

ICSID Case No ARB/05/16

REPUBLIC OF KAZAKHSTAN

Applicant

and

**RUMELI TELEKOM A.S. AND TELSİM MOBİL TELEKOMÜNİKASYON HİZMETLERİ
A.S.**

Respondents

(Annulment Proceeding)

DECISION OF THE *AD HOC* COMMITTEE

Members of the Committee

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Professor Campbell McLachlan QC
Dr. Eduardo Silva Romero

Secretary to the Committee

Ms. Martina Polasek

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1. SUMMARY OF PROCEEDINGS

1. On 31 October 2008, the Republic of Kazakhstan (“RoK” or “Applicant on Annulment” or “Applicant”) submitted a timely application for annulment (“Application”) of the Award which was rendered on 29 July 2008 in favour of Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. (“Rumeli and Telsim” or “Respondents to the Application” or “Respondents”) by an Arbitral Tribunal composed of Professor Bernard Hanotiau (President), Marc Lalonde O.C. P.C. Q.C. and Stewart Boyd C.M.G. Q.C in ICSID Case No. ARB/05/16.
2. The Award determined a dispute arising under the Bilateral Investment Treaty dated 1 May 1992 between Kazakhstan and Turkey (“the BIT”). The dispute concerned the alleged expropriation of Rumeli and Telsim’s 60% shareholding in KaR-Tel, a Kazakh company which, on 31 July 1998, had won the bid to hold the Licence (“the Licence”) for the second mobile telephone network in Kazakhstan. The investment contract granted by the Kazakh Investment Committee for the Licence on 20 May 1999 (“the Investment Contract”) had a ten-year duration and was due to expire on 31 July 2009. The Licence itself was granted for 15 years and expired in 2013. The Tribunal decided unanimously in its Award that it had jurisdiction over the dispute; that the RoK had breached its obligation to accord Rumeli and Telsim fair and equitable treatment under the BIT; and that the RoK had expropriated Rumeli and Telsim’s investment. It ordered the RoK to pay Rumeli and Telsim US\$125 million by way of compensation, together with interest and costs.
3. The Application was based on the grounds that the Tribunal had manifestly exceeded its powers, that there had been a serious departure from a fundamental rule of procedure and that the Award failed to state the reasons on which it was based in violation of Articles 52(1)(b), 52(1)(d) and 52(1)(e) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”). The RoK challenged four aspects of the Award as meriting annulment:

(a) *Jurisdiction*: The Tribunal found that Rumeli and Telsim's investment was in accordance with Kazakh law (Award paragraphs 320 – 322). The Applicant on Annulment submits that the investment was part of a large-scale fraud and was therefore illegal. The Applicant submits that the Tribunal manifestly exceeded its powers by finding that it had jurisdiction when it had none due to the illegality of the investment;

(b) *Collusion*: The Tribunal found collusion between the Investment Committee and Telecom Invest (a Kazakh shareholder in Kar-Tel) (Award paragraphs 707 – 708). The Applicant on Annulment submits that this finding was contrary to all of the evidence before the Tribunal and therefore either amounted to a failure to give reasons or departed from a fundamental rule of procedure;

(c) *Causation*: The Applicant on Annulment submits that the Tribunal failed to make any finding as to causation, and that this failure amounted to an annulable failure to provide reasons and/or a manifest excess of powers;

(d) *Damages*: The Tribunal awarded Rumeli and Telsim US\$125 million damages to compensate them for the expropriation of their shares and to provide full reparation for the breaches of treaty committed by the RoK (Award paragraph 814). The Applicant on Annulment submitted that the Tribunal failed to give reasons for its decision as to quantum and that the Award must be annulled on this basis.

4. In its Application, the Applicant requested a stay of the enforcement of the Award pursuant to Article 52(5) of the ICSID Convention.¹
5. On 3 November 2008, the ICSID Secretariat acknowledged receipt of the Application.
6. On 7 November 2008, the ICSID Secretariat notified the Parties of the registration of the Application and informed the Parties that the enforcement of

¹ RoK's Application for Annulment dated 31 October 2008, paras 119-123.

the Award was provisionally stayed in accordance with Rule 54(2) of the ICSID Rules of Procedure for Arbitration Proceedings (“the Arbitration Rules”).

7. On 12 December 2008, the ICSID Secretariat informed the Parties that the *ad hoc* Committee was constituted and was comprised of Judge Stephen M. Schwebel, Professor Campbell McLachlan and Dr Eduardo Silva Romero (“the Committee”).
8. On 17 December 2008, copies of the declaration signed by each member of the Committee were sent to the Parties in accordance with Rule 6 of the Arbitration Rules.
9. By letter dated 19 December 2008, the ICSID Secretariat informed the Parties that Judge Schwebel had been appointed as President of the Committee and invited the Parties to confer on the request for the stay of the enforcement of the Award.
10. By letter dated 23 December 2008, the Parties were informed that the first session of the Committee would be held on 9 February 2009 at the World Bank offices in Washington D.C. By letter of the same day, the Applicant on Annulment informed the Committee that it did not agree to the request made by Counsel for the Respondents that the stay of the enforcement of the Award be lifted or that the Applicant on Annulment should give a bank guarantee. The Applicant argued that it was entitled to a stay of the enforcement of the Award and that there was no necessity or justification for security to be given.
11. By letter dated 14 January 2009, the Applicant on Annulment informed the Committee of the Parties’ agreement regarding the procedural timetable for the filing of submissions in relation to the issue of the stay. In addition, the Applicant informed the Committee that the Respondents were of the view that oral submissions on the issue of the stay were unnecessary but that the Applicant wished to present oral submissions on the issue of the stay at the initial Committee session to take place on 9 February 2009.
12. On 16 January 2009, the Committee noted the Parties’ agreement regarding the procedural timetable for the filing of submissions in relation to the issue of

the stay and sent a draft agenda to the Parties for the session to be held on 9 February 2009. Both Parties agreed to the draft agenda presented.

13. On 22 January 2009, the Respondents to the Application filed their application for the termination of the stay or for the posting of a security together with 28 exhibits.
14. On 30 January 2009, the Applicant on Annulment filed its response to the Application for the termination of the stay or for the posting of a security.
15. On 4 February 2009, the Respondents to the Application informed the Committee that they would not be submitting a reply to the response submitted by the Applicant on Annulment.
16. On 8 February 2009, the Respondents to the Application filed an additional Exhibit 29 to their application for the termination of the stay or for the posting of security dated 22 January 2009.
17. On 9 February 2009, a hearing was held at the World Bank offices in Washington D.C. The Parties confirmed, *inter alia*, that they had no objection to the constitution of the Committee or to any of its members² and respectively presented their views on the issue of the stay. At the close of the hearing, the Committee decided to maintain the stay pending further analysis of the Parties' positions and the rendering of the resultant decision.
18. On 19 March 2009, the Committee rendered its decision on the Stay of Enforcement of the Award. The Committee decided that the continuation of the stay was conditioned on the provision by the Applicant on Annulment of a written assurance specifying that full payment of the Award would be made within a fixed period of time. It was further decided that if the Applicant on Annulment declined to produce such assurance and it wished that the stay be maintained, then it should deposit the sum of 50% of the principal amount of the Award – USD 62.5 million – into an escrow account.

² Minutes of the First Session, 9 February 2009, Section I Procedural Matters, Point 1.

19. On 7 April 2009, the Applicant on Annulment requested an extension of one month for its declaration concerning the stay of enforcement. By letter of the same day, the President of the Committee requested the Respondents to the Application to submit their comments on the Applicant's request by 14 April 2009.
20. On 8 April 2009, the Respondents to the Application objected to the extension requested by the Applicant on Annulment and requested the Committee to reject the extension or alternatively "*grant a partial extension subject to an undertaking by the Republic of Kazakhstan that it will use this additional time to comply with the Decision.*"
21. On 8 April 2009, the Committee accorded the Applicant on Annulment an extension until 11 May 2009 for the provision of the written assurance set out in paragraph 88 of the Decision on the Stay of the Enforcement of the Award and confirmed that, in the event that such assurance was not forthcoming by that date, the provisions of paragraph 89 of the Decision would take effect.
22. On 9 April 2009, the Applicant on Annulment filed its Memorial on Annulment.
23. By letter dated 28 April 2009, the Applicant on Annulment provided a written assurance in accordance with paragraph 88 of the Decision on the Stay of the Enforcement of the Award.
24. On 6 May 2009, the Committee took note of the written assurance received from the Applicant on Annulment and confirmed that it was satisfactory for the purposes set out in paragraph 88 of the Decision on the Stay of the Enforcement of the Award. The stay of the enforcement of the Award therefore continued.
25. On 9 June 2009, Rumeli and Telsim filed their Counter-Memorial on Annulment.
26. By letter dated 27 July 2007, the Committee confirmed that it approved the time extension agreed by the Parties for the Applicant on Annulment to file its Reply Memorial by 28 July 2009.
27. On 28 July 2009, the Applicant on Annulment filed its Reply Memorial.

28. By letter dated 8 September 2009, the Committee confirmed that it approved the time extension agreed by the Parties for the Respondents to the Application to file their Rejoinder on Annulment by 11 September 2009.
29. On 11 September 2009, the Respondents to the Application filed their Rejoinder on Annulment.
30. On 12 October 2009, in view of the Applicant on Annulment's submissions concerning the Turkish Savings Deposit Insurance Fund relating to paragraphs 324-328 of the Award of 29 July 2008, the President of the Committee informed the Parties that he was among the counsel for the Republic of Turkey in the case of *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5). The President confirmed that this fact had not and would not have any influence on the discharge of his functions in the Committee.
31. On 14 October 2009, the Committee took note of the Parties' respective communications of 12 and 13 October 2009 concerning the length of the hearing on the Application and reserved its position as to the number of days necessary for an oral hearing, subject to a definite decision after having received the pleadings filed by the Parties. The Committee further concluded that in view of the amplitude of the pleadings, the conflicting positions of the Parties on a number of questions and the need to afford both Parties the opportunity to fully argue their case, counsel could use two of the reserved days for the hearing and would be able, if necessary, to continue into a third day.
32. On 15 October 2009, the Applicant on Annulment, in response to the letter of the ICSID Secretariat dated 12 October 2009, confirmed that it had "*no concerns about Judge Schwebel's position on the ad hoc Committee in relation to the Respondent's application for Annulment of the Award.*"
33. On 23 and 24 October 2009, a hearing on annulment was held at The Hague.
34. On 25 October 2009, the Applicant on Annulment provided the Committee with the transcript from day 6 of the hearing on the merits which took place in October 2007, at which the evidence of the experts on quantum was heard as

well as the Analysys PowerPoint presentation given on behalf of Rumeli and Telsim and the Navigant PowerPoint presentation given on behalf of the RoK.

35. On 26 October 2009, the Respondents to the Application, pursuant to the Committee's request at the hearing, provided Analysys' valuation of Rumeli and Telsim's damages based on the assumption that no terminal value should be accounted for, which was communicated to the Tribunal on 30 October 2007 as per its instructions at the hearing on the merits held on 26 October 2007.
36. On 13 November 2009, the Respondents to the Application submitted their request for arbitration costs which they quantified at US\$504,552.97.
37. On 18 November 2009, the Applicant on Annulment submitted costs of US\$1,187,409.36 for pursuing its Application.
38. On 22 January 2010, the proceeding was declared closed in accordance with Arbitration Rules 38(1) and 53.

2. APPLICATION FOR ANNULMENT

2.1 Legal grounds for annulment

2.1.1 Applicant's position³

2.1.1.1 Legal Framework

39. The Applicant on Annulment contends that Article 52 of the ICSID Convention should be construed in accordance with the relevant provisions of the Vienna Convention on the Law of Treaties.
40. The Applicant on Annulment accepts that annulment "*is not a routine step to be taken by a party that has lost a case*" and that the annulment mechanism does not permit an appeal but contends that, given that it is the only possibility open to parties and was a crucial feature of the States' agreement to the ICSID system, the review must be thorough and as wide-ranging as is legitimately

³ The transcript of the hearing held on 22 and 23 October 2009 will be referred to as follows: Transcript [page number];[line number]. See Transcript 24:14-35:16; paras 62-103 of the Memorial on Annulment and paras 12-40 of the Reply Memorial.

requested by the parties and that its central importance should not be watered down or excluded by a fixation with finality.

41. In this regard, the Applicant on Annulment emphasizes that an *ad hoc* committee should resist the temptation to be regarded as the guardian of the award and to uphold it at all costs.
42. The Applicant on Annulment accepts that, as held in the *Vivendi* case,⁴ an *ad hoc* committee must consider “*the significance of the error relative to the legal rights of the parties.*” However, it contends that an *ad hoc* committee only has discretion whether to annul or not in a case where a violation is trivial and that it is not necessary to show in addition to a breach of a requirement by the tribunal that such breach was determinative of the claim.

2.1.1.2 *Manifest excess of powers*

43. According to the Applicant on Annulment, there are three widely recognized principal aspects of the “manifest excess of powers” ground for annulment: lack of jurisdiction, non-exercise of jurisdiction and failure to apply the proper law.
44. The Applicant submits that a deficiency in any of the requirements for jurisdiction constitutes a manifest excess of power.
45. The Applicant further submits that a failure to apply any law or the application of the wrong law can be sanctioned as a manifest excess of power and, in either case, the violation must be manifest, in the sense of being self evident.

2.1.1.3 *Serious departure from a fundamental rule of procedure*

46. According to the Applicant on Annulment, there are four key aspects of this ground for annulment: lack of impartiality, breach of the right to be heard, absence of deliberation and treatment of evidence and burden of proof.

⁴ *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux/ Vivendi Universal ('Vivendi') v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002, 6 ICSID Rep 327, para 66.

47. The Applicant asserts that in order for there to be a serious departure, the violation of such a rule must have caused the Tribunal to reach a substantially different result and that a finding of a serious departure from a fundamental rule of procedure does not permit the Committee any discretion as to whether to annul or not.
48. The Applicant on Annulment further alleges that the inappropriate allocation of the burden of proof is a well settled ground for annulment as well as the rule that ICSID tribunals must deal with all issues put before them.

2.1.1.4 Failure to state reasons

49. According to the Applicant on Annulment, there are four generally accepted aspects to this ground: absence of reasons on an issue, insufficient and inadequate reasons, contradictory reasons and failure to deal with all material issues.
50. The Applicant emphasizes the importance of giving reasons both on the grounds of legitimacy and the policy considerations of public interest, integrity and quality of the process.
51. The Applicant cites the *Mitchell* annulment decision⁵ for the submission that a failure to state reasons exists whenever the reasons are purely and simply not given or are so inadequate that the coherence of the reasoning is seriously affected.
52. The Applicant further cites the *Klöckner I* and *MINE* annulment decisions⁶ for the submission that the reasons must allow “*the reader to follow the arbitral tribunal’s reasoning, on facts and on law*” and enable “*one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion...*”

⁵ *Patrick Mitchell v. Democratic Republic of Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, 1 November 2006, available at <http://ita.law.uvic.ca>.

⁶ *Klöckner Industrie-Anlagen GmbH and others v. Republic of Cameroon* (ICSID Case No. ARB/81/2), Decision on Annulment, 3 May 1985, 2 ICSID Rep 95, para 119; and *Maritime International Maritime Nominees Establishment (MINE) v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, 22 December 1989, 4 ICSID Rep 79, para 5.09.

53. Although agreeing that the correctness of the reasoning is not the subject of review, the Applicant on Annulment asserts that the tribunal's reasoning must be both coherent and displayed.
54. In this regard, the Applicant on Annulment contends that if it is necessary for an *ad hoc* committee to draw inferences in order to explain a decision or say that such reasons were implicit, then the reasons given by the tribunal were inadequate. The Applicant on Annulment further contends that it is not acceptable for the *ad hoc* committee to provide or reconstruct reasons where the tribunal has not done so as this would allow the *ad hoc* committee to modify the award and to assume the responsibility of an appeal court.
55. In addition, the Applicant on Annulment argues that the giving of contradictory reasons by a tribunal amounts to a failure to state reasons.
56. The Applicant further argues that a failure to deal with a question which would have altered an important finding of the tribunal amounts to a failure to state reasons and that it is unacceptable for an *ad hoc* committee to address a failure to deal with an issue by speculating that the tribunal concerned must have considered and dismissed the argument.
57. Finally, the Applicant on Annulment disputes the proposition that there needs to be a 'real impact' on the tribunal's final decision arising from the failure to state reasons in order for the error to be annulable.

2.1.2 Respondents' position⁷

2.1.2.1 Legal Framework

58. The Respondents to the Application contend that Article 52 of the ICSID Convention should be construed in accordance with the Vienna Convention and that in pursuance of the principle of the finality of awards, the annulment proceeding should not be used as a means of re-litigating the dispute.

⁷ See paras 5-81 of the Counter-Memorial on Annulment, paras 4-81 of the Rejoinder on Annulment and Transcript 295:11-301:9.

59. They further contend that annulment is an exceptional recourse intended to sanction only the most egregious violations of basic principles and not to re-litigate the substantive correctness of the Award; the mandate of an *ad hoc* committee is to determine whether the underlying process was fundamentally fair. In this regard, the Respondents emphasize that it is the tribunal which is the judge of the probative value of the evidence produced and not the *ad hoc* committee.
60. The Respondents to the Application argue that *ad hoc* committees have discretion whether to annul an award upon finding one of the grounds of annulment and that only those errors which have a material impact on the applicant on annulment's case in the underlying arbitration justify the annulment of the award.

2.1.2.2 *Manifest excess of powers*

61. The Respondents contend that the alleged excess of powers should be manifest and that this requirement applies equally if the question is one of jurisdiction. According to the Respondents, an excess of powers is manifest if it can be discerned with little effort and without deeper analysis.
62. The Respondents also contend that the misapplication of the proper law is not a ground for annulment and that a failure to apply the proper law will only lead to an annulment if it is manifest.

2.1.2.3 *Serious departure from a fundamental rule of procedure*

63. The Respondents assert that the departure must not only be serious and be such as to deprive the party of the benefit or protection which the rule was intended to provide but also relate to a rule which is fundamental, such as principles of natural justice and due process.
64. In addition, the Respondents contend that there must be a causal link, namely the serious departure from the fundamental rule of procedure must have had a material impact on the applicant on annulment's case in the underlying arbitration.

65. The Respondents accept that if an *ad hoc* committee finds a serious departure from a fundamental rule of procedure, it is obliged to annul the award since the material impact of the tribunal's decision is embodied in the definition of this ground.

2.1.2.4 *Failure to state reasons*

66. The Respondents contend that, as held in the *MINE* annulment decision,⁸ the adequacy of the reasoning is not an appropriate standard of review and 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 in the process it made an error of fact or of law.

67. The Respondents further contend that this ground for annulment concerns a failure to state any reasons with respect to all or part of an award and not a failure to state correct or convincing reasons and that as long as the reasoning is coherent, the award may not be annulled. In addition, the Respondents argue that not only must the express rationale on a central point be lacking but this central point must be necessary for the tribunal's reasoning.

68. It is the contention of the Respondents that, as long as the reasons set out in the award can be explained by the *ad hoc* committee or if the committee can supply the reasons from the context of the award and the record, then the award should not be annulled.

69. They further argue that there is no basis for considering that contradictory reasons constitute a ground for annulment and that a failure to answer all questions does not warrant automatic annulment unless it rendered the award unintelligible.

⁸ *Supra* n 6.

2.1.3 The Position of the Committee

2.1.3.1 Legal Framework

70. In respect to the legal framework of the ICSID annulment proceedings, both Parties agree that an annulment proceeding is not an appeal process and that Article 52 of the ICSID Convention should be construed in accordance with the Vienna Convention on the Law of Treaties.
71. As noted, the Applicant on Annulment argues that, given that an annulment proceeding is the only possibility open to parties to challenge an award and that its institution was a crucial feature of the States' agreement to the ICSID system, the review must be thorough and as wide-ranging as is legitimately requested by the parties. The Respondents to the Application, for their part, contend that in implementation of the principle of the finality of awards, the annulment proceeding should not be used as a means of re-litigating the dispute and that annulment is an exceptional recourse intended to sanction only the most egregious violations of basic principles.
72. The Parties are therefore in disagreement over the scope of the review to be carried out by the Committee. The mission of the Committee, however, is defined in Article 52(1) of the ICSID Convention. An *ad hoc* committee has the power to annul an award on one or more of five grounds, namely, that the tribunal was not properly constituted, that the tribunal has manifestly exceeded its powers, that there was corruption on the part of a member of the tribunal, that there has been a serious departure from a fundamental rule of procedure or that the award has failed to state the reasons on which it is based.
73. An *ad hoc* committee should not be concerned with upholding the finality of an award or ensuring that the review of the award is as extensive as possible given that the annulment proceeding is the only possibility open to the parties, but should simply act within the confines of the task devolved upon it by the ICSID Convention. It may annul the award if, but only if it deems that one or more of the grounds for annulment set out in Article 52(1) of the ICSID Convention obtain.

74. The Applicant on Annulment asserts that an *ad hoc* committee, upon finding an annulable error, only has discretion not to annul the award if the error is trivial. The Respondents to the Application argue, to the contrary, that an *ad hoc* committee always has discretion to annul, or not to annul, the award, regardless of whether the error is trivial or not.
75. In the view of this Committee, an *ad hoc* committee has discretion to annul an award upon finding one or more of the grounds of annulment. That discretion is not fettered by the requirement that the error must not be trivial. The *ad hoc* Committee in the *Vivendi* Annulment Decision, upon which the Applicant on Annulment relies, does not support the proposition that an *ad hoc* committee only has discretion not to annul in the case where such breaches are trivial, and merely points out that an *ad hoc* committee should “*guard against the annulment of awards for trivial cause.*”⁹ That conclusion is sound.
76. The Parties are further in disagreement in relation to the issue whether it is necessary to show, in addition to a breach of a requirement by the tribunal, that such breach was determinative of the claim.
77. Article 52 of the ICSID Convention does not condition annulment of an award on a showing that the breach of a requirement by the tribunal was determinative of the claim. It follows, therefore, that if a ground for annulment obtains the *ad hoc* committee may, at its discretion, annul the award.

2.1.3.2 *Manifest excess of powers*

78. In relation to the ground of annulment for manifest excess of powers, both Parties agree that a failure to apply any law or the application of the wrong law constitutes a manifest excess of powers. The misapplication of law, however, does not constitute a manifest excess of powers. Both Parties also agree that the violation must be manifest, in the sense of being “*self evident*” and “*capable of discernment with little effort and without deeper analysis.*” The Committee

⁹ Supra n 4, para 63.

will elaborate further upon the meaning of manifest excess of powers when it considers the question of jurisdiction.¹⁰

2.1.3.3 *Serious departure from a fundamental rule of procedure*

79. In relation to the ground of annulment for serious departure from a fundamental rule of procedure, both Parties agree that the departure must be serious and also relate to a rule which is fundamental. Both Parties further agree that an *ad hoc* committee is obliged to annul the award if a serious departure from a fundamental rule of procedure is found.

2.1.3.4 *Failure to state reasons*

80. In relation to the ground of annulment for failure to state reasons, both Parties agree that this ground obtains if there is a total absence of reasons. Both Parties further agree that the reasons must be coherent and allow “*the reader to follow the arbitral tribunal’s reasoning, on facts and on law*” and enable “*one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion.*”¹¹

81. In addition, both Parties agree that a failure to deal with a question which would have altered an important finding of the tribunal or would have rendered the award unintelligible amounts to a failure to state reasons.

82. The Parties however do not agree on whether contradictory reasons amount to a failure to state reasons. As the Respondents to the Application point out, there is no basis why contradictory reasons are more objectionable than wrong reasons which do not amount to a failure to state reasons.¹² Accordingly, it is not clear that contradictory reasons constitute a failure to state reasons unless they completely cancel each other out and therefore amount to a total absence of reasons. It is believed that such cases would be extremely rare and, as held in the *Vivendi* Annulment Decision, “*tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to*

¹⁰ Infra para 96.

¹¹ Citing *Klöckner and MINE*, supra n 6.

¹² Para 71 of the Counter-Memorial on Annulment.

discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations."¹³

83. The Parties further disagree over the power of the Committee to draw inferences in order to explain a decision, to state that certain reasons were implicit and to reconstruct reasons where the tribunal has not done so. In this Committee's view, if reasons are not stated but are evident and a logical consequence of what is stated in an award, an *ad hoc* committee should be able to so hold. Conversely, if such reasons do not necessarily follow or flow from the award's reasoning, an *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal. The Committee will elaborate further upon its views on the failure to state reasons ground as it applies to decisions on damages at paragraphs 136 – 151 below.
84. In relation to the arguments raised by the Applicant on Annulment concerning the Tribunal's failure to address certain of its arguments, it is the position of this Committee that it is not necessary for a tribunal explicitly to deal with all the arguments raised by the parties. It is important for a tribunal to summarize the parties' positions accurately and comprehensively and thereby take into account and consider all of the arguments raised by the parties. If the arguments of the parties have been correctly summarized and all the claims have been addressed, 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.

2.2 Jurisdiction

2.2.1 Applicant's position¹⁴

85. The Applicant on Annulment argues that Rumeli and Telsim's investment in KaR-Tel was aimed at furthering their worldwide fraud and, as such, was not in

¹³

Supra n 4, para 65.

¹⁴

Paras 104-123 of the Memorial on Annulment and paras 42-62 of the Reply Memorial, Transcript 100: 25-131:13.

conformity with the laws of Kazakhstan as required by both the Turkey-Kazakhstan BIT and the Foreign Investment Law.

86. Accordingly, the Applicant argues, first, that the Tribunal manifestly exceeded its powers by finding that it had jurisdiction when it had none.
87. Second, the Applicant on Annulment alleges that there was a serious departure from a fundamental rule of procedure. The Applicant contends that it is a fundamental principle of justice that the parties should not face different standard of proof when putting their case before any tribunal and that, as a result, the Tribunal's decision to apply a different standard of proof to the RoK than to Rumeli and Telsim was a serious departure from a fundamental rule of procedure. More specifically, the Applicant on Annulment argues that it was obliged to prove conclusively that Rumeli and Telsim's investments in KaR-Tel were fraudulent whereas Rumeli and Telsim were subject to a less rigorous standard of proof most notably in relation to the finding of collusion.
88. Third, the Applicant on Annulment argues that there was a failure to state reasons. In this regard, the Applicant contends that the Tribunal did not provide any reasons which would enable the reader to understand the basis upon which it disregarded the clear and unrebutted evidence of fraud and found that the investment was made in accordance with the laws of Kazakhstan or international law. In this regard, the Applicant on Annulment asserts that it is difficult to see what better evidence one could adduce of the illegality of Rumeli and Telsim's investment than the judgment of Federal District Court for Southern District of New York in *Motorola Credit Corp. v. Uzan* (ex. A10), which made specific findings that their investment in KaR-Tel for the purposes of acquiring the License was in fact the proceeds of their fraud on Motorola. In addition, the Applicant contends that the Tribunal's reasoning is contradictory as it rejected the evidence of the Almaty City Court's judgment as to the transactions by which Telsim supplied equipment to KaR-Tel and subsequently went on to rely on the same findings as part of its approach to damages. Indeed, the Tribunal found that one of the factors which would influence any prospective purchaser in 2003 was the "*doubts about the quality of the equipment*" which the Applicant asserts can only be a reference to the finding of

the expert inquiry ordered by the Almaty City Court that the equipment which Telsim had supplied to KaR-Tel was previously used and outdated equipment.

2.2.2 Respondents' position¹⁵

89. The Respondents contend that the Application in relation to jurisdiction should be dismissed for the reason that the Tribunal is the judge of the probative value of the evidence produced and that it is not the Committee's role to control the Tribunal's assessment of evidence.

90. In addition, the Respondents contend that there was no manifest excess of power for the following reasons :

- The Tribunal acknowledged that the condition contained in the BIT concerning the legality of the investment was material, analyzed the facts presented by Respondent before determining whether the provision was violated and subsequently reached the conclusion, based on its assessment of the probative value of the evidence presented, that there was no such violation; and
- Even if an excess of power had occurred, it could not possibly qualify as being manifest as there is no excess that is plain on the face of the Award.

91. The Respondents also argue that there was not a serious departure from a fundamental rule of procedure for the following reasons:

- One cannot compare the standard of proof on the question of the legality of the investment for purposes of jurisdiction to the standard of proof for collusion, the latter of which can, in practice, often only be proved by circumstantial evidence;

¹⁵ Paras 91-117 of the Counter-Memorial on Annulment; paras 41-75 of the Rejoinder on Annulment and Transcript 316:9-329:1.

- The Applicant does not demonstrate that the Tribunal applied different standards of proof to the Parties, nor that such a departure from the principle of equality was substantial and could justify annulment;
- The Tribunal found collusion on the basis of extensive additional evidence, both direct and circumstantial as set forth in paragraphs 707-715 of the Award, and held that it was left in no doubt concerning the finding of collusion; and
- The Tribunal's decision would have been the same even if it had applied a lower standard of proof as the Tribunal ultimately found that the New York Judgment did not contain any evidence showing that the two Motorola loans made in relation to KaR-Tel were used improperly or for illegal purposes.

92. In relation to the Applicant on Annulment's assertion that the Tribunal failed to provide reasons, the Respondents assert that the Tribunal took into consideration the Parties' respective positions and supporting evidence and provided sufficient reasons explaining why it dismissed the RoK's allegation of fraud and why it held that Rumeli and Telsim's investment did not violate the laws of Kazakhstan or international law, as shown in paragraphs 318-323 of the Award.

93. The Respondents further assert in this regard that there is no contradiction in the Tribunal's reasoning and that the fact that a third party purchaser may question the quality of the equipment does not constitute a finding by the Tribunal that such equipment was purchased fraudulently or in any irregular manner, let alone that any irregularity relating to mere equipment would be such as to qualify the entire investment as having been made in violation of Kazakh or international law.

2.2.3 The Conclusion of the Committee

94. At paragraphs 318-323 of the Award, the Tribunal came to the conclusion that the evidence did not demonstrate that Rumeli and Telsim's investment was illegal as a matter of Kazakh law or international law.

95. According to Rule 34 of the Arbitration Rules, the Tribunal is the judge of the admissibility of any evidence adduced and of its probative value.
96. An *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties. An in-depth analysis of the evidence produced by the Applicant on Annulment in relation to the allegation that Rumeli and Telsim's investment in KaR-Tel was aimed at furthering their worldwide fraud lies outside the scope of the Committee's powers. Indeed, this is why the Award can only be annulled for a ***manifest*** excess of powers. Such lack of jurisdiction should have been evident on the face of the award and should not require the Committee to reconsider the evidence put before the Tribunal. An *ad hoc* committee will not annul an award if the tribunal's approach is reasonable or tenable, even if the committee might have taken a different view on a debatable point of law.¹⁶ Where, as here, the question of jurisdiction depends not on a question of law but rather on an appreciation of the evidence, it would not be proper for an *ad hoc* committee to overturn a tribunal's treatment of the evidence to which it was referred. The judgment of the U.S. District Court in *Motorola v. Uzan* found that Motorola was fraudulently induced to make loans to KaR-Tel and Telsim, but it does not contain a finding that Rumeli's investment in KaR-Tel was itself a fraud or in perpetration of a fraud or otherwise illegal under Kazakh law. The judgment of the Almaty City Court in *Telecom Invest LLP v. Rumeli* found that the prices paid by KaR-Tel for cellular equipment and handsets were excessive, but the Court made no finding that Telsim had defrauded KaR-Tel, merely overcharged it. Moreover, the judgment concerned the supply of goods after the investment had been made, a matter which could not affect the legality of the investment itself.
97. The Arbitral Tribunal did not create a different standard of proof when it concluded that there was "*no conclusive evidence that Claimants defrauded KaR-Tel by causing it to enter into transactions with Telsim at excessive prices.*"

¹⁶ *Klöckner* supra n 6, 115; *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* ICJ Rep 1991, 53, 92 ILR 30 para 47; *Government of Sudan v. Sudan People's Liberation Movement/Army (the "Abyei Arbitration")*, PCA, 22 July 2009, paras 508, 510.

Rather, the Tribunal was merely expressing its failure to be convinced by the evidence put before it. On a fair reading of paragraphs 320-322 of the Award, the Tribunal is simply rejecting Kazakhstan's case of fraud on the evidence adduced by it. Thus, at paragraph 320, it rejects the general allegation of fraud, explaining:

After careful examination of Respondent's submissions, the Arbitral Tribunal has reached the conclusion that Respondent did not prove that Claimants' investment would have been fraudulent or would have violated any laws or regulations of Kazakhstan.

98. It is clear, as shown in paragraphs 167-176 and 228-235 of the Award, that the Tribunal took into account and considered the Parties' positions concerning the alleged illegality of Rumeli and Telsim's investment in KaR-Tel. The Tribunal recorded in its Award the detailed submissions of Kazakhstan on this issue, including its reliance on the judgment of the Federal District Court in New York and the allegation about the purchase of equipment at inflated prices. It then proceeded in paragraphs 318-323 to note that it had carefully examined the RoK's position in this regard before considering the evidence before it (most notably the District Court's judgment) and arriving at the conclusions that "*the New York judgment does not bring any evidence that the two Motorola loans made in relation to KaR-Tel were used improperly or for illegal purposes*" and that the "*record does not contain conclusive evidence that Claimants defrauded KaR-Tel by causing it to enter into transactions with Telsim at excessive prices.*" Thus, there was no failure to provide reasons in this regard, and the Applicant's arguments to the contrary amount to an attempt to appeal on questions of evidence which the Tribunal was entitled to, and did, determine. This does not amount to a ground for annulment under Article 52 of the ICSID Convention.
99. Applying the holding in the *MINE* Annulment decision, the Award enables the reader to follow how the Tribunal proceeded from the standard that "*investments in the host State will only be excluded from the protection of the treaty if they have been made in breach of the fundamental legal principles of the host country*" (point A) to consider the RoK's position and evidence produced in relation to the alleged illegality of Rumeli and Telsim's investment

(point B) to its conclusion that “*Respondent’s allegation that Claimants’ investment was fraudulent does not find any foundation in the record.*” Accordingly, the Tribunal did not fail to state reasons for its decision that Rumeli and Telsim’s investment did not violate international law or the laws of Kazakhstan.

2.3 Collusion

2.3.1 Applicant’s position¹⁷

100. The Applicant argues that the Tribunal did not state the reasons why it rejected crucial pieces of documentary and oral evidence (notably the letter of 21 February 2002 and the testimony of Mr. Podporin and Mr. Agilonu) and made a finding in relation to collusion which was unsupported and contrary to such evidence. In this regard, the Applicant on Annulment emphasizes that the finding of collusion had a significant effect on the amount of damages awarded as it formed the sole link between the cancellation of the Investment Contract and the subsequent proceedings and the finding of an expropriation.

101. The Applicant further argues that the Tribunal departed from a fundamental rule of procedure when it failed to determine the case based upon the evidence before it.

2.3.2 Respondents’ position¹⁸

102. The Respondents argue that the Application in relation to the Tribunal’s finding of collusion should be rejected for the following reasons:

- The Applicant on Annulment is trying to appeal the factual determination of the Tribunal and its assessment of the evidence in relation to its finding of collusion;

¹⁷ See paras 124-137 of the Memorial on Annulment; paras 63-84 of the Reply Memorial and Transcript 131:14-145:21.

¹⁸ See paras 118-130 of the Counter-Memorial on Annulment, paras 77-99 of the Rejoinder on Annulment and Transcript 329:7-344:5.

- The Tribunal fulfilled its obligation to inform the Parties of the factual and legal basis that led it to its decision in relation to collusion as shown in paragraphs 707-708 of the Award;
- The finding of collusion was established by further direct and circumstantial evidence as set forth in paragraphs 709-715;
- Even though the Award does not make explicit reference in this finding to specific exhibits, such references can be found elsewhere in the Award and in any event, the absence of references is not a ground for annulment as the Tribunal had already reviewed the evidence before it and already summarized it in an earlier section of the Award; and
- The finding of collusion did not have a material impact on the decision of the Tribunal. Even if the Tribunal had found that there was no collusion, the Tribunal would still have found that there was an expropriation as the findings were decided independently of each other. In addition, the Tribunal also held Respondent liable for breach of its obligation of fair and equitable treatment which prompted full compensation irrespective of the holding of expropriation. Accordingly, the same compensation would have been awarded to Rumeli and Telsim irrespective of the finding of collusion and therefore it did not have a material impact on the Tribunal's decision.

2.3.3 The Conclusion of the Committee

103. The Tribunal found that the decision of the Presidium of the Supreme Court of 29 July 2003 affirming compulsory redemption of Rumeli and Telsim's shares in KaR-Tel amounted to a taking of those shares, not for the benefit of the State but for the benefit of a private Kazakh investor, Telecom Invest. The Tribunal held that it was relevant that the taking had been instigated by the decision of the State, acting through its Investment Committee, to terminate the Investment Contract. It further held that *"the court process which resulted in the expropriation of Claimants' shares was brought about through improper collusion between the State, acting through the Investment Committee and Telecom Invest"* (Award, paragraph 707). At the same time, the Tribunal found

itself unable to conclude on the basis of the evidence that, as Rumeli and Telsim claimed, "... *there was a wider conspiracy involving the President [of Kazakhstan], or for his direct or indirect benefit*" (at paragraph 715).

104. As previously pointed out, and pursuant to Rule 34 of the Arbitration Rules, the arbitral tribunal is the judge of the probative evidence put before it. The Committee is neither empowered nor competent to conduct a re-evaluation of the significance of the factual evidence weighed by the Tribunal. The Tribunal gave detailed consideration to the significance of the sequence of events surrounding the Investment Committee's decision to terminate the Investment Contract (Award, paragraphs 113-120). The purpose of the reasons requirement under Article 52(1)(e) of the ICSID Convention is not to require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party, surely an excessive burden for any court or tribunal. Rather, it is to enable the reader (and specifically the parties) to see the reasons upon which the award itself is based. In the case of the finding of collusion, the Tribunal filled this duty. The Tribunal did not therefore seriously depart from a fundamental rule of procedure when it decided, based on its assessment of the evidence before it, that there was collusion between the Investment Committee on the one hand and Telecom Invest and its shareholders on the other.
105. Furthermore, there was no failure to state reasons for the Arbitral Tribunal's conclusion that there was collusion between the Investment Committee on the one hand and Telecom Invest and its shareholders on the other. Applying the holding in the *MINE* Annulment Decision, the Tribunal noted at paragraph 707 of the Award that the decision to terminate the Investment Contract was taken by the State on 25 March 2002 and that the following day Telecom Invest sent its notice to KaR-Tel and to Rumeli and Telsim calling for an Extraordinary General Meeting of shareholders of KaR-Tel to consider the harm to KaR-Tel and the compulsory redemption of Rumeli and Telsim's shares (point A). The Tribunal subsequently noted that, as a result, the notice was sent without the decision of the Investment Committee having been communicated to KaR-Tel (point B) before concluding that, in its judgment, Telecom Invest and its shareholders were privy to the decision and that KaR-Tel and Rumeli and

Telsim were not, and that this was the result of collusion between the Investment Committee on the one hand and Telecom Invest and its shareholders on the other.

106. In any event, the issue of collusion did not determine the outcome of the case. As discussed below, the Tribunal found treaty breaches including a finding of expropriation which gave rise to Rumeli and Telsim's right to be awarded damages. The Tribunal made a finding of collusion based on its appreciation of the evidence before it, an appreciation that the Committee cannot challenge.

2.4 Causation

2.4.1 Applicant's position¹⁹

107. The Applicant, first, contends that the Tribunal manifestly exceeded its powers by failing to address the issue of causation and by failing to apply international law in the form of the concept of causation to its findings of fact and that this was highly material to the outcome of the arbitration since if there was no causation, no compensation could have been awarded.
108. The Applicant contends, second, that the Tribunal departed seriously from the fundamental principle that it was required to determine all questions before it by failing to determine the issues in relation to causation raised by the RoK.
109. The Applicant contends, third, that the Tribunal failed to provide reasons for rejecting its arguments on causation, most notably its argument that there was no causal link between the cancellation of the Investment Contract and the court decision because the court proceedings resulted from the independent intervening act of Telecom Invest and its argument that the cancellation of the Investment Contract caused Rumeli and Telsim no loss because it was substantively justified. In this regard, the Applicant asserts that if its arguments were implicitly rejected, there was a total absence of reasons for such a rejection and, if they were not implicitly rejected, there was a serious failure to address a crucial question before the Tribunal.

¹⁹ Paras 138-210 of the Memorial on Annulment, paras 85-105 of the Reply and Transcript 145:21-191:17.

110. The Applicant further argues that the Tribunal failed to explain, and there is no way to follow how it arrived at, the conclusion that either the procedurally wrong termination of the Investment Contract or the lack of transparency of the Task Force was the proximate cause of Rumeli and Telsim's loss of their shareholding in KaR-Tel. The Applicant's essential point on causation is that the Tribunal failed to make a finding that Kazakhstan's breaches of treaty caused Rumeli and Telsim's loss and that this omission constitutes a failure to provide reasons. The Applicant focuses its attention on paragraphs 745-751 of the Award, under the heading "Causation." It points out that this section merely records the Parties' arguments on causation, but fails to state any conclusion of the Tribunal on those arguments.

2.4.2 Respondents' position²⁰

111. The Respondents argue that the application for annulment in relation to the Tribunal's finding on causation should be rejected for the following reasons:

- There was no excess of power let alone a manifest excess of power since the Tribunal applied international law and heavily relied on international law to determine the damages, and particularly to attribute these damages to the State as shown at paragraphs 785-793 of the Award;
- The Tribunal did determine the issue of causation raised by Respondents. In relation to the causal link between the wrongful termination of the Investment Contract and the damages, the Tribunal, after finding that the RoK had breached the BIT and summarizing the Parties' arguments on causation (paragraphs 745-751), found that there was a causal link between the BIT breach and the damages as it was the BIT breach, namely the wrongful termination of the Investment Contract, which ultimately led to the expropriation of Rumeli and Telsim's investment (paragraphs 707-708 and 790-797 of the Award).

²⁰ Paras 131–158 of the Counter-Memorial on Annulment, paras 101-114 of the Rejoinder and Transcript 344:6-357:23.

In relation to the causal link between the lack of transparency of the Task Force and damages, the Tribunal found that had the Working Group's procedure been fair, it would not have confirmed the validity of the termination of the Investment Contract and it was the cancellation of the Investment Contract that led to the expropriation of the investment (paragraphs 707-708 of Award);

- The Applicant on Annulment challenges the Tribunal's application of the law and/or the correctness of its decision when it asserts that the Investment Contract would have in any event been terminated following a suspension. Moreover, it was not shown that Rumeli and Telsim were ultimately able to cure any default under the Investment Contract; and
- Even if the challenge on this ground was well founded, it would not justify annulment for failure to meet the material impact test. The Tribunal found that the RoK committed multiple breaches (wrongful termination of the Investment Contract, finding of an expropriation and inadequate compensation and breach of the fair and equitable treatment standard by virtue of the lack of transparency and due process of the Working Group) and that the damages sustained by Rumeli and Telsim were compensable pursuant to any of these breaches.

2.4.3 The Conclusion of the Committee

112. If the Tribunal had failed to consider in its Award the legal and factual question of whether the breaches of treaty committed by the RoK had caused the loss of Rumeli and Telsim's shares, that might well constitute a failure to give reasons within the meaning of the Convention. But a fair reading of the Award as a whole demonstrates that this is not so. On the contrary, the Tribunal adequately considered both the legal and factual issues related to causation.

113. The Tribunal summarized the Parties' positions in relation to causation in paragraphs 745-75 of the Award. The Tribunal therefore took into account and considered the arguments raised by both Parties including the RoK's arguments that the cancellation of the Investment Contract caused no loss to Rumeli and

Telsim because it was substantively justified and its argument that there was no causal link between the cancellation of the Investment Contract and the Kazakh court decision because the court proceedings resulted from the independent intervening act of Telecom Invest.

114. When turning to its own decision on causation in Section IV of the Award, the Tribunal records that the obligation of a State for the commission of an act engaging its international responsibility includes, under Article 31²¹ of the International Law Commission's Articles on State Responsibility, "*full reparation for the injury caused by the internationally wrongful act*" (Award, paragraph 790, emphasis supplied). It is clear from the ILC Commentary to this article that, while a sufficient causal link is a necessary condition for reparation, this is not to be reduced to any particular verbal formula, as the particular requirements of causation may differ, depending on the type of obligation breached and the circumstances of the case.²²
115. The Tribunal then proceeds to find that Rumeli and Telsim's loss is the expropriation of their shares in KaR-Tel (Award, paragraph 793). The factual finding that RoK's actions caused the expropriation of Rumeli and Telsim's shares is contained in earlier sections of the Award dealing with respective breaches of treaty. The Tribunal found breach of the treaty standard of fair and equitable treatment by reason of the decision of the Investment Committee to terminate, rather than to suspend, the Investment Contract, and because of the subsequent decision of the Working Group to ratify the Investment Committee's decision (Award, paragraphs 613-618). Then, when addressing the claim of expropriation, the Tribunal found that "*the court process which culminated in the expropriation was instigated by the decision of the State, acting through the Investment Committee, to terminate the Investment Contract*" (paragraph 707). What is "instigated" by the decision of the State is caused by the decision of the State. In this way, the Tribunal traced the sequence of causal events from the

²¹ Mis-cited in the Award as Article 32.

²² International Law Commission 'Responsibilities of States for Internationally Wrongful Acts: Text of the Draft Articles with Commentaries thereto' (Crawford, Special Rapporteur) in *Report of the International Law Commission of its Fifty-third Session (2001)*, *Official Records of the General Assembly Fifty-sixth Session*, Supp No 10, UN Doc A/56/10, 59, 92-3.

original decision of the Investment Committee to the final decision of the Supreme Court, which resulted in the expropriation of the shares.

116. Moreover, the decision of the Supreme Court was held by the Tribunal to constitute a breach of the treaty's protection against expropriation, because the compensation awarded by the Court did not meet the treaty requirement of adequate compensation. It is irrelevant for this purpose that the Tribunal found (as it did at paragraph 619) that there had been no denial of justice in the Court's procedure such as to amount to a breach of the fair and equitable treatment standard by the Court. The treaty protection from expropriation supplies an independent standard which must also be met, whether or not the decision was the result of a fair procedure or was in compliance with national law. Indeed, the authorities relied upon by the Applicant in these annulment proceedings expressly support the proposition that the taking of property by a court may amount to expropriation by the State and that this may in itself amount to an international wrong.²³
117. The Tribunal furthermore relied in its Award (paragraph 615) upon the admission of breach of the Investment Contract made by Kazakhstan in two letters sent to the Ministry of Industry and Trade by the Ministry of Finance and the Ministry of the Economy and Budget on 14 May 2003. These letters support the Tribunal's view (at paragraph 615) and show Kazakhstan's awareness that its wrongful termination would result in pursuit of an arbitral claim. They thus underscore the Tribunal's finding that the ultimate loss of the shares resulted from a chain of causation, commencing with the wrongful decision of the Investment Committee to terminate the Investment Contract.

²³

Oil Field of Texas Inc v Iran (1986) 12 Iran-USCTR 308, para 42; Decision No 136 of Franco-Italian Claims Commission (1952) XIII UNRIAA 389, 438.

2.5 Damages

2.5.1 The Parties' Submissions

(1) Applicant's submissions

118. The Applicant's principal submission in its Application to annul the Award by reason of its treatment of damages was that the Tribunal's decision to award damages of \$125 million was inexplicable, being based on inconsistent, illogical or nonexistent reasons. The Applicant contended that it was impossible to follow the progression of the Tribunal's reasoning "from Point A to Point B and eventually" to its figure of \$125 million.²⁴ Although the Applicant submitted in its Memorial that a number of the other grounds of annulment in Article 52(1) of the ICSID Convention were satisfied, its submissions centered on the allegation that the Tribunal failed to adequately state the reasons for its decision on the quantum of damages (Article 52(1)(e)).
119. The Applicant contended that the Tribunal's reasons had to be coherent²⁵ and that it was inappropriate for the Committee to infer or construe the Tribunal's reasons, let alone reconstruct them.
120. The Applicant stressed the fragile financial position of KaR-Tel in April 2002.²⁶ Navigant's opinion was that KaR-Tel was insolvent by that stage. The Applicant then argued that the improvement in KaR-Tel's fortunes that followed the installation of Mr. Yerimbetov as general manager would not have occurred if Rumeli and Telsim had remained involved in the company and that consequently, Rumeli and Telsim were not entitled to seek the benefit of that improvement in the company's fortunes. The Applicant submitted that on these two preliminary factual issues – whether the company was insolvent at April 2002 and the relevance of the change in fortunes between then and 2004 – the

²⁴ Memorial on Annulment, para 261, citing *MINE* supra n 6, para 5.09.

²⁵ Reply Memorial, para 30, citing *Hussein Nuaman Soufraki v. United Arab Emirates (UAE)* (ICSID Case No ARB/02/7), Decision on Annulment, 5 June 2007, para 23, available at <http://ita.law.uvic.ca>.

²⁶ Transcript 192-195.

Tribunal had expressly preferred the evidence of the Applicant's expert, Navigant, referring to paragraphs 806 and 808 of the Award respectively.

121. The Applicant submitted that there had been a nine-step reasoning process by which the Tribunal reached its decision.²⁷ On the basis of this analysis, the Applicant sought to demonstrate that the Tribunal's reasoning was inconsistent with the evidential findings referred to above. Then it sought to show that the reasons given by the Tribunal were so erroneous, illogical, inconsistent and insufficient that it was actually impossible to reconstruct a logical reasoning process by which the Tribunal reached the figure of \$125 million.
122. *Step One* was to identify the overall approach to the calculation of damages, which is to give Rumeli and Telsim back the value of their shares at the time that the expropriation took place.²⁸ The Applicant submitted that this required the application of a method of valuation, not merely the choice of a figure.²⁹
123. *Step Two* was to identify the date of the valuation. The Tribunal chose 30 October 2003 (Award, paragraph 796). The Applicant submitted that it should not have mattered because the Tribunal had accepted that Rumeli and Telsim were not entitled to the benefits accruing after April 2002.³⁰
124. *Steps Three and Four* were to determine the method of valuation. The Applicant argued that the discounted cashflow ("DCF") method should not have been adopted.³¹ The Applicant recalled the fact that the Tribunal preferred Navigant's evidence on the matters in dispute, and criticised the Tribunal's decision to adopt the DCF approach. The Applicant suggested that, on Navigant's evidence and pursuant to the World Bank Guidelines,³² the liquidation value approach had to be adopted; the DCF approach, it submitted, was inappropriate for a financially-distressed company such as KaR-Tel.³³ The

²⁷ Transcript 206.

²⁸ Memorial on Annulment, para 244.

²⁹ Transcript 207: 7–10.

³⁰ Memorial on Annulment, para 246; Transcript 207:24 – 208:2.

³¹ Transcript 209:10–11.

³² International Bank for Reconstruction and Development 'Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment' (1992) 31 ILM 1366.

³³ Memorial on Annulment, para 248; Transcript 214–216.

Applicant also emphasised that the DCF approach required an actual calculation, not a “shot in the dark.”³⁴

125. The Applicant submitted that *Step Five* should have been to follow Navigant’s evidence and adopt the liquidation value approach. Instead, the Tribunal adopted the DCF approach, despite describing its shortcomings. The Applicant submitted that this approach was “wholly unreasoned,” and “contradictory with the earlier findings which indicate that liquidation value is appropriate.”³⁵ The Applicant criticised the Tribunal’s reference in paragraph 810 of the Award to the value of the Licence, stressing that the Tribunal’s task was to assign a value to the shares, not the Licence.
126. The Applicant submitted that the Tribunal never asked the Applicant or its expert to undertake a DCF analysis, and the Tribunal did not do so itself. Instead, at *Step Six*, the Applicant criticised the Tribunal’s decision to start with the Analysys figure, despite its flaws, and “reduce it to come up with a damages award.”³⁶ The Applicant suggested that when a tribunal adopted a DCF analysis, it was required to provide full reasons for its decision to reject or adopt certain factors. The Applicant submitted that the Tribunal’s analysis was arbitrary and inconsistent with its earlier reasoning. It alleged that the Tribunal’s analysis was wrong, and that it failed to explain why it rejected the approach advocated by Navigant.
127. The Applicant contended that the Award at this point is “unreasoned...incoherent and...wholly arbitrary” and that the Tribunal was not entitled to adopt a “bad and flawed valuation” before “knocking off some of the figures.”³⁷ The Applicant argued that the burden of proof on Rumeli and Telsim required them to establish both the right to, and the quantum of, the damages, and that a discretionary analysis by the Tribunal was inconsistent with this obligation notwithstanding the latitude it admitted the Tribunal enjoyed.³⁸ It

³⁴ Transcript 218/19.

³⁵ Transcript 232:15-17.

³⁶ Memorial on Annulment, para 251; Transcript 237:15.

³⁷ Transcript 248:1-2; 249:8-10.

³⁸ Memorial on Annulment paras 219 – 220.

contended that Rumeli and Telsim had a duty to calculate an accurate damages figure, and that because Analysys' calculation was obviously flawed, the Tribunal was obliged to award zero damages.³⁹

128. At *Step Seven*, the Tribunal compared its figure with the price paid by VimpelCom in August 2004 (paragraph 813 of the Award). The Applicant submitted that this figure was irrelevant, given the changes that had occurred since Rumeli and Telsim sold their shares in KaR-Tel, and that the Tribunal failed to explain why it was taken into consideration. It submitted that the true relevance of the price was to illustrate the flaws in Analysys' valuation.
129. *Step Eight* was the calculation of the figure of \$125 million. The Applicant contended that if that figure was reached as the product of a DCF analysis, it was not possible to see how the figure was reached. No inputs were given by the Tribunal, and the methodology was not described. Rather than being "*extremely succinct*," the Applicant contended that the reasons were nonexistent⁴⁰ and that tribunals are obliged to properly reason their awards to avoid deciding *ex aequo et bono*. The Applicant suggested that, in fact, the Tribunal may have reached this figure by analysing the value of the licence instead of the shares, noting that the licence could not be assigned, although the shares could be sold. The Applicant contended that the Tribunal's finding that the value of the licence was "*far in excess of its book value*" was "*unreasoned*."⁴¹
130. *Step Nine* was to consider the relevance of the negotiations with Telecom Invest and the valuations before the Presidium. The Applicant contended that the Tribunal's finding that Telecom Invest was inexperienced in the mobile communications market was contradictory and that the Tribunal failed to take proper account of these factors.⁴²

³⁹ Memorial on Annulment para 235; Reply Memorial para 112.

⁴⁰ Citing *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007, 13 ICSID Rep 500, para 106.

⁴¹ Transcript 268:4.

⁴² Memorial on Annulment paras 253 – 259.

131. Finally, the Applicant disagreed that the failure to state reasons must have caused the Tribunal to reach a substantially different result to justify annulment.

(2) Respondents' submissions

132. The Respondents contended that the Award was perfectly easy to follow and was not lacking in reasons, and that the Applicant's complaints related exclusively to the correctness of the Award. They contended that reasons did not need to be "*correct or convincing*."⁴³ All this required in the context of a damages calculation, in the Respondents' submission, was "reference to the Tribunal's estimation."⁴⁴

133. The Respondents agreed that the Tribunal began by identifying the task, which was to determine the value of the expropriated investment. It then decided to adopt the DCF approach as a starting point, because this would have been used as a starting point in discussions between a willing buyer and a willing seller, and because it reflected the significance of the licence asset.⁴⁵

134. In the Respondents' submission, the Tribunal then identified the limitations of the DCF method in the circumstances: the lack of historical data; KaR-Tel's balance sheet insolvency; the prospect that the company's fortunes would not improve unless new management was introduced, and so on.⁴⁶ It then chose Analysys' figure as a starting point and exercised its discretion to approximate a figure based on the evidence, which the Respondents contended is inherent in such an exercise.⁴⁷ A tribunal is not obliged, in the Respondents' submission, to choose a figure that corresponds exactly with the amount requested by a claimant.

⁴³ Citing *Vivendi* supra n 4, para 64.

⁴⁴ Counter-Memorial para 189, citing *Wena Hotels Ltd v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, 5 February 2002, 6 ICSID Rep 129, para 91.

⁴⁵ Counter-Memorial para 179, citing Award paras 811–813; Transcript 363–365, 370–371.

⁴⁶ Counter-Memorial para 180; Transcript 373–375.

⁴⁷ Transcript 375:17–21.

135. The Respondents referred to paragraph 813 of the Award, where the Tribunal identified a starting point of \$210 million. At paragraph 814, the Tribunal adopted a figure of \$125 million. The Respondents submitted that the Tribunal moved from the first to the second figure after taking into account all the circumstances referred to above.⁴⁸ This was a similar approach to that approved on annulment in *REPSOL v. Ecuador*⁴⁹. In this light, the Respondents submitted, it was easy for a reader to follow the progression of the Tribunal's reasoning.

2.5.2 The Analysis of the Committee

(1) *The Review of Reasons on Annulment*

136. The proper approach which an *ad hoc* committee ought to take when considering an application to annul an award on the ground that it “*has failed to state the reasons on which it is based*” (Art 52(1)(e) ICSID Convention) requires special consideration in the context of the quantification of damages.

137. The general approach which should guide the review of an award on this ground was well stated by the *ad hoc* Committee in *Vivendi*:⁵⁰

... 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 of part of an award, not the failure to state correct or convincing reasons... 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....

⁴⁸ Counter-Memorial para 183; Transcript 384:17–18.

⁴⁹ *Repsol YPF Ecuador v. Empresa Petroleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on Annulment, 8 January 2007, para 84, available at <http://ita.law.uvic.ca>.

⁵⁰ *Supra* n 4, paras 64 – 65.

It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.

138. Moreover, an *ad hoc* committee is entitled itself to seek to understand the reasons for the award from the record before the tribunal. Indeed, in appropriate cases, it should do so. As the *ad hoc* Committee held in *Soufraki*:⁵¹

It is also possible that a tribunal may give reasons for its award without elaborating the factual or legal bases of such reasons, so long as those reasons in fact make it possible reasonably to connect the facts or law of the case to the conclusions reached in the award, annulment may appropriately be avoided.

Such an approach echoes the suggestion made by Professor Reisman in his influential monograph, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair*,⁵² that *ad hoc* committees should:

... actively seek to get inside the skin of the tribunal whose award is under review and to track its explicit and implicit ratiocination before concluding that its reasoning is insufficient.

139. In *MINE v Guinea*, the *ad hoc* Committee did annul the portion of the Award relating to damages.⁵³ It found that the Tribunal had contradicted itself by rejecting both of the damages calculations put forward by the claimants, and adopting, without explanation, one of its own which was contrary to the reality of the situation. This portion of the Decision on Annulment in *MINE* has not

⁵¹ Supra n 25, para 128.
⁵² (Duke UP, Durham, 1992), 95.
⁵³ Supra n 6, paras 6.105 – 6.108.

escaped critical comment. As Professor Schreuer observes in his *Commentary*:⁵⁴

The *ad hoc* Committee's arguments on this point are not convincing and have been criticized by several commentators. The calculation of lost profits always has a speculative element. What the Tribunal had done was to dismiss two theories that had appeared to it as too speculative and to adopt another method that seemed more realistic. The speculative character of damages theories in the calculation of lost profits is a matter of degree. To adopt a theory that is speculative but less so than other ones is not inherently contradictory. That a method for the calculation of damages is "contrary to what really happened" is inherent in a situation of lost profits.

140. In the more recent Decision of the *ad hoc* Committee in *Azurix*,⁵⁵ the applicant had sought annulment of the award *inter alia* on the basis that it failed to state the reasons upon which the Tribunal had arrived at its damages figure. The Committee rejected this ground of annulment. The Tribunal had stated that it was applying a fair market value test. It then accepted the claimant's proposed method of valuation. But it proceeded to discount the figures submitted by the claimant so as to arrive at its final figure. In so doing, it took into account its estimation of what an independent and well-informed third party would have been prepared to pay for the concession at the relevant date, and also the possibility that such a third party might well have developed the business significantly. The *ad hoc* Committee found that the Tribunal balanced these competing considerations.⁵⁶ Its resulting figure "*was an approximation that the Tribunal considered to be fair in all the circumstances.*"⁵⁷ The *ad hoc* Committee held that there was no insufficiency in the Tribunal's reasoning in this regard.

⁵⁴ Schreuer et al *The ICSID Convention: A Commentary* (2 ed, 2009) 1012-3 (citations omitted).

⁵⁵ *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Annulment, 1 September 2009, paras 341 – 366, available at <http://icsid.worldbank.org>.

⁵⁶ *Ibid*, para 350.

⁵⁷ *Ibid*, para 351.

(2) *The Quantification of Damages*

141. It is necessary at this stage to make some general observations about the nature of the adjudicatory task confronting an arbitral tribunal when it is determining the quantum of damages to award a claimant which has succeeded on liability. The general test of “*full reparation*,” found in Article 31 of the ILC Draft Articles, can be simply stated. It is that classically formulated by the Permanent Court of International Justice in the *Chorzów Factory Case*, namely:

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...reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

142. It is quite another thing, however, to translate that test into actuality in the circumstances of a particular case. That is because the valuation of expropriated shares in a company necessarily involves a consideration of the future profitability of the business, a matter which is inherently uncertain. As Whiteman observed:⁵⁹

However, the absolute certainty of prospective profits can scarcely ever be established in as much as in all cases they are to be realized *in futuro*. It is the worth of the expectation of future profits, appropriately discounted, that is to be considered in cases where an award for the loss of prospective profits is proper.

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Chorzów Factory Case (Germany v Poland) (Merits) (1928) PCIJ Rep Ser A No 17, 47.

59

Whiteman, *Damages in International Law* (1943) Vol III, 1872.

143. The problem of arriving at an appropriate valuation faced by an arbitral tribunal determining the amount of damages to be awarded for the expropriation of shares in a business is, in this respect, substantially similar to that faced by any court or tribunal, national or international.

144. The fact that the exercise is inherently uncertain is not a reason for the tribunal to decline to award damages. This point was made by Sole Arbitrator Cavin in the *Sapphire* arbitration, when determining the amount of damages to be awarded to the plaintiff for loss of profits following the expropriation of an oil concession. He stated:⁶⁰

It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.

145. So, too in the *Pyramids* ICSID arbitration,⁶¹ the Tribunal, in assessing the damages attributable to the loss of the claimants' opportunity to make a commercial success of the project, held that:

... it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred.

A similar approach is also frequently adopted by national courts.⁶²

146. For this reason, tribunals are generally allowed a considerable measure of discretion in determining issues of quantum. Thus, in *Wena Hotels*, the *ad hoc* Committee held:⁶³

⁶⁰ *Sapphire International Petroleums Ltd v National Iranian Oil Co* (Award) (1963) 35 ILR 136, 187-8.

⁶¹ *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award, 20 May 1992, 3 ICSID Rep 189, para 215.

⁶² See, e.g. *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 83 (HCA).

⁶³ *Supra* n 42, para 91.

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

147. This is not a matter to be resolved simply on the basis of the burden of proof. To be sure, the tribunal must be satisfied that the claimant has suffered *some* damage under the relevant head as a result of the respondent’s breach.⁶⁴ But once it is satisfied of this, the determination of the precise amount of this damage is a matter for the tribunal’s informed estimation in the light of all the evidence available to it. This is widely accepted in municipal law.⁶⁵ The point was well put by Brennan J:⁶⁶

Although the issue of a loss caused by the defendant’s conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation.

148. A similar distinction between the fact of loss (which it is for the claimant to prove) and the amount of loss (which it is for the tribunal to determine) has been accepted in the practice of international courts and tribunals. Thus, in *Chorzów Factory* itself, the Permanent Court found that the two German companies had suffered *some* damage as a result of the illegal act of the Polish Government in dispossessing them of the Factory at Chorzów.⁶⁷ It then took up itself the task of determining the quantum of that damage, by appointing its own experts to

⁶⁴ Thus, for example, the PCIJ rejected a claim for damages resulting from third party competition with the Bayerische factories as insufficiently proved in *Chorzów Factory* supra n 58, 56.

⁶⁵ Gotanda ‘Recovering Lost Profits in International Disputes’ (2004-5) 36 Georgetown JIL 61, 101.

⁶⁶ *Sellars v Adelaide Petroleum NL* (1992-4) 179 CLR 332, 368 (HCA).

⁶⁷ Supra n 58, 46.

conduct an enquiry.⁶⁸ In *Vivendi v Argentina* the Tribunal drew the distinction between fact of loss and its amount when it observed:⁶⁹

[C]ompensation for lost profits is generally awarded only where *future profitability* can be established (*the fact of profitability* as opposed to the *amount*) with some level of certainty.

149. In arriving at its own estimation of the extent of the claimant's loss, an arbitral tribunal has available to it a number of different bases of valuation. But it is worth emphasising that valuation methodologies are not mutually exclusive. They may well be complementary tools. As the United States Supreme Court recently observed:⁷⁰

Valuation is not a matter of mathematics....Rather, the calculation of true market value is an applied science, even a craft. Most appraisers estimate market value by employing not one methodology but a combination. These various methods generate a range of possible market values which the appraiser uses to derive what he considers to be an accurate estimate of market value, based on careful scrutiny of all the data available.

150. In the case of expropriation, adequate compensation will normally be determined by reference to the fair market value of the taken asset immediately before the time at which the taking occurred.⁷¹ Although there are a number of more specific techniques which a tribunal may employ to determine such value, the World Bank Guidelines themselves provide that they do not imply the exclusive validity of a single standard for the fairness by which compensation is to be determined.⁷² The overriding criterion is simply:⁷³

⁶⁸ Ibid, 51 and Order (Expert Enquiry) (1928) PCIJ Ser A No 17, 99-103.

⁶⁹ *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux/ Vivendi Universal ('Vivendi') v. Argentine Republic* (ICSID Case No ARB/97/3), Second Award, 20 August 2007, para 8.3.3 (emphasis in original). See also Ripinsky and Williams *Damages in International Investment Law* (BIICL, 2008) 165-6.

⁷⁰ *CSX Transport Inc v Georgia State Board of Education* 552 US 9, 128 S Ct 467 (2007), 472.

⁷¹ World Bank Guidelines supra n 32, IV 3.

⁷² Ibid IV 6.

⁷³ Ibid IV 5.

...an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.

151. Nor is a court or tribunal required to shut its eyes to events subsequent to the date of injury, if these shed light in more concrete terms on the value applicable at the date of injury or validate the reasonableness of a valuation made at that date.⁷⁴

2.5.3 The Evidence on Damages before the Tribunal

(1) Introduction

152. With these considerations in mind, it is necessary for the Committee to assess carefully the approach and reasoning of the Tribunal in determining the quantum of damages, in the light of all of the evidence available to the Tribunal relevant to the issue.
153. For this reason, the Committee requested at the oral hearing that the Parties provide it with a complete record of all evidence before the Tribunal in the arbitral proceedings relating to the quantum.⁷⁵ To the extent that this material had not already been exhibited in the annulment record, this was provided by the Parties under cover of their communications dated 25 and 26 October 2009.
154. The material before the Tribunal consisted of the following:

⁷⁴ Kantor *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (2008) 68-9; *Sinclair Refining Co v Jenkins Petroleum Process Co* 289 US 689, 698; 53 S Ct 736 (1933); *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 WLR 691, para 36.

⁷⁵ Transcript 368:24 – 369:9.

(a) Report of A Wright (Analysys) for Rumeli and Telsim, 26 February 2007, (Analysys Report) (Ex PB 7);

(b) Report of B Kaczmarek (Navigant) for RoK, 23 May 2007 (Navigant Report) (Ex PB 6);

(c) Transcript of Day 6 of the arbitration hearing, 26 October 2007 at which the experts gave oral evidence;⁷⁶

(d) PowerPoint presentation slides used by each expert at the oral hearing;

(e) Analysys' further valuation produced at the request of the Tribunal dated 30 October 2007.

(2) *The question as to quantum before the Tribunal*

155. Before assessing the evidence as to quantum, it was necessary for the Tribunal to characterise and refine the damages question it had before it.
156. The Tribunal had concluded (at paragraphs 612 – 615 of the Award) that the decision of the Investment Committee to terminate the Investment Contract on 25 March 2002 constituted a failure to provide fair and equitable treatment, and that this was compounded by the decision of the Working Group on 9 August 2003 (paragraphs 616 – 618). The final act of taking that made the expropriation irreversible was the decision of the Supreme Court on 30 October 2003 (paragraph 705).
157. The Tribunal had decided that Kazakhstan's acts had caused the loss of Rumeli and Telsim's investment (paragraphs 613 – 617 as to the facts; paragraphs 705 – 707 as to the law). Furthermore, the compensation awarded by the Supreme Court was inadequate to meet the standard imposed by the Treaty (paragraph 706). The Tribunal was required, therefore, to determine either the "*real value*"

⁷⁶ Here referred to as TH6.

or the “*fair market value*” of the investment at the time of the expropriatory action or when the action became known (paragraph 785).

158. The Tribunal concluded that the same test applied whether real value or fair market value was being assessed (paragraph 786), and that the date at which the assessment was made was the same for both (paragraph 787). The task, following *Chorzów Factory*, was to determine the value to Rumeli and Telsim of their shares (paragraph 794). The Tribunal then approved the formulation in the World Bank Guidelines, noting that the “*fair market value*” approach assumes a transaction between a willing buyer and a willing seller, and that the task in assessing “*real value*” was not materially different (paragraph 802).
159. The Tribunal’s task was then to resolve this issue of quantum, having considered the expert evidence presented by Mr. Andrew Wright, of Analysys (submitted on behalf of Rumeli and Telsim), and Mr. Brent Kaczmarek, of Navigant (submitted on behalf of the RoK).

(3) *Analysys’ evidence*

160. In Analysys’ opinion, three methodologies were potentially available by which the value of the investment could be assessed: DCF; “*net book value*” (NBV); and a comparison with other companies.⁷⁷ Analysys’ opinion was that NBV gave an inaccurate picture of a mobile telecommunications company’s value, and that there were major practical difficulties in determining an accurate valuation by the comparative method.
161. Analysys accepted that KaR-Tel was balance-sheet insolvent, but stressed that it was not bankrupt and that it was still capable of trading.⁷⁸ In those circumstances, a liquidation value approach was not appropriate and it was correct to value the company as a going concern. Analysys also disputed Navigant’s approach to calculating fair market value, because it involved a

⁷⁷ Analysys Report, 7–9.
⁷⁸ TH6, 54–58.

hypothetical transaction when in fact there was not a willing buyer and willing seller. Analysys was of the opinion that the DCF approach should be used to determine fair market value anyway. In other words, Analysys believed that fair market value and real value should be determined by the same methodology. Analysys therefore concluded that DCF was the most appropriate means of valuing Rumeli and Telsim's investment.

162. The DCF approach required Analysys to model KaR-Tel's cash flows from 2002 to 2013, when the Licence expired, and then calculate the terminal value of the business at that point. The Weighted Average Cost of Capital (WACC) was then calculated. Analysys' modelling of future cash flows was based on an estimation of the number of future subscribers and an estimated Average Revenue per User (ARPU). Non-subscriber revenues were added, and costs were estimated. The WACC was then subtracted.
163. Prior to the hearing, Analysys revised its figures after determining that the definition of revenue in the VimpelCom 2005 Annual Report had been misleading. The Report had defined revenue as excluding interconnect fees, but had included those fees in the actual calculations of revenue.⁷⁹ Analysys had thus added interconnect revenue to the total in the original calculations of ARPU, meaning it was counted twice. Analysys' revised valuations were:
 - (a) At 23 April 2002: \$162 million;
 - (b) At 30 October 2003: \$227 million.⁸⁰
164. Mr. Wright opined that these figures were consistent with the price paid by VimpelCom⁸¹ suggesting that VimpelCom paid less than Analysys' projected value due to wariness caused by the very events that were the subject of the arbitration. He also took the view that Analysys' projections were consistent with VimpelCom's actual declared revenue. He explained why the "*Enterprise Value per Subscriber*" calculated by Analysys was much higher than for

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TH6, 33:1–5.

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Analysys Presentation, Slide19.

⁸¹

TH6, 106–107.

comparable companies, and why, in his view, cash flow would have jumped from being negative before 2002 to \$10.8 million in 2002.⁸²

165. Analysys' figures were calculated using actual data (for example, figures for actual mobile penetration in Kazakhstan in 2002 to 2007). Analysys also prepared calculations based only on forecasts representative of those available in 2002/2003 (described as the "*average underestimate forecasts*," because at that time it analysts had underestimated the future growth of mobile telephony in Kazakhstan). These figures were (at 23 April 2002):

- (a) \$91 million (with 3G technology investment);
- (b) \$185 million (without 3G technology investment).⁸³

166. On the last day of the hearing, Mr. Lalonde had queried the possibility that KaR-Tel's mobile telecommunications licence would not have been renewed in 2013. Analysys thus recalculated the value of Rumeli's investment to exclude the terminal value of the business in 2013. Analysys also provided alternative calculations that excluded the cost of investing in 3G technology, on the assumption that KaR-Tel would only do so if its licence was to be renewed. The resulting valuations, provided in a letter to the Tribunal of 30 October 2007, were:

- (a) At 23 April 2002: \$87.6 million, or \$97.2 million without 3G investments;
- (b) At 30 October 2003: \$130.8 million, or \$143.4 million without 3G investments;
- (c) On "*average underestimate forecasts*:" \$44.4 million (without 3G investments).

⁸² TH6, 132:8.
⁸³ Analysys Presentation, Slide 20.

167. On the last day of the hearing, Mr. Boyd had questioned whether the management forecasts prepared by KaR-Tel in 1999 and 2002 were relevant, and asked why DCF calculations had not been done on the basis of them.⁸⁴ In response, Analysys ran a fourth set of calculations that were included in Rumeli and Telsim's Post-Hearing Memorial at paragraph 208. The resulting valuations were:

- (a) \$54.6 million (with 3G investments)
- (b) \$111 million (without 3G investments)

(4) Navigant's evidence

168. From the outset, Navigant's approach stressed KaR-Tel's fragile financial position. It noted that the company had been mismanaged in the years 1999 to 2002 and had failed to meet business goals.⁸⁵ It had also pointed out in its written report that its market share had dropped from 50% to 25%,⁸⁶ but on cross-examination Mr. Kaczmarek accepted that the 50% figure in KaR-Tel's business plan was only nominal (indicating that KaR-Tel began with one of the two licences in Kazakhstan before any users were subscribed).⁸⁷

169. Navigant concluded that at 23 April 2002, KaR-Tel was financially insolvent and not a going concern.⁸⁸ It noted that MCC had called in its loan, and that KaR-Tel showed no signs of being able to raise the necessary funds to pay it. On cross-examination, Mr. Kaczmarek accepted that Telsim, a large company, had guaranteed the loan⁸⁹ and that it was possible that someone other than Mr.

⁸⁴ TH6 150.

⁸⁵ Navigant Report paras 9, 28– 64.

⁸⁶ Ibid paras 9, 59.

⁸⁷ TH6 165:8–166:9.

⁸⁸ Navigant Report paras 10, 69–74.

⁸⁹ TH6 157:19–158:14.

Yerimbetov could have rectified the company's position.⁹⁰ He also accepted that KaR-Tel had continued to trade throughout the period.⁹¹

170. Following its conclusion that KaR-Tel was insolvent, Navigant did not accept that a DCF analysis was appropriate, and instead determined that the liquidation value of the company was the appropriate measure.⁹² It concluded that KaR-Tel's debt to MCC was greater than the value of its assets, and therefore that the value of Rumeli's shares in the company was, at best, zero. Mr. Kaczmarek accepted, however, that while the shares may have been worthless, principally because of the size of the debt, the business was not worthless.⁹³ On the contrary, he accepted that the business could have had a value, even in April 2002, of between US\$81.9 million and US\$113 million.⁹⁴
171. Navigant concluded that the price paid by VimpelCom in 2004 was fair or slightly high.⁹⁵ It therefore concluded that \$350 million represented the absolute limit of KaR-Tel's value at that point. Navigant went on to opine that the increase in KaR-Tel's value could be ascribed to the new management team, and therefore would not have occurred had Rumeli and Telsim remained shareholders.
172. Navigant considered that Analysys had failed to take account of the fact that KaR-Tel's revenue would not have been sufficient to pay its debts and failed to take account of significant factors that would have weighed on a potential purchaser in 2002. Navigant argued that the EV per subscriber was so high that there must have been serious errors in Analysys' calculations. It further argued that the nearly three-fold discrepancy between Analysys' valuation of KaR-Tel's shares at 2004 and the price paid by VimpelCom indicated that

⁹⁰ Ibid 159:9–10 .

⁹¹ Ibid 158:23–25.

⁹² Navigant Report paras 11 & 125; TH6 76:14–18; 81:13–14.

⁹³ TH6 173:20–23.

⁹⁴ Navigant Presentation 32; TH6 173:12-14.

⁹⁵ Navigant Report paras 176 – 179.

Analysys' calculations were flawed. Navigant submitted that Analysys' revised calculations remained significantly overinflated.⁹⁶

2.5.4 The Tribunal's Approach

173. The Tribunal thus had three possible starting-points on the evidence submitted to it:

(a) First, it could accept that KaR-Tel was actually insolvent, as opposed to merely balance-sheet insolvent; accept that KaR-Tel was not a going concern; and conclude that the company's shares had zero net value.

(b) Second, it could adopt a DCF approach, starting from those projections presented by Analysys which proceeded from the assumptions that the Tribunal chose to adopt, and then discounting those projections in the light of any further considerations which the Tribunal decided were relevant.

(c) Third, in order to test the reasonableness of any figure arrived at under (b), the Tribunal could consider the relevance of the sale to VimpelCom for \$350 million, on the basis that the sale reflected the value of the License, KaR-Tel's major asset, at that time, appropriately discounted to take account of changes in circumstances in the ten months between the date of expropriation (30 October 2003) and the date of the Vimpelcom sale (August 2004).

174. The Tribunal began at paragraph 752 by reciting Rumeli and Telsim's argument that the sale to VimpelCom constituted "relevant background" to the Tribunal's task of assessing the compensation due. It was accepted by the RoK that the

⁹⁶ TH6 97:5–6; 98:10–12.

price was, at most, only a slight overvaluation. RoK maintained, however, that the price was wholly attributable to the changes that had occurred since the expropriation.

175. Having considered the World Bank Guidelines, the Tribunal noted at paragraph 809 that the Tribunal's "*overriding objective*" remained to assess the market value of the investment to a willing buyer. A DCF valuation would have formed one of the methods used by a buyer to determine how much to pay. The Tribunal noted, however, at paragraph 811 that it remained an approximation dependent on the validity of its underlying assumptions, not a mechanical calculation.
176. The Tribunal held that, although Kar-Tel lacked the track record which would normally be required for it to be treated as a going concern for the purpose of applying a DCF analysis, nevertheless, value had to be ascribed to its major asset, the Licence. The Licence was plainly worth far in excess of its book value, and this value was determined by the potential for whoever owned it to generate income from it. A purchaser of the company's shares would have been guided in deciding what to pay by the Licence's potential to generate income, because by purchasing the shares they would obtain the Licence. The Tribunal thus concluded at paragraph 811 that there was "*no realistic alternative*" to using the DCF method. The date of the expropriation was part-way through the period from Rumeli and Telsim's eviction, in April 2002, and the sale to VimpelCom in September 2004. By the time of the expropriation subscriber numbers in Kazakhstan had begun to increase rapidly, and the value of the Licence, and therefore KaR-Tel's shares, would have already begun to increase.
177. The Tribunal then adopted Rumeli's "*base case DCF valuation*" of \$227 million in the absence of any more reliable starting point. After taking into account countervailing factors, such as the possibility that the management initiatives adopted by Mr. Yerimbetov would not have been adopted had Rumeli and Telsim remained shareholders, the Tribunal referred at paragraph 813 to the VimpelCom sale price. In paragraph 814 it concluded that \$125 million constituted adequate compensation for the loss of Rumeli and Telsim's 60%

shareholding. That sum values the total shares at \$208 million, which is approximately 60% of the price actually paid for the company some 11 months later.

2.5.5 The Conclusion of the Committee

178. The figure of US\$125 million is baldly stated in the Award, without an explanation of a mathematical calculation undertaken by the Tribunal in arriving at it. The Committee well understands the grounds for the Applicant on Annulment's objection in this regard. It is highly desirable that tribunals should minimise to the greatest extent possible the element of estimation in their quantification of damages and maximise the specifics of the ratiocination explaining how the ultimate figure was arrived at. But, nevertheless, the Committee does not consider that the award of damages is one which it ought to annul, since the Tribunal did not fail to give reasons for its award of damages. On the contrary, the Tribunal examined the position as to damages with considerable care and set out the reasons for its award in terms appropriate to the circumstances of the case and the evidence available to it.

179. In the light of the foregoing analysis, the reasons why this conclusion is warranted may be summarised in the following ten points:

(1) The Committee is not limited in its review of the Award under Article 52(1)(e) of the ICSID Convention to the text of the Award alone, but rather should seek to understand the motivation of the Award in the light of the record before the Tribunal.⁹⁷

(2) The Tribunal plainly rejected the view that the shares were worthless at the time of expropriation. The fact that the Tribunal accepted at paragraph 806 that the company was *balance-sheet* insolvent does not contradict its subsequent

⁹⁷ Supra paras 138 and 140, citing *Soufraki & Azurix*.

finding in this respect. On the contrary, it took the view that Kar-Tel had at that stage a major asset of considerable value, which would have far exceeded its book value (i.e. the value ascribed to it in the balance-sheet). That asset was the Licence (for which Rumeli and Telsim had already paid US\$67.5 million on 31 July 1998, over four years previously).⁹⁸ The Tribunal held that this asset of the company would undoubtedly have been taken into account by a buyer in any valuation. Since that asset was income-generating, the Tribunal decided at paragraph 811 that it had no alternative but to use the DCF method to ascribe a value to it.

(3) The shares in Kar-Tel were freely transferrable. The Licence being an asset of Kar-Tel, the owner for the time being of shares in Kar-Tel would obtain the benefit of the value of that Licence to the extent of its shareholding and subject to the other assets and liabilities of the company.⁹⁹ Thus, to that extent, the value of this income-generating asset of the company would be relevant to the value to be ascribed to the expropriated shares.

(4) Once the Tribunal had determined that Rumeli and Telsim had established that they had lost something of real value, the determination of *what* value was to be ascribed to that loss became one for the Tribunal's own informed estimation. It was not limited in that exercise to the evidence or figures put forward by the Parties.¹⁰⁰

(5) The estimation of damages in such circumstances is not an exact science. It is of the essence of such an exercise that the tribunal has a measure of discretion, since the final figure must of its nature be an approximation of the claimant's loss. There may in that context be real limitations on the extent of reasoning which can reasonably be expected.¹⁰¹

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Award para 6.

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This was accepted by Counsel for the RoK in response to questions from the President of the Committee: Transcript 288:21 – 292:5.

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Supra paras 147 and 148 and the authorities there cited.

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Supra paras 144 – 146 and the authorities there cited.

(6) In the instant case, the Tribunal expressly decided, for the reason given in (2), that it would apply a DCF analysis. But, at the same time, it explained, correctly, that “the method must be understood as an approximation which is dependent on the validity of the assumptions, and not as a mechanical calculation which will yield a value whose validity is not open to question” (paragraph 810). The overarching test for fair market value was that which a willing buyer would have paid to a willing seller, and a DCF analysis was simply one tool which would have been used in such a negotiation.

(7) Once the Tribunal had reached this point in its analysis, the only evidence available to it (i.e. evidence that would enable it to undertake a DCF analysis) was that put forward by Analysys on behalf of Rumeli and Telsim. That was because Navigant for Kazakhstan had maintained its position that the shares were worthless. Thus, its evidence was of no real use to the Tribunal for the exercise which it had decided it had to undertake. The Tribunal could only be guided by the DCF calculations undertaken by Analysys on the basis of the various different assumptions applied. It expressly adopted, at paragraph 813, Analysys’ base case valuation of US\$227 million for Rumeli and Telsim’s 60% stake, after repaying the Motorola loan.

(8) In arriving at its final figure, the Tribunal was entitled to balance a number of countervailing considerations.¹⁰² These considerations included those stated by the Tribunal in its Award at paragraphs 806 to 808 and 812. The factors do not contradict the other elements of the Tribunal’s reasoning. Rather, they serve to explain the reason for the reduction from US\$227 million to arrive at the final damages figure of US\$125 million.

(9) The Tribunal was entitled to, and did, test the reasonableness of the DCF valuation against the price achieved in the sale to Vimpelcom some 10 months later (Award paragraph 813).

¹⁰² Supra para 137, citing *Vivendi* supra n 4 paras 64-65.

(10) In the result, therefore, the Tribunal did undertake the task of producing a reasoned Award as to damages as mandated by the ICSID Convention, and its Award is not to be annulled on this ground.

3. COSTS

180. The Respondents to the Application request the Committee to issue a decision ordering the Applicant on Annulment to pay to the Respondents all costs and expenses incurred by them flowing from the preparation and conduct of the annulment proceedings, including the fees and expenses of counsel, the arbitrators and the charges of ICSID.¹⁰³
181. On 13 November 2009, the Respondents to the Application submitted their request for arbitration costs quantified at US\$504,552.97. The Applicant on Annulment, in its letter of 18 November 2009, submitted its request of US\$1,187,409.36 for pursuing its Application.
182. The Committee has discretion to determine how, and by whom, the expenses incurred by the parties in connection with the proceedings and the ICSID costs should be paid (Article 61(2) of the ICSID Convention and Arbitration Rule 47(1)(j), read in conjunction with Article 52(4) of the ICSID Convention and Arbitration Rule 53).
183. The *Azurix* annulment decision held that, “*the normal course should be for a wholly unsuccessful applicant for annulment [to] carry the burden of the whole costs of the Centre advanced by it associated with the proceedings, including the fees and expenses of the members of the ad hoc committee.*”¹⁰⁴ However, the practice of virtually all ICSID annulment committees has been to divide ICSID costs – including the fees of committee members -- equally between the

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Para 196 of the Counter-Memorial on Annulment and para 153 of the Rejoinder on Annulment. Supra n 55 para 278.

parties and to order each party to bear their own counsel fees.¹⁰⁵ In one of the few annulment decisions in which the unsuccessful applicant was ordered to pay both counsel fees and ICSID costs, the *ad hoc* Committee found that the annulment application was “*fundamentally lacking in merit*” and that the applicant’s case was “*to any reasonable and impartial observer, most unlikely to succeed*”.¹⁰⁶

184. In the instant case, although the Committee has denied the RoK’s application for annulment in its entirety, the Application was not fundamentally lacking in merit; particularly on the question of damages, it raised a claim that required extended consideration. Accordingly, the Parties shall each bear their own counsel fees and shall contribute equally to meeting the costs of the annulment proceeding (RoK’s advances to ICSID). As the Applicant has been solely responsible for making the advance payments to cover the costs of the proceeding in accordance with ICSID Administrative and Financial Regulation 14(3)(e), the Respondents to the Application shall reimburse the Applicant half of such costs.¹⁰⁷

¹⁰⁵ Schreuer *supra* n 54, 1234.

¹⁰⁶ *CDC Group PLC v. Republic of the Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, 29 June 2005, 11 ICSID Rep 237, 266.

¹⁰⁷ The ICSID Secretariat will in due course provide the Parties with a financial statement showing the costs of the proceeding.

DECISION

For the reasons given above, the *ad hoc* Committee decides:

- (1) The Application for Annulment of the Republic of Kazakhstan is dismissed in its entirety.**
- (2) The Parties shall bear in equal shares all expenses incurred by the Centre in connection with this proceeding, including the fees and expenses of the members of the Committee.**
- (3) Each Party shall bear its own litigation costs and expenses incurred with respect to this annulment proceeding, including its cost of legal representation.**
- (4) Pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3), the stay of enforcement of the Award ordered by the *ad hoc* Committee in its decision of 19 March 2009 is terminated.**

THE AD HOC COMMITTEE:

C. A. McLachlan

Campbell McLachlan

Date: 12 February 2010

E. Silva Romero

Eduardo Silva Romero

Date: 18 February 2010

Stephen M. Schwebel

Stephen M. Schwebel

Date: 22 February 2010