions on jurisdiction and quantum and that it must be annulled as well. He relies on decisions of *ad hoc* committees in *MINE v. Guinea* and *TECO v. Guatemala*.[607] However, those cases are easily distinguishable from the case at hand.

373. In both *MINE* and *TECO*, decisions on costs were based on reasons that entirely ceased to exist once the relevant part of the awards were annulled. In *MINE*, the tribunal awarded the claimant costs towards its fees and expenses in the arbitration, based on the fact that Guinea was a losing party in the arbitration.[608] In *TECO*, the tribunal ordered Guatemala to reimburse only 75% of the claimant's legal costs, since it found that Guatemala was partially successful on quantum.[609] Once the relevant portions of the awards were annulled by respective *ad hoc* committees, the decisions on costs in both cases could not survive the annulment of parts of the awards with which they were inextricably linked.[610]

374. In the case at hand, unlike in *MINE* and *TECO*, the Tribunal's decision on costs was motivated by the set of circumstances most of which would remain unchanged, even if each and every Mr. Rand's claim with respect purported manifest excess of powers and

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[605] ICSID Convention, Article 52(3).

[606] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, para. 80, **CLA-189**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 412, **RLA-232**.

[607] Memorial on Annulment, para. 327.

[608] *Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4*, Decision of the Ad hoc Annulment Committee, 22 December 1989, paras. 2.01. and 6.112, **CLA-184**.

[609] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 360, **CLA-186**.

[610] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, para. 6.112, **CLA-184**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 363, **CLA-186**.

failure to state reasons would be accepted by the Committee. The circumstances that directed the Tribunal's decision on costs and that cannot be changed by Mr. Rand's potential success in the current proceeding are:

1) the Tribunal found that it lacked jurisdiction over the claims of all the other Claimants, except Mr. Rand, under the Canada-Serbia BIT, and over the only Claimant (Sembi) under the Serbia - Cyprus BIT;
2) the issues involved were complicated because of Mr. Rand's unusual investment structure, which triggered objections and extensive debates;
3) the amount awarded to Mr. Rand was awarded by the Majority;
4) there was a significant disparity between Claimants' costs and those of Respondent.[611]

375. Based on those reasons, the Tribunal decided to divide the costs equally between the Parties, even though Mr. Rand was successful on the issue of liability. Just as it was held by the committee in *Enron v. Argentina*, here too there is no reason for thinking that the Tribunal would not have made exactly the same order, even if Mr. Rand had been awarded a larger amount on quantum or if the Tribunal had accepted jurisdiction over the two peripheral claims in the arbitration.[612] As a result, the Tribunal's decision on costs must remain unchanged.

[611] Award, para. 716.
[612] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 417, **RLA-232**.

G. PRAYER FOR RELIEF

376. Respondent requests the *Ad hoc* Committee to

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

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

Belgrade / Novi Sad, 1 November 2024

Respectfully submitted,

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