INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

PAWLOWSKI AG AND PROJEKT SEVER S.R.O.

(Applicants)

and

CZECH REPUBLIC

(Respondent on Annulment)

ICSID Case No. ARB/17/11
Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Dr. Jacomijn J. van Haersolte-van Hof, President of the *ad hoc* Committee
Ms. Yoshimi Ohara, Member of the *ad hoc* Committee
Mr. David A. Pawlak, Member of the *ad hoc* Committee

Secretary of the *ad hoc* Committee
Mr. Alex B. Kaplan

Date of dispatch to the Parties: March 7, 2025

REPRESENTATION OF THE PARTIES

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and

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TABLE OF ABBREVIATIONS/DEFINED TERMS

A-[#]	Applicants' Exhibit
ALA-[#]	Applicants' Legal Authority
Annulment Request	Lawsuit filed on June 28, 2021, by Benice mayor to annul Zoning Plan Change
Application	Application for Partial Annulment filed on February 26, 2022
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	Award issued on November 1, 2021, in the case of *Pawlowski AG and Projekt Sever s.r.o. v. The Czech Republic*, ICSID Case No. ARB/17/11
BIT	Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments signed on October 5, 1990
C-Mem.	Respondent's Counter-Memorial on Partial Annulment dated April 3, 2023
Committee	The Committee constituted on May 23, 2022. Its members are: Jacomijn van Haersolte-van Hof (Dutch), President; Yoshimi Ohara (Japanese); and David Pawlak (Irish/U.S.); all members appointed by the Chairman of the Administrative Council.
Hearing	Hearing on Partial Annulment held on September 10, 2024, in Prague
Hr. Tr. [page:line]	Transcript of the Hearing on Annulment
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes

Mem.	Applicants' Memorial on Partial Annulment dated December 1, 2022
Merits Hr. Tr.	Transcript of the Hearing on the Merits held on January 26 - 30, 2020
PO5	Procedural Order No. 5 of June 16, 2020
RA-[#]	Respondent's Exhibit
Rej.	Respondent's Rejoinder on Partial Annulment dated October 3, 2023
Reply	Applicants' Reply on Partial Annulment dated July 3, 2023
RLA-[#]	Respondent's Legal Authority
Tribunal	Arbitral tribunal consisting of: Juan Fernández-Armesto (Spanish), President, appointed by agreement of the Parties; John Beechey (British), appointed by the Claimants; and Vaughan Lowe (British), appointed by the Respondent
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an application for annulment ("Application") of the award rendered on November 1, 2021, in the arbitration proceeding between Pawlowski AG and Projekt Sever s.r.o. and the Czech Republic (ICSID Case No. ARB/17/11) ("Award" in the "Arbitration") rendered by a Tribunal composed of Prof. Juan Fernández-Armesto, Mr. John Beechey, and Prof. Vaughan Lowe KC ("Tribunal").[1] The Applicants and the Respondent on Annulment are collectively referred to as the "Parties." The Parties' representatives and their addresses are listed above on page (i).

2. In the Award, the Tribunal decided a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or "Centre") on the basis of the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, signed on October 5, 1990 ("BIT" or "Treaty") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 ("ICSID Convention" or "Convention").

3. The dispute in the original proceeding related to the Applicants' investment in a large-scale real estate development project (the "Project") in the borough of Benice in Prague, Czech Republic ("borough of Benice" or "Benice").

4. In the Award, the Tribunal found that it had jurisdiction over the dispute, declared that the Czech Republic violated Article 4 of the BIT, and dismissed all other claims. The Tribunal awarded no compensation to the Claimants. It also declared that each Party was to bear its own legal fees and expenses and in equal parts the costs of the proceeding.

5. The Applicants applied for partial annulment of the Award on the basis of Article 52(1) of the ICSID Convention, identifying two grounds for annulment: (i) serious departure from

[1] *Pawlowski AG and Projekt Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, November 1, 2021, **A-1** ("***Pawlowski* Award**") (available at https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C6327/DS16910_En.pdf).

a fundamental rule of procedure (Article 52(1)(d)); and (ii) failure to state reasons (Article 52(1)(e)).

II. PROCEDURAL HISTORY

6. On February 26, 2022, ICSID received an application for annulment of the Award from Pawlowski AG and Projekt Sever s.r.o. of the Award ("Application").

7. On March 9, 2022, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the Secretary-General of ICSID registered the Application.

8. By letter dated May 23, 2022, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Jacomijn van Haersolte-van Hof, a national of the Netherlands, appointed to the Panel by the Netherlands, and designated as President of the Committee, Yoshimi Ohara, a national of Japan, appointed to the Panel by Japan, and David Pawlak, a national of Ireland and the United States of America, appointed to the Panel by the Slovak Republic had been constituted ("Committee"). On the same date, the Parties were notified that Mr. Alex B. Kaplan, Legal Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

9. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the Parties on July 19, 2022, by video conference. The following participants attended the session:

Members of the Committee:
Prof. Dr. Jacomijn J. van Haersolte-van Hof, President of the Committee
Ms. Yoshimi Ohara, Member of the Committee
Mr. David A. Pawlak, Member of the Committee

ICSID Secretariat:
Mr. Alex B. Kaplan, Secretary of the Committee

For Pawlowski AG and Projekt Sever s.r.o. (Applicants):
JUDr. Vojtěch Haman, Havlicek Law Offices
JUDr. Tomáš Mach, MACH LEGAL
JUDr. Filip Černý, advokát

For the Czech Republic (Respondent on Annulment):
Mr. Jaroslav Kudrna, Ministry of Finance of the Czech Republic
Mr. Martin Nováček, Ministry of Finance of the Czech Republic
Mr. Eduardo Silva Romero, Dechert
Ms. Erica Stein, Dechert
Ms. Audrey Caminades, Dechert

10. Following the first session, on August 1, 2022, the Committee issued Procedural Order No. 1 ("PO1") recording the agreement of the Parties on procedural matters. PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. PO1 also sets out a procedural calendar for the proceeding.

11. In accordance with PO1, on December 1, 2022, the Applicants filed a memorial on partial annulment, together with Exhibits A-1 through A-46, and Legal Authorities ALA-1 through ALA-21 ("Memorial").

12. On April 3, 2023, the Respondent filed a counter-memorial on partial annulment, together with Exhibits RA-1 through RA-7 and Legal Authorities RLA-1 through RLA-34 ("Counter-Memorial").

13. On July 3, 2023, the Applicants, filed a reply on partial annulment, together with Exhibit A-47 and Legal Authorities ALA-22 through ALA-34 ("Reply").

14. On October 3, 2023, the Respondent filed a rejoinder on partial annulment, together with Exhibit RA-0008 to RA-0011 and Legal Authorities RLA-0035 to RLA-0046 ("Rejoinder").

15. On November 27, 2023, the Committee issued Procedural Order No. 2 concerning the organization of the then-scheduled hearing.

16. On December 1, 2023, ICSID notified the Parties of the Applicants' default on the payment of the advance requested on October 12, 2023. Either Party was invited to pay the outstanding advance pursuant to ICSID Administrative and Financial Regulation 16. The Committee notified the Parties in the same communication that if the payment was not

received, "a deferral of the January hearing is likely" to ensure "that the funds presently held in trust are not eroded by non-refundable hearing expenses."

17. On December 5, 2023, the Committee notified the Parties of cancellation of the hearing since no payment was received. The Committee indicated that the hearing would be rescheduled once the outstanding payment was received.

18. On January 17, 2024, ICSID Secretary-General suspended the proceeding for non-payment of the required advances pursuant to ICSID Administrative and Financial Regulation 16(2)(b).

19. On April 12, 2024, the proceeding was resumed following the Applicants' payment of the required advance.

20. Following resumption of the proceeding, on April 22, 2024, the Committee indicated its availability to reschedule the hearing. Following discussions with the Parties, a new hearing date was set.

21. A rescheduled hearing on partial annulment was held at Hotel Almanac X Alcron, Prague, Czech Republic, on September 10, 2024 ("Hearing"). The following persons were present at the Hearing:

Committee:	
Prof. Dr. Jacomijn J. van Haersolte-van Hof	President
Ms. Yoshimi Ohara	Member of the Committee
Mr. David A. Pawlak	Member of the Committee
ICSID Secretariat:	
Mr. Alex B. Kaplan	Secretary of the Committee
For the Applicants:	
Dr. Jan Havlíček	Havlíček Haman, advokátní kancelář s.r.o.
Mr. Vojtěch Haman	Havlíček Haman, advokátní kancelář s.r.o.
Ms. Dominika Benáčková Havlíčková	Havlíček Haman, advokátní kancelář s.r.o.
Dr. Tomáš Mach	MACH LEGAL, advokátní kancelář s.r.o.
Dr. Filip Černý	JUDr. Filip Černý, Ph.D., advokát
Mr. Sebastian Pawlowski	Pawlowski AG and Projekt Sever s.r.o.

For the Respondent:

Mr. Eduardo Silva Romero	Wordstone Dispute Resolution
Ms. Audrey Caminades	Wordstone Dispute Resolution
Mr. João Manoel Pereira De Assis	Wordstone Dispute Resolution
Ms. Martina Matejová	Ministry of Finance of the Czech Republic
Mr. Jaroslav Kudrna	Ministry of Finance of the Czech Republic
Ms. Alžběta Bělova	Ministry of Finance of the Czech Republic
Ms. Lenka Kubická	Ministry of Finance of the Czech Republic
Ms. Magdaléna Kůrová	Ministry of Finance of the Czech Republic
Ms. Lenka Psárská	Ministry of Finance of the Czech Republic
Ms. Tereza Ševčíková	Ministry of Finance of the Czech Republic

Court Reporter:
Ms. Anne-Merie Stallard

22. The Parties filed their submissions on costs on October 18, 2024.

23. The proceeding was closed on 14 February 2025.

III. LEGAL STANDARDS APPLICABLE TO THE APPLICATION

24. Before addressing the Applicants' individual grounds for annulment, the Committee considers the positions of the Parties regarding the standards of review to be applied to the grounds invoked; namely, Article 52(1)(d) of the ICSID Convention for a serious departure from a fundamental rule of procedure, and Article 52(1)(e) of the ICSID Convention for a failure to state the reasons on which the Award is based.

A. GENERAL PRINCIPLES APPLICABLE IN ANNULMENT PROCEEDINGS

(1) The Applicants' Position

25. The Applicants explain that the grounds for annulment are circumscribed by Article 52 of the ICSID Convention, and each ground should be interpreted in its ordinary meaning and informed by the decision-making of annulment committees. According to the Applicants, there is consensus among prior committees that Article 52 is to be interpreted "neither narrowly nor broadly," or put another way, "neither restrictively nor extensively."[2]

26. The Applicants also observe that there is agreement among annulment committees that interpretation of Article 52(1) should be made "in the light of Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties ("VCLT")" and therefore "in good faith, in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose."[3]

27. Observing that the Respondent speaks of a "high bar" for annulment, which it characterizes as an "exceptional recourse," the Applicants say that "[t]he truth is [] that the bar for annulment is neither high nor low."[4] On this point, the Applicants rely on *RSM v. Saint Lucia* where the committee stated, "The provisions in Article 52 may be described as

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[2] Reply, ¶¶42-43, citing *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on the Application for Annulment, May 28, 2021, ¶64, **RLA-9** ("***Perenco***"); *Teinver S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on the Application for Annulment, May 29, 2019, ¶48, **RLA-27** ("***Teinver***"); *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on the Application for Annulment, September 30, 2022, ¶51, **ALA-22** ("***Global Telecom***"); *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on the Application for Annulment, August 22, 2018, ¶62, **ALA-23** ("***Standard Chartered Bank***"); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Application for Annulment, June 29, 2010, ¶75, **ALA-24** ("***Sempra***"); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on the Application for Annulment, December 30, 2015, ¶48, **ALA-8** ("***Tulip***"); *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on the Application for Annulment, September 17, 2020, ¶128, **RLA-28** ("***Orascom***"); *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/08, Decision on the Application for Annulment, May 1, 2018, ¶82, **RLA-21** ("***CEAC Holdings***"); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment, December 6, 2018, ¶59, **RLA-14** ("***OI European Group***"); *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Decision on the Application for Annulment, April 26, 2019, ¶57, **RLA-22** ("***Vestey Group***"); *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on the Application for Annulment, June 5, 2007, ¶ 21, **ALA-12** ("***Soufraki***").

[3] Reply, ¶44, citing *CEAC Holdings*, ¶82, **RLA-21**; *Soufraki*, ¶21, **ALA-12**; *Global Telecom*, ¶50, **ALA-22**; *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on the Application for Annulment, April 29, 2019, ¶151, **ALA-25** ("***RSM***").

[4] Reply, ¶42.

exceptional in the sense that Article 52 provides limited grounds for annulment but that has no impact on the way the provisions are to be applied by the Committee."[5]

28. Thus, for the Applicants, interpretation of Article 52 is neither restrictive nor broad, and there is no presumption in favor of or against annulment. The Applicants point also to *Soufraki v. United Arab Emirates*, where the committee observed that "[s]ome commentators have suggested that in case of doubt, an annulment committee should decide in favour of the validity of the award. Such presumption, however, finds no basis in the text of Article 52 and has not been used by annulment committees."[6]

29. While the Applicants acknowledge that the Committee does possess discretion not to annul the award or to decide whether an award is annulled in part or in whole[7], they maintain that—in line with consistent ICSID *ad hoc* committee practice—if a ground for annulment is established, then the Committee "should always" annul in whole or in part.[8]

30. The Applicants agree with the observations of the committee in *Perenco v. Ecuador* that the degree of inquiry and analysis to determine a ground for annulment is not merely superficial or formal, and in fact the Convention imposes no limitation on the level of detail in the committee's analysis, provided that the committee remains within the limits of its powers.[9]

(2) The Respondent's Position

31. The Respondent submits that the Applicants recognize the limited scope of review in annulment proceedings.[10] The Respondent insists that awards are presumed to be valid, and this presumption is well settled in the case law. "[A]nalysis should be resolved *in*

[5] Reply, ¶46, quoting *RSM*, ¶151, **ALA-25**.

[6] Reply, ¶¶47-48, quoting *Soufraki*, ¶22, **ALA-12**.

[7] Reply, ¶¶49-51, quoting *Rumeli*, ¶77.

[8] Reply, ¶¶52-53, quoting *Perenco* ¶ 63, RLA-9. Reply ¶69 citing *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment, December 18, 2012, ¶80, **ALA-6**.

[9] Reply, ¶55, citing *Perenco*, ¶62, **RLA-9**.

[10] Respondent's Opening Statement, slide 39.

favorem validitatis sententiae."[11] The Respondent describes this presumption as "the cornerstone of the ICSID review mechanism because, as a rule, investment awards are final and binding."[12] According to the Respondent, therefore it follows that annulment can only occur in exceptional circumstances and based only on Article 52's strictly delimited grounds.[13]

32. For the Respondent, the alternative would pave the way toward "*de novo* arbitration," which goes against the essence of the binding force and finality of ICSID awards. "If [an] award d[oes] not enjoy a presumption of validity, and the burden of proof [is] not on the challenging party, the procedure would be rearbitration."[14]

33. The Applicants, therefore, are wrong to rely on the few annulment committees, such as *Soufraki v. United Arab Emirates*, which denied that awards are presumed to be valid. The Respondent says that these authorities ignore that "Article 52 of the ICSID Convention itself provides that annulment is an exceptional mechanism in that it strictly limits annulment to five defined grounds."[15] It is in this context that committees and scholars have stressed that annulment is "an extraordinary remedy reserved for cases involving 'egregious violations of certain basic principles.'"[16]

34. Additionally, the Respondent clarifies that it does not dispute that committees are vested with discretion in deciding annulment applications. The Respondent again insists, however, that the Applicants are wrong that a committee must annul in whole or in part if

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[11] Rej., ¶40, citing *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on the Application for Annulment, May 3, 1985, ¶52, **ALA-9** ("***Klöckner***").

[12] Rej., ¶41, citing ICSID Convention, Article 53.

[13] Rej., ¶41.

[14] Rej., ¶41, quoting W.M. Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration," *Duke Law Journal*, Issue 4 (1989), p. 761, **RLA-36**.

[15] Rej., ¶42.

[16] Rej., ¶42, quoting *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, March 19, 2021, ¶173, **RLA-30** ("***Cortec***")(emphasis added); citing, also, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, July 30, 2021, ¶157, **RLA-29** ("***Infrastructure Services***"); *Tulip*, ¶39, **ALA-8;** *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, June 10, 2022, ¶407, **RLA-2** ("***InfraRed***"); Stephan W. Schill (ed.), *Schreuer's Commentary on the ICSID Convention* (CUP 2022), Article 52, ¶17, **RLA-13**.

a ground for annulment is established. For the Respondent, it is the opposite, in that "committees may choose not to annul the award even if a ground for annulment is found."[17] The Respondent relies on the view of the committee in *Orascom v. Algeria* that "[i]f one of the grounds listed in Article 52(1) of the ICSID Convention is established, an *ad hoc* committee still has to consider whether that ground had a material impact on the party seeking annulment."[18]

35. The Respondent also disagrees with the Applicants' position that no committee has ever found an annullable error and refused to annul. For example, the Respondent cites *AMCO v. Indonesia*, where the committee refused to annul because the error was determined to be *de minimis*. The Respondent also recalls that between 2011 and 2020, there were only eight annulments among 117 annulment proceedings.[19]

(3) The Committee's Analysis

36. The Committee has carefully considered all the submissions of the Parties and presents herein a non-exhaustive summary of the Parties' primary positions to provide context for the decision.

37. Before addressing the specific annulment grounds invoked by the Applicants and the scope of these individual grounds, the Committee briefly addresses the basic framework of an application for annulment. Although certain general concepts and considerations may help shape the Committee's review, ultimately, the scope of review is dictated by the individual legal standards for annulment and the specific grounds invoked. In addition, the Committee observes that both Parties' submissions on the general principles applicable in annulment proceedings are fairly brief and high level, presumably reflecting the limited guidance these general considerations can provide.

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[17] Rej., ¶43, *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, March 25, 2010, ¶75, **RLA-17** ("***Rumeli***"); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on the Application for Annulment, April 13, 2020, ¶148, **ALA-27**; *Perenco*, ¶63, **RLA-9**.

[18] Rej., ¶43, citing *Orascom*, ¶127, **RLA-28**.

[19] Rej., ¶45.

38. A fundamental goal of the ICSID Convention is to assure the finality of awards and to provide limited exceptions to the concept of finality in the interest of fundamental procedural integrity. Annulment is an exceptional and narrowly circumscribed remedy and annulment proceedings cannot be equated with appeal proceedings. Article 53 of the ICSID Convention makes clear that there are no rights of appeal against awards rendered pursuant to the Convention and that the only remedies are the ones set forth in the Convention itself. Under Article 52(1), the Committee may not engage in an assessment of whether it agrees with the reasoning or conclusions of the Tribunal, but only whether one of the grounds for annulment listed in that Article has been established.[20]

39. The Committee agrees with the Applicants that there is no presumption either in favor of or against annulment.[21] Furthermore, there is no basis for either an extensive or restrictive interpretation of Article 52 of the ICSID Convention.[22] Here again, the starting point of the annulment process is the finality of awards.

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

(1) The Applicants' Position

40. It is the Applicants' position that both Parties agree that the Committee should employ a three-part test in deciding the ground for annulment of a serious departure from a fundamental rule of procedure: (i) the procedural rule must be fundamental; (ii) the tribunal must have departed from it; and (iii) the departure must be serious.[23]

41. As to the relationship between the annulment grounds contained in Article 52(1)(d) and (e), the Applicants submit that while the failure to deal with "every question submitted to the tribunal" may result in annulment for lack of reasons under subsection (e), such a failure with respect to, for example, a specific defense, may in certain circumstances also amount

[20] Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶74(1), **ALA-3.**

[21] Reply, ¶47; citing *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on the Application for Annulment, March 28, 2022, ¶93, **ALA-26**.

[22] Reply, ¶43, citing *Perenco*, ¶64, **RLA-9;** *Teinver*, ¶48, **RLA-27;** *Global Telecom*, ¶51, **ALA-22;** *Standard Chartered Bank*, ¶ 62, **ALA-23;** *Sempra*, ¶75, **ALA-24**; *Tulip*, ¶48, **ALA-8;** *Orascom*, ¶ 128, **RLA-28;** *CEAC Holdings*, ¶82, **RLA-21;** *OI European Group*, ¶59, **RLA-14;** *Soufraki*, ¶21, **ALA-12**.

[23] Reply, ¶58, citing to C-Mem., ¶37; Mem., ¶157. See also Applicants' Opening Statement, slide 8.

to a serious departure from a fundamental rule of procedure regardless of whether such failure also meets the ground under subsection (e).[24] The Applicants clarify that a failure to state reasons does not automatically entail a serious departure from a fundamental rule of procedure.[25]

42. The Applicants disagree, however, with the Respondent's outdated contention that the departure must have "had a material impact on the outcome of the award" and that it must have "likely caused the tribunal to reach a result that is substantially different from what it would have been had such rule been observed."[26]

43. Instead, the Applicants maintain that a less stringent showing is required—that it is sufficient that the departure from the rule could potentially have had a material impact on the outcome of an award, insisting that committees have now adopted this more flexible approach.[27]

> *To require an applicant to prove that the award would actually have been different, had the rule of procedure been observed, may impose an unrealistically high burden of proof. Where a complex decision depends on a number of factors, it is almost impossible to prove with certainty whether the change of one parameter would have altered the outcome.*[28]

The Applicants continue,

> *[T]o determine that the outcome of an award would have been different had a departure from a fundamental rule of procedure not occurred would require the committee to go into the merits of the Parties' arguments and the tribunal's decision, which is*

[24] Reply, ¶80 and Applicants' Opening Statement, slides 12-13, citing *Klöckner*, ¶115, **ALA-9**; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Annulment, September 16, 2011, ¶97, **RLA-7** ("***Continental Casualty***"); *Perenco*, ¶ 125, **RLA-9**.

[25] Reply, ¶190, quoting C-Mem., ¶105.

[26] Reply, ¶59, quoting C-Mem., ¶39.

[27] Reply, ¶62.

[28] Mem., ¶163 and Reply, ¶64, quoting *Tulip*, ¶78, **ALA-8**. Applicants' Opening Statement, slide 14.

> *inappropriate given the limited nature of annulment proceeding[s].*[29]

44. The Applicants further state that once the committee has established a serious departure from a fundamental rule, then the committee must annul an award.[30]

45. The Applicants confirm that both Parties agree that the right to be heard is a fundamental rule of procedure, as confirmed by many ICSID annulment committees,[31] but the Parties differ as to the scope of the right. The Applicants maintain that the content of the right must be informed by rulings of the European Court of Human Rights.[32] According to the Applicants, the right to be heard means that a tribunal "is not required to provide a detailed answer to every argument and address every piece of evidence but is, on the other hand, required at least to provide reasons why it does not consider these arguments and evidence relevant."[33]

(2) The Respondent's Position

46. The Respondent agrees with the three-part test, as set out above, that the Committee should employ to determine whether a serious departure from a fundamental rule of procedure occurred.[34] The Respondent, however, disagrees with the Applicants on two points: when a departure from a fundamental rule is deemed to be serious and the scope of the right to be heard.[35]

47. For the Respondent, the Committee must determine whether a serious departure from a fundamental rule of procedure had a material impact on the outcome of the award, causing the tribunal to reach a result substantially different from what it would have awarded had

[29] Reply, ¶66, citing *Infrastructure Services*, ¶202, **RLA-29**; See also Mem., ¶164.

[30] Reply, ¶69, citing *Perenco*, ¶134, **RLA-9**.

[31] Reply, ¶¶188-189.

[32] Reply, ¶¶188-189; *cf.* Rej., ¶56.

[33] Mem., ¶249; Reply, ¶72, citing *Joksas v. Lithuania*, Application no. č. 25330/07, Judgement of the European Court of Human Rights, November 12, 2012, ¶58, **ALA-19**; *Wagner and J.M.W.L. v. Luxembourg*, Application no. 76240/01, Judgement of the European Court of Human Rights, June 28, 2007, ¶¶90-91, **ALA-20**.

[34] C-Mem., ¶37; Rej., ¶48. Respondent's Opening Statement, slide 42.

[35] Rej., ¶50.

such a rule been observed.[36] The Respondent submits its view is not outdated and supported by numerous committees, including the recent *Flughafen Zürich v. Venezuela* Committee, "this Committee considers that 'serious' should be interpreted not as a potential effect but, on the contrary, as a distinguishable material effect on the award."[37]

48. In any event, even if the Committee, adopts the Applicants' view that the serious departure need not have been outcome-determinative, and that a potentially different outcome is sufficient, the Applicants still have the burden to demonstrate "that there is a distinct possibility that the departure may have made a difference on a critical issue of the Tribunal's decision."[38] For the Respondent, the potential impact on the award "must, at the very least, be evident."[39]

49. On the scope of the right to be heard, the Respondent's view is that it is limited to the right to present one's case.[40] The Respondent therefore rejects the Applicants' contention that the scope extends to the manner in which a tribunal has dealt with the arguments and evidence presented to them. Tribunals are entitled to make their own decisions regarding the evaluation and the relevance of the evidence presented by the parties.[41] The Respondent here refers to the annulment decision in *Tulip Real Estate v. Turkey*:

> *[T]he fact that an award does not explicitly mention an argument or piece of evidence does not allow the conclusion that a tribunal has not listened to the argument or evidence in question. A refusal to listen, amounting to a violation of the right to be heard, can only exist where a tribunal has refused to allow the presentation of an argument or piece of evidence. Therefore, absence in an award of a discussion of an argument or piece of evidence put forward by a*

[36] C-Mem., ¶39; Rej., ¶48, citing *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Annulment, December 8, 2000, ¶58, **ALA-4** ("***Wena***").

[37] Rej., ¶53, quoting *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment, April 15, 2019, ¶117, **RLA-42** (emphasis added by the Respondent).

[38] Rej, ¶55, quoting *Perenco*, ¶137, **RLA-9**.

[39] Rej., ¶55.

[40] C-Mem., ¶41.

[41] Respondent's Opening Statement, slide 43.

> *party does not mean that a tribunal has violated the right to be heard.*[42]

Tribunals are under no obligation to mention, analyze and comment on each and every piece of evidence.[43] The Respondent goes on to state that adopting the Applicants' view—that all arguments and evidence must be addressed is impractical and would lead to annulment of all awards.[44]

(3) The Committee's Analysis

50. At least at a high level, there is considerable consensus between the Parties as to the applicable standard under Article 52(d) of the ICSID Convention. Both Parties agree that the Committee should employ a three-part test in determining whether there has been a serious departure from a fundamental rule of procedure: (i) the rule must be fundamental; (ii) the tribunal must have departed from it; and (iii) the departure must be serious.[45] The Parties also agree that the right to be heard qualifies as a fundamental rule of procedure.

51. The Parties differ, however, as to the concrete implementation of the test, first, in relation to the level of the required "seriousness" of the departure from the rule in question. Specifically, in advocating what they refer to as a more "permissive" approach,[46] the Applicants argue that it is enough for an applicant to prove that a departure from a fundamental rule of procedure could potentially have a material impact on the outcome of an award, in which case the seriousness criterion would be fulfilled.[47] The Respondent invokes the *Flughafen Zürich v. Venezuela* committee decision for the proposition that it is not sufficient that the breach would potentially have a material effect on the award; rather the applicant must show a "distinguishable material effect on the award."[48] The

[42] C-Mem., ¶46, quoting *Tulip*, ¶82, **ALA-8** (emphasis added by the Respondent); See also Rej., ¶58; Respondent's Opening Statement, slide 45, citing *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, November 21, 2018, ¶255, **RLA-5** ("***Von Pezold***").

[43] Respondent's Opening Statement, slide 44.

[44] Rej., ¶58.

[45] Reply, ¶58, citing to C-Mem., ¶37; Mem., ¶157. See also Rej., ¶48

[46] Reply, ¶65.

[47] Reply, ¶68.

[48] Rej., ¶53.

Respondent states that even those committees that have deemed a potential different outcome to be sufficient have underscored that the applicant must demonstrate a "distinct possibility" that the departure may have made a difference in the tribunal's decision, such that the potential impact on the award must, at least, be evident.[49]

52. This Committee considers that a distinction between a departure from a rule of procedure that potentially would have a material effect on an award from a departure that is shown to have a distinguishable effect is in practice not necessarily clear cut or practicable. Under either interpretation, the analysis involves the comparison of an actual and a hypothetical situation, which brings elements of uncertainty and speculation.

53. The second area where there is high level consensus between the Parties, but a diversion in implementation and application, is the scope of the right to be heard, constituting a fundamental rule of procedure. Neither party maintains that the right to be heard requires a detailed review of every argument nor the need to address every piece of evidence. The Applicants further acknowledge that while there is no explicit support in decisions of other *ad hoc* committees for the contrary view, jurisprudence of the European Court of Human Rights is instructive in determining the boundaries of what constitutes the right to fair trial. Relying on this jurisprudence, the Applicants submit that a tribunal's prerogative not to address specific arguments or evidence should be mitigated by providing reasons for not doing so.[50]

54. This Committee does not follow the Applicants in this interpretation. First, several ICSID committees have rejected the notion that tribunals are required explicitly to mention every argument or piece of evidence. As the Respondent submits, the right to be heard does not provide an unlimited opportunity to be heard.[51]

55. The tribunal is required to deal with all claims and/or defenses specifically raised for the tribunal's determination.[52] It is the tribunal's prerogative to assess the relevance and

[49] Rej., ¶55, citing *Perenco* ¶137, **RLA-9**.
[50] Reply, ¶80, citing *Klöckner*, ¶115, ALA-9
[51] Rej., ¶57, citing *Von Pezold*, ¶255, **RLA-5**.
[52] Rej., ¶61, citing *Continental Casualty*, ¶92, **RLA-7**.

importance of the issues at stake and evidence submitted. That does not, however, imply a requirement that *"a tribunal [ ] give express consideration to every argument or issue advanced by a party in support of its position in relation to a particular question*."[53] The arbiter of relevance is the tribunal, not the parties.[54]

56. The Committee is not persuaded that this approach amounts to a restrictive interpretation of the right to be heard, nor that the Respondent espouses a restrictive approach.[55] Rather, referring to the committee in *Von Pezold*, the Respondent argues that the right to be heard aims to provide parties with a reasonable and fair opportunity to present their case.[56] While a "reasonable and fair" opportunity provides discretion not to mention, analyze and/or comment on each and every piece of evidence,[57] that does not amount to a restrictive interpretation.

57. The Committee is also not persuaded by the Applicants' reliance on case law of the European Court of Human Rights to assert that the right to be heard imposes an obligation on a tribunal to provide reasons for its determination as to why certain arguments and evidence were deemed irrelevant. Such reasoning would appear to be circular. Requiring a tribunal explicitly to provide reasons why it does not consider arguments and/or evidence to be relevant erodes the tribunal's prerogative to determine which elements are relevant building blocks for its decision, and conversely, which are not. As the committee in *Enron v. Argentine Republic* observed, albeit in the context of Article 52(1)(e), "[t]he tribunal is required to state reasons for its *decision*, but not necessarily reasons for its *reasons*."[58]

58. To conclude, under Article 52(1)(d) a serious departure from a fundamental rule of procedure extends to the right to be heard. A tribunal is not required, however, explicitly to consider every argument, issue or evidentiary submission addressed by the parties, or to

[53] *Continental Casualty*, ¶92, **RLA-7**.

[54] See *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, ¶ 244, **RLA-8**; *Continental Casualty*, ¶ 97, **RLA-7.**

[55] Reply, ¶72.

[56] C-Mem., ¶43.

[57] C-Mem., ¶44, citing *InfraRed*, ¶ 771, **RLA-2**.

[58] *Enron Creditors et al. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010, ¶222, **RLA-18** ("***Enron***").

provide reasons why the tribunal has not done so. At the same time, while the tribunal has discretion to determine which arguments, issues or evidence are relevant, this does not provide a tribunal with *carte blanche* to ignore questions submitted to it, such as specific claims and defenses.

59. Consequently, it is not possible to provide comprehensive guidance in the abstract regarding the standard contained in Article 52(1)(d). Ultimately, it requires an analysis of each annulment ground invoked, in particular to distinguish between a genuine "question" or a claim presented to the tribunal, as opposed to a mere argument, or reference to a particular piece of evidence. The Committee must assess the context, the factual circumstances, and the legal rights invoked, in its interpretation and evaluation of each scenario.

60. In some cases, an applicant invoking a serious departure from a fundamental rule of procedure may also invoke the failure to state reasons on which the award is based pursuant to Article 52(1)(e), which standard will be addressed below. Reasons or the failure to provide reasons, may conceivably be a component of the analysis whether in a particular case a tribunal has violated a fundamental rule of procedure. However, the grounds for annulment under Article 52(1)(d) and (e) are distinct and it cannot be said, nor have the Applicants suggested, that the requirement to provide reasons is in and of itself a fundamental rule of procedure. Rather, to justify annulment of an award on the basis of a failure to state reasons, the requirements of Article 52(1)(e) must be fulfilled.

C. ARTICLE 52(1)(E): FAILURE TO STATE REASONS ON WHICH THE AWARD IS BASED

(1) The Applicants' Position

61. The Applicants state that the Parties are in agreement regarding the basic premise that the Article 52(1)(e) ground for annulment relates to the requirement enshrined in Arbitration Rule 47(1)(i) that the award contain the decision of the tribunal on every question submitted to it, together with the reasons on which the award is based.[59]

[59] Mem., ¶168; Rej. ¶92.

62. For the Applicants, a tribunal must provide reasons for the factual and legal premises leading to its decision. Reasons may be implicit "provided they can reasonably be inferred from the terms used in the decision."[60] But the Applicants state that a committee's authority to discern implicit reasons is limited. "[A]n *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal."[61]

63. Relying on *MINE v. Guinea*, the Applicants explain that "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."[62]

64. The Applicants also catalogue the deficiencies that they say fall within the rubric of this ground for annulment, as follows:

- *Insufficient reasons*: According to the Applicants, insufficient or inadequate reasons, which are insufficient or inadequate to explain the result arrived at by the tribunal, warrant annulment. Here the Applicants rely on the committee in *Fábrica de Vidrios Los Andes v. Venezuela*, which observed that this reasoning "is not substantially different from the holding of the *MINE* annulment committee."[63]

- *Frivolous reasons*: The Applicants refer to *Perenco v. Ecuador* for the proposition that "irrelevant or absurd arguments [] supporting a conclusion do not amount to reasons."[64]

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[60] Reply, ¶95, quoting *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 the Application for Annulment, March 18, 2022, ¶132, **RLA-20**.

[61] Reply, ¶101, *Rumeli*, ¶83, **RLA-17**. *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on the Application for Annulment, January 15, 2016, ¶ 263, **RLA-24** ("***Dogan***").

[62] Mem., ¶169, quoting *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application for Annulment, January 6, 1988, ¶5.09, **ALA-5** ("***MINE***"). Applicants' Opening Statement, slide 17.

[63] Reply, ¶¶106-108, quoting *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 the Application for Annulment, November 22, 2019, ¶121, **ALA-31** ("***Fábrica***").

[64] Reply, ¶¶109-111, quoting *Perenco*, ¶167, **RLA-9.** Applicants' Opening Statement, slide 18.

- *Contradictory reasons*: Nor can reasons be contradictory, according to the Applicants. "Insofar as there are alleged inconsistencies in an award, these cannot lead to annulment unless they are so contradictory that they cancel each other out."[65] In *Continental Casualty v. Argentina*, the committee added that "for genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision."[66]

- *Failure to address a particular question*: The Applicants agree with the Respondent that it is unreasonable to require a tribunal to address each and every argument made. But the Applicants say that a tribunal is, however, required to address all "outcome-determinative," crucial questions and arguments, meaning those that would have "altered the Tribunal's conclusions in the Award."[67]

  Critically for the Applicants, where "nothing in the text of the award makes it possible to say with certainty that the tribunal actually considered [the] question and resolved it," there has been a failure to address a particular question.[68]

- *Failure to address certain evidence*: While the Applicants confirm that a tribunal has no duty to address in the award all evidence on record, it must nonetheless address evidence that is "highly relevant" or "outcome determinative." Nor should the tribunal "simply gloss over evidence upon which the Parties have placed significant emphasis" without analysis or explanation.[69]

[65] Reply, ¶114, quoting *Cube Infrastructure*, ¶323, **ALA-26**. Applicants' Opening Statement, slide 18.

[66] Reply, ¶115, quoting *Continental Casualty*, ¶103, **RLA-7**. See also Applicants' Opening Statement, slide 18.

[67] Reply, ¶121. See also Applicants' Opening Statement, slide 19, citing *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on the Application for Annulment, October 19, 2009, ¶ 67, **ALA-32** ("***MCI***"); *Teinver*, ¶210, **RLA-27**.

[68] Reply, ¶123, citing *Klöckner*, ¶147, **ALA-9**.

[69] Reply, ¶¶124-128. Applicants' Opening Statement, slide 20, *citing TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on the Application for Annulment, April 5, 2016, ¶131, **ALA-16** ("***TECO***"), and *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Application for Annulment, May 5, 2017, ¶ 163, **ALA-33** ("***Vivendi II***").

(2) The Respondent's Position

65. The Respondent disputes the Applicants' "bold attempt to lower the standard" for annulment under this ground.[70] For the Respondent, this ground for annulment is concerned with the existence of reasons and not their quality, correctness, or persuasiveness.[71] "[T]he failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision."[72] The Respondent therefore disagrees with the Applicants' contention that other deficiencies, as set out above, may give rise to annulment under Article 52(1)(e).[73]

66. The Respondent takes particular issue with three points raised by the Applicants. First, committees need not assess the adequacy of a tribunal's reasoning. According to the Respondent, all that is required, as held by authorities on which Applicants rely, is that the tribunal explain its decision in a manner that makes it possible for the parties to understand it. For example, the *Soufraki v. United Arab Emirates* committee reached this very conclusion when it rejected an annulment application where one could "easily [ ] understand how the Tribunal reached its conclusion."[74]

67. Second, there is no obligation that a tribunal address all questions and arguments raised by a party.[75] It is telling, the Respondent says, that even though ICSID Convention Article 48(3) requires a tribunal to deal with every question submitted to it and state the reasons on which the award is based, only the failure to comply with the latter requirement was

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[70] Rej., ¶65.

[71] C-Mem., ¶50.

[72] Rej., ¶64, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Application for Annulment, July 3, 2002, ¶65, **ALA-13** ("***Vivendi I***"). Respondent disagrees with the Applicants' contention that Vivendi lowered the threshold. *See* Respondent's Opening Statement, slide 56.

[73] Rej., ¶65.

[74] Rej., ¶¶66-68; Rej., ¶67, quoting *Soufraki*, ¶134, **ALA-12**.

[75] *See* C-Mem., ¶61, citing *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, ¶133, **RLA-19** ("***Kılıç***"). See also Rej., ¶ 69.

elevated to a ground for annulment. The Respondent observes that other breaches of Article 48(3) may be addressed *via* a supplementary decision under ICSID Rule 49.[76]

68. In any event, the Respondent states that the obligation to deal with every question refers to claims and not each argument put forward in support. Tribunals possess discretion to determine which arguments in support of claims they must address expressly. Citing the decisions of prior committees, the Respondent's view is that tribunals are therefore not required to address arguments that one of the parties deems relevant to the outcome of the award.[77]

69. Third, the duty to provide reasons does not require a tribunal to address all arguments—even those on which the Parties have placed a significant emphasis—or each piece of evidence. The Respondent says that the Applicants have not rebutted this contention. The Respondent explains that it is in the tribunal's discretion to determine the probative value of evidence and to select which evidence is outcome-determinative. No authority proffered by the Applicants establishes otherwise.[78]

(3) The Committee's Analysis

70. Article 52(1)(e) of the ICSID Convention provides that a party may request annulment where "the award has failed to state the reasons on which it is based." This annulment ground corresponds to Article 48(3) of the Convention, in its second part: "the award shall deal with every question submitted to the Tribunal, and shall state the reasons on which it is based." Implementing these requirements, Arbitration Rule 47(1)(i) reads that "[t]he

[76] Rej., ¶70; Respondent's Opening Presentation, slide 47.

[77] Rej., ¶¶71-72, *citing Enron*, ¶222, **RLA-18**; Rej., ¶ 74. See Respondent's Opening Presentation, slide 59, citing *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on the Application for Annulment, February 12, 2015, ¶110, **ALA-11** ("***Tza Yap Shum***").

[78] Rej., ¶¶73-79, citing *Global Telecom*, ¶80, **ALA-22** ("[i]f a tribunal provides reasons on how and why it reached its decision, there is no room for annulment under Article 52(1)(e)"); *Rumeli*, ¶84, **RLA-17** ("there is no need explicitly to address each and every one of the arguments raised in support of the particular claims, and it is in the discretion of the tribunal not to do so"); *Fábrica*, ¶116, **ALA-31** ("lack of consideration of a question submitted to a tribunal could amount to a failure to state reasons if no reasons are given by the tribunal for not addressing the question and such question would be determinant for understanding the reasoning of the award"). See also Respondent's Opening Presentation, slide 52.

award […] shall contain […] the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based."

71. As addressed above in Section III(A), the ICSID Convention favors the finality of awards and provides only limited exceptions to that principle in the interest of fundamental procedural integrity. An annulment is not an appeal, which is of particular relevance in relation to the interpretation and application of the fifth ground for annulment, namely the failure to state reasons under Article 52(1)(e). The obligation to provide reasons for an award is a cornerstone of a tribunal's obligation. At the same time, in the ICSID system, it is not a function of a committee to conduct a review of the adequacy or correctness of the reasoning of the tribunal in rendering the Award.

72. As the committee in *Vivendi I* reasoned:

> *[T]he ground of "failure to state reasons[]" ... is not qualified by any such phrase as "manifestly" or "serious." 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. 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.*[79]

73. The decision of the committee in *MINE v. Guinea*, which both Parties have cited, refers to the obligation to state reasons as a "minimum requirement" that is not satisfied by "contradictory or frivolous" reasons.[80] Similarly, the committee in *Adem Dogan v.*

[79] *Vivendi I*, ¶¶64-65, **ALA-13**.

[80] *MINE*, ¶¶5.08-5.09, **ALA-5** ("[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention […] 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

Turkmenistan, cited by the Applicants, held that reasons that are "unintelligible or contradictory or frivolous" fall short of the Article 52(1)(e) standard as does the absence of any reasons.[81]

74. In *TECO v. Guatemala*, another case on which the Applicant relies, the *ad hoc* committee observed that

> *[A]nnulment of an award for failure to state reasons can only occur when a tribunal has failed to set out the considerations which underpinned its decision in a manner that can be understood and followed by a reader. Article 52(1)(e) may not be used so as to obtain the reversal on the merits of an award for allegedly providing incorrect or unconvincing reasons.*[82]

75. While the reader should thus be able to follow the decision, *ad hoc* committees should not impose a particular mode of expression on tribunals but should defer to their way of expressing the basis for their decisions. As articulated by the committee in *Wena v. Egypt*:

> *Neither Article 48(3) nor Article 52(1)(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 implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.*[83]

76. A specific manifestation of (potentially) failing to state reasons is providing contradictory or conflicting reasons, as the committee in *Perenco v. Ecuador* explained.[84] However, here too, committees need to be careful not to stray into an impermissible or substantive assessment of the tribunal's reasoning. A mere or apparent inconsistency is not sufficient;

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eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.").

[81] *Dogan,* ¶262, **RLA-24**.

[82] *TECO*, ¶87, **ALA-16**.

[83] *Wena*, ¶81, **ALA-4**. See also *id*., ¶83 ("The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision.").

[84] *Perenco*, ¶169, **RLA-9**; see also *MINE*, ¶5.09, **ALA-5**.

annulment may be warranted only where the contradiction in reasons is so fundamental that they "cancel each other out."[85] An annulment committee "should prefer an interpretation which confirms an award's consistency as opposed to its inner contradictions."[86] In undertaking its review, a committee must "look to the totality of an award to understand the motivation of the decision, and not just particular parts."[87]

77. First, the Committee considers that in delimiting and implementing the review envisaged by Article 52(1)(e), two aspects can be distinguished, the object of the review, and second, how fulsome the analysis by the tribunal needs to be. At the same time, in practice, including as reflected in decisions cited by the Parties, these two aspects often are conflated. Most decisions focus on the appropriateness of the *level* of review, rather than the appropriateness of the *object* of the review.

78. The Respondent refers to a tribunal's "finding" as the object of review[88] and contends that not every finding is of such significance that failing to provide reasons therefore justifies annulment.[89] Citing the committee in *Kılıç*, the Respondent submitted

> *arbitral tribunals have no obligation to expressly address, in their awards, every single issue and argument raised by the parties. Tribunals have discretion to focus on those issues and arguments that they find determinative for their decision and not to address in their awards arguments of the parties that they find to be irrelevant. Even more so, making use of that discretion is not by itself a reason for nullification under Article 52.1(e) of the ICSID Convention.*[90]

79. The Applicants emphasized the putative *decisive* nature of the "question" as establishing the threshold for which aspects of the decision may or may not justify annulment.[91]

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[85] See *Rumeli*, ¶81, **RLA-17**, *Cube Infrastructure*, ¶323, **ALA-26**, *Continental Casualty*, ¶103, RLA-7.

[86] *TECO,* ¶102, **ALA-16** (citing *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on the Application for Annulment, June 29, 2005*,* ¶81).

[87] Rej., ¶68, citing *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, April 2, 2021, ¶115, RLA-43 ("***Hydro***").

[88] C-Mem., ¶55.

[89] *Rumeli*, ¶81, **RLA-17**, referring to "an important *finding.*"

[90] C-Mem., ¶61, citing *Kılıç*, ¶133, **RLA-19**.

[91] Reply, ¶118-119, citing *Global Telecom,* ¶77*,* **ALA-22** ("the Tribunal has to deal with every question submitted to it, which, as pointed out by Prof. Schreuer, is to be understood objectively in the sense of a crucial or decisive

Invoking *TECO v. Guatemala*, the Applicants underscored need for a tribunal at least to "address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion."[92]

80. These authorities show that prior committees have imposed similar standards of review under Article 52(1)(e), whether the alleged failure to provide reasons related to an argument or to evidence. Nevertheless, in the subsequent review of the factual grounds invoked, it may be appropriate and helpful to distinguish these two elements. An alleged failure relating to the reasoning may require a different analysis than an allegation that a tribunal disregarded a fact. In practice, the latter may impact the former.

81. Second, as to the standard more generally, the Committee notes that while the text is the starting point, the text of the ICSID Convention and the Arbitration Rules do not provide complete clarity as to the legal standard, as the committee in *Hydro v. Albania* also observed. Namely, while Article 48(3) of the Convention refers to the requirement "to deal with" every question, the obligation to provide reasons refers to the award ("shall state the reasons upon which *it* is based" [emphasis added]), rather than to every *question*.[93] The text of the relevant provisions do not, therefore, provide comprehensive or unequivocal guidance as to the applicable standard.

82. Unsurprisingly, numerous decisions have addressed the interpretation of these provisions and the applicable standard, not always consistently, and in any event always in the specific context of the factual matrix at issue. While these various decisions therefore understandably differ in nuance, they generally support the proposition that there is no need for a tribunal to address every argument or piece of evidence; rather, the threshold is formed

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argument, that is one whose acceptance would have altered the tribunal's conclusions."). See also *Fábrica,* ¶116, **ALA-31**, referring to "outcome-determinative arguments" or similarly in *Teinver*, ¶210, **RLA-27,** that "a tribunal has no duty to follow the parties in the detail of their arguments, and that the sole fact of failing to address one or more of the same does not in itself entail annulment, unless the argument in question was so important that it would clearly have been determinative of the outcome."

[92] Mem., ¶175, citing *TECO*, ¶131, **ALA-16**.

[93] *Hydro,* ¶119, **RLA-43** ("a close textual reading of both Articles 48(3) and 52(1)(e) indicates that the requirement to state reasons and the right to seek annulment for a failure to state reasons, both relate back to the award. The components of the award would seem to be the questions submitted for decision, as distinct from every issue or argument raised by the parties in the proceedings.") (emphasis in original).

by "outcome determinative" questions. The Applicants' contention, by reference to text of the Convention and the Rules, that "if a Tribunal's failure to address a particular question submitted to it might have affected the Tribunal's ultimate decision, this could also amount to a failure,"[94] requires nuancing. The cases discussed, including the cases referred to by the Applicants, show the need to weigh and contextualize the significance of the question allegedly not addressed; a review which should consider the tribunal's overall award, not every reference, consideration, or component of the decision in isolation.

IV. GROUNDS FOR ANNULMENT

83. The Applicants identify eight shortcomings in the Award, which they contend amount to either a failure to provide reasons, a breach of a fundamental rule of procedure, or both.

84. For each of these eight alleged issues with the Award, the Applicants set out the relevant procedural background, the underlying facts and considerations in the Award, and the ground for annulment that is claimed. The Respondent has replied in turn. The Parties' positions are therefore summarized below.

A. GROUND 1: THE TRIBUNAL'S ALLEGED FAILURE TO ADDRESS THE ŠTĚPÁNKOVÁ FACEBOOK POST, MS. ŠTĚPÁNKOVÁ'S TESTIMONY, AND THE AFFIDAVIT OF MS. ŠTĚPÁNKOVÁ

(1) The Applicants' Position

85. The Applicants explain that Ms. Štěpánková, together with Mr. Hepner and the borough of Benice—all represented by the same attorney—filed the Annulment Request seeking to annul the Zoning Plan Change that ultimately brought about the demise of the Project. In the original proceeding, Ms. Štěpánková's motivations for joining forces with the borough were examined extensively across the written procedure and at the hearing, according to the Applicants.[95]

[94] Mem., ¶173.

[95] Mem., ¶178-201.

86. The Applicants state that in the Arbitration they argued that the borough of Benice's decision to challenge the Zoning Plan Change was not rational; instead, it was "a decision by Mayor Topičová" and "very likely an act of revenge against Projekt Sever for not agreeing to make the payments to Benice that Mayor Topičová had demanded."[96] The Applicants contend that, whereas the Respondent characterized the participation of Ms. Štěpánková more organically, and argued that she was an immediate neighbor of the Project who sought to join Benice's lawsuit out of her own self-interest, the evidence revealed that Mayor Topičová had enlisted Ms. Štěpánková and another neighbor of the Project to join the lawsuit.[97]

87. As the written procedure progressed in the Arbitration, the Claimants (now Applicants) proffered Exhibit C-183, a press interview with Ms. Štěpánková after the lawsuit had concluded in which she acknowledged that she was contacted by the borough, which "asked for help in this dispute," to seek to reverse the Zoning Plan Change.[98]

88. At the hearing, Ms. Štěpánková denied that she had been recruited to join forces with the borough and expressly disavowed the content of the press interview. At the hearing she stated, "I asked whether I could join because I found it logical."[99]

89. On May 27, 2020, after the cut off for the submission of new evidence and after the hearing, the Claimants requested leave to submit a new exhibit containing a Facebook post of Ms. Štěpánková ("Facebook Post"). This exhibit, an April 2, 2015 post on the Facebook page of the Mayors and Independents Political Party, contains a statement by Ms. Štěpánková that "Benice borough knew that if it went into the court case alone it didn't have much chance of winning, so Mrs Topičová asked two owners of neighboring properties (me and Mr Hepner) for help."[100]

[96] Mem., ¶181.

[97] Mem., ¶¶182-183.

[98] Mem., ¶184.

[99] Mem., ¶186, citing Merits Hr. Tr., January 28, 2020, 659:22-25, **A-30**.

[100] Mem., ¶188, citing Štěpánková Facebook Post, April 2, 2015, **A-18** (Exhibit C-219 in the original proceeding).

90. The Tribunal, in its Procedural Order No. 5 ("PO5"), permitted the Facebook Post to be entered into the record as Exhibit C-219 together with an affidavit to be prepared by Ms. Štěpánková addressing the evidence. The Tribunal explained its decision,

> *[T]he Knew Evidence pertains to facts which are prima facie relevant and material to the case, because Ms. Štěpánková's testimony could clarify the dispute between the Parties regarding the real motives behind Mayor Vera Topičová's decision to file the lawsuit that eventually resulted in the annulment of the zoning plan change.*[101]

In accordance with PO5, the Facebook Post was produced and Ms. Štěpánková proffered an affidavit addressing this evidence.[102]

91. In subsequent Post-Hearing Briefs, the Claimants explained that this evidence showed that the Annulment Request was filed at the sole initiative of the mayor. Indeed, neither Ms. Štěpánková nor Mr. Hepner had participated in the zoning plan change process by submitting comments to the borough opposing the change. Nor did they undertake factual inquiries, consult their own lawyers or share in the costs of Benice's lawyer.[103]

92. Critically, the Applicants observe that the Facebook Post and affidavit were referenced only once in the Award—in the procedural history describing PO5. They also observe that Ms. Štěpánková's name was mentioned only once in the Award—in the statement of facts. The Tribunal did not otherwise address the Facebook Post, the affidavit, or Ms. Štěpánková's testimony at the hearing in the Award.[104]

93. For the Applicants, despite that this evidence was duly before the Tribunal, the Award made factual findings that are inconsistent with it. For example, the Facebook Post shows that it was the mayor who made the decision to file the Annulment Request, and not Ms. Štěpánková or Mr. Hepner. The Applicants observe that the Tribunal found the opposite to be true: "But then the District of Benice, led by Mayor Topičová, and two residents of

[101] Mem., ¶190, citing PO5, June 16, 2020, ¶13, **A-40** ("**PO5**").
[102] Mem., ¶192.
[103] Mem., ¶¶193-194.
[104] Mem., ¶¶202-203.

Urhineves (and immediate neighbors to the Project area), decided to file the Annulment Request."[105]

94. The Applicants go on to explain the consequence of the failure of the Tribunal to include this evidence in the Award and address it; namely, the Tribunal found no breach of Article 4(1) of the Treaty for arbitrary conduct based on its conclusion that the borough acted in concert with Ms. Štěpánková and Mr. Hepner.[106]

95. The Tribunal was also not persuaded by the Claimants that the decision to file the Annulment Request was an arbitrary act due to the personal retaliation of the mayor. It went on to state, "[i]f this were indeed the case, such conduct could constitute a breach of the FET standard enshrined in Article 4 of the BIT."[107] On this basis, the Applicants insist that had the Tribunal considered this evidence, it would have found a violation of Article 4.[108]

96. The Applicants seek annulment on two grounds for the Tribunal's failure to address the Štěpánková Facebook Post, her testimony, and her affidavit. Each is addressed in turn in the paragraphs that follow.

97. First, the Applicants seek annulment under Article 52(1)(e) for the Tribunal's failure to state reasons on which the Award was based, i.e., the Tribunal's failure to address the evidence at issue and its failure to deal with every question submitted to it.[109]

98. On the Tribunal's alleged failure to address the evidence, the Applicants recall, as stated in *TECO v. Guatemala*, that a tribunal cannot be expected to address each and every piece of evidence in the record—but that this "cannot be construed to mean that a tribunal can [] gloss over evidence upon which the Parties have placed significant emphasis, without any

[105] Mem., ¶¶209, quoting *Pawlowski* Award, ¶377, **A-1**.
[106] Mem., ¶210.
[107] Mem., ¶211, quoting *Pawlowski* Award, ¶397, **A-1**.
[108] Mem., ¶222.
[109] Mem., ¶224.

analysis [or] explanation [as] to why it found that evidence insufficient, unpersuasive or [] unsatisfactory."[110]

99. The Applicants stress that this is exactly what happened in the Award. For the Applicants, evidence regarding Ms. Štěpánková was addressed by both Parties in every merits submission and was the focus of a post-hearing procedure dedicated to the entry into the record of the Facebook Post and the affidavit.[111]

100. The Applicants insist, "[i]n fact, there is no other evidence that the Parties and the Tribunal paid so much attention to."[112] As such, the Facebook Post, the affidavit, and Ms. Štěpánková's testimony falls under "evidence upon which the Parties have placed significant emphasis."[113] Yet the Tribunal did not consider this evidence in the Award nor explain why it was disregarded. Thus, the Tribunal violated its duty to "at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion."[114]

101. The Applicants go on to explain that examination of this evidence could have been outcome-determinative in that the Tribunal could have found a violation of Article 4(1) of the Treaty. It also could have impacted the Tribunal's decision on reparations as the Tribunal itself noted that the proposed quantification of damages accounted for the filing of the Annulment Request by Benice.[115]

102. Critically, the Applicants recall that the Tribunal concluded there was no evidence that the filing of the Annulment Request was a retaliatory act by the mayor or otherwise arbitrary. It then stated, as noted above, "[i]f this were indeed the case, such conduct could constitute a breach of the FET standard enshrined in Article 4 of the BIT."[116] It is the Applicants' position that the evidence at issue proved that "it [was] indeed the case" that the act was

[110] Mem., ¶225, citing *TECO*, ¶131, **ALA-16**. Applicants' Opening Statement, slide 31.
[111] Reply, ¶135.
[112] Mem., ¶229.
[113] Mem., ¶230, citing to *TECO*, **ALA-16**.
[114] *TECO*, ¶232, **ALA-16**.
[115] Mem., ¶¶233-234; Hr. Tr. 22:6-9.
[116] Reply, ¶147, quoting *Pawlowski* Award, ¶ 397, **A-1**.

retaliatory and arbitrary in breach of the FET standard, and the Tribunal logically would have reached this conclusion if it had taken the evidence at issue into account.[117]

103. The Applicants recall that there are numerous prior decisions that support the proposition that annulment for a failure to state reasons could be warranted where the tribunal does not address outcome-determinative evidence.[118]

104. Additionally, the Applicants explain, the Committee need not establish what potential effect consideration of the evidence at issue would have had on the Tribunal's ultimate decision, "[w]hat can be ascertained at the annulment stage is that the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case."[119]

105. For the avoidance of doubt, the Applicants reject the Respondent's contention that this line of argumentation is raised for the first time in the annulment proceeding.[120]

106. Second, the Applicants seek annulment, again under Article 52(1)(e), on the basis that, in connection with the Štěpánková evidence, the Tribunal failed to address a particular question, while Applicants maintain that it is required that the Tribunal deal with every question submitted to it.[121]

107. The Applicants say that there was a dispute over the motives behind the mayor's decision to file the Annulment Request and also over Ms. Štěpánková's decision to join the lawsuit. The Applicants recall that the Claimants asserted that the mayor manipulated Ms. Štěpánková and Mr. Hepner into participating in the Annulment Request. The Respondent, on the other hand, maintained that it was Ms. Štěpánková who decided to join the Annulment Request of her own volition due to concerns about the size of the Project.[122]

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[117] See Reply, ¶151. Hr. Tr. 23:8-16.

[118] Reply, ¶143, citing *TECO*, ¶, **ALA-16**; *Vivendi I*, ¶163, **ALA-13**; *Fábrica*, ¶118, **ALA-31**; *Teinver*, ¶210, **RLA-27**; *Tza Yap Shum*, ¶110, **ALA-11**.

[119] Mem., ¶235, citing *TECO*, ¶131, **ALA-16**.

[120] Reply, ¶¶151-156.

[121] Mem., ¶237.

[122] Mem., ¶239.

108. The Applicants state that the Tribunal was well aware of this dispute and went so far as to record in PO5, "Ms. Štěpánková's testimony could clarify the dispute between the Parties regarding the real motives behind Mayor Topičová's decision to file the lawsuit."[123] This is a dispute that the Tribunal did not ultimately resolve, say the Applicants.

109. The Applicants rely on *Duke Energy v. Peru*, *EDF v. Argentina*, and *MCI v. Ecuador*, which concurred in the view that, if the failure to address a particular question might have affected the Tribunal's ultimate decision, then annulment under Article 52(1)(e) could be warranted.[124] Indeed, for the Applicants, had the Tribunal resolved this question, its ruling on Article 4(1) could have resulted in a finding of a violation of Article 4(1) and an award of damages.

110. Critically, the Applicants, citing *Klöckner v. Cameroon*, maintain that there is nothing in the text of the Award that explains that this question was considered by the Tribunal in reaching its conclusion on the alleged breach of the FET standard. For the Applicants, the Tribunal's considerations on this key issue are opaque and therefore the Tribunal failed to address this particular question pursuant to Article 52(1)(e).[125]

111. Third, the Applicants seek annulment under Article 52(1)(d) for a serious departure from a fundamental rule of procedure for a violation of their right to be heard.[126]

112. The Applicants state that it is established that a party is "heard" when its observations are properly examined by the decision-making authority.[127] To establish annulment on this ground the Tribunal's failure must be "serious," meaning that it must have produced a

[123] Reply, ¶175, quoting PO5, ¶13, **A-40**.

[124] Mem., ¶286, citing *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on the Application for Annulment, March 1, 2011, ¶228, ALA-14 ("**Duke**"); *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 the Application for Annulment, February 5, 2016, ¶¶197-198, **ALA-15** ("***EDF***"); Reply, ¶168, citing *MCI*, ¶67, **ALA-32**.

[125] Reply, ¶¶182-185, citing *Klöckner*, ¶150, **ALA-9**. See also Applicants' Opening Statement, slide 33

[126] Mem., ¶246.

[127] Reply, ¶189.

material impact on the Award or had the potential of causing the tribunal to render an award substantially different from what it actually decided.[128]

113. Referring to *Perenco v. Ecuador*, the Applicants argue that while the failure to provide reasons is a distinct ground for annulment, a failure by a tribunal to consider one of the questions submitted to it for decision, such as a specific defense raised by the respondent could amount to a serious departure from a fundamental rule of procedure.[129]

114. As stated above, according to the Applicants, if the Tribunal had "heard" the evidence in the record and the arguments, there was the potential that the Tribunal would have reached a substantially different outcome—finding of a violation of Article 4(1) and ordering accompanying reparations.[130]

(2) The Respondent's Position

115. It is the Respondent's position that no annulment can arise from the Tribunal's purported failure to address the Facebook Post, the hearing testimony and the affidavit of Ms. Štěpánková.

116. First, as matter of law, the Respondent contends that a failure to address evidence in the record is not a failure to state reasons pursuant to Article 52(1)(e). The Tribunal was under no obligation to "justify" its choice as to which evidence it found to be relevant and which it found not to be relevant. The Respondent points to the Applicants' own authorities, *Tza Yap Shun v. Peru* and *TECO v. Guatemala*, for the proposition that there is no basis for annulment where the Tribunal did not explain why it rejected evidence that was not relevant or outcome-determinative.[131] A tribunal has the discretion to choose the evidence which it deems most relevant.[132]

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[128] Mem., ¶254, citing *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Application for Annulment, February 21, 2014, ¶99, **ALA-7**; *Tulip*, ¶78, **ALA-8**; Reply, ¶194.

[129] Reply, ¶199, *Perenco*, ¶125, **RLA-9**and *Continental Casualty*, ¶97, **RLA-7**.

[130] Reply, ¶¶201-202.

[131] C-Mem., ¶¶75-78.

[132] See Respondent's Opening Presentation, slide 59, citing *Tza Yap Shum*, ¶110, **ALA-11.**

117. Second, as a matter of fact, the evidence at issue here was not "evidence upon which the parties have placed significant emphasis."[133]

118. The Respondent argues that the Applicants' position that "there was no other evidence that the Parties and the Tribunal paid so much attention to" is "nonsense."[134] That the Facebook Post and affidavit flowed from a procedural order issued after the cutoff date for new evidence and after the hearing is of the Applicants' own doing, according to the Respondent. It is not an indication of the importance or relevance of this evidence to the Tribunal; rather, the Respondent raised a procedural objection to the admission of the Facebook Post and affidavit.[135]

119. Nor is it relevant, according to the Respondent, that the Parties discussed Ms. Štěpánková's involvement with regard to the Annulment Request throughout the pleadings or that the Respondent raised an objection to the evidence. Her involvement was one of many issues discussed by the Parties, and it was only logical that it was addressed during the written procedure. The objection and the submission of her affidavit were merely an exercise of the Respondent's procedural rights. These steps do not indicate that the evidence at issue was given "particular emphasis."[136]

120. It is the Respondent's view that the Tribunal never accorded the Facebook Post any special relevance or materiality.

> *When a tribunal orders the production of a document, it does so on the assumption that it may be relevant to the issues in dispute. It is only after having received it, and having heard the arguments of the Parties, that, in the exercise of its discretionary power under ICSID Arbitration Rule 34(1), it evaluates its probative value . . . . The fact that the Tribunal does not refer to it specifically in its reasoning implies that it did not consider it to be material.*[137]

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[133] C-Mem., ¶79.

[134] C-Mem., ¶80.

[135] C-Mem., ¶¶81-82; Rej., ¶88.

[136] Rej., ¶¶90-94.

[137] C-Mem., ¶84, quoting *Tulip*, ¶150, **ALA-8**.

Thus, the Tribunal's acceptance of the evidence into the record is neither an admission by the Tribunal of its importance nor an obligation to address the evidence in the Award.[138]

121. Third, the Respondent observes that the significance of the Facebook Post and affidavit cannot rightly be compared to the evidence at issue in *TECO v. Guatemala*. In that case, the tribunal had failed to address four quantum expert reports, wrongly held there was no such evidence on record, and rejected the investor's claim for loss of value.[139] This case is distinguishable.[140]

122. In the present case, the Tribunal did not disregard any key evidence or wrongly hold no such evidence existed. Instead, the Respondent states that the Tribunal amply justified its conclusions that the District of Benice's filing of the Annulment Request did not constitute a personal and retaliatory decision by the mayor against the Claimants, and, hence, that it did not constitute a breach of Article 4(1). It employed its discretion not to refer to this evidence because it was not material to its decision—this was implicit in the Tribunal's choice not to refer to it.[141] The evidence relating to Ms. Štěpánková was "not relevant or necessary for [the Tribunal's] analysis."[142]

123. Fourth, and in any event, nor was the evidence in question "highly relevant and outcome determinative" in and of itself. The Respondent states that the evidence does not show "personal retaliation" of the mayor. For the Respondent, the Facebook Post shows that Ms. Štěpánková was "happy to have helped in the case and pleased with its outcome."[143] From this evidence, the Respondent insists that it is "simply impossible" to conclude from that the Tribunal would have found that the filing of the Annulment Request was an act of personal retaliation by the mayor, as argued by the Applicants.[144]

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[138] C-Mem., ¶84.

[139] C-Mem., ¶¶85-86, citing *TECO*, ¶¶130-131, **ALA-16**.

[140] Rej., ¶¶86-91.

[141] C-Mem., ¶88.

[142] C-Mem., ¶89, quoting *TECO*, ¶249, **ALA-16**.

[143] Rej., ¶98, Affidavit of Ms. Silvie Štěpánková, June 29, 2020, ¶9, **A-41**.

[144] Rej., ¶99.

124. Even if the Tribunal had concluded that Mayor Topičová had taken the initiative to contact Ms. Štěpánková, that would not have changed the Tribunal's overall conclusion on this point. The Respondent observes that the Tribunal, with all the evidence before it, found that,

> *[T]he decision to file the Annulment Request was taken by the democratic organ of the District of Benice, its Assembly, not by Mayor Topičová singlehandedly; there is no evidence that the Assembly was aware of Mayor Topičová's unsuccessful efforts to extract funds from the developer and there is no evidence that the Assembly's motives were to retaliate against the investor.*[145]

Additionally in this regard, both the Assembly and the Courts provided reasoned decisions for their findings nullifying the Zoning Plan Change; there was thus no evidence of retaliation by these organs either.[146]

125. As to the alleged "failure to address a particular question"—an alternative ground for annulment under Article 52(1)(e)—the Respondent avers that this is simply a repackaging of the alleged failure to address evidence. As a matter of law, the ICSID Convention requires only that a tribunal address every claim submitted by a party, and not every argument—put forward in support of every claim.[147]

126. This approach was confirmed by the committees in *Duke Energy v. Peru* and *EDF v. Argentina*. In *Duke Energy v. Peru* in particular, the committee stated that a failure to address a specific argument can give rise to annulment only when it renders the award unintelligible.[148] The Respondent also asserts that there is also no obligation on a tribunal to "explain why it rejected arguments or authorities that were not relevant or necessary for its analysis."[149]

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[145] Rej., ¶102, quoting *Pawlowski* Award, ¶398, **A-1**.

[146] Rej., ¶102-105.

[147] C-Mem., ¶¶90-91; Rej., ¶¶108, 111.

[148] C-Mem., ¶93, citing *Duke*, ¶228, **ALA-14**; *EDF*, ¶197, **ALA-15**; Rej., ¶114

[149] Rej., ¶112, citing *TECO*, ¶249, **ALA-16**.

127. As a matter of fact, according to the Respondent, the "particular question" put forward by the Applicants—how Ms. Štěpánková joined the Annulment Request and the mayor's motives for filing it—was indeed addressed by the Tribunal.[150]

128. But in any event, this is not a "particular question," instead it was an argument put forward in the context of the Applicants' claim that the filing of the Annulment Request was an act that breached Article 4 of the Treaty.[151]

129. The Tribunal provided reasons for rejecting this claim, addressing in detail its finding that the filing of the Annulment Request was not retaliatory against Mr. Pawlowski. For the Respondent, the Tribunal's reasoning in this regard "is perfectly clear." It stated, "it was not persuaded by that argument" and went on to list "three reasons" for reaching this conclusion.[152]

130. The Respondent says that the Tribunal was under no obligation to address the Applicants' sub-argument regarding Ms. Štěpánková's own initiative to join the lawsuit.[153] In any event, the Respondent recalls that the Tribunal did address this issue by discussing her meeting with the mayor to discuss the potential for her to join in the Annulment Request. Here, the Tribunal examined Ms. Štěpánková's own testimony and the Minutes and Resolution of the June 21, 2012, Benice District Assembly meeting. These were indeed mentioned only in the Tribunal's statement of facts, but that is of no moment as regards the Applicants' position because an Award must be examined in its entirety.[154]

131. The Applicants have also failed to show how this point was "outcome determinative" in the first place.[155] The Respondent rejects the Applicants' contentions that "[n]egotiations held by Mayor Topičová with Mr. Hepner, Ms. Štěpánková and Mr. Bernard took place outside any proper procedure and without any authorisation" and that, "had the Tribunal

[150] C-Mem., ¶94.
[151] C-Mem., ¶95.
[152] Rej., ¶¶114-115.
[153] C-Mem., ¶96.
[154] Rej., ¶¶117-119; see *Hydro*, ¶115, **RLA-43**; *Teinver*, ¶209, **RLA-27**.
[155] C-Mem., ¶97.

addressed this question it could have found violation of Article 4(1) of the BIT and could have awarded the damages claimed."[156]

132. The Respondent contends that this is an entirely new argument that was never advanced in the original proceeding and may not be raised for the first time in the annulment phase.[157]

133. For the Respondent, the Tribunal addressed the question before it and concluded that the decision to file the Annulment Request was taken by the District of Benice's Assembly "adhering to proper administrative procedure" and not by personal retaliation of the mayor.[158] Even if the Tribunal had found retaliation by the mayor, the evidence with regard to the District of Benice's Assembly would still stand—and the Tribunal found no motive on the part of the Assembly to retaliate.[159]

134. The Respondent also rejects the Applicants' contention on annulment that the Tribunal's alleged failure to address the Facebook Post, the affidavit, and Ms. Štěpánková's oral testimony is a violation of the Applicants' right to be heard justifying annulment under Article 52(1)(d).[160]

135. As a matter of law, the Respondent observes that the Applicants cannot invoke the Tribunal's purported failure to state reasons to allege a departure from a fundamental rule of procedure. The two grounds for annulment are distinct. In this regard, the Respondent points to the decision of the *Tulip v. Turkey* committee in support of the view that "[t]he right to be heard refers to the opportunity given to the parties to present their position. It does not relate to the manner in which tribunals deal with the arguments or evidence presented to them."[161]

136. As a matter of fact, the Respondent's view is that the Applicants were given a full opportunity to present their evidence concerning Ms. Štěpánková. Evidence such as the

[156] C-Mem., ¶98, citing Mem., ¶¶221-244.
[157] C-Mem., ¶99.
[158] C-Mem., ¶100, citing *Pawlowski* Award, ¶¶390, 398, **A-1**.
[159] Rej., ¶122.
[160] C-Mem., ¶101.
[161] C-Mem., ¶104, quoting *Tulip*, ¶82, **ALA-8**.

Facebook Post was entered into the record, specifically and at the Applicants' behest, after the hearing. The Respondent adds that the Applicants conceded that evidence regarding Ms. Štěpánková was addressed "in every submission on the merits."[162]

137. The Respondent goes on to say that even assuming the Tribunal's treatment of evidence concerning Ms. Štěpánková was a departure from a fundamental rule of procedure, it was not a "serious" departure. Specifically, the Respondent explains that the motives behind Ms. Štěpánková's decision to join the lawsuit was not relevant to, and thus could not have altered, the Tribunal's conclusions that the District of Benice's decision to file the Annulment Request was not arbitrary. Nothing in the evidence at issue suggests that the borough's filing of the Annulment Request resulted from a retaliatory personal decision of the mayor, according to the Respondent.[163]

(3) The Committee's Analysis

138. The first annulment ground goes to the heart of the dispute before the Committee, and at the same time goes to the core of the Tribunal's decision that while Benice's conduct constituted a breach Article 4 of the BIT,[164] the wrongful conduct attributable to the Czech Republic, consisting in the Mayor of Benice's irregular and improper requests for payments, did not cause any harm to Claimants.[165]

139. The Applicants, in paraphrasing the Award[166] state that "the Tribunal ruled that the Czech Republic breached Article 4 of the BIT by the conduct of Mayor Topičová, who made unreasonable requests for Claimants to make certain payments." The Award, however, is more nuanced in a material respect, namely in that the Tribunal considered that the relevant question was "whether the payment requests made by Mayor Topičová, *on behalf of the district of Benice*, constitute an unreasonable measure" resulting in a breach of Article 4 of the BIT.[167] The Tribunal expressed sympathy for Mr. Pawlowski's predicament, "even

[162] C-Mem., ¶107; Rej., ¶126.
[163] C-Mem., ¶¶108-109; Rej., ¶¶127-128.
[164] *Pawlowski* Award, ¶362.
[165] Mem., ¶16; see also *Pawlowski* Award, ¶732.
[166] Mem., ¶16.
[167] *Pawlowski* Award, ¶361 (emphasis added).

accepting that Mayor Topičová's aim was to obtain monies for the benefit of Benice district."[168] It further considered that it was not fair that investors be put in a position where they are requested by a public authority to make payments to secure progress of their projects, "regardless of the motives or the intended use of any funds paid or sought to be procured."[169]

140. The Applicants submit that the Claimants argued that the decision to challenge the Zoning Plan Change was not rational; instead, it was "an act of revenge against Projekt Sever for not agreeing to make the payments to Benice that Mayor Topičová had demanded."[170] In the Annulment proceedings, the Applicants invoke the Štěpánková Facebook Post (Exhibit C-219), Ms. Štěpánková's testimony and her Affidavit, in support of their allegation that the evidence shows that the Annulment Request was filed at the sole initiative of the Mayor, and that the Award made factual findings that are inconsistent with the evidence.

141. Before addressing the specific elements of this annulment ground, the Committee recalls that the Tribunal considered it immaterial what were the motives or the intended uses of any funds paid or sought to be procured.[171] Consequently, any discussion by the Committee about such motives, findings, or considerations relating thereto which may or may not be inconsistent is *a priori* irrelevant.

142. The Applicants argue, first, that the Tribunal's failure to address the evidence regarding Ms. Štěpánková constitutes a failure to state the reasons on which the Award was based,[172] as this constitutes evidence on which the Parties have placed significant emphasis. The Committee must first assess what exactly is meant by "the evidence regarding Ms. Štěpánková"[173] because there are three distinct components of this evidence (the Affidavit,

[168] *Pawlowski* Award, ¶368.
[169] *Pawlowski* Award, ¶372.
[170] Mem., ¶181.
[171] *Pawlowski* Award, ¶372.
[172] Mem., ¶224.
[173] Mem., ¶227.

the testimony and the Facebook Post) and the argumentation in relation to each is not necessarily identical.

143. The first level of argumentation is that there is no reference to any aspect of the Štěpánková evidence. However, as the Respondent points out, the Tribunal did cite the statement of Ms. Štěpánková and referred to her oral testimony in paragraph 121 of the Award[174] so this argument appears to lack a factual basis. In relation to the Facebook Post, the Applicants submit that the only reference to that Post is in the procedural section of the Award (and that that does not suffice). This goes to the extent of the Tribunal's reasoning, which is the Committee addresses below.

144. The second level of argumentation relates to the issues on which the disputed evidence may have some bearing. More specifically, the Applicants contend that the Tribunal's decision, insofar as it deals with the issues on which the disputed evidence might have shed light, is inconsistent ("It is more than clear that Tribunal's reasoning in the Award makes factual findings that are completely inconsistent with this evidence."[175]). In addition, the Applicants contend that there is no indication that Mayor Topičová was authorized by the Benice District Assembly to negotiate with residents, including Ms Štěpánková.[176]

145. While similar procedural requirements may apply, it is important to distinguish whether the alleged failure of the Tribunal relates to failing to address a piece of evidence or failing to address an argument. As set out above, an allegation that a tribunal disregarded a fact, may require a different analysis than an alleged failure to provide reasoning (see above para. 80). In this case, the Applicants amalgamate the alleged failure to refer to one or more pieces of evidence and the failure of the Tribunal to do justice to the substance of the Applicants' argumentation, including by being inconsistent.

146. The Committee now turns to the thrust of the Applicants' submissions. The Applicants submit that the Tribunal's failure to address the three components of the Štěpánková

[174] Rej, ¶117.
[175] Mem., ¶205.
[176] Mem., ¶219.

evidence resulted in a failure to address certain evidence upon which the Parties have placed significant emphasis, applying the standard laid down in *TECO v. Guatemala*. In this context, the Committee recalls its observation that the Applicants' argument is not simply that the Tribunal failed to address one or more pieces of evidence; rather, they take issue with the reasoning regarding certain issues which they say the pieces of evidence may have some bearing on.

147. The Committee agrees with the Respondent that there is no support for the proposition that the evidence at issue here was evidence upon which the Parties have placed significant emphasis during the Arbitration, such that the reasoning of *TECO* that is invoked by the Applicants should be applied here.[177] There was a procedural skirmish over the production of documents, which led to the Tribunal's admission into the record of a document that had been in existence for some time. This is not a situation in which the Parties (plural) deemed a piece of evidence to be highly relevant to their case. Rather, the Applicants seek support in the evidence, and more specifically in the apparent inconsistency in what may or may not be a material point (namely, who approached whom as to filing or rather joining the Annulment Request), as a building block for arguing that Mayor Topičová acted on her own behalf, without any authorization of the Benice District Assembly and without its knowledge.[178]

148. On its face, it is difficult to see how the Facebook Post and other evidence in any way provide direct support for this allegation. The Applicants contend that there is no indication that Mayor Topičová was authorized by the Benice District Assembly to negotiate with Ms. Štěpánková and Mr. Hepner until June 21, 2012, or even that the Benice District Assembly was aware of Mayor Topičová's actions and negotiations until June 21, 2012. The disputed evidence is at best tangentially relevant to the issue or issues addressed by the Applicants. In any event, one cannot turn a negative (the absence of a showing of authorization or awareness) into a positive conclusion (the showing of a lack of procedure or authorization). There is no support therefore for the conclusion that "[n]egotiations held

[177] C-Mem., ¶¶85-89.

[178] Mem., ¶212.

by Mayor Topičová with Mr. Hepner, Ms. Štěpánková and Mr. Bernard took place outside any proper administrative procedure and without any authorisation from the Benice District Assembly or of any other administrative body."[179]

149. However this may be, the review called for in assessing whether a tribunal has failed to state reasons is not an invitation for an annulment committee to explore "what if" scenarios. The reader should be able to follow a decision, and it is appropriate to defer to the tribunal's preferences in expressing the basis for its decision. As stated above (see para. 75), the committee in *Wena v. Egypt* considered that a tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision. The Committee is of the view that the decision not to address the Facebook Post and other new evidence implies a finding that they were not material to the Tribunal's decision.

150. The decision under review here is the conclusion as regards a breach of Article 4 of the BIT.[180] The Tribunal considered the Claimants' contentions that the decision to file the Annulment Request was a personal decision of Mayor Topičová, adopted as a retaliation for Claimants' refusal to pay the additional sums that she had sought to extract from them,[181] and stated that if this were indeed the case, such conduct could constitute a breach of the FET standard enshrined in Article 4 of the BIT.[182]

151. The Tribunal identified three reasons that, in its view, undermined Claimants' argument:

- the decision to file the Annulment Request was taken by the democratic organ of the District of Benice, its Assembly, not by Mayor Topičová singlehandedly; there is no evidence that the Assembly was aware of Mayor Topičová's unsuccessful efforts to extract funds from the developer and there is no evidence that the Assembly's motives were to retaliate against the investor;

[179] Mem., ¶221.
[180] *Pawlowski* Award, ¶409.
[181] *Pawlowski* Award, ¶396.
[182] *Pawlowski* Award, ¶397.

- the Assembly justified its decision with the arguments which the Tribunal considered to ring true; and

- the subsequent judgments rendered by the Courts "retroactively justified" the District's decision: the Zoning Plan Change was indeed held to be illegal and lacking in proper reasoning, as the District had been claiming.[183]

152. This reasoning cannot be said to fall short of the standard imposed by Article 52(1)(e). The reasoning can be followed, and it is not for the Committee to review the decision as if it were an appeal. It is also not the role of an *ad hoc* committee to review the correctness or persuasiveness of the reasoning.

153. The Applicants' arguments (lack of indication that Mayor Topičová was authorized to file the Annulment Request, and no sign that the Assembly was aware of her actions and negotiations until June 21, 2012)[184] relate to the first building block of the Tribunal's reasoning, namely that the filing of the Annulment Request was not shown to be a personal and retaliatory decision by the mayor against the Claimants. First, as considered above, as a matter of logic, there is no support for the conclusion that "[n]egotiations held by Mayor Topičová with Mr. Hepner, Ms. Štěpánková and Mr. Bernard took place outside any proper administrative procedure and without any authorisation from the Benice District Assembly or of any other administrative body."[185] Regardless, the first building block of the Tribunal's decision in relation to its conclusion that there was no breach of Article 4 of the BIT is not negated by the Štěpánková evidence. Moreover, considering the three reasons contained in paragraph 398 of the Award as set out above, even if there were support for the Applicants' allegation that the decision to file the Annulment Request was motivated by Mayor Topičová's desire for personal retaliation, this would have no bearing on the second and third justification identified by the Tribunal.

[183] *Pawlowski* Award, ¶398.
[184] Mem., ¶212.
[185] Mem., ¶221.

154. In so far as the Applicants contend that the Tribunal's reasoning was contradictory, the Committee reiterates that committees need to be careful not to stray into an impermissible or substantive assessment of the tribunal's reasoning. A mere or apparent inconsistency is not sufficient; only where the contradiction in reasons is so fundamental that they "cancel each other out" may annulment be warranted.[186] In this case, the Applicants have not pointed to such inconsistency in the Award. The Applicants have referred to the (potential) inconsistency of some of the evidence (that Applicants alleged to be relevant) with the Tribunal's findings. However, such an assessment is not within the mandate of the Committee under the standards embodied in Article 52(2)(e). Rather, it is the reasoning of the Award and any inconsistency therein that might justify annulment.

155. The Applicants' second prong of the first annulment ground is that in failing to decide what the motives were behind the Mayor's decision to file the Annulment Request and also Ms. Štěpánková's decision to join the lawsuit, the Tribunal failed to address a particular question. In support, the Applicants refer to the wording of PO5, by which the Tribunal allowed Claimants to submit the Facebook Post, stating that "the New Evidence pertains to facts which are prima facie relevant and material to the case, because Ms. Štěpánková's testimony could clarify the dispute between the Parties regarding the real motives behind Mayor Topičová's decision to file the lawsuit that eventually resulted in the annulment of the zoning plan change."[187]

156. This ground is a variation of the previous ground, focusing on the failure specifically to decide on the motives of Mayor Topičová in deciding to file the lawsuit and of Ms. Štěpánková in deciding to join the Annulment Request. As with the first ground, this ground fails because it does not take as the starting point the Award and the actual decision of the Tribunal regarding the claim before it but rather a hypothetical scenario developed by the Applicants.

157. In issuing its PO5, the Tribunal may well have envisaged the possibility that new evidence would shed light on the motives to file the lawsuit. Be that as it may, and regardless of

[186] See *Rumeli*, ¶81, **RLA-17**, *Cube Infrastructure*, ¶323, **ALA-26**, *Continental Casualty*, ¶103, **RLA-7**.
[187] PO5, **A-40**.

whether the document admitted into the record (Exhibit C-219) could be seen to shed any light on such motives, in the Tribunal's reasoning "the real motives" were not in fact a building block for its decision. It is the prerogative of the tribunal to shape the decision and to determine the relevance if any of evidence submitted for its decision.

158. Furthermore, as the committee in *Tulip* observed,

> *[w]hen a tribunal orders production of a document, it does so on the assumption that it may be relevant to the issue in dispute. Whether it is, the tribunal can only determine after review of the document, in the context of the parties' arguments, that it evaluates its probative value in the exercise of its discretionary power under ICSID Arbitration Rule 34(1). […] The fact that the Tribunal does not refer to it specifically in its reasoning implies that it did not consider it to be material.* [188]

159. In the present case, the Tribunal's evaluation of Exhibit C-219 and its potential relevance was subsequent to the Tribunal's procedural decision to admit the exhibit into the record, and the Tribunal was entitled, at its discretion, to omit any express reference to that exhibit or any other document that the Tribunal did not deem to be material. In any event, the Tribunal's conclusion that the Applicants had failed to establish a violation of Article 4(1) of the BIT in connection with the Annulment Request was based on a three-tier decision as set out above, with the second and third tier reasoning not affected by issues of the potential motives at the time of filing of lawsuit.

160. The Applicants' third prong of the first annulment ground takes their argument one notch further by arguing that the Tribunal's failure to address the Štěpánková evidence, as well as the Claimants' arguments in relation thereto, independently constitutes a breach of the right to be heard under Article 52(1)(d). While this right does not imply the need to address every argument and every piece of evidence, the Applicants submit that the right to be

[188] *Tulip*, ¶150, **ALA-8** ("[w]hen a tribunal orders production of a document, it does so on the assumption that it may be relevant to the issue in dispute. Whether it is, the tribunal can only determine after review of the document, in the context of the parties' arguments, that it evaluates its probative value in the exercise of its discretionary power under ICSID Arbitration Rule 34(1). […] The fact that the Tribunal does not refer to it specifically in its reasoning implies that it did not consider it to be material."). See Respondent's Opening Statement, slide 60.

heard imposes the obligation to provide reasons why the tribunal does not consider these arguments and evidence relevant.[189]

161. The Committee finds that the Tribunal has not departed from the fundamental rule of a right to be heard in not addressing expressly the Štěpánková evidence.[190] Specifically, as set out above (see para. 57), the Committee is not persuaded by the suggestion that the right to be heard imposes an obligation on a tribunal to provide reasons why it does not consider arguments and evidence relevant, which would essentially amount to circular reasoning eroding the tribunal's right to determine which elements are relevant building blocks for its decision, and conversely, which are not. As noted above, a tribunal must provide reasons for its award, not reasons for its reasons.[191]

162. More generally, the Committee is of the view that the Applicants have not established that they were denied a "reasonable and fair" opportunity to present their case in the Arbitration.[192] As set out in relation to the first and second prong of this annulment ground, the Applicants' contentions in relation to the Štěpánková evidence and arguments fail on many levels. Even insofar as there is factual support for the allegation that the Tribunal did not make reference thereto, the basis for the decision in favor of (partial) annulment by the committee in *TECO v. Guatemala* (namely that the parties have placed significant emphasis on certain evidence) has not been established by the Applicants in relation to the Štěpánková evidence, as the Committee already has concluded above in paragraph 152. Moreover, it is not apparent that the disputed evidence provides support for the conclusions the Applicants seek to derive therefrom (in arguing that Mayor Topičová acted on her own behalf, without any authorization of the Benice District Assembly and without its knowledge[193]), nor is the alleged inconsistency in the evidence before the Tribunal a basis

[189] Mem., ¶246.

[190] See supra, ¶50 (setting out the relevant three-part test for a determination of a serious departure from a fundamental rule of procedure).

[191] See supra, ¶57, citing *Enron* ¶222.

[192] *Von Pezold*, ¶255, **RLA-5.**

[193] Mem., ¶212.

for a finding of inconsistent *reasons* in the Award of such gravity that they can be said to amount to a failure to provide reasons under Article 52(1)(e).

163. The Committee therefore concludes that the Applicants have not met their burden to establish the basis for annulment that they have advanced under Articles 52(1)(e) and (d) in connection with the Tribunal's treatment of the Štěpánková evidence.

B. GROUND 2: THE TRIBUNAL'S ALLEGED FAILURE TO CONSIDER EVENTS CUMULATIVELY IN CONTEXT TO EACH OTHER

(1) The Applicants' Position

164. The Applicants state that during the written procedure in the Arbitration they alleged that multiple actions of diverse agents and institutions, and especially those of Mayor Věra Topičová, District of Benice, Mayor Tomáš Hudeček and the Assembly of the City of Prague, led to violations of the Treaty.[194]

165. The Claimants expressly requested that the Tribunal consider the conduct of all the representatives of the Czech Republic as a whole—as a single action which violated the Treaty.[195] They disagree with the Respondent that this request was made for the first time in their Post-Hearing Brief. They explain that even though the phrase "cumulatively in context to each other" was formulated for the first time in their Post-Hearing Brief, it was merely "to concretize and explicate their claims asserted from the very beginning of the underlying arbitration."[196]

166. The Applicants further explain that the issue at hand was addressed amply in both the Memorial and the Reply, where the Claimants described "the crux of the case [as] 'whether Respondent's treatment of Claimants violated international law [...] in light of the

[194] Mem., ¶256.
[195] Mem., ¶257.
[196] Reply ¶214.

following combination of circumstances and actions by local officials.'"[197] The Claimants maintain that the cumulative nature of their claims was also addressed at the hearing.[198]

167. The Applicants underscore that the Claimants' position that the concerted efforts outlined above constituted a basis for their claim of breach of the Treaty was set forth in their Post-Hearing Brief, as follows:

> *Finally, the Tribunal does not need to decide whether each of Benice's and the City of Prague's individual actions described below was a wrongful act under the BIT. Rather, the events should be considered "cumulatively in context to each other". Ultimately the question is whether the cumulative effect of Respondents' actions on the Claimants' investments amounts to a violation of the BIT.*[199]

168. The Applicants further contend that they specified the conduct that gave rise to the alleged breach in the Arbitration:

> *− Benice and Uhříněves actively pursued rezoning of the Project Area to residential starting in 2002.*
>
> *− The districts then enticed Claimants into purchasing property for the purpose of developing a residential complex in 2007 and into making further investments to develop the project over the next five years.*
>
> *− Messrs. Langmajer, Coller, Votava, and others explicitly assured Mr. Pawlowski that the project will be realized.*
>
> *− Both districts and the City of Prague approved the anticipated zoning plan change in 2010, thereby changing the functional use of the Project Area to residential.*
>
> *− The State then increased the density of the development allowed in the Project Area in 2011.*

[197] Reply, ¶¶219-220, citing Reply on the Merits, ¶383, **A-6** (emphasis added by the Applicant).

[198] Reply, ¶221, citing to Merits Hr. Tr., January 26, 2020, 74:12-20, **A-29**.

[199] Mem., ¶262, quoting Claimants' Post-Hearing Brief, ¶21, **A-7**.

> *− And then in 2012 the State deliberately and without warning, contradicted its prior behavior when Benice, the district that had initially applied for the zoning change in 2004 and which had approved the density increase in 2011, filed a lawsuit seeking to annul the zoning plan change that had already become effective in 2010,*
>
> *− After the courts annulled the zoning change for lack of sufficient substantiation in the Prague City Assembly's 2010 approval of the change, the City of Prague failed to remedy the situation and protect the Claimants' investment by:*
>
> - *refusing for 26 months to even consider taking the minimal steps required to restore the zoning in the Project Area to residential, and finally*
> - *deciding definitively in April 2015 not to restore the zoning in the Project Area to residential.*[200]

169. Citing *Stati v. Kazakhstan* and *Rompetrol v. Romania*, the Claimants maintain that it is standard practice in investment arbitration that respondent's actions be considered "cumulatively in context to each other."

170. In *Rompetrol v. Romania*, the Tribunal stated,

> *[It] can join other recent tribunals in accepting that the cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord fair and equitable treatment even where the individual actions, taken on their own, would not surmount the threshold for a Treaty breach.*[201]

171. Paradoxically, the Applicants say, the Tribunal itself acknowledged in the Award that:

> *Claimants argue that the Tribunal does not need to decide whether each of Benice's and the City of Prague's individual actions was wrongful; the events should be considered "cumulatively in context to each other," with the ultimate question being whether the*

[200] Mem., ¶260, quoting Claimants' Reply on the Merits, ¶383, **A-6**.

[201] Mem., ¶264, quoting *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶276, **ALA-21**.

> *cumulative effect of Respondent's actions amounts to a violation of the BIT.*[202]

172. The Applicants observe, however, that the Tribunal did not consider the actions of the Czech Republic's representatives cumulatively. Instead, they dealt with each one in isolation, without explanation as to why they did not adopt a cumulative approach.[203]

173. For the Applicants, the Tribunal's failure to analyze the acts of the Czech Republic's representatives cumulatively was outcome-determinative. For example, the Tribunal decided that the conduct of the mayor acting on behalf of the borough—demanding payments in return for withdrawal of the lawsuit against Projekt Sever and a guarantee of the borough's "smooth cooperation in the permitting stages" or renovation of "civil amenities"—resulted in a violation of the BIT.[204]

174. Nonetheless, the Applicants observe that, the Tribunal's opinion that the borough's decision to file the Annulment Request, the mayor's decision regarding re-procurement, the City Assembly's decision not to re-procure and Benice's opposition to the re-procurement did *not* result in violation of the BIT.[205]

175. The Applicants explain that the actions by the borough are connected: if the investor had paid the sums wrongfully demanded by the mayor, the borough would have ensured the smooth running of his Project. There would have, therefore, been no Annulment Request and the borough would have indicated its consent to the planning and building authorization procedures. Similarly, the deputy mayor would not have disavowed the Zoning Plan Change at a Prague City Assembly meeting on April 14, 2015.

176. Taking a cumulative approach, the Applicants argue that the Tribunal would have concluded that the adverse concerted actions of the city and its officials resulted from Mr. Pawlowski's refusal to pay the requested bribe. These actions, the Applicants submit, also breached Article 4 of the Treaty. However, according to the Applicants, the failure to

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[202] Mem., ¶265, quoting *Pawlowski* Award, ¶276, **A-1**.

[203] Mem., ¶¶266-267.

[204] Mem., ¶270, citing *Pawlowski* Award, ¶¶354-359, **A-1.**

[205] Mem., ¶271, citing *Pawlowski* Award, ¶¶374-409, **A-1.**

undertake a cumulative analysis precluded an award of damages, given that the Claimants had connected the quantification of damages to the filing of the Annulment Request (which, as noted, the Tribunal determined was not a violation of the BIT).[206]

177. The Applicants claim that the Tribunal's failure to consider events cumulatively in context to each other amounts to a failure to address a particular question pursuant to Article 52(1)(e). The Applicants deny that these arguments constitute an effort to obtain appellate review of the Tribunal's findings. Instead, the Applicants say that this ground for annulment is rooted in the Tribunal's having omitted from its reasons points addressing the Claimants' claim directed at the conduct of all the representatives of the Czech Republic as a whole.[207]

178. For the Applicants, there is no doubt that the question of whether the cumulative conduct breached the BIT was "adequately submitted to the Tribunal" in accordance with Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i)—provisions that require the Tribunal to deal with each question submitted to it.[208]

179. The Applicants contend that the Tribunal did not, however, consider the Respondent's actions cumulatively, but in fact did the opposite, and therefore the Tribunal failed to state reasons pursuant to Article 52(1)(e).[209]

180. The Applicants also claim that the Tribunal's failure to consider the Respondent's acts cumulatively violated their right to be heard and warrants annulment pursuant to Article 52(1)(d), given that under the Applicants' interpretation this provision obliged the Tribunal to "answer every argument and address every piece of evidence or provide reasons why it does not consider" them to be relevant.[210]

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[206] Mem., ¶¶272-280.

[207] Reply, ¶¶205, 209.

[208] Mem., ¶¶281-283.

[209] Mem., ¶286, citing *Duke*, ¶228, **ALA-14**; *EDF*, ¶¶197-198, **ALA-15**.

[210] Mem., ¶¶289-295; Reply ¶¶242-247. But see supra ¶45; Mem., ¶249 (invoking judgments of the ECHR and stating the tribunal "is not required to provide a detailed answer to every argument and address every piece of evidence but is, on the other hand, required at least to provide reasons why it does not consider the[m to be] relevant.").

(2) The Respondent's Position

181. The Respondent states that the Applicants' complaints that the Tribunal allegedly failed to consider events cumulatively fall short of the standards for annulment under Article 52(1)(d) and (e).

182. First, the Respondent submits that the Tribunal summarized Claimants' argument and addressed all Claimants' claims.[211] The Respondent disagrees that the "Claimants repeatedly asked the Tribunal to consider multiple actions of Czech local officials cumulatively."[212] Instead, the Respondent observes that the Claimants requested that the Tribunal consider "Benice's and the City of Prague's individual actions [] 'cumulatively and in context to one another'" for the first and only time in their Post-Hearing Brief, as an alternative argument.[213]

183. For the Respondent, the Claimants had expressly noted otherwise when they stated in their Reply that "[w]hile an accumulation of independently innocuous measures may add up to a violation of FET, Claimants do not rely on such a 'creeping violation.'"[214]

184. The Respondent states that the Tribunal cannot be faulted for not explicitly addressing an alternative argument that arises for the first time in a Post-Hearing Brief. The Respondent relies on *Cortec v. Kenya* in which the committee concluded that,

> *[T]he Tribunal could not be faulted for not expressly addressing such a potential claim, buried as it was in a footnote to the Claimants' Post-Hearing Brief. If the Claimants wished to pursue such a claim, it was incumbent on them to set out their position clearly at an earlier stage of the proceedings – or at least to raise it to the Tribunal's attention in a post-Award application.*[215]

185. The Respondent insists that the Claimants' allegations amount to nothing more than a line of argument, and there was no "claim" made by the Claimants for a ruling by the Tribunal

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[211] Hr. Tr. 89:14-17.

[212] C-Mem., ¶123.

[213] C-Mem., ¶124.

[214] C-Mem., ¶125, citing Claimants' Reply on the Merits, July 3, 2019, ¶403, **A-6** (emphasis added by the Respondent).

[215] C-Mem., ¶126, citing *Cortec,* ¶173*,* **RLA-30.**

regarding the cumulation of their allegations against the Respondent.[216] The Respondent rejects the Applicants' contention that the "claim" was made in each of the Claimants' pleadings and also at the hearing. It was, at best, never clearly presented, like the cryptic claim in *Cortec v. Kenya*.[217]

186. But even if it were a claim, the Respondent submits that even a failure to address a claim does not give rise to an annulment provided that the Claimants were given the opportunity to present their position in the Arbitration.[218] Additionally, annulment is not the post-award remedy to be used where there has been the sort of omission alleged by the Applicants. Instead, they should have requested that the Tribunal issue a supplementary decision under ICSID Rule 49.[219]

187. Even so, the Respondent says that when considering the Award as a whole, as the relevant test requires,[220] the Tribunal did in fact consider the alleged acts cumulatively, even noting the Claimants' argument in the Award at paragraph 276. Moreover, it made express findings as follows:

- that it was "not persuaded by [Claimants'] argument" that the Benice's District Assembly's decision to file the Annulment Request was a retaliatory act connected with any "efforts to extract funds from the developer."[221]

- The mayor's stance opposing re-procurement "had no influence on the Assembly's eventual decision to dismiss the re-procurement of the Zoning Plan Change."[222]

- The deputy mayor did not manipulate the Prague City Assembly into voting against the re-procurement of the Zoning Plan Change.[223]

[216] Rej., ¶¶132-134; Hr. Tr. 89:14-17.
[217] Rej., ¶¶139-144.
[218] Rej., ¶137.
[219] Rej., ¶136, citing *Duke*, ¶228, **ALA-14**. See also Respondent's Opening Statement, slide 71; Hr. Tr. 89:18-23.
[220] Rej., ¶150, n. 258
[221] C-Mem., ¶130, citing *Pawlowski* Award, ¶¶394, 398, **A-1**; Reply, ¶150.
[222] C-Mem., ¶131, citing *Pawlowski* Award, ¶463, **A-1**; Reply, ¶150.
[223] C-Mem., ¶131, citing *Pawlowski* Award, ¶¶489-501, **A-1**; Reply, ¶150.

- There was "no evidence that Benice's opposition to the re-procurement swayed the (unanimous) decision of the City Assembly."[224]

188. The Respondent goes on to say that the Applicants have not shown that the Tribunal's alleged failure in this regard concerns a serious or outcome-determinative point. In particular, the Respondent observes that the Applicants contend—without elaboration—that they would have been awarded damages had the Tribunal considered the Respondent's actions cumulatively. But the Tribunal did just that, according to the Respondent, and considered that this alternative argument was irrelevant to its conclusions.[225]

(3) The Committee's Analysis

189. In analyzing the Applicants' arguments for annulment based on the Tribunal's alleged failure to consider the impugned events cumulatively, the Committee begins with the observation that the Tribunal took cognizance of the Claimants' argument in paragraph 276 of its Award. Namely, the Tribunal recorded "that [it] does not need to decide whether each of Benice's and the City of Prague's individual actions was wrongful; the events should be considered 'cumulatively in context to each other,' with the ultimate question being whether the cumulative effect of the Respondent's actions amounts to a violation of the BIT."[226]

190. In structuring its decision, the Tribunal first set out in Chapter III of the Award the facts in largely chronological order, followed by the relevant legal standard, recording that the "Claimants single[d] out the following measures" for which they allege State responsibility under international law on the basis that the measures were not only unreasonable but also arbitrary:

- Mayor Topičová's attempts to extract payment from Claimants;

[224] C-Mem., ¶131, citing *Pawlowski* Award, ¶506, **A-1**.
[225] C-Mem., ¶¶133-135; Reply, ¶154.
[226] Mem., ¶265, quoting *Pawlowski* Award, ¶276, **A-1**.

- Benice's filing of the Annulment Request, by which it sought to annul the Zoning Plan Change;
- Benice's opposition to the re-procurement of the Zoning Plan Change;
- Mayor Hudeček's refusal to re-procure the Zoning Plan Change; and
- The City Assembly's decision to terminate the procurement.[227]

191. The Tribunal succinctly paraphrased the Respondent's high-level disagreement, namely that

- Mayor Topičová never tried to extort money from the Claimants and that Benice's actions were within its prerogatives and neither unreasonable nor unjustifiable;
- As regards the actions of Mayor Topičová and Deputy Mayor Stropnický, the Respondents aver that neither the Mayor, nor the Deputy Mayor acted arbitrarily;
- With respect to the actions of the Prague City Assembly, the Respondent argues that these actions cannot be construed as arbitrary or unjustifiable, since in all instances the Assembly acted in full compliance with Czech law, demonstrating no abuse of administrative discretion.[228]

192. The Tribunal analyzed the impugned measures chronologically, which led it to conclude that the Czech Republic had breached Article 4 of the BIT based on Mayor Topičová's attempts to extract payment from Claimants (in 2009 and in 2011).[229] To this effect, the Tribunal considered that the Mayor of Benice represented an organ of the Czech Republic, and in accordance with Article 4 of the ILC Articles the Mayor's conduct must be attributed to the Czech Republic.[230]

[227] *Pawlowski* Award, ¶350, **A-1**.
[228] *Pawlowski* Award, ¶351, **A-1**.
[229] *Pawlowski* Award, ¶362, **A-1**.
[230] *Pawlowski* Award, ¶373, **A-1**.

193. The Tribunal went on to address sequentially the other measures which had been "singled out" by the Claimants (the subsequent filing of the Annulment request by Benice (Section 3.2), Mayor Hudeček's opposition to re-procurement (Section 3.3), the Assembly's decision not to re-procure (Section 3.4), and Benice's opposition to the re-procurement (Section 3.5)).

194. The question before the Committee is whether in structuring its decision in this way, the Tribunal failed to address a particular question under the standards of Article 52(1)(e) or violated Claimants' right to be heard under Article 52(1)(d). The Committee addresses each ground for annulment in turn.

195. As regards the Applicants' invocation of Article 52(1)(e), the Committee observes that, on the face of the Award, the Tribunal was cognizant of the fact that the Claimants had argued (albeit explicitly for the first time only in their Post-Hearing Brief) that each of Benice's and the City of Prague's individual actions or measures should be considered cumulatively as well as individually. Obviously, the Tribunal's approach still required a review of each alleged breach, including whether the conduct of the relevant actor or actors could be attributed to the State.

196. The Claimants refer to their Memorial on the Merits in support of their contention that the breaches of the BIT were based not on single actions "but [as] a whole."[231] The difficulty with this statement is that while Chapter VI is entitled "the Czech Republic has violated the BIT," in the factual basis for each alleged breach, the Claimants presented their claims as a set of distinct actions, committed by different local officials. While the Applicants describe their position as having requested that the Tribunal consider actions "cumulatively *in context to each other*," in their submissions Claimants describe a large number of actions and circumstances sequentially, without, however, addressing the potential context or interrelationship. For example, in paragraphs 284-285 of the Memorial on the Merits, the Applicants (then Claimants) presented not so much the context of each fact and the potential relation to other but rather a compilation of overlapping statements.

[231] Reply, ¶219, citing Memorial on the Merits, ¶¶245 - 322, **A-5**.

197. The Committee notes that the Claimants' invocation of the cumulative events is properly characterized as an argument rather than an independent claim. Furthermore, had it been intended as an independent claim, which the Tribunal failed to address, the suitable remedy would have been recourse to the Tribunal for a supplementary decision under ICSID Rule 49.

198. Moreover, in contrast to the Applicants' emphasis in the Annulment Proceedings, the Claimants' presentation of their arguments in the Arbitration focused in fact on the individual alleged breaches, not the possible interrelationship and/or the collective or cumulative conduct. For example, the submissions in Claimants' Post-Hearing Brief, address specifically the borough of Benice's alleged arbitrary conduct consisting of Benice's failure to refrain from filing a lawsuit to annul the Zoning Plan Change, after having supported the zoning change earlier.[232] There is no suggestion in this argument that Benice's conduct should be seen in the context and in conjunction with other acts and/or the conduct of other actors. Thus, it is not clear that Claimants advanced a cumulative claim in the Arbitration, in the manner suggested by the Applicants' submissions on annulment. Regardless of its specific contours, having acknowledged the Claimants' cumulative claim argument,[233] and having rejected each individual claim, the Committee concludes that the Tribunal implicitly rejected the cumulative claim too.

199. It is not the role of an *ad hoc* committee to review the correctness or fulsomeness of a reasoning or to impose particular mode of expression on a tribunal; in particular, the tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision (see above para. 75).

200. Faced with the elaborate but arguably somewhat indiscriminate compilation of allegations, the Tribunal chose to digest the claims by means of a largely chronological analysis. This

[232] Claimants' Post-Hearing Brief, ¶¶68-72, **A-7.**

[233] *Pawlowski* Award, ¶276.

resulted in a finding of a breach in relation to the impugned payments, but not the other components of the allegedly unreasonable or discriminatory measures.

201. Thus, in summary, the Committee concurs with the considerations expressed by the committee in *Rumeli*, that if the arguments of the parties have been correctly summarized and all *claims* have been addressed, the tribunal has discretion in selecting which *arguments* to address.[234] Second, the Committee agrees with the Respondent that insofar as the Tribunal could be said to have failed to address a question, the logical and appropriate remedy is a request for a supplementary decision. Without more, a failure to address every question will not in and of itself justify annulment.[235]

202. In this case, the Committee is not persuaded by the Applicants' contention that "there is more." In light of the way in which Claimants structured their arguments in the Arbitration, the Tribunal cannot be faulted for structuring its decision in the way it did, and focusing its decision on what it perceived the critical elements of the claims and arguments.

203. In any event, the Committee did, in effect, consider the impact of any potential ulterior and/or impermissible motive for the decision to proceed with the Annulment Request. In paragraph 398 of the Award, the Tribunal sets out its three-tier reasoning in support of its conclusion that the filing did not constitute a breach of the FET standard contained in Article 4 of the BIT, notwithstanding the Claimants' contention that the decision to file the Annulment Request was an arbitrary act as a personal decision of the Mayor adopted as retaliation:

- the decision to file the Annulment Request was taken by the democratic organ of the District of Benice, its Assembly, and there is no evidence that the Assembly's motives were retaliation or that it was even aware of the Mayor's unsuccessful efforts to extract payment;

[234] Respondent's Opening Statement, slide 69, citing *Rumeli*, ¶84, **RLA-17**.

[235] Respondent's Opening Statement, slide 71, citing *Duke*, ¶228, **ALA-14**.

- second, the Assembly justified its decision with a reasoning that the Tribunal considered to ring true; and

- third, the subsequent judgments rendered by the Courts retroactively justified the District's decision.

204. Consequently, even if the Committee had determined that the Tribunal's decision reflected a failure to address a claim or outcome-determinative argument, which the Committee has not, the considerations in paragraph 398 serve as belt and braces support for the Tribunal's decision. In these circumstances, the Committee declines to accept the Applicants' position that the Tribunal's reasoning fails to meet the standard of Article 52(1)(e) of the Convention.

205. Finally, the Committee also cannot accept the Applicants' submission that the Tribunal's failure to consider events cumulatively in context with each other amounts to violation of Claimants' right to be heard under Article 52(1)(d). As considered above, tribunals are not required explicitly to mention every argument or piece of evidence.[236] Furthermore, the requirement to deal with all claims and/or defenses specifically raised for the tribunal's determination does not implicate a fundamental rule of procedure requiring a tribunal to give express consideration to every argument or issue advanced by a party in relation to a particular question.[237] Additionally, while it is conceivable that a failure to provide reasons coincides with a violation of a party's right to be heard, they are distinct annulment grounds and a failure to provide reasons as such—which the Committee has concluded has not been established as regards the Tribunal's alleged failure to consider events cumulatively—is not in any event sufficient to constitute a breach of the right to be heard.

206. In this case, for the reasons given above, the Committee has found that that there has been no failure to provide reasons as required pursuant to Article 52(1)(e). For similar reasons,

[236] *Von Pezold*, ¶255, **RLA-5**.

[237] *Continental Casualty*, ¶92, **RLA-7**.

the Committee rejects the argument that either as a corollary thereof and/or independently, the Tribunal's decision constitutes a breach of the right to be heard.

207. Insofar as Claimants argued that the impugned actions cumulatively and in context with each other constituted a violation, and that the Tribunal failed to consider the totality of and the correlation between the actions, the Applicants have not demonstrated a failure of the Tribunal to do justice to the arguments made. The Tribunal recorded the Claimants' argument concerning the need to consider the cumulative effect of the Respondent's actions.[238] However, the Claimants did not identify a particular connection between these actions and the focus in the Arbitration appears to have been the (multitude of) individual actions. As noted in paragraph 198 above, in the context of the award as a whole, the Tribunal's rejection of each individual claim is tantamount to a rejection of any argument that the Respondent's actions taken cumulatively amounted to a violation of the BIT.

208. Furthermore, it was the Tribunal's prerogative to determine which arguments and/or evidence are relevant building blocks, so that even if the Tribunal could be said not to have addressed every argument, which in any event the Committee has rejected, that would not have constituted a breach of the right to be heard.

209. Given that the Committee has rejected the argument that the Tribunal committed a breach of the right to be heard, the magnitude and severity of such breach is a moot point. In any event, as before, the Committee refers to the Tribunal's considerations in paragraph 398 of the Award, which establish that regardless of any defects in other parts of the Tribunal's decision in relation to the alleged breach of the FET standard, if any, the Tribunal explicitly determined that the Claimants' arguments cannot be sustained.

[238] *Pawlowski* Award, ¶276, **A-1**.

C. GROUND 3: THE TRIBUNAL'S ALLEGED FAILURE TO CONSIDER EVENTS CUMULATIVELY IN CONTEXT TO EACH OTHER WITH RESPECT TO DAMAGES AND COMPENSATION

(1) The Applicants' Position

210. As the Claimants stated in connection with their ground for annulment addressed in Section IV.B above, the Czech Republic violated the Treaty based on its conduct as a whole. The Applicants maintain that their claim for compensation was based on the same principle, but the Tribunal failed to take this fact into account, in violation of the standards laid down in Articles 52(1)(d) and (e).[239]

211. More specifically, the Applicants state that in the Arbitration they argued that "[t]he annulment of the change in the zoning plan in 2013 such that the real property could no longer be developed for residential use, and the City of Prague's decision in 2015 not to pursue procurement of the change annulled by the courts, prevented construction of the Project and severely damaged Claimants."[240]

212. The Applicants go on to assert that these statements corresponded to an analysis done by its economic expert from AlixPartners, who stated in his report that,

> *For the case at hand, it is my understanding that Respondent's interference(s) occurred over a longer period of time. Despite these creeping interference(s), I have been instructed to use 14 April 2015 as the best proxy for the date when the Claimants' investments were fatally damaged or indirectly expropriated, as this "Date of Harm" represents the date when the progress of the Housing Complex would have continued "but-for" the ultimate damaging event, i.e. the Prague City Assembly's decision not to remedy the deficiencies identified by the court and restore the residential zoning designation.*[241]

[239] Mem., ¶297.

[240] Mem., ¶299, citing Claimants' Memorial on the Merits, ¶334, **A-5**.

[241] Mem., ¶300, citing Quantum Report for the Determination of Damages of Kai F. Schumacher, AlixPartners GmbH, June 26, 2018, ¶77, **A-42**.

213. And in the Reply on the Merits, the Claimants stated that they again sought damages "as a result of their inability to realize the development of [the] Benice Residential Complex."[242]

214. The Applicants maintain that even the Respondent admitted in this annulment proceeding that the Claimants' claim for compensation was a "global claim" that "conflate[d] all purported breaches with all purported damages."[243]

215. According to the Applicants, the Tribunal nevertheless failed to acknowledge in the Award that the Claimants had requested that the State's individual actions be considered as a single concerted action in assessing damages.[244]

216. Instead, the Tribunal considered the claim for damages based to the conduct that it judged to be a violation of the BIT, i.e., that of the mayor. The Tribunal then concluded that there was no causal link between the conduct that was deemed internationally wrongful and the damages claimed by the Claimants. The Tribunal did not provide a reason why it did not assess the actions of the various State actors cumulatively in connection with the assessment of damages, nor explain why they could not be so considered.[245]

217. As already had been shown, according to the view of the Applicants, the actions by the State representatives were interconnected. "Had Mr. Pawlowski paid the amount wrongfully demanded by Mayor Topičová, most likely there would have been no Annulment Request and neither [the] City of Prague nor Benice would have opposed the re-procurement."[246] Thus, the Tribunal should have considered these actions cumulatively, and if the Tribunal had done so it would have awarded damages to the Claimants.[247]

218. As with the prior, related ground, the Applicants again observe that because the Tribunal did not consider the Respondent's actions cumulatively, and in fact did the opposite, the

[242] Mem., ¶301, citing the Reply on the Merits ¶575.
[243] Reply, ¶253, citing C-Mem., ¶¶142-143.
[244] Mem., ¶302.
[245] Mem., ¶303; Reply, ¶255.
[246] Mem., ¶308.
[247] Mem., ¶309.

Tribunal failed to state reasons pursuant to Article 52(1)(e) on this potentially outcome-determinative issue.[248]

219. The Applicants again also argue that the Tribunal's failure to consider the Respondent's acts cumulatively with regard to damages violated their right to be heard, thus warranting annulment pursuant to Article 52(1)(d), on the basis that the Tribunal "did not provide any reason why it did not … assess the actions of the representatives of the Czech Republic cumulatively with respect to Claimant's [*sic*] damages claim."[249]

(2) The Respondent's Position

220. The Respondent urges the Committee to dismiss this ground for reasons similar to those advanced against the Applicants' Ground 2—as the two grounds are essentially identical. The Respondent asserts that the Tribunal did consider the Claimants' belated alternative argument and rejected it.[250]

221. The Respondent goes on to say that the Claimants' claim for damages was fundamentally flawed, as it was not linked to any particular behavior of the Czech Republic. The Claimants were instead pursuing an impermissible global claim.[251] In its Counter-Memorial in the Arbitration, the Respondent observed that the "Claimants have not specified which heads of damage correspond to which specific Treaty violations. Rather, Claimants conflate all purported breaches with all purported damages."[252] The Respondent says that the Claimants never refuted this, and the Tribunal rightly dismissed the Claimants' approach stating that "[t]he duty to make reparation extends only to those damages which [] are legally regarded as the consequence of the wrongful act."[253] The

[248] Mem., ¶¶311-315; Reply, ¶260.
[249] Mem., ¶316-321.
[250] C-Mem., ¶141; Rej., ¶157.
[251] Rej., ¶160.
[252] C-Mem., ¶142, citing Respondent's Counter-Memorial on the Merits, December 5, 2018, ¶402, **A-8**.
[253] C-Mem., ¶144, citing *Pawlowski* Award, ¶728, **A-1**; Rej., ¶162.

Tribunal went on to find that "Claimants have failed to prove that the wrongful acts of the Czech Republic caused any damage at all."[254]

(3) The Committee's Analysis

222. Similar to the ground addressed under Section IV.D below, this ground for annulment is a variation on the broad second ground for annulment addressed under Section IV.B. Unlike the ground addressed at Section IV.D, however, which essentially addresses a subset of the factual circumstances considered by the Tribunal, this ground goes to the Tribunal's decision in relation to damages, and its explicit finding that one of the two elements that it considered prerequisites for the damages calculation, had not been fulfilled.

223. The Applicants argue that their claim for damages is based on their inability to realize the development of Residential Complex Benice,[255] which was caused by the complex set of actions of the State via its officials.[256] They submit that the Tribunal never acknowledged that "Claimants' damages claim was put before it in this matter but rather held that Claimants' quantification related mostly to the filing of the Annulment Request by the District of Benice and the following decision of Prague City Assembly, not [to] reprocure a zoning change."[257] In their written submissions on annulment, the Applicants phrased their argument slightly differently, namely that the Tribunal considered the damage incurred by the Claimants based solely on the conduct it judged to be a violation of the BIT but not in connection with other conduct.

224. For the reasons set out above in Section IV.B(3), the Committee already rejected the argument that the Tribunal failed to consider events cumulatively in context with each other. Given that this ground builds on the allegation that the Tribunal's decision is defective in this sense, there is no basis to sustain the similar derivative argument pertaining specifically to damages.

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[254] C-Mem., ¶144, citing *Pawlowski* Award, ¶¶731-733, **A-1**; Rej., ¶163.

[255] Claimants' Reply on Merits, ¶575, **A-6**.

[256] Hr. Tr. 33:23-25.

[257] Hr. Tr. 34:1-8.

225. Moreover, there is no logical support for the Applicants' argument. The Tribunal considered that the claim for damages was based on the premise that the Annulment Decision adopted by the Czech Courts, as well as the subsequent decision by the Prague City Assembly to terminate the re-procurement of the Zoning Change, destroyed the value of Claimants' investment. The Tribunal found that there was no evidence that the filing by the District of Benice of the Annulment Request, and the subsequent adoption of the Annulment Decision by the Czech Courts, which annulled the Zoning Plan Change (as well as the decision by the Prague City Assembly not to re-procure the annulled Zoning Plan Change) constitute internationally wrongful acts attributable to the Czech Republic.

226. Thus, the damages finding sought by the Claimants was precluded not by the Tribunal's alleged failure to consider events cumulatively, but the Tribunal's determination that Claimants failed to show evidence of a causal link between the internationally wrongful conduct attributable to the Respondent and the damages claimed. Contrary to the Applicants' arguments (in particular on annulment), the Tribunal identified an absence of evidence for what it considered a determinative step in Claimants' damages calculation. The evaluation of evidence is firmly within the Tribunal's remit. In any event, the Committee has found that insofar as the reliance on the cumulative effect of events constituted a claim, rather than an argument, a proper reading of the award as a whole and in context makes clear that the Tribunal implicitly rejected such claim. Thus, there is no basis for the allegation that the cumulative consideration of the various actions would have countermanded the Tribunal's conclusions as to the established internationally wrongful acts and the damages claimed.

227. In sum, there is no factual or logical basis for this annulment ground and, in any event, given that this ground builds on an annulment ground which the Committee has found does not meet the standards of either Article 52(1)(d) or (e), this ground also must be rejected.

D. GROUND 4: THE TRIBUNAL'S ALLEGED FAILURE TO CONSIDER ACTIONS OF MAYOR TOPIČOVÁ AND THE DISTRICT OF BENICE CUMULATIVELY IN CONTEXT TO EACH OTHER

(1) The Applicants' Position

228. Similar to the second ground for Annulment addressed above in Section IV.B that the Tribunal failed to consider that Respondent violated the Treaty based on its conduct as a whole, the Applicants' fourth ground posits that, in the Arbitration, the Claimants had maintained that the actions of Mayor Topičová and the District of Benice had to be considered together and cumulatively in their context, but the Tribunal failed to do so.[258]

229. During the written procedure in the Arbitration, the Claimants alleged that Benice's decision to challenge the Zoning Plan Change, which put a stop to the Benice Residential Complex, was not rational. Instead, for the Claimants, it was an act of revenge against Projekt Sever for not agreeing to make the payments that the mayor demanded.[259]

230. During the written procedure, the Respondent produced witness statements of Mayor Topičová in which she "did not deny" that she sought payments from Mr. Pawlowski but asserted that "[t]he lawsuit was not brought to extort money from Mr. Pawlowski or for 'revenge.'"[260]

231. But at the hearing, the Applicants say, the mayor refused to answer whether the District of Benice and she would have challenged the Zoning Plan Change had Mr. Pawlowski paid the CZK 30 million demanded by her in 2009.[261]

232. Despite the Tribunal's acknowledgement in the Arbitration that it had been requested to consider these acts cumulatively, the Applicants contend that the Tribunal did not do so and provided no explanation.[262]

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[258] Mem., ¶322; Reply, ¶272.

[259] Mem., ¶323, citing Claimants' Memorial on the Merits, ¶139, **A-5**.

[260] Mem., ¶325, citing Second Witness Statement of Věra Topičová, November 6, 2019, ¶30, **A-42**.

[261] Mem., ¶326.

[262] Mem., ¶¶329-332; Reply, ¶270.

233. Again, the Applicants maintain that "if the Tribunal assessed all actions of Mayor Topičová and the District of Benice cumulatively and in context to each other, its decision on the merits could have been different and the Tribunal would have found a violation of Article 4 of the BIT."[263] According to the Applicants, the Tribunal's failure to do so gave rise to a failure to state reasons under Article 52(1)(e) on a potentially outcome-determinative issue.[264]

234. The Applicants further contend that the Tribunal's failure to consider cumulatively these acts of Respondent violated the Applicants' right to be heard. On this basis, the Applicants seek annulment also pursuant to Article 52(1)(d), arguing that under this provision the Tribunal was obliged to consider every question and all evidence or provide reasons why it does not consider these matters to be relevant.[265]

(2) The Respondent's Position

235. For the Respondent, this ground for annulment cannot be considered separately from the second ground—that events should have been considered cumulatively in context to each other. And in any event, as stated above, the Respondent maintains that the Tribunal did indeed consider the actions of the various Czech State organs and actors—including those of the mayor and the District of Benice—cumulatively and in context to each other.[266]

236. Second, the Respondent observes that, in any event, to satisfy the standard under Article 52(1)(e) the Tribunal was not required to address every single argument put forth by the parties, but only the outcome-determinative questions. Similarly, the failure of the Tribunal to engage with a piece of evidence is not a "failure to address a particular question" pursuant to Article 52(1)(e). Furthermore, the Respondent highlights that the Tribunal found that "there is no evidence that the Assembly was aware of Mayor Topičová's unsuccessful efforts to extract funds from the developer and there is no evidence that the

[263] Mem., ¶335.
[264] Mem., ¶¶336-340; Reply, ¶¶277-279.
[265] Mem., ¶¶341-347; Reply, ¶¶282-285.
[266] Rej., ¶168.

Assembly's motives were to retaliate against the investor."[267] For the Respondent, this indicates that the Tribunal did consider the Mayor's and the District's actions cumulatively and in context with one another.[268]

237. Third, the Respondent disagrees that this is an outcome-determinative issue. Even if the Mayor had stated she would not have challenged the Zoning Plan Change, such a challenge could have been brought by private actors. Indeed, it was, given that Ms. Štěpánková and Mr. Hepner joined the challenge.[269]

238. What is more, says the Respondent, is that the Zoning Plan Change plainly warranted annulment—as the Tribunal expressly held. It found that the Benice District acted within its rights, the decision to file the annulment request was justified given the size and nature of the Project, and subsequent court judgments ratified the District's annulment decision.[270]

239. Nor can there be any basis for a failure to be heard under Article 52(1)(d) according to the Respondent. The Parties had an equal opportunity to present their respective cases, and this is not disputed. The Tribunal need not address all evidence before it for a party to have been heard.[271]

(3) The Committee's Analysis

240. This annulment ground is essentially a derivative or a sub-argument of the broader ground addressed above that the Tribunal failed to consider events cumulatively in context with each other generally. Again invoking both Article 52(1)(e) and (d), the Applicants' focus in advancing this ground is the relationship between the actions of Mayor Topičová and the District of Benice. For reasons similar to those considered in relation to the second ground for annulment, the Committee rejects this ground.

[267] Rej., ¶¶171-172.
[268] Rej. ¶172.
[269] Rej., ¶173.
[270] Rej., ¶175.
[271] Rej., ¶176.

241. First, as a preliminary consideration, the Committee notes that there is some tension in the Applicants' alleging that on the one hand all facts need to be reviewed collectively, and the failure on the part of the Tribunal to do so warrants annulment, and at the same time, a specific inconsistency which is part of a larger group of facts and circumstances, in and of itself constitutes an impermissible inconsistency.

242. Second, there is no support for the Applicants' suggestion that the Tribunal would have come to the conclusion that the Annulment Request and Benice's opposition to the Project were the result of Mr. Pawlowski's refusal to make the demanded payment, regardless of whether the Tribunal assessed the actions of the Mayor and the District cumulatively, or otherwise. Namely, as noted earlier, the Tribunal considered it immaterial what the motives or the intended use of any funds paid or sought to be procured were.[272] Consequently, even if the motives of Mayor Topičová were attributed to the District or otherwise considered relevant, the Applicants have not established that would have influenced the Tribunal's conclusion meaningfully.

243. Furthermore, as addressed above, it was the Tribunal's prerogative to identify and focus on what it perceived to be the critical elements of the claims and arguments. Moreover, the Committee did in effect consider the impact of any potential ulterior and/or impermissible motive for the decision to file annulment proceedings of the zoning plan (paragraph 398 of the Award) and thus, even if the Tribunal's decision could be considered to reflect a failure to address a claim or outcome determinative argument, which the Committee has not found, these considerations discredit the argument that the Tribunal's reasoning fails to meet the standard of Article 52(1)(e) of the Convention.

244. Similarly, considering specifically the subset of actions addressed under the Applicants' fourth ground, for the same reasons expressed in paragraphs 205 to 209 as regards the Applicants' second ground, the Applicants have failed to demonstrate that the Tribunal committed a serious departure from a fundamental rule of procedure under the standards of Article 52(1)(d).

[272] *Pawlowski* Award, ¶372, **A-1**.

E. GROUND 5: THE TRIBUNAL'S ALLEGED FAILURE TO ADDRESS CLAIMANTS' ARGUMENT THAT A BIT VIOLATION IS NOT EXCUSED BY COMPLIANCE WITH A STATE'S INTERNAL LAWS

(1) The Applicants' Position

245. The Applicants maintain that, in the Arbitration, the Claimants argued extensively that the Respondent cannot defend the behavior of its actors in the face of an alleged treaty violation by arguing that they complied with Czech law. In support of the Applicants' view that these arguments were advanced in the Arbitration, they point to citations in their Memorial, Reply and Post-Hearing Brief, in the original proceeding.[273]

246. The Applicants also state that, in the Arbitration, the Parties agreed on this point, with the Respondent having also admitted that it is a "principle of international law that a violation of an international treaty obligation is independent of the laws of the host state or of the treatment of investors under those laws."[274]

247. Again, the Applicants further argue that the Tribunal acknowledged the Claimants' argument but paid no further attention to it in its Award, or explain its reasons for not doing so, instead basing its Award on principles that go "directly against" Claimants' argument.[275]

248. In rejecting the claim of a violation of Article 4(1) of the Treaty for Benice's filing of the Annulment Request, the Tribunal concluded that Benice (and the two private actors who sued) had the right under domestic law to request a review of the Prague City Assembly decision approving the Zoning Plan Change. Relying on the maxim, "*Qui iure suo utitur neminem laedit*," meaning "He who uses a right injures no one," the Tribunal concluded the decision by the District to file the Annulment Request did not amount to a violation of the Treaty.[276]

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[273] Mem., ¶¶348-350; Reply, ¶¶294-296.

[274] Mem., ¶351, citing Claimants' Reply on the Merits ¶¶381-382, **A-6**; Respondent's Counter-Memorial on the Merits ¶¶246-251, **A-8**.

[275] Mem., ¶353.

[276] Mem., ¶¶352-356.

249. The Applicants assert that, in reaching this conclusion, the Tribunal did not examine the Claimants' argument regarding domestic law, nor did it explain why it was disregarded.[277] The Tribunal acknowledged the Claimants' argument only formally, in the introductory part of the merits section, which the Applicants submit is not sufficient.

250. According to the Applicants, the Tribunal's failure to address Claimants' argument could have had a decisive effect on the outcome of the Award. The Applicants insist that Benice's decision to file the Annulment Request was "out of all proportion to any legitimate interest Benice may have had, and therefore violated the FET standard."[278]

251. If the Tribunal had addressed the Claimants' argument regarding domestic law, "the Tribunal would have had to assess the Annulment Request in light of all alleged breaches of the BIT that Claimants associated with this event."[279] For the Applicants, the Tribunal's ultimate decision on the merits, and its decision on reparation, could have been different.[280]

252. Invoking Article 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i), the Applicants contend that the Tribunal's ignoring their argument concerning domestic law,[281] and failing to explain why, amounted to a failure to address a particular question, and therefore a failure to state reasons for the Award, pursuant to Article 52(1)(e).[282]

253. The Applicants claim that these same circumstances amounted to a serious departure from their right to be heard, thus warranting annulment pursuant to Article 52(1)(d). In the Applicants' view, the Tribunal was obliged under this ground of annulment to consider every argument—or at least the points "critical to the tribunal's decision"—and all evidence or provide reasons why it does not consider certain arguments and evidence relevant.[283] The Applicants explain that the Respondent's invocation of the committee's

[277] Mem., ¶357; Reply ¶304.
[278] Mem., ¶359, citing Claimants' Post-Hearing Brief, ¶106, **A-7**.
[279] Mem., ¶361.
[280] Reply, ¶307.
[281] Mem., ¶365; Reply, ¶288.
[282] Mem., ¶367.
[283] Mem., ¶¶370-374; Reply, ¶¶310, 315, citing *Perenco*, ¶125, **RLA-9**.

decision in *Iberdrola v. Guatemala* is inapposite, because in that case the issue regarding domestic law was plainly not outcome-determinative, as it is here.[284]

(2) The Respondent's Position

254. The Respondent argues that the Applicants' position that the Tribunal failed to consider the Claimants' argument concerning the effect of domestic law does not provide any basis to partially annul the Award.

255. According to Respondent, even the Applicants "openly admit" that this was an "'*argument*'" (not a claim), and "that the Tribunal acknowledged and summarized their argument."[285] "This is sufficient to dismiss the" argument under either Article 52(1)(e)[286] or 52(1)(d).[287]

256. Additionally, specifically as regards Article 52(1)(e), the Respondent asserts that an award must be considered in its entirety when assessing whether a tribunal has provided reasons for its decisions. In this regard, the Respondent's position is that the Tribunal implicitly deemed the argument at hand to be irrelevant.[288]

257. The Respondent does not agree that the Claimants highlighted the argument at issue as highly relevant or critical, given that it was given short shrift in the written procedure.[289]

258. Nevertheless, the Respondent explains that the Tribunal did consider the argument, but that the Applicants have not even correctly framed the Tribunal's finding that is under attack. The Tribunal's finding at issue is more rightly described as "there can be no violation of the Treaty's FET standard for arbitrariness when the challenged conduct is legitimate under

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[284] Mem., ¶314, citing to *Iberdrola Energia S.A. v. Republic of Guatemala (I)*, ICSID Case No. ARB/09/5, Decision on Annulment, January 13, 2015, **RLA-11** ("***Iberdrola***").

[285] Counter-Memorial, ¶156, citing Memorial, ¶¶348-349, 352, 361, 363, 371; Respondent's Opening Statement, slide 95, citing *Orascom*, ¶319, **RLA-28**.

[286] Counter-Memorial, ¶157, citing *Kiliç*, ¶133, **RLA-19**; *Continental Casualty*, ¶130, **RLA-7**; C-Mem., § 3.2, ¶¶60-61 and accompanying citations.

[287] Counter-Memorial, ¶ 157, citing *Continental Casualty*, ¶ 97, **RLA-7**; C-Mem., § 3.1, ¶¶ 44-47 and accompanying citations.

[288] C-Mem., ¶¶150-151.

[289] Rej., ¶189.

domestic law."[290] The Respondent disputes that the Tribunal justified the behavior of the Czech Republic's actors by stating that they merely complied with Czech law.

> *On the contrary, the Tribunal found that the system of checks balances developed by Czech law worked as an investor could and should have expected, and on this basis there was no breach of the Treaty. In other words, the Tribunal did not find a breach of the Treaty that was subsequently justified by invoking domestic law of the host state. The Tribunal simply determined that the Benice Assembly District's decision to file the annulment request did not amount to a violation of the Treaty.*[291]

259. Thus, the Respondent asserts that at no point did the Tribunal seek to justify the behavior of the Czech actors by arguing that they complied with Czech law. Rather it considered that the domestic legality of the impugned action precluded the State's liability for arbitrariness.[292]

260. Nor was this an outcome-determinative issue in the Respondent's view.[293] The alleged failure to consider the argument that a State may not rely on domestic law compliance to excuse a BIT violation would not have altered the Tribunal's decision "in the slightest," according to the Respondent, because the Tribunal did not even find a breach of the Treaty with regard to the filing of the Annulment Request, which the Tribunal then justified by the invocation of domestic law.[294] In an analysis of the Czech legal system, the Tribunal amply justified its finding that the system worked as any investor could have expected, and the Benice District adhered to proper administrative procedure.[295]

261. For the Respondent, the Applicants invocation of Article 52(1)(d) also fails. The right to be heard does not require that a tribunal give express consideration to every argument or issue. The Respondent emphasizes the findings of the committee in *Iberdrola v. Guatemala*, which "plainly confirm that Article 52(1)(d) of the Convention cannot

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[290] C-Mem., ¶159; Rej., ¶190.

[291] Respondent's Opening Statement, slide 96; Hr. Tr. 101:15-25.

[292] C-Mem., ¶160.

[293] C-Mem., ¶162; Rej., ¶192.

[294] Rej., ¶193.

[295] Rej., ¶¶194-195.

accommodate a complaint regarding a tribunal's alleged failure to explicitly address an argument that domestic law does not excuse a treaty violation since it is a mere argument, not a claim."[296]

(3) The Committee's Analysis

262. The decision of the Tribunal to which this annulment ground relates appears at paragraphs 389-390 of the Award, where, having first considered that the Czech court judgments do not infringe Article 4 of the BIT, the Tribunal considered that the decision by the District of Benice to file the Annulment Request does not result in a violation of the BIT either. Rather, as highlighted by the Respondent, the Tribunal considered that

> *[t]he system of checks and balances developed by Czech law worked as any investor could and should have expected: the political decision of the Prague City Assembly was conditional upon review as to its legality by the Czech Courts. Any aggrieved party had the right to request such review. Two affected citizens plus the District of Benice did so. The District acted under the instruction of its highest organ, the Assembly; it exercised its legal right to challenge the Zoning Plan Change, and it did so adhering to proper administrative procedure.*

263. This argument appears to amount to an example of ships passing in the night. It is clear that Claimants in the Arbitration did not invoke a denial of justice, neither as regards the decision of the Courts or the decision of the District of Benice to file the Annulment Request. While it is true that a state's exercise of its legal rights under domestic laws does not preclude a violation of FET, that truism cannot be turned around; *i.e.*, it is not the case that any—potential—breach of domestic law in and of itself constitutes a breach of the FET standard or another standard contained in the BIT.

264. In this case, the Applicants' arguments relate to the decision of the District of Benice to file an Annulment Request. The Tribunal found that the District's decision to do so did not—as such—amount to a violation of the BIT. Logically, therefore, for the State's conduct to amount to a breach of the BIT, the onus was on the Claimants to show that

[296] C-Mem., ¶153, citing *Iberdrola*, ¶15, **RLA-11**; Rej., ¶200.

despite the Tribunal's finding that the Annulment Request as such was legitimate, the State's conduct otherwise or more generally amounted to a breach, in particular of the FET standard contained in Article 4 of the BIT.

265. And that is exactly what Claimants have sought to do in the Arbitration, arguing, *inter alia*, that the Benice District acted in an unreasonable or arbitrary manner, and specifically that the filing of the Annulment Request was an arbitrary and disproportionate measure[297] in that the filing of the Request was a use of a legal process for a purpose for which it was not intended, all in violation of the FET standard.[298]

266. After reviewing the facts and arguments invoked by Claimants, the Tribunal determined, as noted above, that the relevant administrative procedure provided for checks and balances, and included a review of legality of the Zoning Plan Change, a review which two affected citizens and the District of Benice could and did instigate. Furthermore, the Tribunal elaborated on why the decision to file the Annulment Request was not an arbitrary act,[299] nor disproportionate.[300]

267. Arguably a more logical sequence might have been to consider these two components of the Tribunal's decision up front before stating its conclusion that the decision of the District of Benice to file the Annulment request does not result in a violation of the BIT.[301] Be that as it may, it is for the Tribunal to choose its way of expressing the basis for its decisions,[302] and it cannot be said that the Tribunal's decision rests on a mere conclusion that the measure at issue was in accordance with domestic law, and therefore justified as a matter of international law.

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[297] *Pawlowski* Award, ¶374, **A-1**, citing Claimants' Reply on the Merits, ¶¶253-262, **A-6**; Claimants' Post-Hearing Brief, ¶¶104, 106-107, **A-7**.

[298] *Pawlowski* Award, ¶320, **A-1**, citing Claimants' Reply on the Merits, ¶¶253-262, **A-6**; Claimants' Post-Hearing Brief, ¶104, **A-7**.

[299] *Pawlowski* Award, ¶¶393-398, **A-1**.

[300] *Pawlowski* Award, ¶¶399-409, **A-1**.

[301] *Pawlowski* Award, ¶398, **A-1**.

[302] See supra, citing *Wena*, ¶81, **ALA-4.**

268. In sum, there is no basis for the Applicants' allegation that the Tribunal ignored or failed to explain its rationale on this issue, nor that the Tribunal failed to consider their arguments concerning domestic law, and thus there was no failure to state reasons pursuant to Article 52(1)(e) or a violation of the right to be heard pursuant to Article 52(1)(d).

F. GROUND 6: THE TRIBUNAL'S ALLEGED LACK OF REASONS REGARDING THE TWO-YEAR PERIOD TO CHALLENGE THE ZONING PLAN CHANGE

(1) The Applicants' Position

269. The Applicants affirm that it was undisputed between the Parties that a measure adopting a zoning change may be challenged in court by any affected person. This notion was confirmed by the Claimants' legal expert Professor Doctor Veronika Tomoszková in her expert opinion. According to the Applicants, neither Party questioned the matter further in the written or oral procedures.[303]

270. In the Award, the Tribunal noted that the Zoning Plan Change was subject to judicial review. The Applicants explain, however, that the Tribunal inexplicably stated that "Czech law provides for a two-year period during which any change to the zoning plan can be challenged before the Courts."[304] The Tribunal further stated in the Award that "there was a two-year statute of limitations for annulment requests."[305]

271. Further, the Tribunal expressed its view that,

> *The summary of the facts shows that Projekt Sever never had acquired a right that the Project Area be considered as residential. At best, after the initial approval of the Zoning Plan Change by the Assembly, it had an expectation that, if the period of limitation lapsed and no annulment request was filed (or the request was filed but rejected), the approval would become final, and the land would then definitively be considered as zoned for residential use.*[306]

[303] Mem., ¶¶375-378, citing Expert Legal Opinion of Prof. Dr. Veronika Tomoszková, June 27, 2018, ¶63, **A-44.**

[304] Mem., ¶380, citing *Pawlowski* Award, ¶644, **A-1**.

[305] Mem., ¶381, citing *Pawlowski* Award, ¶701, **A-1**.

[306] Mem., ¶382, citing *Pawlowski* Award, ¶702, **A-1**.

272. The Applicants insist that the Tribunal's reasoning above—referencing a two-year period to file an annulment—is not in line with the facts or Czech law. The Tribunal cited the Hearing Transcript in this regard, but there is no mention in the transcript of the two-year period. Nor is there any reference to a two-year limitations period elsewhere in the record. Therefore, the Applicants state that the Award "is not only groundless but also incorrect, and substantively wrong."[307] They observe that the Respondent agrees that this conclusion was in error.[308]

273. Here, the Applicants are careful to explain that this ground for annulment does not seek an appeal of the Tribunal's error. Instead, the Applicants seek partial annulment because the Tribunal provided no reasons or at best frivolous or contradictory reasons for its conclusion regarding the two-year limitations period.[309]

274. In fact, the Applicants explain that there was no limitations period at the time when Change Z 1294/07 was challenged and annulled.[310] The Applicants argue that the relevant point in time is 2010, when the zoning change was decided by the city of Prague, at which time there was no time limit.[311] It was only in 2012 that a three-year time limit was introduced.[312]

275. And even if there was a two-year limitations period, then the borough's Annulment Request would have been time barred. The Zoning Plan Change was approved on March 26, 2010, and entered into force on April 16, 2010. The borough filed its annulment request more than two years after that date on June 28, 2012.[313]

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[307] Mem., ¶¶383-386.

[308] Reply, ¶329, citing C-Mem., ¶175.

[309] Reply, ¶321.

[310] Hr. Tr. 53:20-54:1 ("The two-year period for filing a lawsuit for the annulment of zoning plan changes did not exist at the time when the respective zoning plan change was adopted, when it was challenged, when it was annulled. In fact, there was no time limitation in any provision of Czech law at the time of approval of the zoning plan change").

[311] Hr. Tr. 130:14-16.

[312] Hr. Tr. 130:8-13.

[313] Mem., ¶¶386, 388-389.

276. The Applicants explain that the Tribunal's misplaced conclusions have had decisive effects on the Award concerning fair and equitable treatment, unreasonable measures, and indirect expropriation.[314]

277. Critically, the Applicants explain, the Tribunal analyzed these three issues on the basis that the approval of the Zoning Plan Change was not final and still subject to annulment. As a result, the Tribunal deemed the Zoning Plan Change to be "conditional upon review as to its legality by the Czech Courts."[315] In turn, and finding that the Claimants had no acquired right, upon approval of the Zoning Plan Change, the Tribunal found no breach of the relevant Treaty provisions.[316]

278. The Respondent's approach is nonsensical in the Applicants' view: the Respondent says that a political decision to approve a Zoning Plan Change is never final and remains conditional, given that there was no time limit after which the change could not have been challenged.[317]

279. Indeed, the only interpretation that is plausible under the correct application of the law as it existed is that a political decision to approve a Zoning Plan Change is final and accords an acquired right once it enters into force, though it may be later subjected to judicial review. Benice's Annulment Request should have been rightly regarded as intervening on that right, and the Tribunal would have reached substantially different conclusions with respect to its findings on the three issues above invoking violations of Articles 4 and 6 of the Treaty.[318]

280. The Applicants claim that, on this basis, the Award is subject to annulment for a failure to state reasons—or for having provided at best frivolous or contradictory reasons[319]—pursuant to Article 52(1)(e). The Applicants refer to the conclusion of the committee in

[314] Mem., ¶392.
[315] Mem., ¶393, citing *Pawlowski* Award, ¶390, **A-1**.; Reply, ¶¶327-328.
[316] Mem., ¶¶395, 398.
[317] Reply, ¶¶333-336. Hr. Tr. 130:23-131:1.
[318] Mem., ¶¶400-401; Reply, ¶337.
[319] Reply, ¶¶359-363; Applicants' Opening Statement, slides 67-68.

MINE v. Guinea, where it stated that the award shall enable one to follow how the tribunal proceeded from point A to point B and eventually to its conclusion. They explain, however, that "[t]his is exactly what cannot be done in this case," as the Award does not make it possible to follow how the Tribunal concluded that a two-year limitation existed.[320] Applying the *MINE* test, the Applicants submit that the relevant steps are as follows:

> *Here point A is the hearing transcript providing the information on the two-year period. Point B is that our zoning plan change could have been challenged by any affected party for two years after it entered into force. Point C is that within this period, the District of Benice and two affected citizens did so by filing of the annulment request. Then, point D and following points were the Tribunal's conclusions that with respect to the previous points, Claimants never acquired their right which related to its final decision on a non-violation of Article 4 and Article 6 of the BIT.*[321]

281. Relying on the *Vivendi v. Argentina* committee, the Applicants underscore that they need not show that the failure to state reasons was "manifest" or "serious." Nevertheless, the Tribunal's findings in this regard were outcome-determinative, as the Tribunal "would have issued a substantially different decision on the merits."[322]

282. In the alternative, the Applicants again point to *MINE v. Guinea*, *CDC Group v. Seychelles*, and *Tza Yap Shum v. Peru* to explain that reasons provided in an award may not be contradictory or frivolous.[323] They explain that the Tribunal's finding that the Zoning Plan Change was "conditional" for two-years when there was no such time limitation is frivolous. For the Applicants, the notion was "plucked out of the air."[324] They also argue that the Tribunal's explanations with regard to the date of filing of the Annulment Request after two years are also contradictory given that the Tribunal first opined there was a two-

[320] Mem., ¶¶403-404; Reply, ¶¶349-356.

[321] Hr. Tr. 54:24-55:10.

[322] Mem., ¶¶408-409, citing *Vivendi*, ¶64, **ALA-13**; Reply, ¶338.

[323] Mem., ¶405, citing to *MINE*, ¶5.09, **ALA-5**; *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on the Application for Annulment, June 29, 2005, ¶70, **ALA-10**; *Tza Yap Shum*, ¶101, **ALA-11**.

[324] Reply, ¶¶360-362.

year limitations period for the filing of the Annulment Request but then observed that its filing beyond two years was permissible.[325]

283. Nor can the Committee, in its discretion, attempt to clarify the Tribunal's reasoning on this critical issue given that a two-year limitations period never existed.[326]

284. Lastly, the Applicants argue that annulment is warranted pursuant to Article 52(1)(d) on the basis that the Applicants were denied their right to be heard. They observe that the issue of when the Zoning Plan Change was (or was not) subject to review was not before the Tribunal as an issue to be decided. This is a violation of the right to be heard because "a tribunal should not surprise the parties with an issue that neither party brought to the record."[327] As the Parties were deprived of the opportunity to address, and perhaps correct, the Tribunal regarding the lack of a limitations period, the Tribunal's related merits rulings could have differed.[328]

(2) The Respondent's Position

285. The Respondent gives five reasons as to why this ground may not give rise to annulment. First, the Applicants' complaint is not based on the absence of reasoning from the Award, but for the Respondent, it is based on a substantive error. Citing *Orascom v. Algeria*, the Respondent confirms that "even 'a manifestly incorrect application of the law [] is not a ground for annulment.'"[329] Nor is a mistake or unsupported finding by the Tribunal—even manifest error is not a ground for annulment.[330]

286. Second, the Respondent states that the Award does enable the reader to understand how the Tribunal reached its conclusion. The Respondent explains that in finding no violation

[325] Mem., ¶406; Reply, ¶¶367-370.

[326] Reply, ¶358, citing Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶106, **ALA-3.**

[327] Reply, ¶¶377-378, citing *Global Telecom*, ¶68, **ALA-22.**

[328] Reply, ¶382.

[329] C-Mem., ¶168-169, quoting *Orascom*, ¶166, **RLA-28**; Rej., ¶¶202-206; Respondent's Opening Presentation, slide 103, citing *MINE*, ¶5.08, **ALA-5** ("a manifestly incorrect application of the law […] is not a ground for annulment"). See also Hr. Tr. 104:19-22.

[330] Rej., ¶212.

of Article 4(1) of the Treaty, the Tribunal justified its conclusion that a decision to approve a zoning plan change in Prague is not final because it is subject to judicial review for two years. The Respondent continues, "[i]rrespective of whether or not this was correct, the Tribunal's explanations in this respect are clear and consistent and perfectly demonstrate its reasoning reaching the conclusion of a non-violation of Article 4(1) of the Treaty."[331]

287. The Respondent also explained its position that the Tribunal provided "clear reasons" for finding that the Zoning Plan Change was conditional, citing the Respondent's arguments in this regard in the original proceeding and the Claimants' legal expert Professor Doctor Tomaszkova. Thus, the Tribunal did proceed from "Point A to Point B" and fulfilled its duty to state reasons. Whether the Tribunal was factually incorrect about "Point A" is irrelevant, according to the Respondent.[332]

288. The Respondent does indeed agree with the Applicants that the issue of a time bar for challenging a zoning plan change was neither disputed nor put to the Tribunal.[333] Citing *Wena Hotels v. Egypt*, the Respondent explains that an award cannot be annulled for lack of reasons regarding arguments that have not been presented to the tribunal.[334]

289. In any event, the Respondent's witness, Mr. Ondrej Bohac of the Prague Institute of Planning and Development, did mention a two-year time limit for challenging changes to the zoning plan: "[t]he Change can be challenged in court for two years thereafter." The Respondent parroted this testimony in its Post-Hearing Brief. It appears that in the Award, the Tribunal's citation to the witness testimony was wrong, but the cite for the Post-Hearing Brief was correct. The Tribunals' mention of the two-year limitations period was supported in the record and not "plucked out of the air."[335]

290. Third, it was not "frivolous" for the Tribunal to have found that the Zoning Plan Change was conditional for a period of two years. The Tribunal's reasoning still stands on this issue

[331] C-Mem., ¶171.

[332] C-Mem., ¶172; Rej., ¶214; Hr. Tr 106:14-16.

[333] C-Mem., ¶ 173 ("the time-limit ... was never a question put to the Tribunal" or "disputed or addressed between the Parties in detail").

[334] C-Mem., ¶173, citing *Wena*, ¶82, **ALA-4**.

[335] Rej., ¶¶218-220, citing to Merits Hr. Tr., January 28, 2020, 542:25-543:1, **A-30**.

no matter whether there was a two-year time bar because "what matters is that the zoning change was to be understood as being subject to potential annulment."[336] What matters is that the time-limit was mentioned during the proceedings. This finding was substantiated at the hearing by Professor Kadecka's testimony that "no one has any public right to th[e] zoning plan change."[337] And in any event, there is evidence supporting the Tribunal's finding that Czech law provides for a two-year period during which any change to the zoning plan can be challenged.[338]

291. Fourth, the Respondent does not agree that this issue is outcome-determinative. Again, the Respondent says that no matter the time limitation, the key fact is that the Zoning Plan Change was subject to judicial review. Thus, the Respondent emphasizes that the Zoning Plan Change was not definitive, and as such the Tribunal's findings were neither frivolous nor contradictory. The Respondent also disagrees that the Tribunal's finding on indirect expropriation would have been different because the Tribunal gave reasons for its decision in this regard—that the Zoning Plan Change "never became final and definitive" and there was no acquired right to expropriate. The Respondent also reminds that the Tribunal added that even if the Claimants had acquired a right through the zoning change, they did not prove any interference with their investment justifying a finding of indirect expropriation.[339] In any event, because Czech law did provide a time limit within which the annulment of a zoning plan change can be requested, the Tribunal's alleged mistake was not "outcome-determinative."[340]

292. Fifth, the Respondent argues that there can be no annulment pursuant to Article 52(1)(d) for a violation of the right to be heard. The Applicants misstate the Parties' submissions in relation to the Zoning Plan Change and its review. Rather than never having been discussed, as argued by the Applicants, the Respondent posits that it was "the central issue" in that neither Party had questioned the right to challenge the Zoning Plan Change. It is for

[336] C-Mem., ¶175; Rej., ¶¶223-224.

[337] C-Mem., ¶175, citing Merits Hr. Tr., January 29, 2020, 961:9-16, **A-31**; Hr. Tr. 108:12-13.

[338] Respondent's Opening Statement, slide 107.

[339] C-Mem., ¶¶177-179; Rej., ¶¶226-228.

[340] Respondent's Opening Statement, slide 108.

this reason that the issue was not developed in depth. According to the committee in *Klockner v. Cameroon*, "arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been)."[341] The issue at hand was mentioned in the record and could have been seized upon further.[342]

(3) The Committee's Analysis

293. This annulment ground relates to the Tribunal's reference in its Award to a two-year time limit for filing a request for judicial review of a zoning change, as a building block for its decision that there had been no breach of the FET standard pursuant to Article 4 of the BIT and no indirect expropriation pursuant to Article 6 of the BIT essentially because the Claimants had no acquired right.[343]

294. As to legitimate expectations, the Tribunal referred to five considerations in support of its conclusion that the conduct of the Districts of Uhříněves and Benice, and of the Municipal authorities of Prague, did not generate a legitimate expectation, to the benefit of the Claimants, that the Zoning Plan Change would be authorized by the Prague Assembly and that the Residential Complex could be successfully promoted.[344] The fifth and final step in the tribunal's reasoning was that the Zoning Plan Change did not create an acquired right because it was still subject to judicial review.[345] However, this was not the only basis of the Tribunal's reasoning. It equally held that the Claimants had failed to meet the other elements required to establish a claim based on legitimate expectations, such as the allocation of risk in the underlying contracts and the absence of a specific and unambiguous declaration binding on either of the relevant municipalities, which in any event would not

[341] Rej., ¶232, quoting *Klöckner*, ¶91, **ALA-9** (emphasis added by the Respondent).

[342] Rej., ¶237. Hr. Tr. 111:20-23 ("the right to be heard hinges on whether the parties were given the opportunity to present their case, not on whether they chose to seize that opportunity.")

[343] Applicants also suggest the reference impacts the decision in relation to the decision regarding unreasonable measures, Mem., ¶392, but the reference appears to relate only to FET and expropriation.

[344] *Pawlowski* Award, ¶645, **A-1**.

[345] *Pawlowski* Award, ¶644, **A-1**.

have been competent to make such commitment, and thus they could not be deemed reasonable.[346]

295. Similarly, the decision regarding expropriation was not only based on the consideration that Projekt Sever never had an acquired right that the project area be considered as residential,[347] but also that even if the Claimants had acquired a specific right ("*quod non*") they had failed to prove any interference with their property rights that would have been sufficiently restrictive, permanent and irreversible to justify a finding of indirect expropriation.[348]

296. In the Arbitration, it was undisputed between the parties that the measure adopting a zoning plan change could be challenged in court by any affected person.[349] Apparently, in 2010, when the Zoning Plan Change was approved, there was no explicit statutory time limit for such review although this was subsequently introduced. The issues of a time limit, the duration thereof, and the relevant date for the commencement of such a time limit was not debated in the Arbitration.

297. Equally, it does not appear to have played a role in the judicial review procedure, which led to the annulment of the Zoning Plan Change.[350] The existence of a two-year time limit was mentioned by a witness of the Respondent and referred to by the Respondent in its Post-Hearing Brief, but not, as stated above, the subject of any discussion between the Parties.

298. While there is therefore a reference to a two-year time limit in the record in the Arbitration, it is not in the witness testimony cited by the Tribunal, and apparently incorrect. Paradoxically, it is the incorrectness which appears to explain why judicial review could

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[346] *Pawlowski* Award, ¶¶629-643, **A-1**.

[347] *Pawlowski* Award, ¶702, **A-1**.

[348] *Pawlowski* Award, ¶705, **A-1**. As the Tribunal pointed out, the "Claimants remain the owners of the same land that they purchased in 2007 and they remain entitled to initiate a procedure that could lead to a future zoning change. [citation omitted] [T]here is still a possibility that the land may eventually be designated as residential." Id., ¶706.

[349] See supra, ¶¶274, 293.

[350] A three-year time limit was introduced in 2012, although this was subsequently amended more than once. See Hr. Tr. 130:17-22.

take place: either because there was no time limit considered relevant by the court or because the relevant time limit was three years and not two years as—incorrectly—stated by the Tribunal.

299. First, the review pursuant to Article 52(1)(e), does not entitle a committee to review the correctness or the persuasiveness of a tribunal's reasoning. Rather, the question is whether the reasons relate to the issues before the tribunal and can be followed.[351] Furthermore, in undertaking its review, a committee must look at the totality of the award to understand the motivation of the decision, and not just particular parts.[352] Moreover, even a manifestly incorrect application of the law is not a ground for annulment.[353]

300. In this case, although the Tribunal's Award contains an incorrect reference (incorrect both as a citation and as a reference to and computation of the applicable time limit), the Applicants have not established that these issues (i) have had a material impact on the outcome the Tribunal's decision overall or (ii) resulted in the Award having failed to meet the requirements of the *MINE* standard or otherwise for lack of reasoning.

301. As considered above, the issue of an existing time limit was addressed in the context of whether the Claimants had an acquired right. For both sections in the Award where the issue of an acquired right was addressed, there were other, and independently supportive, reasons expressed by the Tribunal,[354] so that even if with hindsight it could be said that the Claimants did have an acquired right, they would still not have met the threshold of either a breach of FET or expropriation. In applying its review, a committee must "look to the totality of an award to understand the motivation of the decision, and not just particular parts."[355]

302. Second, the critical component of the Tribunal's reasoning was that judicial review was still open, which proved to be factually correct. As considered above, the Applicants have

[351] *Vivendi I*, ¶¶64-65, **ALA-13**.
[352] Rej., ¶68, citing *Hydro*, ¶115, **RLA-43**.
[353] *MINE*, ¶5.08, **ALA-5**.
[354] Award, ¶644.
[355] Rej., ¶68, citing *Hydro*, ¶115, **RLA-43**.

not disputed that under Czech law a change to a zoning plan can be challenged before the Czech Courts. The Committee has taken note of the fact that the relevant provisions of the Act of Judicial Administrative Procedure and the Code of Administrative Judicial Procedure, introducing a three-year time limit for requesting an annulment of a zoning change did not form part of the record in the Arbitration. As the Applicants confirmed during the hearing, neither of the Parties submitted the relevant law into the record.[356]

303. Indeed, the Tribunal paid more attention to the time limit than the Parties had done in their debate,[357] but the upshot of the Tribunal's decision was the conditionality of the zoning plan which was borne out by the effectiveness of the judicial review proceedings. For that reason, the Committee does not agree with the Applicants that the Tribunal's decision was a "surprise" decision depriving them of an effective opportunity to discuss or comment on the issue. The relevant building block in the Tribunal's reasoning was not so much the duration of the time limitation, as much as the (undisputed) conditionality. Clearly, the incorrect reference and computational error is unfortunate, but the Committee disagrees with the Claimants that had the Tribunal been fully briefed on the actual time limitation, it would have come to a different *overall* conclusion.[358] Presumably, the reference to the length of the applicable time limit would have been different, but it would not have made a difference to the conclusion that, because the zoning change could be and was annulled, Claimants never had an acquired right.

304. The Committee therefore rejects the argument that the Tribunal's decision constitutes a breach of the right to be heard under the standards of Article 52(1)(d). While the modalities of the conditionality of the zoning change may not have been discussed in the Arbitration, and the Award contains an error as regards the time limitation, the Applicants seek to attribute a significance and relevance to these modalities and error that are belied by the

[356] Hr. Tr. 58:16-17. See also Mem. ¶377.

[357] Code of Administrative Judicial Procedure, **RA-10**, was only submitted in the Annulment proceeding, as Respondent confirmed at the hearing. See Hr. Tr. 160:20-161:10.

[358] See Hr. Tr. 59:24-60:1.

decision of the Tribunal, in particular its separate determination on zoning plan conditionality.

305. Furthermore, the Committee also rejects the Applicants' submission that the Tribunal's decision amounts to a breach of Article 52(1)(e) as it fails to meet the *MINE v. Guinea* standard.[359] The (incorrect) reference to the Hearing transcript is not the starting point (point A) of the Tribunal's decision. Rather, the relevant building block for the conclusion that Claimants never had an acquired right in the designation of the Projekt Sever as residential (point C)[360] is that the decision of the Assembly never became final and definitive (point A), and that a Request for Annulment was filed and the decision was in fact annulled (point B).

306. Similarly, in paragraph 644 of the Award the structure of the reasoning of the Tribunal is to build up to the conclusion that the Zoning Plan Change did not create an acquired right (point C), in light of the existence of the possibility of judicial review (point A), and the absence of legitimate expectation that such review would not be exercised by those with legal standing (point B).

307. For the same reason, it cannot be said that the Tribunal's reasoning was frivolous or contradictory and therefore does not meet the standard of Article 52(1)(e). The Applicants correctly point out that there was no evidence supporting the two-year time limit, which in any event appears to be explained by the fact that this was a non-issue between the Parties. But the Applicants are not correct in contending that this was a "conclusion."[361] Rather, it was an incorrect but ultimately immaterial building block for the Tribunal's subsequent conclusion that the Claimants did not have an acquired right. Despite that the reference and the computation were in error in the Award, annulment is not warranted where the Applicants have not established a lack of substantiation for the overall conclusion that a Request for Annulment could be and was filed.

[359] Hr. Tr. 54-55.

[360] *Pawlowski* Award, ¶702, **A-1**.

[361] Hr. Tr. 56:21.

308. In sum, if the submissions made in the annulment had been presented in the Arbitration, the Tribunal may have reformulated certain references (the Committee notes that the Applicants appear to have introduced a new element to its argumentation that judicial review is an extraordinary measure, the assessment of which exceeds the Committee's mandate). However, the Committee cannot endorse the Applicants' position that the Tribunal's reasoning leading up to its conclusion cannot be followed, and therefore also rejects this ground for annulment under Article 52(1)(e).

G. GROUND 7: THE TRIBUNAL'S ALLEGED FAILURE TO ADDRESS CLAIMANTS' ARGUMENTS REGARDING CONTINUITY IN DECISION MAKING AND ESTOPPEL

(1) The Applicants' Position

309. In the Arbitration, the Claimants argued that Benice's Annulment Request and "subsequent steps" attributable to the Czech Republic were arbitrary and violated fair and equitable treatment because they lacked continuity in decision making. They specifically invoked *Crystallex v. Venezuela* for the premise that a State violates the fair and equitable treatment standard where local officials first supported a project but later changed their position due to a change in the political climate.[362]

310. The Applicants say that the record in the Arbitration contained facts and evidence concerning Benice's obligation to preserve continuity.[363] This includes, in particular, the KAAMA Study, a study—supportive of the Zoning Plan Change—that was on file in the Benice's district office since Mayor Topičová took office in 2006 but was used as one of the bases on which to seek annulment of the Zoning Plan Change.[364] The Applicants also point to Mayor Topičová's own testimony, where she indicated that when she took office, she "read the documentation related to the re-zoning proposal, whatever was available at the time." The Applicants infer that the mayor "must have been aware of the size and scope

[362] Mem., ¶¶411-412. Hr. Tr. 43:25-44:5.

[363] The Applicants dispute the Respondent's contention in the Counter-Memorial at paragraph 184 that the argument that the authorities were required to preserve continuity was not raised in the written procedure of the original proceeding in relation to the claim of arbitrariness but only with respect to the claim of breach of legitimate expectations, and proceed to detail where in the record the arguments appeared in the Reply at paragraphs 386-390.

[364] Mem., ¶¶413-414.

of the development that Benice had been pursuing when it applied for the zoning plan change in 2004."[365]

311. While the Respondent had suggested that a new government is entitled to change course in its decision making, the Applicants point out that the relevant officials—the mayor and other officials—had not changed post during the relevant period.[366]

312. The Claimants had also invoked the principle of estoppel, asserting that the City of Prague had an obligation to protect Claimants' investment and not disparage or undercut a concession granted by a predecessor government.[367]

313. The Applicants state that "the Tribunal paid no attention" to these arguments in the Award and did not explain why they were disregarded. Had the Tribunal addressed these arguments, the Applicants insist that the Tribunal would have reached a different outcome with regard to (i) a violation of the fair and equitable treatment standard at Article 4(1) of the Treaty and (ii) reparation.[368]

314. For the Applicants, given that the Tribunal did not analyze these (potentially) outcome-determinative issues regarding continuity and estoppel in the Award and failed to explain why, the Tribunal failed to "address a particular question" within the meaning of Article 52(1)(e), and thus the Award is subject to annulment.[369]

315. The Applicants also again claim that the Tribunal's failure to consider the Respondent's arguments on these issues warrants annulment pursuant to Article 52(1)(d), given that the Tribunal failed to consider certain arguments critical to the Tribunal's decision or provide reasons why such arguments were irrelevant.[370]

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[365] Mem., ¶414, quoting Claimants' Post-Hearing Brief, ¶73, **A-7**.
[366] Mem., ¶415, quoting Claimants' Post-Hearing Brief, ¶73, **A-7**.
[367] Mem., ¶¶417-418.
[368] Mem., ¶¶424-428.
[369] Mem., ¶¶429-433; see Reply, ¶¶393-403.
[370] Mem., ¶¶435-439; see Reply, ¶¶404-410. Applicants' Opening Statement, slides 12-13.

(2) The Respondent's Position

316. The Respondent gives five reasons as to why this ground may not give rise to annulment. First, the Tribunal did indeed consider, and reject, the Claimants' arguments on continuity and estoppel. For the Respondent, though, the Claimants never invoked these arguments with regard to arbitrariness. This is something that the Applicants raised for the first time in this Annulment Proceeding. Instead, these arguments were raised with regard to legitimate expectations. And the Respondent observes that the portions of the pleadings and the Award that the Applicants cite to all point to sections on legitimate expectations and not arbitrariness.[371] The Respondent states that the Committee is not empowered to review these merits findings, citing *Klöckner v. Cameroon*, given that an annulment proceeding cannot be used to complete or develop an argument that should have been made during the arbitral proceeding.[372]

317. Second, the grounds for annulment that the Applicants have invoked are not appropriate for the Tribunal's alleged failure to address Claimants' arguments. There is consensus, according to the Respondent, among prior committees that tribunals are not required to address all arguments or authorities raised to satisfy the requirement for a statement of reasons under Article 52(1)(e). Nor is "express consideration" of every argument required to satisfy the right to be "heard" pursuant to Article 52(1)(d).[373]

318. Third, invoking *Continental Casualty v. Argentina* and *UAB v. Latvia*, the Respondent repeats that the Tribunal cannot be accused of failing to state reasons regarding an argument that was raised to support a different claim.[374] Nowhere in their arbitral submissions did

[371] Rej., ¶241.

[372] C-Mem., ¶¶182-184, 185, quoting *Klöckner*, ¶83, **ALA-9**; Rej., ¶238.

[373] C-Mem., ¶¶186-189; Rej., ¶246; Respondent's Opening Statement, slide 114, citing *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, November 2, 2015, ¶101, **RLA-1** ("***Occidental***").

[374] C-Mem., ¶192 citing *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Decision on Annulment, April 8, 2020, ¶190, **RLA-33** (quoting *Wena*, ¶82, **ALA-4**); *Cortec*, ¶228(e), **RLA-30**. C-Mem., ¶¶190-193; ¶191, n. 256, ¶192 n. 257; see Rej., ¶¶252-253.

the Claimants allege that their arguments for arbitrariness and breach of legitimate expectations were somehow connected.[375]

319. Fourth, the Applicants have not shown that addressing Benice's obligation to preserve continuity and application of the principle of estoppel would have had a material impact on the Award. The Respondent says that the Applicants are saying that it would have without explaining why. The Respondent also notes that the Tribunal found these concepts to be irrelevant and immaterial to the Claimants' arguments on legitimate expectations, and thus it would have likely reached the same conclusion with regard to arbitrariness in any event.[376]

320. Fifth, the alleged failure of a tribunal to address an argument raised by a Party is not automatically a breach of the right to be heard.[377] There is no dispute that the Tribunal afforded both Parties the opportunity to present its case, including in relation to continuity and estoppel. In any event, it is mere speculation that had the issue been raised in the way that the Applicants have framed it on annulment that the outcome of the Award would have changed.[378]

(3) The Committee's Analysis

321. The Applicants' argument is twofold: first they allege that the Tribunal's failure to address Claimants' argument that Benice's District Assembly's filing of the Annulment Request constituted a failure to respect continuity and thus a violation of the FET standard by the imposition of arbitrary measures. The Applicants refer in this respect to their submissions in the Arbitration, specifically its submission in the Post-Hearing Brief that Benice's support of the Zoning Change from 2002 to 2012 obligated Benice to refrain from filing a lawsuit in 2012 to annul the Zoning Plan Change.[379] In relation to this component of their argument, they submit that there is no justification for this change of course as a result of

[375] C-Mem., ¶192.

[376] C-Mem., ¶¶194-196; Rej., ¶254. Hr. Tr. 115, Respondent's Opening Statement, slide 116.

[377] Rej., ¶256, citing *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on the Application for Annulment, February 21, 2023, ¶¶283, 295, **ALA-28** ("***Watkins***").

[378] Rej., ¶¶257-259. Respondent's Opening Statement, slide 117.

[379] Mem., n. 300, citing Claimants' Post-Hearing Brief, ¶73, **A-7**.

a change of government, because the Mayor of Benice had been in charge all along and was aware of relevant studies relating to the Project.

322. Second, but separately, the Applicants point to the conduct of the City of Prague and submit that the new Government "remained obligated to protect Claimants' investments"[380] and maintain that the Tribunal failed to "[pay] attention to Claimants' argument [regarding] the principle of estoppel with respect to the City of Prague's actions."[381] In describing the allegedly relevant conduct, however, the exact basis for estoppel, in particular in relation to the City's conduct is not made entirely clear. Claimants refer somewhat indiscriminately to conduct by multiple state officials, in various positions and in various levels of responsibility, over a period of five years.[382]

323. Factually, the situation of the City of Prague differs from that of the district of Benice in at least one material respect, namely that in Prague, as a result of elections, a new government was in place. Be that as it may, in developing this annulment ground, the thrust of the Applicants' argument is that the Tribunal failed to do justice to their argument in the Arbitration that the State's conduct, notably its change in position in relation to the Project, amounted to a breach of Article 4 of the BIT.

324. The Parties are divided on whether the argument of the failure to respect the principle of continuity in its decision-making was made both in relation to the allegation of the arbitrariness of the State's actions as well as in relation to the allegation of the breach of Claimants' legitimate expectations. The Applicants say it was, and argue that in the Arbitration they submitted that "Benice's Annulment Request and subsequent steps attributable to the Czech Republic resulted in a violation of the FET, as this conduct was arbitrary."[383] However, the reference to the Applicants' submissions in the Arbitration does not bear out the contention that there is a causal connection between the allegedly arbitrary conduct and the allegation of a breach of legitimate expectations.

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[380] Claimants' Post-Hearing Brief, header above ¶154, **A-7.**

[381] Mem., ¶420.

[382] Claimants' Post-Hearing Brief, ¶¶156-157, **A-7**.

[383] Mem., ¶412; Reply, ¶388.

325. The Applicants refer to paragraphs 296-303 of their Memorial.[384] These paragraphs, however, constitute Section 3 of chapter D, dealing with the obligation to ensure fair and equitable treatment and not to impair investments by unreasonable measures. Section 1 addresses the Czech Republic's breach of good faith, and section 2 addresses the frustration of Claimants' legitimate expectations and violation of transparency. Section 3 is headed "The Czech Republic's Conduct Was Arbitrary." The structure of this chapter and the juxtaposition of these sections effectively undermines the contention that the arguments contained in Section 3 (namely that the Czech Republic's conduct was arbitrary) constitute the basis for the submission in Section 2 (that the Republic violated the FET standard).

326. As the Respondent submits, in addressing the Claimants' arguments in relation to the obligation to preserve continuity and the principle of estoppel (in the section dealing with legitimate expectations, which is where the Claimants raised them),[385] the Tribunal dismissed the Claimants' claim for legitimate expectations considering that while the stability of the legislative and regulatory framework can be relevant to the investor's regulatory legitimate expectations, such regulatory expectations were not at issue in this case, where the Claimants' claim was based on their alleged "direct legitimate expectation," which the Tribunal determined was not established.[386]

327. Moreover, as set out above, this annulment ground is also compromised by the fact that while the Applicants address the legal basis of both prongs of its argument without distinguishing between the actions of the borough of Benice and City of Prague, the factual matrix of both elements of this argument differ in significant part.

328. In any event, the Committee agrees with the Respondent that even assuming the arguments in relation to continuity and estoppel had been raised in the context of arbitrariness, tribunals are not under the obligation to address every argument put forth by the parties in the context of Article 52(1)(e).[387] It is the Tribunal's prerogative whether to consider an

[384] See Mem.,¶412, n. 292; Reply, ¶388, n. 356.
[385] *Pawlowski* Award, ¶¶612-614, **A-1**.
[386] *Pawlowski* Award, ¶645, **A-1**.
[387] See *Occidental*, ¶101, **RLA-1**; *MCI*, ¶67, **ALA-32**; *Rumeli*, ¶84, **RLA-17**; *Continental Casualty*, ¶92, **RLA-7**.

argument and to determine the relevance of arguments. As the committee in *Kılıç* observed, tribunals have discretion to focus on those issues and arguments that they find determinative for their decision and making use of this discretion is not by itself a reason for annulment.[388]

329. Furthermore, the Committee agrees with the Respondent that even assuming the arguments of continuity and estoppel had been argued in relation to arbitrariness, such arguments would not have been outcome determinative. There is no indication that these arguments would have been evaluated any differently than they were in the context of legitimate expectations. A mere hypothesis that the outcome could potentially have been different is not sufficient to justify annulment.

330. Finally, the Committee rejects the argument that the Tribunal's decision constitutes a breach of the Applicants' right to be heard pursuant to Article 52(1)(d). There is no support for the allegation that the Tribunal denied the Claimants their right to be heard; the Tribunal provided the Claimants ample opportunity to present their position; it considered and evaluated Claimants' arguments. The right to be heard does not relate to the manner in which tribunals deal with the arguments and evidence presented.[389] As noted above, speculation that the outcome could have been different does not justify annulment.

H. GROUND 8: THE TRIBUNAL'S ALLEGED FAILURE TO ADDRESS THE CIRCUMSTANCES OF THE JUNE 21, 2012 BENICE DISTRICT ASSEMBLY MEETING

(1) The Applicants' Position

331. The Applicants recall that on June 21, 2012, the Benice District Assembly passed a resolution to cooperate with the co-petitioners, Ms. Štěpánková and Mr. Hepner "to prevent the realization of the submitted Benice Residential Complex project or at least to minimize

[388] See supra, ¶79, citing *Kılıç*, ¶133, **RLA-19**.

[389] *Watkins*, ¶¶283, 295, **ALA-28**.

its scale."[390] It was at this meeting, say the Applicants, that the District and its co-petitioners resolved to submit the Annulment Request.[391]

332. According to the Applicants, the Claimants emphasized the "non-standard circumstances" of this meeting in the Arbitration. First, the Claimants explained that when the Assembly approved the pursuit of the Annulment Request it did so without having examined any documentation or undertaken any planning or legal analysis. The Applicants contend the decision was based solely on the mayor's reference to a news article entitled "problematic Benice Residential Complex Project."[392]

333. The Claimants also showed in the Arbitration that the mayor proposed the submission of the Annulment Request to the district assembly without prior notice to them or the public. The item was not even on the meeting's agenda, and thus, Mr. Pawlowski or other representatives of the Claimants were not invited to defend their plans for the development to the district assembly prior to the vote. From this, the Applicants posit that the mayor plotted a "vote by ambush" where she did not want the district assembly to hear the other side.[393]

334. The Applicants allege that, in the Award, the Tribunal paid "no attention" to this line of argument. The Tribunal did not even acknowledge that the Claimants had criticized the circumstances of the Benice District Assembly meeting. Instead, the Applicants say that the Tribunal interpreted the argument as having required notice to the Claimants, and the Tribunal found that there was no notice requirement.[394]

[390] Mem., ¶440, quoting Resolution of the Benice district assembly, June 21, 2012, **A-17** (Exhibit C-76 in original proceeding).

[391] Mem., ¶440.

[392] Mem., ¶¶441-442.

[393] Mem., ¶¶443-444; Reply, ¶¶417-418.

[394] Mem., ¶¶447-448; Reply, ¶423.

335. The Applicants insist, though, that the point of the Claimants' line of argument here was not the lack of notice to the Claimants, but that the overall circumstances of the vote to file the Annulment Request were irregular—and these were not addressed by the Tribunal.[395]

336. For the Applicants, the Tribunal's having side stepped this issue had a decisive effect on the Award given that the Claimants argued that the filing of the Annulment Request was arbitrary, unreasonable, and disproportionate pursuant to Article 4 of the BIT.[396]

337. In the Award, the Tribunal found no such violation because it found that the decision was taken by a democratic organ, the Benice District Assembly. It qualified, however, that, if the decision to file the Annulment Request was driven by the mayor, "such conduct could constitute a breach of the FET standard enshrined in Article 4 of the BIT."[397]

338. The Applicants insist that if the Tribunal had addressed the Claimants' argument, as it was presented, the decision on Article 4 and on reparation would have been different given that the record shows that the District Assembly's decision was made in an irregular way—under the influence and time pressure of the mayor.[398]

339. For the Applicants, the Tribunal did not analyze the Claimants' arguments regarding the circumstances of the June 21, 2012, meeting in the Award and failed to explain why it did not. Thus, it failed to state reasons pursuant to Article 52(1)(e) on this potentially outcome-determinative issue and the Award is subject to annulment.[399]

340. The Applicants also again claim that the Tribunal's failure to consider the Respondent's argument regarding the meeting warrants annulment pursuant to Article 52(1)(d), which

[395] Mem., ¶¶449-450.
[396] Mem., ¶¶451-454; Reply, ¶419.
[397] Mem., ¶¶452-453.
[398] Mem., ¶456; Reply, ¶419.
[399] Mem., ¶¶458-465; Reply 412.

obliged the Tribunal to consider the aforesaid argument as a *"'point critical to the tribunal's decision'"*[400] or provide reasons why it does not consider it to be relevant.[401]

(2) The Respondents' Position

341. The Respondent provides four reasons for its disagreement with the view that the Tribunal's alleged failure to consider the circumstances of the June 21, 2012, Benice District Assembly meeting may give rise to annulment of the Award. First, the Applicants may not use this Annulment Proceeding to seek a retrial of their allegations that the Benice District Assembly meeting was a personal retaliatory decision by the mayor. The Respondent observes that that the Tribunal considered—and rejected—these allegations in the Award, expressly rejecting the notion of a vote by ambush.[402] It is not the Committee's function to review the Tribunal's factual findings on the merits.[403]

342. Second, again, the Respondent argues that the grounds for annulment that the Applicants have invoked are not appropriate for the Tribunal's alleged failure to address a "mere argument of Claimants relating to the 'circumstances of Benice District Assembly's meeting on June 21, 2012.'"[404] Invoking the decision in *Kılıç*, the Respondent reiterates that whether or not a given argument is deemed to be relevant is a matter for the Tribunal's discretion, and making use of that discretion is not a basis for finding a "failure to state reasons" pursuant to Article 52(1)(e).[405] "Express consideration" of every argument is not required to be "heard" pursuant to Article 52(1)(d).[406]

343. Third, the Respondent asserts that when the Award is considered in its entirety that it is clear the Tribunal did address the Claimants' argument that Mayor Topičová allegedly manipulated the Benice District Assembly's decision to file the Annulment Request. The Award itself says that the Tribunal considered whether "Benice's decision to file the

[400] Reply, ¶433 quoting Perenco ¶125, **RLA-9**.
[401] Mem., ¶¶466-470; Reply, ¶432-437.
[402] Rej., ¶266, citing *Pawlowski* Award, ¶¶390, 396, 397, 398, **A-1**.
[403] C-Mem., ¶¶199-200.
[404] Rej., ¶260, citing Mem., ¶446.
[405] Rej., ¶263-264, citing *Kılıç*, ¶133, **RLA-19**.
[406] C-Mem., ¶¶201-205.

Annulment Request was driven by Mayor Topičová" and found it was "not persuaded by [it]."[407]

344. The Respondent further explains that the Tribunal did justify its decision for its finding that the approval to file the Annulment Request was not irregular or a personal decision of the mayor. The Tribunal found that "[p]ublic authorities are not under an obligation to provide advance notice of their intention to launch lawsuits which affect protected investors," and as such, the district assembly "adher[ed] to proper administrative procedure."[408]

345. Fourth, according to the Respondent, the Applicants have not shown that any alleged failure of the Tribunal to consider the circumstances of the June 21, 2012, meeting was outcome-determinative on Article 4 or on reparation. For the Respondent, the issue clearly was not outcome-determinative given that the Tribunal found that the decision was not motivated by the mayor, required no notice, and adhered to proper administrative procedure. Further, the subsequent judgments by the Courts retroactively justified the District's decision.[409]

346. Fifth, the Respondent denies that the Applicants have shown a violation of their right to be heard under Article 52(1)(d). The absence or inadequate discussion of an argument "does not automatically amount to a violation of the right to be heard."[410] There is no debate that the Parties were given the opportunity to submit and present their respective arguments, and the arguments at issue here were indeed considered and deemed irrelevant. The Applicants' theory that the Tribunal would have found a violation of Article 4 and awarded reparations had it considered the overall circumstances of the vote is mere speculation.[411]

(3) The Committee's Analysis

347. The Applicants' submissions in relation to this annulment ground are a mixture of arguments of procedure and substance. For the reasons set forth below, the Committee

[407] C-Mem., ¶¶206.

[408] C-Mem., ¶207, quoting *Pawlowski* Award, ¶¶406, 390, 394, **A-1**.

[409] C-Mem., ¶¶209-212; Rej., ¶¶268-269.

[410] Rej., ¶271, citing *Watkins*, ¶¶283, 295, **ALA-28.**

[411] Rej., ¶¶274-276.

rejects the Applicants' position that the Tribunal's decision in relation to the circumstances of the Benice District Assembly meeting of June 21, 2012, justifies annulment.

348. The Applicants' arguments are a blend of the allegation that the failure to place the resolution to file the Annulment Request on the agenda prior to the meeting resulted in a vote by ambush and precluded an adequate decision-making process. It appears that the focus of this argument evolved throughout the Arbitration. Initially, the Applicants focused more so on the (procedural) surprise element while later, faced with the fact that there was no formal requirement to place the issue on the agenda prior to the meeting, the Applicants dropped this argument and emphasized the more generic concerns about the adequacy of the process.[412] Notably, on annulment, the Applicants advance precisely the argument that the Tribunal referenced ("[…] [a]nd Benice did so without giving Claimants any advance notice […]"),[413] and rejected.[414]

349. First, the Committee recalls the considerations above that tribunals are not under the obligation to address every argument put forth by the parties under the standards of Article 52(1)(e).[415] It is the tribunal's prerogative whether or not to consider an argument and to determine the relevance of arguments. As the committee in *Kılıç* observed,[416] tribunals have discretion to focus on those issues and arguments that they find determinative for their decision and making use of this discretion is not by itself a reason for annulment.[417] Consequently, even if there were factual support for the Applicants' argument, it is not for the Applicants' to be the arbiter of what constitutes "the crux" of their arguments; that is the Tribunal's prerogative.

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[412] "Mayor Topičová put this proposal to the members of the Benice District Assembly without prior notice to them or to the public. As is clear from the June 21, 2012 Benice District Assembly Resolution, this item was not on the agenda for meeting and was instead added and then voted on during the same meeting rendering the vote irregular." Claimants' Reply on the Merits, ¶362, **A-6**.

[413] *Pawlowski* Award, ¶400, **A-1.**

[414] *Pawlowski* Award, ¶404, **A-1.**

[415] See *Occidental*, ¶101, **RLA-1**; *MCI*, ¶67, **ALA-32**; *Rumeli*, ¶84, **RLA-17**; *Continental Casualty*, ¶92, **RLA-7**.

[416] *Kılıç*, ¶133, **RLA-19**.

[417] See supra, ¶79, *Kılıç*, ¶133, **RLA-19**.

350. Furthermore, in the Committee' view, the Applicants have not established that the issues in question were outcome-determinative for the case.[418] Namely, the argument that the Assembly's decision "may not have been as democratic as the Tribunal found"[419] and that a different procedure could have led to a different Award outcome in relation to a violation of the BIT and the Tribunal's decision on reparation is speculative. Moreover, the Tribunal's decision was based on a multi-tiered consideration that (i) the Assembly was acting within the law and its right; (ii) the decision was justified given the nature and size of the Project, and (iii) the decision was retroactively justified by judgments of the Courts.

351. Finally, the Committee rejects the argument that the Applicants have shown that they have been denied their right to be heard pursuant to Article 52(1)(d). There is no support for the allegation that the Tribunal denied the Claimants their right to be heard. The Tribunal provided the Claimants ample opportunity to present their position; it considered and evaluated the Claimants' arguments and did not deem them to have the relevance attributed thereto by the Claimants. The right to be heard does not, however, relate to the manner in which tribunals deal with the arguments and evidence presented.[420] As noted above, speculation that the outcome could have been different does not justify annulment.

V. COSTS

A. THE APPLICANTS' COST SUBMISSIONS

352. The Applicants seek an order requiring that the Respondent pay the Applicants' costs of this Annulment proceeding (plus interest) as well as all costs and expenses of the arbitrators and the Centre.[421]

[418] See C-Mem., ¶209, citing *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment, December 18, 2012, ¶86, **ALA-6**.

[419] Mem., ¶455.

[420] *Watkins*, ¶¶283, 295, **ALA-28**.

[421] Mem., ¶471; Reply, ¶438.

353. In its Memorial, the Applicants had also sought annulment of the Award in relation to the Tribunal's cost order in the Arbitration,[422] which led the Respondent to qualify this as a (putative) ninth ground for annulment.[423]

354. At the Hearing, the Committee requested both Parties to clarify their position, and in particular whether the Applicants seek annulment of the cost order in the Arbitration.[424] In response, the Applicants argued that it is not correct to assert that they lost the Arbitration.[425] They submit that the Tribunal's order that costs were to be borne by both Parties was therefore surprising as it is a general principle of law that the losing party bears the costs of the proceedings in a dispute.[426] Moreover, they submit that that in deciding on the costs in this way, the Tribunal also departed from fundamental rules of procedure, constituting a ground for annulment of the Award in respect to costs.[427]

355. Nevertheless, in their final submissions on this issue the Applicants posited that "the decision on costs in the underlying arbitration is dependent on the decision on merits. That's why we submit that also the decisions on costs should be annulled, if the Committee would annul part of the Award as a whole. To be clear, we do not submit specific ground for annulment of the decision costs."[428]

356. Thus, the Applicants submit that the Respondent should bear all of the Applicants' costs and expenses of these proceedings totaling CZK 8,510,191.00, as well as the expended portion of the USD 405,025 in advances paid to ICSID.

[422] Mem., ¶34.
[423] C-Mem., ¶¶213-214.
[424] Hr. Tr. 260:4-6.
[425] Hr. Tr. 148:2-4.
[426] Hr. Tr. 148:5-11.
[427] Hr. Tr. 148:21-149:1.
[428] Hr. Tr. 151:9-15.

B. THE RESPONDENT'S COST SUBMISSIONS

357. In its written submissions, the Respondent observed that the Applicants seek annulment on the Tribunal's order of costs—that "each Party shall bear, in equal parts, the Costs of the Proceedings and [shall] be responsible for its own Legal Fees and Expenses."[429]

358. The Respondent urges the Committee summarily to dismiss this request as it is not substantiated in the Applicants' Memorial on Annulment, and they have raised no ground under Article 52(1) in connection with the allocation of costs.[430]

359. At the Hearing, in response to the request for clarification from the Committee, the Respondent pointed out that the earlier practice of not ordering costs has evolved recently and annulment committees tend to apply the principle that costs follow the event.[431] Furthermore, the Respondent submits that as a matter of policy, applying this principle in a case of a frivolous application for annulment, will send the right message to the participants in the system of investment treaty arbitration.[432]

360. Second, the Respondent refers to the Applicants' behavior in this case as a factor supporting that the Applicants should be ordered to bear the costs of the Annulment and recall that the Hearing had to be suspended because of lack of payment.[433] The Applicants' behavior also necessitated analyzing how to obtain an order on costs in favor of the Czech Republic even if the Committee did not render a decision on the application.[434]

361. Third, as to the allocation, the Respondent argues that the Committee should assess costs on the basis of what happened in the Annulment Proceedings, and that costs follow the event, and not somehow take into account the decision on costs made by the Tribunal in the Arbitration.[435]

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[429] C-Mem., ¶213; Rej., ¶277.
[430] C-Mem., ¶214; Rej., ¶278.
[431] Hr. Tr. 171:23-172:9.
[432] Hr. Tr. 172:10-18.
[433] Hr. Tr. 172:19-24.
[434] Hr. Tr. 172:25-173:10.
[435] Hr. Tr. 172:11-173:1.

362. Thus, the Respondent submits that the Applicants should bear all of the Respondent's costs and expenses of these proceedings totaling EUR 307,696.51 and CZK 151,881.00.

C. THE COMMITTEE'S DECISION ON COSTS

363. First, the Committee notes that at the Hearing, the Applicants unambiguously confirmed that they did not seek annulment specifically in relation to the cost order contained in the Award. Insofar as the Applicants did seek annulment of the cost order contained in the Award as a corollary of the annulment grounds submitted in relation to the merits decision contained in the Award,[436] the Applicants' request has become moot because the Committee has found no basis to annul the Award.

364. As regards the allocation of the costs of the Annulment proceeding. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

365. This provision, together with Arbitration Rule 47(1)(j) (applied by virtue of Arbitration Rule 53), gives the Committee discretion to allocate all costs of the proceeding, including attorney's fees and other costs, between the Parties as the Committee deems appropriate.

366. In addition, in this case, the BIT contains a specific provision dealing with the allocation of costs in Article 9(2)(d), providing that

> *Each party to the dispute shall bear the costs of its own member of the tribunal and of its representation in the arbitral proceedings; the costs of the chairman and the remaining costs shall be borne in equal parts by both parties to the dispute. The tribunal may,*

[436] "That's why we submit that also the decisions on costs should be annulled, if the Committee would annul part of the Award as a whole." See Tr. 151:11-13.

however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties.

367. Both Parties have submitted that in this case a suitable approach would be that costs follow the event, i.e., that the successful party is awarded some or all costs. As the Applicants have submitted, this is a well-established principle, which the Respondent has submitted is an increasingly common approach also in investment arbitration. In their submissions, the Parties have not made a distinction between the costs of the Annulment proceeding and legal fees, but have advocated for the same approach to both components of the costs.

368. In their submissions, the Parties have not explicitly considered the implications of the guidance provided in Article 9(2)(d) of the BIT. Although the terminology of this provision does not fully correspond to the ICSID procedure in either arbitration or annulment, and grants the tribunal discretion to decide otherwise, the BIT suggests as a general allocation that costs shall be borne by both Parties.

369. Both the ICSID Convention and the ICSID Arbitration Rules and the specific provision of the BIT allow the tribunal or committee considerable discretion to allocate costs. The Committee is mindful of the increasing practise of allocating at least certain costs to the successful party, an approach advocated by both Parties. At the same time, the Committee is mindful of the fact that while ultimately all annulment grounds were rejected, the Application was not frivolous, and Article 9(2)(d) of the BIT lays down a general rule that costs shall be shared equally by the Parties. In considering the totality of the circumstances, the Committee seeks a balance between the rule that costs follow the event, and the notion that costs shall be borne equally by the Parties. Consequently, the Committee determines that an appropriate allocation of the costs of the Annulment proceeding entails that the Applicants shall bear the costs of the Annulment consisting of the fees and expenses of the Committee and ICSID, and that each Party shall bear its own legal costs.

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

Committee Members' fees and expenses	
Jacomijn J. Van Haersolte-Van Hof	72,744.78
Yoshimi Ohara	62,413.77
David Pawlak	75,882.31
ICSID's administrative fees	136,000.00
Direct expenses	28,953.66
Total	**375,994.52**

371. The above costs have been paid out of the advances made by the Applicants pursuant to Administrative and Financial Regulation 15(5).[437]

VI. DECISION

372. For the reasons set forth above, the *ad hoc* Committee decides unanimously as follows:

(1) The Application is rejected; and

(2) The Applicants shall bear all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, and each Party shall bear its own legal costs.

[437] The remaining balance will be reimbursed to the Applicants.

[signed]

Ms. Yoshimi Ohara
Member of the *ad hoc* Committee

Date: March 6, 2025

Mr. David A. Pawlak
Member of the *ad hoc* Committee

Date:

Dr. Jacomijn J. van Haersolte-van Hof
President of the *ad hoc* Committee

Date:

[signed]

Ms. Yoshimi Ohara
Member of the *ad hoc* Committee

Date:

Mr. David A. Pawlak
Member of the *ad hoc* Committee

Date: March 6, 2025

Dr. Jacomijn J. van Haersolte-van Hof
President of the *ad hoc* Committee

Date:

Ms. Yoshimi Ohara
Member of the *ad hoc* Committee

Date:

Mr. David A. Pawlak
Member of the *ad hoc* Committee

Date:

[signed]

Dr. Jacomijn J. van Haersolte-van Hof
President of the *ad hoc* Committee

Date: March 6, 2025