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CERTIFICATE

UAB E ENERGIJA (LITHUANIA)

v.

REPUBLIC OF LATVIA

(ICSID CASE NO. ARB/12/33) – ANNULMENT PROCEEDING

I hereby certify that the attached document is a true copy of the *ad hoc* Committee's Decision on Annulment dated April 8, 2020.

Meg Kinnear
Secretary-General

Washington, D.C., April 8, 2020

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

UAB E ENERGIJA (LITHUANIA)

Claimant

and

REPUBLIC OF LATVIA

Respondent

ICSID Case No. ARB/12/33 – Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Ms. Loretta Malintoppi, President
Prof. Geneviève Bastid Burdeau
Dr. Andrés Rigo Sureda

Secretary of the *ad hoc* Committee
Dr. Jonathan Chevry

Date of dispatch to the Parties: April 8, 2020

REPRESENTATION OF THE PARTIES

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I. INTRODUCTION AND PARTIES

1. This case concerns the outcome of a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Lithuania-Latvia Agreement on the Promotion and Protection of Investments (the "**BIT**"), which entered into force on July 23, 1996, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated October 14, 1966 (the "**ICSID Convention**").

2. The Claimant in the Arbitration proceeding and the Respondent in the annulment proceeding is UAB E energija (Lithuania), a company incorporated under the laws of the Republic of Lithuania ("**UAB E energija**" or the "**Claimant**").

3. The Respondent in the Arbitration proceeding and the Applicant in the annulment proceeding is the Republic of Latvia ("**Latvia**," the "**Respondent**," or the "**Applicant**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. The dispute in the original proceeding and the findings of the Award are summarized in Section III below.

6. In this annulment proceeding, Latvia invokes two grounds for annulment: (i) the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention); and (ii) the Tribunal failed to state the reasons on which the Award was based (Article 52(1)(e) of the ICSID Convention). The Committee notes that in its Application for Annulment, Latvia referred to a third ground for annulment, namely a serious departure from a fundamental rule of procedure, under Article 52(1)(d) of the ICSID Convention (*see* Application for Annulment, paragraphs 4, 23). However, this ground for annulment is no longer mentioned in Latvia's Memorial and Reply and was not mentioned at the Hearing. Consequently, it is not addressed in this Decision.

II. PROCEDURAL HISTORY

7. On August 15, 2012, ICSID received a Request for Arbitration from UAB E energija against Latvia (the "**RfA**").

8. On October 15, 2012, the Secretary-General of ICSID registered the RfA in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

9. On June 12, 2013, a Tribunal composed of Dr. Paolo Michele Patocchi, a national of Switzerland, President, appointed by the Chairman of the Administrative Council; Mr. Samuel Wordsworth, a national of the United Kingdom, appointed by the Claimant; and Prof. August Reinisch, a national of Austria, appointed by the Respondent, was constituted.

10. On October 10, 2013, the Tribunal issued Procedural Order No. 1, with a procedural calendar. The Parties accordingly filed the following submissions:

- The Claimant's Memorial on Jurisdiction and the Merits dated December 6, 2013;
- The Respondent's Request for Bifurcation dated April 18, 2014, as amended on May 12, 2014;
- The Claimant's Response to the Respondent's Request for Bifurcation dated May 19, 2014;
- The Claimant's Reply on the Merits and Counter-Memorial on Preliminary Objections dated October 10, 2014;
- The Respondent's Rejoinder on the Merits and Reply on Preliminary Objections dated December 12, 2014; and
- The Claimant's Rejoinder on Preliminary Objections dated January 2, 2015.

11. From February 23 through February 27, 2015, the Tribunal held a hearing on jurisdiction and the merits in London.

12. On March 20, 2015, the Parties filed their post-hearing briefs.

13. On June 1, 2015, the Parties filed their reply post-hearing briefs.

14. On October 11, 2017, the Tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).

15. On December 22, 2017, the Tribunal rendered its Award; attached to which was the dissenting opinion of Prof. August Reinisch.

16. On February 7, 2018, the Secretary-General registered a request for the rectification of the Award filed by Latvia to correct certain clerical errors.

17. On May 3, 2018, the Tribunal, after having consulted the Parties, issued its decision on the rectification of the Award correcting clerical errors.

18. On August 30, 2018, ICSID received an Application for Annulment (the "**Application**") from Latvia, with a request for the stay of enforcement of the Award. The Application for Annulment was made within the time-period provided in Article 52(2) of the ICSID Convention. Latvia sought annulment of the Award based on the following three grounds:

- The Tribunal *manifestly exceeded its powers* because it allegedly failed to decide the Parties' dispute on applicable law.[1] Latvia further claims that the Tribunal had no jurisdiction,[2] and that Latvia's consent to arbitrate was lacking further to Latvia's accession to the EU, rendering the BIT incompatible with EU law.[3]

- The Tribunal *departed from the fundamental rules of procedure* because, according to Latvia, the Tribunal dismissed Latvia's objection that evidence on the alleged payment provided by the Claimant to Danske Bank was insufficient.[4]

- The Tribunal *failed to state reasons* because, according to Latvia, (i) it failed to provide reasons as to the connection between the loss incurred (also unexplained and lacking causality) and the breaches of Article 3(1) of the BIT on arbitrary and discriminatory measures;[5] (ii) it failed to give reasons for the evidential basis of the damages claim;[6] (iii) its reasoning on the quantum was flawed and lacking;[7] and (iv) its reasoning on interest

[1] Application, ¶¶ 8-12.

[2] Application, ¶¶ 32-36.

[3] Application, ¶¶ 22-36.

[4] Application, ¶¶ 19-23. As noted above, this ground of annulment was not mentioned in Latvia's subsequent written submissions nor at the Hearing.

[5] Application, ¶¶ 13-18.

[6] Application, ¶¶ 19-23.

[7] Application, ¶¶ 24-26.

was deficient because it omitted to identify the basis for the Claimant's entitlement to interest, the reasoning on compound interest was vague and unsupported, and the date from which interest would run was not justified legally.[8]

19. On September 4, 2018, the Secretary-General registered the Application and informed the Parties of the provisional stay of enforcement of the Award.

20. By letter of September 11, 2018, ICSID informed the Parties that it intended to recommend to the Chairman of the Administrative Council the appointment of Ms. Loretta Malintoppi, a national of Italy, as President of the *ad hoc* Committee (the "**Committee**"), with Mr. Makhdoom Ali Khan, a national of Pakistan, and Mr. Ucheora Onwuamaegbu, a national of the Nigeria, serving as co-members. The Centre invited the Parties to provide any comments on the proposed appointments by September 18, 2018.

21. By letter of September 18, 2018, UAB E energija confirmed that it had no objection to the proposed Committee Members. By letter of the same date, Latvia confirmed that it also did not object to the proposed Members; however, it noted that according to his CV, Mr. Onwuamaegbu also holds British nationality, with Mr. Samuel Wordsworth, the arbitrator appointed by the Claimant in the original proceeding also being a British national.

22. By email of September 18, 2018, the Centre confirmed that Mr. Onwuamaegbu's British nationality disqualified him as a candidate and stated that it would revert shortly with a third potential Member.

23. By letter of September 20, 2018, ICSID proposed Prof. Geneviève Bastid Burdeau, a national of France, as a third Member of the Committee and transmitted certain disclosures of Ms. Malintoppi.

24. By letters of September 27, 2018, both Parties confirmed their agreement to the proposed Committee Members, provided Prof. Bastid Burdeau had no further disclosures.

25. By letter of October 1, 2018, the Centre transmitted Prof. Bastid Burdeau's confirmation that she had no conflicts in the case and informed the Parties that the Chairman of the Administrative Council would proceed to make the appointments.

[8] Application, ¶¶ 27-31.

26. By letter of October 2, 2018, the Centre confirmed that the Chairman of the Administrative Council had made the appointments and that the Centre was in the process of seeking the Members' official acceptance of their appointments.

27. By letter of October 5, 2018, the Secretary-General informed the Parties that all of the Members had accepted their appointments and the Committee was constituted in accordance with Article 52(3) of the ICSID Convention. Its Members were: Ms. Loretta Malintoppi (Italian), President; Prof. Geneviève Bastid Burdeau (French), and Mr. Makhdoom Ali Khan (Pakistani); all members appointed by the Chairman of the Administrative Council.

28. By letter of October 10, 2018, the Committee invited the Parties to confirm their availability for a first session by telephone conference on November 20, 2018, which both Parties did.

29. By letter of October 29, 2018, the Committee asked Latvia to confirm if its request for the stay of enforcement of the Award included in the Application was maintained; if so, the Committee invited UAB E energija to state whether it opposed the request for the stay of enforcement by November 12, 2018. Additionally, the Parties were invited to confer on a timetable for written submissions by November 15, 2018.

30. By letter of October 31, 2018, Latvia confirmed that it maintained its request for the stay of enforcement of the Award and asked that, should UAB E energija object, the Committee extend the provisional stay of enforcement beyond the 30-day period foreseen in ICSID Arbitration Rule 54(2).

31. By letter of November 1, 2018, ICSID transmitted a draft Procedural Order No. 1 and a draft agenda for the first session to the Parties.

32. By letter of November 9, 2018, UAB E energija confirmed that it did not object to the stay of enforcement of the Award.

33. By letter of November 13, 2018, the Committee confirmed that the stay of enforcement of the Award would remain in effect until a final decision on the Application.

34. By email of November 15, 2018, the Parties submitted their proposed changes to draft Procedural Order No. 1.

35. On November 20, 2018, the Committee held a first session by telephone conference.

36. On November 21, 2018, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. Procedural Order No. 1 also sets out the agreed schedule for the proceeding, which was later modified by agreement of the Parties.

37. On November 23, 2018, the European Commission (the "**Commission**") filed its First Application for Leave to Intervene as a Non-Disputing Party (the "**First Application to Intervene**").

38. By email of November 27, 2018, the Committee invited the Parties to provide their comments on the First Application to Intervene by December 12, 2018, with observations on the other side's comments due by December 19, 2018.

39. By letter of December 5, 2018, Latvia confirmed that it had no objection to the First Application to Intervene.

40. By letter of December 12, 2018, UAB E energija objected to the First Application to Intervene.

41. By letter of December 19, 2018, Latvia provided its observations on UAB E energija's December 12, 2018 letter. By email of December 20, 2018, UAB E energija confirmed that it had no further comments.

42. On January 4, 2019, the Committee issued Procedural Order No. 2 rejecting the Commission's First Application to Intervene.

43. On February 15, 2019, Latvia filed its Memorial on Annulment (the "**Memorial**") with supporting documentation.

44. On June 7, 2019, UAB E energija filed its Counter-Memorial on Annulment (the "**Counter-Memorial**") with supporting documentation.

45. By emails of July 26, 2019, the Parties informed the Committee that they had agreed to short extensions for the filing of the two remaining submissions on annulment. By email of the same date, the Centre informed the Parties of the Committee's agreement to the changes.

46. By letter of August 7, 2019, the Centre transmitted a new disclosure from Ms. Malintoppi to the Parties. Neither of the Parties raised objections.

47. On August 16, 2019, Latvia submitted its Reply on Annulment (the "**Reply**") with supporting documentation.

48. By email of September 26, 2019, the Committee invited the Parties to confirm their availabilities for the pre-hearing call to be held on December 13, 2019. By emails of September 27 and September 30, 2019, the Parties confirmed their availabilities for the proposed time.

49. By letter of October 9, 2019, the Centre informed the Parties that Mr. Khan had submitted his resignation in accordance with ICSID Arbitration Rule 8(2) and that the proceeding was therefore suspended under ICSID Arbitration Rule 10(2) until the vacancy was filled under ICSID Arbitration Rule 11(1).

50. By letter of October 17, 2019, ICSID informed the Parties of its intention to propose Dr. Andrés Rigo Sureda, a national of Spain, as a Member of the Committee and invited the Parties to provide any comments by October 24, 2019.

51. By letter of October 22, 2019, Latvia confirmed that it had no objection to the appointment of Dr. Rigo Sureda. By letter of October 23, 2019, UAB E energija also confirmed that it had no objection.

52. By letter of October 24, 2019, the Centre informed the Parties that Dr. Rigo Sureda had accepted his appointment and the Committee was therefore reconstituted as of that date.

53. On October 25, 2019, UAB E energija filed its Rejoinder on Annulment (the "**Rejoinder**") along with supporting documentation.

54. On November 25, 2019, the Centre received the Commission's Second Application to Intervene, dated November 20, 2019, along with accompanying annexes (the "**Second Application to Intervene**").

55. By email of November 26, 2019, the Committee invited the Parties to provide their comments on the Second Application to Intervene by December 10, 2019.

56. On December 10, 2019, the Parties provided their comments on the Second Application to Intervene.

57. On December 13, 2019, the Committee held a pre-hearing conference by teleconference.

58. On December 16, 2019, the Committee issued Procedural Order No. 3 rejecting the Commission's Second Application to Intervene.

59. By letter of December 23, 2019, the President of the Committee made further disclosures to the Parties. Neither of the Parties raised objections.

60. On January 9, 2020, Latvia filed a request for the Committee to decide on the admissibility of new evidence. By email of the same date, the Committee invited UAB E energija to provide its comments on the request by January 10, 2020.

61. By letter of January 10, 2020, Latvia notified the Committee of exhibits from the original Arbitration on which it intended to rely during the Hearing.

62. By email of January 10, 2020, UAB E energija confirmed that it had no objection to Latvia's request of January 9, 2020, but objected to Latvia's use of the exhibits listed in its letter of January 10, 2020.

63. By email of January 11, 2020, the Committee provisionally admitted the documents listed in Latvia's January 10, 2020 letter while inviting Latvia to explain how it intended to rely on them.

64. By letter of January 13, 2020, Latvia provided its response to the Committee's January 11, 2020 email.

65. On January 13 and 14, 2020, a Hearing on Annulment was held in Paris (the "**Hearing**"). The following persons were present at the Hearing:

Ad hoc Committee:

Ms. Loretta Malintoppi	President
Prof. Geneviève Bastid Burdeau	Member
Dr. Andrés Rigo Sureda	Member

ICSID Secretariat:

Dr. Jonathan Chevry	Acting Secretary of the *ad hoc* Committee

For UAB E energija:

Counsel	
Mr. James Loftis	Partner, Vinson & Elkins
Mr. Alexander Slade	Counsel, Vinson & Elkins
Ms. Sophie Freelove	Associate, Vinson & Elkins
Mr. Valts Nerets	Senior Associate, Sorainen
Ms. Agita Sprūde	Senior Associate, Sorainen

Parties	
Ms. Raminta Barauskienė	COO, E energija
Ms. Žydruolė Azukienė	General Legal Counsel, E energija
Mr. Aleksas Jautakis	CFO, E energija
Mr. Gediminas Uloza	CEO, E energija
For Latvia:	
Counsel	
Mr. Ben Juratowitch QC	Freshfields Bruckhaus Deringer
Dr. Daniel Müller	Freshfields Bruckhaus Deringer
Ms. Nora Bellec	Freshfields Bruckhaus Deringer
Ms. Claire Rohou	Freshfields Bruckhaus Deringer
Parties	
Ms. Nērika Lizinska	State Chancellery of Latvia
Mr. Dainis Pudelis	State Chancellery of Latvia
Court Reporter:	
Mr. Trevor McGowan	The Court Reporter Ltd.

66. As instructed by the Committee at the Hearing, the Parties submitted on January 30, 2020 the corrections to the Hearing transcript agreed by the Parties, and on January 31, 2020 their respective statements of costs. On January 31, 2020, each Party filed its statement of costs.

67. On February 14, 2020, the Secretary-General informed the Parties that Dr. Jonathan Chevry, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal in the present case.

68. On March 19, 2020, the Committee declared closed the proceeding.

III. BACKGROUND ON THE ARBITRATION AND THE AWARD

69. Both Latvia and UAB E energija present in their submissions short summaries of the dispute brought before the Arbitral Tribunal and of the arbitral Award resulting from this dispute.[9]

70. The present section aims to recall the main points agreed by the Parties in their summaries (or, at the very least, advanced by one Party and not challenged by the other) on the factual background to the dispute (**1.**), and on the arbitral proceeding and the Award (**2.**), as completed whenever necessary by the Committee's own reading and understanding of the Award.

[9] Applicant's Memorial, Section II, ¶¶ 5-15; Claimant's Counter-Memorial, Section II, ¶¶ 4-12.

1. Factual Background

71. The Arbitration was initiated by the Claimant, UAB E energija, against the Respondent, the Republic of Latvia, in relation to the Claimant's right under a 30-year concession agreement for the production and sale of thermal energy in the Latvian city of Rēzekne.[10]

72. The concession agreement was concluded in 2005 between SIA Latgales Energija ("**Latgales**") – a Latvian company controlled by UAB E energija and Rēzeknes Siltumtīkli ("**Siltumtīkli**") – a public company fully owned by the municipal authority of Rēzekne (the "**Rēzekne Municipality**" or the "**Municipality**").[11] Prior to the agreement, Siltumtīkli oversaw heating supply services in Rēzekne.[12] The license agreement provided that Latgales would take over Siltumtīkli's activities and assume its debts.[13] The license agreement further provided that Latgales was to review, upgrade and operate the heating supply system in Rēzekne.[14] Pursuant to the license and Latvian law, the tariffs that Latgales could charge for its services were set by a Latvian central regulatory authority (the "**Regulator**").[15] Further to the conclusion on the license agreement, Latgales and the Municipality concluded a separate agreement, which provided, among other things, that the Municipality would not interfere in the performance of the agreement.[16]

73. Soon after the conclusion of the license, and due the rise of natural gas prices, Latgales filed a number of applications for tariffs increase with the Regulator.[17] Latvia's authorities rejected these tariff increases ostensibly because the Rēzekne Municipality had not adopted a "heat supply development plan" (an investment program required by Latvian law for heat supply services).[18] The failure to increase tariffs eventually resulted in Latgales being unable to pay the full amount of its gas invoices, the gas supplier refusing to deliver, and Latgales experiencing difficulties in providing heating to certain areas of the city of Rēzekne.[19]

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[10] Applicant's Memorial, ¶ 5; Claimant's Counter-Memorial, ¶ 6.
[11] Applicant's Memorial, ¶ 7; Claimant's Counter-Memorial, ¶ 6.
[12] Applicant's Memorial, ¶ 7; Claimant's Counter-Memorial, ¶¶ 6-7.
[13] Applicant's Memorial, ¶ 7; Claimant's Counter-Memorial, ¶¶ 6-7.
[14] Applicant's Memorial, ¶ 7; Claimant's Counter-Memorial, ¶¶ 6-7.
[15] Applicant's Memorial, ¶ 8; Claimant's Counter-Memorial, ¶ 8.
[16] Claimant's Counter-Memorial, ¶ 7.
[17] Claimant's Counter-Memorial, ¶ 9(a).
[18] Applicant's Memorial, ¶ 9; Claimant's Counter-Memorial, ¶ 9. *See also*, Award (AR-0003), ¶¶ 132, 207-266.
[19] Applicant's Memorial, ¶ 9; Claimant's Counter-Memorial, ¶ 9. *See also*, Award (AR-0003), ¶¶ 207-266.

74. In September 2007, the Rēzekne Municipality declared an energy crisis, and subsequently, Siltumtīkli began filing legal claims against Latgales in court, obtaining thereunder the attachment of Latgales's bank accounts.[20] Soon after, the Municipality incorporated a new, wholly-owned public operator company, SIA Rēzeknes Enerģija ("**Rēzeknes Energija**"), whose purpose was soon revealed to be providing heating services in Rēzeknes.[21] In October 2007, the Municipality initiated the process to appoint its two wholly-owned companies, Siltumtīkli and Rēzeknes Energija, to take over Latgales' activities. By October 2008, the Municipality eventually terminated the license, seizing all of the Latgales' assets and investments without compensation.[22]

75. After four years of unsuccessful negotiations, UAB E energija, as controlling shareholder of Latgales, initiated ICSID Arbitration proceedings claiming that Latvia breached its BIT obligations, including the fair and equitable treatment and full protection and security standards under the BIT Article 3(1), and the obligation not to expropriate foreign investment without compensation under the BIT Article 4(1).[23]

2. The Arbitral Proceeding and the Award

76. In the annulment proceeding, Latvia argues that the Claimant had alleged, in the original Arbitration, 73 breaches of the Lithuania-Latvia BIT.[24] UAB E energija does not to take issue with this number. The total amount of damages sought by the Claimant in the Arbitration was EUR 8.39 million.[25]

[20] Applicant's Memorial, ¶ 9; Claimant's Counter-Memorial, ¶ 9. *See also,* Award (AR-0003), ¶¶ 245-361.

[21] Applicant's Memorial, ¶ 9; Claimant's Counter-Memorial, ¶ 9. *See also,* Award (AR-0003), ¶¶ 245-361.

[22] Applicant's Memorial, ¶ 9; Claimant's Counter-Memorial, ¶ 9. *See also,* Award (AR-0003), ¶¶ 245-361.

[23] Applicant's Memorial, ¶¶ 10-11; Claimant's Counter-Memorial, ¶¶ 10-11.

[24] Applicant's Memorial, ¶ 11. Relying on several sections of the Award, Latvia explains this number as follows: "[t]he Claimant made 18 separate claims for unlawful expropriation…; 41 claims for breach of the FET standard, including 14 claims in respect of the need for transparent and consistent state conduct…, 12 claims for harassment…, five claims for procedural impropriety and failure to accord due process…, and ten claims for breaches of good faith…; one claim for breach of the FPS standard…; 12 claims for arbitrary and discriminatory measures…; and one claim under the MFN clause…." *See* Applicant's Memorial, ¶ 11, fn. 17 (citing Award (AR-0003), ¶¶ 375, 681, 685, 689, 691, 701, 707). *See also,* Transcript Day 1, p. 26, lines 13-14.

[25] Applicant's Memorial, ¶ 11. After the original Arbitration hearing, UAB E energija reduced its damages claim to 7.8 million. *See* Award (AR-0003), ¶ 1115.

77. In the Arbitration, Latvia raised two general jurisdictional objections on issues that are irrelevant to the present annulment proceeding,[26] which were both rejected by the Tribunal.[27] The Tribunal's decision on these two objections is not a ground for the challenge of the Award.

78. On the merits, the Tribunal found that the following three series of measures were arbitrary in a manner inconsistent with Article 3(1) of the BIT:[28]

- the Municipality's inaction and delay with respect to the establishment of the "heat supply development plan" (which served as an excuse for refusing the tariff increases);[29]
- the measures (analyzed collectively) taken by the Municipality in the context of its declaration of the energy crisis and relating to, among other things, the initiation (through Siltumtīkli) of legal actions against Latgales, the attachment of Latgales' bank accounts and the failure to have this attachment lifted, as well as the ultimatum issued by the Municipality against Latgales ordering it to resume heating services with 24 hours;[30] and
- the announcement by the Municipality in the midst of the energy crisis that Rēzeknes Energija–a newly-established wholly owned subsidiary of the Municipality–was ready to take over the heating services; and the subsequent appointment of Rēzeknes Energija.[31]

79. The conclusion of the Tribunal's reasoning on liability based on Article 3(1) of the BIT reads as follows:

> 1065. The Claimant is […] entitled to succeed on its claim that the Municipality's actions justifying the claims which the Tribunal granted in paragraphs 887 [*i.e.*

[26] The first jurisdictional objection related to UAB E energija's internal documents authorizing the Request for Arbitration. According to Latvia, UAB E energija failed to comply with the pre-conditions to arbitration found in these internal documents. The second objection pertained to UAB E energija's alleged delay in the submission of its Request for Arbitration (42 months after the period authorized in the BIT). According to Latvia, this delay showed UAB E energija's bad faith and caused Latvia to understand that the claims would not be pursued beyond negotiations. Because of this delay, Latvia objected to the Tribunal's jurisdiction based on the lack of legal dispute within the meaning of Article 25 of the ICSID Convention. *See* Award (AR-0003), Section V, ¶¶ 449-553.

[27] Applicant's Memorial, ¶ 12; Claimant's Counter-Memorial, ¶ 12. *See also*, Award (AR-0003), Section V, ¶¶ 449-553.

[28] The Committee takes note of the reference by UAB E energija in its Counter-Memorial on Annulment to a breach that the Tribunal would have found with respect to "The fact that the Municipality had issued its own development plan for the city of Rēzekne only on 21 September 2007." *See* Claimant's Counter-Memorial, ¶ 12(c) (citing Award (AR-0003), ¶ 1009). This point was not discussed further during the annulment proceedings by the Claimant.

[29] Award (AR-0003), ¶ 887.

[30] Award (AR-0003), ¶ 973.

[31] Award (AR-0003), ¶ 987.

> delay by the Municipality to coordinate and approve a heat supply development plan for the City], 973 [*i.e.* measures taken against Latagles subsequent to the declaration of an energy crisis] and 987 [*i.e.* the Municipality's appointment of Rēzeknes Energija] above amount to arbitrary measures impairing the management, maintenance, use, enjoyment or disposal of its investment. In the above paragraphs, the Tribunal has found that the conduct of the Respondent was arbitrary in a manner inconsistent with Article 3(1) of the BIT. As to impairment of the management, maintenance, use, enjoyment or disposal of the Claimant's investment (as defined in paragraph 521 above) the conduct for which the Respondent is responsible is one of the principal causes that ultimately resulted in the Claimant being unable to recover loans granted to Latgales Enerģija and having to pay a guarantee in respect of Latgales Enerģija's unpaid debts to third parties. The Tribunal finds that such conduct and measures on the part of the Municipality amount to arbitrary measures impairing the use, enjoyment or disposal of the Claimant's investment in breach of Article 3(1), second paragraph, of the BIT.
>
> (C). THE TRIBUNAL'S FINDING
>
> 1066. The Tribunal therefore concludes that the Respondent has breached Article 3(1) of the BIT based on the specific findings in paragraphs 887, 973, 987 and 1065 above. [32]

80. The Tribunal rejected the other claims brought forward by UAB E energija, including the claim for expropriation of its investment.[33]

81. On damages, the Tribunal rejected the Claimant's claim for lost profits, finding that the Claimant failed to discharge "its burden of proof in relation to the existence of future profits."[34] The Tribunal found nonetheless that the Claimant was "entitled to compensation for the actual proven losses (*damnum emergens*) suffered as a consequence of the Respondent's breaches of Article 3(1) of the BIT."[35]

82. The Tribunal identified two heads of loss that could result in actual damages for the Claimant, namely:

- loans made by the Claimant to Latgales (for a total amount of EUR 1.31 million), which Latgales was unable to reimburse;[36] and

[32] Award (AR-0003), ¶¶ 1065-1066.
[33] Award (AR-0003), ¶ 1101.
[34] Award (AR-0003), ¶ 1136.
[35] Award (AR-0003), ¶ 1137.
[36] Award (AR-0003), ¶ 1140.

- a guarantee paid by the Claimant in the amount of EUR 1.86 million to a Latvian bank named Danske Bank in respect of the debts owed by Latgales to various creditors.[37]

83. The Tribunal noted that these two heads of loss represented "an actual loss suffered by the Claimant" and found that they were "therefore recoverable in principle."[38] The Tribunal then went on to consider whether the Claimant was entitled to the total amount of these two heads of loss (*i.e.* 1.31 + 1.86 = EUR 3.17 million). The Tribunal decided that this was not the case and awarded only 50% of the total amount of the costs associated with the loans and the bank guarantee.[39]

84. The Tribunal further awarded interest, compounded annually, at different rates, from January 1, 2008 until payment by the Respondent.[40]

85. Finally, on costs, the Tribunal decided that the Claimant was entitled to reimbursement of part of its legal costs, as well as of its share of the ICSID Arbitration costs.[41] The Tribunal however declined the request from the Claimant that the Tribunal include a success fee for its lawyer.[42] In a short dissent, Prof. Reinisch explained that he disagreed with the Tribunal's decision on costs and explained that, in his view, the Tribunal should have left both Parties to bear their own costs and share of the ICSID Arbitration.[43] The issue of costs and Prof. Reinisch's dissent are not subject of dispute between the Parties in the present annulment proceeding.

IV. ANNULMENT LEGAL STANDARDS

86. In the interest of efficiency, this Decision focuses only on questions that must be answered in order to address the grounds of annulment advanced by the Applicant. The summaries of the Parties' positions that appear herein are not intended to capture all the points made during this annulment proceeding, but, rather, to present the points that, in the Committee's view, call for the greatest attention. The Committee has taken into account the full range of arguments raised by each Party.

[37] Award (AR-0003), ¶ 1140.
[38] Award (AR-0003), ¶ 1141.
[39] Award (AR-0003), ¶ 1145.
[40] Award (AR-0003), ¶ 1153.
[41] Award (AR-0003), ¶ 1167.
[42] Award (AR-0003), ¶ 1165.
[43] Award (AR-0003), ¶ 1160.

The Committee has also given due consideration to the legal authorities cited by the Parties, including other awards and annulment decisions, but has reached its own conclusions.

87. In the present section, the Committee addresses the Parties' positions on the scope of the annulment process under the ICSID Convention (**A.**), and on the two grounds of annulment advanced by Latvia, namely (**B.**) "manifest excess of powers" (ICSID Convention Article 52(1)(b)), and (**C.**) "failure to state reasons" (ICSID Convention Article 52(1)(e)).

A. SCOPE OF ANNULMENT

1. The Parties' Positions

88. While the Parties agree on the general principle that the function of an annulment committee is not to serve as an avenue of appeal,[44] Latvia and UAB E energija differ on several aspects of the ICSID annulment process.

a. Latvia's Position

89. Latvia recognizes, as does UAB E energija, that Article 52 of the Convention constitutes "an exceptional remedy."[45] Yet, Latvia claims that UAB E energija makes "an extreme characterization" of this consideration, and that, contrary to what UAB energija asserts, Article 52 does not provide for "any particular restriction or deference beyond enumerated standards."[46] Latvia relies on *RSM v. Saint Lucia* to argue that "there is no presumption one way or another about an annulment process,"[47] and that "[t]he provisions in Article 52 may be described as exceptional in the sense that Article 52 provides limited grounds for annulment but that has no impact on the way the provisions are to be interpreted and applied by the Committee."[48]

90. Further, while Latvia admits that it is not the role of *ad hoc* committees to make findings on the facts presented and assessed during the arbitral proceedings, Latvia argues nonetheless that "*ad hoc*

[44] Applicant's Memorial, ¶ 33; Applicant's Reply, ¶ 5; Claimant's Counter-Memorial, ¶¶ 13(a) and 19.

[45] Applicant's Reply, ¶ 6.

[46] Applicant's Reply, ¶ 6.

[47] Applicant's Reply, ¶ 6 (citing *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment, April 29, 2019 (ARLA-0103), ¶ 151 ("*RSM v. St. Lucia*")). *See also*, Transcript Day 2, p. 6, lines 21-25 (referring to *Capital Financing Holdings S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Decision on Annulment, October 25, 2019 (ARLA-106), ¶ 117).

[48] Applicant's Reply, ¶ 6 (citing *RSM v. Saint Lucia* (ARLA-0103), ¶ 151).

committees do not sit in splendid isolation from facts."[49] As explained by Latvia, *ad hoc* committees "do not make factual findings, but they do properly consider the evidence, factual and expert, as the context in which they determine whether the Tribunal stated reasons."[50]

91. More specifically, with respect to evidentiary issues, Latvia observes that while "[a]n annulment committee should not therefore seek to determine conclusively the impact of evidence that has been ignored," it should however "annul an award where it is able to ascertain that the evidence in question 'at least had the potential to be relevant to the final outcome of the case.'"[51]

b. UAB E energija's Position

92. UAB E energija stresses that ICSID annulment proceedings are not appellate proceedings, and annulment under Article 52 of the ICSID Convention is "an exceptional remedy."[52] Referring to ICSID precedents and the ICSID Convention's drafting history, UAB E energija contends that "*ad hoc* committees have a well-defined, limited role in reviewing ICSID awards"[53] and that annulment should not be considered as "a remedy against an incorrect decision."[54] Hence, according to UAB E Energija, "the nature of the ICSID annulment remedy is so exceptional that, even if an *ad hoc* committee finds an annullable error, annulment is not automatic."[55]

2. The Committee's Analysis

93. As recalled above, the Parties agree on at least two important aspects regarding the scope of the annulment process, which are also well-established in ICSID case law: the fact that annulment is

[49] Transcript Day 2, p. 14, lines 8-9.

[50] Transcript Day 2, p. 14, lines 10-13.

[51] Applicant's Memorial, ¶ 33 (citing, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016 (ARLA-0061), ¶ 135 ("*TECO v. Guatemala*")).

[52] Claimant's Counter-Memorial, ¶ 18.

[53] Claimant's Counter-Memorial, ¶ 18 (citing, *inter alia*, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the *Ad hoc* Annulment Committee, December 14, 1989 (ARLA-0012), ¶ 4.04 ("*MINE v. Guinea*"); *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012 (ACLA-0020), ¶ 17 ("*AES v. Hungary*")).

[54] Claimant's Counter-Memorial, ¶ 21 (citing *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, December 17, 1992 (ACLA-0003), ¶ 1.17 ("*Amco* II"); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, December 23, 2010 (ACLA-0017), ¶ 84 ("*Fraport v. Philippines*"); *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014 (ARLA-0056), ¶ 33.

[55] Claimant's Counter-Memorial, ¶ 22.

an exceptional remedy and that annulment proceedings are not appeals from an arbitral award. The Committee need not elaborate further on these uncontroversial points.

94. In addition, the Committee notes that Article 52 of the ICSID Convention aims at protecting the fundamental integrity of arbitral tribunals' decisions and the fulfilling of basic procedural guarantees. As noted by the committee in *CDC Group v. Seychelles*, "[b]ecause of its focus on procedural legitimacy, annulment is 'an extraordinary remedy for unusual and important cases.'"[56] Furthermore, annulment is not an inquiry into the substance of the award nor is it a remedy against a flawed or incorrect decision.

95. The Committee further finds that, if an applicant could have raised an objection in the original Arbitration but failed to do so, it is precluded from invoking that objection as a ground for annulment.

96. With respect to evidentiary issues, it is not a committee's role to decide whether a tribunal rightly assessed the evidence before it. Only the Tribunal could weigh and appreciate the probative value and the relevance of the evidence submitted in the Arbitration proceedings. The Committee shares the position taken by the *Daimler v. Argentina* annulment committee when it stated as follows:

> "If this Committee were to undertake a careful and detailed analysis of the respective submissions of the parties before the Tribunal… and annul the Award on the ground that its understanding of facts or interpretation of law or appreciation of evidence is different from that of the Tribunal, it will cross the line that separates annulment from appeal."[57]

[56] *CDC Group Plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005 (ARLA-0029), ¶ 34 ("*CDC v. Seychelles*"). Footnotes omitted.

[57] *Daimler Financial Services A.G. v. Argentine Republic*, Decision on Annulment, January 7, 2015 (ARLA-0057), ¶ 186 ("*Daimler v. Argentina*").

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

1. The Parties' Positions

a. Latvia's Position

97. Latvia considers that annulment committees have often considered that the ground of annulment under Article 52(1)(b) "involves two requirements: first, that the arbitral tribunal committed an 'excess of power,' and second, that it is 'manifest.'"[58]

98. Regarding the first requirement, Latvia argues that excess of powers occurs when an ICSID tribunal "fails to apply the proper applicable law to the dispute before it"[59] or where a tribunal purports to exercise a jurisdiction that it does not possess.[60]

99. Regarding the second requirement, Latvia contends that an excess of powers can be characterized as manifest when "it is obvious, clear or self-evident, and discernible without the need for an elaborate analysis of the award,"[61] and that "[a]n excess of powers is manifest if it can be discerned with little effort and without deeper analysis."[62]

b. UAB E energija's Position

100. UAB E energija agrees with Latvia that Article 52(1)(b) provides for a dual requirement: (i) an excess of powers, which is (ii) manifest.[63] Such "two-step analysis" is the favored approach because "excess of powers is a *sine qua non* for the need to gauge the manifestness of the excess, and allows

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[58] Applicant's Memorial, ¶ 20 (citing, *inter alia*, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, August 22, 2018 (ARLA-0072), ¶ 181 ("*Standard Chartered v. TANESCO*"); *OI European Group BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment, December 6, 2018 (ARLA-0074), ¶ 180).

[59] Applicant's Memorial, ¶ 21.

[60] Applicant's Memorial, ¶ 120 (stating that "a decision on the merits by an arbitral that in fact lacks jurisdiction to decide the parties' dispute" should be considered as "the most obvious example of an excess of power," and citing in support of this statement, *TECO v. Guatemala* (ARLA-0061), ¶ 77).

[61] Applicant's Memorial, ¶ 22 (citing, *inter alia*, *Impregilo SpA v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, January 24, 2014 (ARLA-0053), ¶ 128 ("*Impregilo v. Argentina*"); *Daimler v. Argentina* (ARLA-0057), ¶¶ 156, 158, 186; *Gambrinus, Corp v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Decision on Annulment, October 3, 2017 (ARLA-0066), ¶ 167).

[62] Applicant's Reply, ¶ 19 (citing Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed. 2009) (ARLA-0037), p. 938, ¶ 135 ("Schreuer et al.")).

[63] Claimant's Counter-Memorial, ¶¶ 24-25 (citing, *inter alia*, *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, May 3, 1985 (ARLA-0009), ¶ 17 ("*Klöckner v. Cameroon*"); *Sempra Energy v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, June 29, 2010 (ACLA-0013), ¶ 212 ("*Sempra v. Argentina*").

a more cogent analysis of what constitutes a breach, on one hand, and, on the other, what makes it manifest."[64] According to UAB E energija, there is such an excess of powers "where a tribunal acts outside of what it was authorized to do based on the parties' consent."[65]

101. On the issue of applicable law more specifically, UAB E energija agrees with Latvia that "annulment may exist where a tribunal has disregarded the applicable law."[66] Yet, UAB E energija insists that "it is for the Tribunal, not the *ad hoc* Committee, to determine the relevant provisions of the applicable law, their content, their relevance and their legal effect and a tribunal's decision on such issues cannot amount to a manifest excess of power."[67] As a result, "a ground for annulment can only be established where a tribunal has disregarded the law agreed upon by the parties in its entirety."[68]

102. With respect to findings on jurisdiction, UAB E energija notes that "several *ad hoc* committees considered allegations that a tribunal's decision on jurisdiction amounted to a manifest excess of powers under Article 52(1)(b) of the ICSID Convention."[69] It argues that ICSID *ad hoc* committees have nonetheless "been careful to avoid surpassing the limits of the annulment powers when applicants ask them to review tribunals' determinations on jurisdictional issues made in exercise of their express power under Article 41 of the ICISD Convention."[70] Hence, according to UAB E energija, a decision on jurisdiction may trigger the annulment of an award, but "only where it is obvious that a tribunal lacked or exceeded its jurisdiction,"[71] and "[a]n *ad hoc* committee may not

[64] Claimant's Counter-Memorial, ¶ 25 (citing *Sempra v. Argentina* (ACLA-0013), ¶ 12).

[65] Claimant's Counter-Memorial, ¶ 27 (citing *CDC v. Seychelles* (ARLA-0029), ¶ 40). *See also*, Claimant's Counter-Memorial, ¶ 39 (stating that "to be successful on these grounds [applicable law and jurisdiction], an applicant must demonstrate that the tribunal failed to decide the Parties' dispute with respect to the applicable law or declined jurisdiction based on a clear, unquestionable, manifest, departure from the parties' agreement.").

[66] Claimant's Counter-Memorial, ¶ 37.

[67] Claimant's Counter-Memorial, ¶ 37.

[68] Claimant's Counter-Memorial, ¶ 37.

[69] Claimant's Counter-Memorial, ¶ 38.

[70] Claimant's Counter-Memorial, ¶ 38.

[71] Claimant's Counter-Memorial, ¶ 34 (citing *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009 (ACLA-0010), ¶¶ 68-69 ("*Azurix v. Argentina*"); *Fraport v. Philippines* (ACLA-0017), ¶ 44, finding that "the Committee will not intervene where the Tribunal's decision on its jurisdiction was not unreasonable.").

enter upon an assessment of whether a tribunal made a correct assessment of the content of the applicable law."[72]

103. According to UAB E energija, "[t]o be manifest, the excess of powers must be easily recognizable without deeper analysis, *i.e.*, it must be 'self-evident rather than the product of elaborate interpretations one way or the other,'"[73] and "a manifest excess of powers only exists where a tribunal obviously acted outside of its mandate."[74]

2. The Committee's Analysis

104. In general terms, Article 52(1)(b) of the ICSID Convention contains a dual requirement: an "excess of powers" must exist and it must be "manifest." The latter requirement has been interpreted by *ad hoc* committees as a *prima facie* test: an excess of powers that is "obvious," "clear," "self-evident," or "easily recognizable."[75] The Committee adds that, in order to ascertain whether the original

[72] Claimant's Counter-Memorial, ¶ 36 (citing *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment, March 1, 2011 (ARLA-0045), ¶¶ 212-213 ("*Duke Energy v. Peru*"); *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007 (ARLA-0034), ¶¶ 85-86 ("*Soufraki v. UAE*")).

[73] Claimant's Counter-Memorial, ¶ 30 (citing *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002 (ARLA-0023), ¶ 25 ("*Wena v. Egypt*")).

[74] Claimant's Counter-Memorial, ¶ 32.

[75] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on August 20, 2007, August 10, 2010 (ACLA-0015), ¶ 245 ("*Vivendi* II") ("must be 'evident'"); *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, January 8, 2007 (ACLA-0006), ¶ 36 ("obvious by itself"); *Azurix v. Argentina* (ACLA-0010), ¶ 68 ("obvious"); *Soufraki v. UAE* (ARLA-0034), ¶ 39 ("obviousness") (citing *Webster's Revised Unabridged Dictionary* (1913) ("'clear,' 'plain,' 'obvious,' 'evident'….")); *CDC v. Seychelles* (ARLA-0029), ¶ 41 (citing *Wena v. Egypt* (ARLA-0023), ¶ 25 ("clear or 'self-evident'")); *MCI*, ¶ 49 (citing *Wena v. Egypt* (ARLA-0023), ¶ 25) ("self-evident"); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, March 25, 2010 (ARLA-0042), ¶ 96 ("*Rumeli v. Kazakhstan*") ("evident on the face of the Award"); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, June 14, 2010 (ARLA-0043), ¶ 55 ("*Helnan v. Egypt*") ("obvious or clear"); *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited, July 3, 2013 (ARLA-0050), ¶ 56 ("*Malicorp v. Egypt*") ("both obvious and serious"); *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, February 12, 2015 (ACLA-0024), ¶ 82 ("*Tza Yap Shum v. Peru*") ("must be evident"); *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, May 19, 2014 (ARLA-0055), ¶ 122 ("textually obvious and substantively serious"); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment, May 22, 2013 (ACLA-0022) ¶ 82 ("*Libananco v. Turkey*") ("'self-evident,' 'clear,' 'plain on its face' or 'certain'"); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, November 2, 2015 (ACLA-0026), ¶ 57 ("*Occidental v. Ecuador*") ("perceived without difficulty"); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015 (ACLA-0027), ¶ 56 ("*Tulip v. Turkey*") ("obvious, clear or easily recognizable"); *Ioan Micula*,

tribunal committed an excess of powers and whether such excess was "manifest," an *ad hoc* committee might have to review the record of the original Arbitration proceedings in order to assess the Parties' submissions in the annulment proceedings in their proper procedural and factual context.

105. Latvia asserts that the Tribunal in this case manifestly exceeded its powers in two respects, because: (i) it exercised a jurisdiction that it did not possess, and (ii) it failed to apply the proper applicable law. The Committee will therefore address in turn the legal standard concerning an alleged manifest excess of powers by the Tribunal with respect to these two allegations.

106. With regard to jurisdiction, *ad hoc* committees have generally recognized that an award may be annulled if a tribunal asserted jurisdiction when there was no jurisdiction, when the tribunal exceeded the scope of its jurisdiction, or when the tribunal asserted its jurisdiction over an issue that is not encompassed in the consent of the Parties.[76] Some *ad hoc* committees have held that the requirement that an excess of powers be "manifest" also encompasses the need to show that the excess be material to the outcome of the case.[77] At the same time, committees have also consistently acknowledged that arbitral tribunals are the judges of their own competence and have the power to decide whether or not they have jurisdiction on the basis of the parties' arbitration agreement and the mandatory jurisdictional requirements of the ICSID Convention. Moreover, as held in *Fraport*

Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016 (ARLA-0060), ¶ 123 ("*Micula v. Romania*") ("evident, obvious, clear or easily recognizable"); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, February 1, 2016 (ACLA-0028), ¶ 173 ("*Total v. Argentina*"); *TECO v. Guatemala* (ARLA-0061), ¶¶ 77, 181. *See also*, Schreuer et al. (ARLA-0037), p. 938.

[76] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 (ARLA-0024), ¶ 86 ("*Vivendi* I"); *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, November 1, 2006 (ARLA-0032), ¶¶ 47, 48, 67 ("*Patrick Mitchell v. Congo*"); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007 (ACLA-0009), ¶ 47 (quoting *Klöckner v. Cameroon* (ARLA-0009), ¶ 4); *Azurix v. Argentina* (ACLA-0010), ¶ 45 (quoting *Klöckner v. Cameroon* (ARLA-009), ¶ 4); *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007 (ARLA-0035), ¶ 99 ("*Lucchetti v. Peru*"); *MCI*, ¶ 56 (quoting *Lucchetti v. Peru* (ARLA-0035), ¶ 99); *Occidental v. Ecuador* (ACLA-0026), ¶¶ 49-51; *Tulip v. Turkey* (ACLA-0027), ¶ 55; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2016 (ACLA-0029), ¶ 191; *Total v. Argentina* (ACLA-0028), ¶ 242; *Micula v. Romania* (ARLA-0060), ¶ 125; *TECO v. Guatemala* (ARLA-0061), ¶ 77.

[77] *Vivendi* I (ARLA-0024), ¶ 86 ("clearly capable of making a difference to the result"); *Soufraki v. UAE* (ARLA-0034), ¶ 40 ("at once be textually obvious and substantially serious"); *Fraport v. Philippines (ACLA-0017)*, ¶ 44 ("demonstrable and substantial and not doubtful"); *AES v. Hungary* (ACLA-0020), ¶ 31; *Impregilo v. Argentina* (ARLA-0053), ¶ 128 ("obvious, self-evident, clear, flagrant and substantially serious"); *Libananco v. Turkey* (ACLA-0022), ¶ 102; *Total v. Argentina* (ACLA-0028), ¶ 308.

v. Philippines, a committee "must determine the reasonableness of the Tribunal's approach in light of the evidence and submissions which were before the Tribunal and not on the basis of new evidence."[78]

107. As to the applicable law, while failure to apply the applicable law is a ground for annulment, the incorrect application or interpretation of that law cannot give rise to annulment.[79] Some committees have stressed in that regard that a fine line exists between a failure to apply the proper law and its erroneous application.[80] This was aptly summarized by the *ad hoc* committee in *Enron v. Argentina*, when it observed that:

> "[T]here is a distinction between non-application of the applicable law (which is a ground for annulment), and an incorrect application of the applicable law (which is not), although this is a distinction that may not always be easy to draw." [81]

108. Committees however differ as to whether an egregious error in the application of the proper law may amount to a failure to apply the proper law. In this regard, the Committee shares the view of the *ad hoc* committee in *Occidental v. Ecuador* which held as follows:

> "Misinterpretation or misapplication of the proper law to be applied to the merits, even if serious, does not justify annulment. In exceptional circumstances, however, a gross or egregious error of law could be construed to amount to a failure to apply the proper law, and could give rise to the possibility of annulment. But the threshold for applying this exceptional rule must be set very high – otherwise the annulment mechanism permitted by the Convention would expand into a prohibited appeal system on the merits."[82]

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

1. The Parties' Positions

a. Latvia's Position

109. According to Latvia, the purpose of the requirement to state reasons is to ensure that the parties to a dispute can understand the basis on which an ICSID arbitral tribunal came to its decision.[83] The

[78] *Fraport v. Philippines* (ACLA-0017), ¶ 45.

[79] Aron Broches, "Observations on the Finality of ICSID Awards" *in Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* 299 (1995) (ARLA-0080), ¶¶ 354-355.

[80] *Soufraki v. UAE* (ARLA-0034), ¶ 85. *See also, Klöckner v. Cameroon* (ARLA-0009), ¶ 60.

[81] *Enron Creditors Recovery Corporation (previously Enron Corporation) & Ponderosa Assets, L.P. v. Argentine Republic*, Decision of the *ad hoc* Committee, July 30, 2010 (ACLA-0014), ¶ 68.

[82] *Occidental v. Ecuador* (ACLA-0026), ¶ 56 (footnotes omitted).

[83] Applicant's Memorial, ¶ 30.

ground contained in Article 52(1)(e) is connected to the obligation found in Article 48(3) for the tribunal to issue an award dealing "with every question submitted to the Tribunal," and stating "the reasons upon which it is based."[84] As stated in the *MINE v. Guinea* annulment committee's decision, "the award must enable one 'to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion.'"[85] In Latvia's own words, "the award must demonstrate, through reasons, that it is not arbitrary on any material point. It can be wrong, so long as it is reasoned; but it cannot through a failure of reasoning, leave the reader thinking that it may be arbitrary."[86]

110. According to Latvia, ICSID tribunals have "a duty to render an award that allows readers to comprehend and follow its reasoning."[87] As a result, "ICSID awards are susceptible to annulment for a failure to state reasons if the arbitral tribunal offered no reasons for its decision, or gave reasons that were unintelligible, contradictory, or frivolous, on a point that was essential to the outcome of the case."[88] Latvia further argues that "[i]ncoherent reasoning"[89] and "contradictory"[90] reasoning by an ICSID tribunal can constitute a failure to give reasons in the sense of Article 52(1)(e).[91] Latvia also contends that "perfunctory" arguments in an ICSID tribunal's reasoning can lead to annulment on the basis of Article 52(1)(e).[92] In support, Latvia refers to the decision in *Klöckner v. Cameroon*, where the committee found that "'two genuinely contradictory reasons cancel each other out' and therefore must be equated to the absence of any reasons to explain the basis for the decision,"[93] and to an extract of a widely-cited commentary of the ICSID Convention where the authors explain that, in the context of Article 52(1)(e), "[n]o doubt frivolous perfunctory

[84] Applicant's Memorial, ¶ 28.

[85] Applicant's Reply, ¶ 12 (citing *MINE v. Guinea* (ARLA-0012), ¶ 5.09).

[86] Transcript Day 1, p. 48, lines 8-12.

[87] Transcript Day 1, p. 52, lines 21-22.

[88] Applicant's Memorial, ¶ 29 (citing, *inter alia*, *Vivendi* I (ARLA-0024), ¶ 65; and Schreuer et al. (ARLA-0037), p. 1008, ¶ 377.

[89] Applicant's Memorial, ¶ 31 (citing *Klöckner v. Cameroon* (ARLA-0009), ¶ 120; *Amco Asia Corp v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, May 16, 1986 (ARLA-0010), ¶ 43; *Soufraki v. UAE* (ARLA-0034), ¶¶ 122-123).

[90] Applicant's Memorial, ¶ 31 (citing *Klöckner v. Cameroon* (ARLA-0009), ¶ 116; *Patrick Mitchell v. Congo* (ARLA-0032), ¶ 21; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014 (ARLA-0054), ¶ 102; *Standard Chartered v. TANESCO* (ARLA-0072), ¶¶ 610-611).

[91] Applicant's Memorial, ¶ 34. *See also*, Transcript Day 1, p. 50, lines 18-20, and p. 51, lines 11-17 (quoting from *Soufraki v. UAE* (ARLA-0034), ¶¶ 122 and 126); Applicant's Memorial, ¶ 31.

[92] Transcript Day 2, p. 48, lines 8-12.

[93] Applicant's Memorial, ¶ 31. *See also*, Applicant's Reply, ¶ 14 (citing *Klöckner v. Cameroon* (ARLA-0009), ¶ 151).

or absurd arguments by a tribunal would not amount to 'reasons'."[94] In sum, according to Latvia, the test should be "whether in light of the evidence, factual and expert, that the Tribunal has referred to, the reasons on the issue of causation were adequately coherent so as to explain logically the conclusions reached in the award."[95]

111. Finally, Latvia argues that "[a]nnulment of an ICSID award based on a failure to state reasons requires the applicant to demonstrate that the deficiency of reasoning relates to an issue that is relevant to the tribunal's overall decision in the award."[96] In other words, the failure to state reasons has to relate to an issue that is material to the outcome of the case in order to trigger the annulment of the award.[97]

b. UAB E energija's Position

112. Like Latvia, UAB E energija submits that the standard of Article 52(1)(e) is related to the requirement contained in Article 48(3) of the ICSID Convention, namely that an award "shall state the reasons upon which it is based."[98]

113. UAB E energija insists, however, on the idea that Article 52(1)(e) does not warrant an evaluation of the quality or persuasiveness of the tribunal's reasoning. In UAB E energija's words, "as long as reasons have been stated, even if they are incorrect, unconvincing or non-exhaustive, the award cannot be annulled on this ground."[99]

114. UAB E energija also agrees with Latvia that an award can be annulled on the ground found in Article 52(1)(e) when there is a failure to state reasons and when "the absent reasons [are] necessary to the tribunal's decision."[100] In other words, "the award may be annulled where there is a failure to answer an outcome-determinative question which leads to a failure of intelligibility of a tribunal's reasoning."[101]

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[94] Schreuer et al (ARLA-0037), p. 998, ¶ 344.

[95] Transcript Day 1, p. 55, lines 19-24.

[96] Applicant's Memorial, ¶ 32 (citing *Standard Chartered Bank v. TANESCO* (ARLA-0072), ¶ 609).

[97] Applicant's Memorial, ¶ 39 (explaining that "[i]f reasons are absent on a material issue […], the Award must be annulled.").

[98] Claimant's Counter-Memorial, ¶ 40.

[99] Claimant's Counter-Memorial, ¶ 95 (citing *Micula v. Romania* (ARLA-0060), ¶ 135).

[100] Claimant's Counter-Memorial, ¶ 42 (citing *MINE v. Guinea* (ARLA-0012), ¶ 5.13).

[101] Claimant's Counter-Memorial, ¶ 47.

115. Based on a review of ICSID annulment committees' case law, UAB E energija concludes that "to be successful, Latvia must show that there is a complete lack of reasons or that it is impossible to follow or infer the tribunal's reasoning on a determinative finding."[102]

2. The Committee's Analysis

116. Article 48(3) of the ICSID Convention provides that an award shall state the reasons upon which it is based.[103] ICSID Arbitration Rule 47(1)(i) provides that the award shall contain "the decisions of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based."

117. Several committees have held that it does not matter for purposes of annulment whether the tribunal's reasoning is correct or convincing; what matters is that the flow of the reasoning can be followed to its conclusion. Both Parties have referred to the holding by the *MINE v. Guinea* committee that "the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons."[104]

118. Indeed, awards must be drafted in such a way that the reasoning should logically follow and be understood. The *Micula v. Romania* committee noted in this regard:

> "Unreasoned awards can be annulled, because parties should be able to ascertain to what extent a tribunal's findings are based on a correct interpretation of the law and on a proper evaluation of the facts. However, as long as reasons have been stated, even if incorrect, unconvincing or non-exhaustive, the award cannot be annulled on this ground. Article 52(1)(e) does not permit an enquiry into the quality or pervasiveness of the reasons."[105]

119. The Committee notes that reasons need not be explicitly stated as long as the reader can understand the decision reached by the tribunal. However, even though reasons can be implicitly inferred from a tribunal's reasoning, an *ad hoc* committee should not strive to reconstruct those reasons, or, to use the words of the *Klöckner v. Cameroon* committee, it should not:

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[102] Claimant's Counter-Memorial, ¶ 49.

[103] Claimant's Counter-Memorial, ¶ 40.

[104] *MINE v. Guinea* (ARLA-0012), ¶ 5.09. *See also, AMCO* II (ACLA-0003), ¶ 1.18.

[105] *Micula v. Romania* (ARLA-0060), ¶ 135.

> "[D]eal '*ex post facto*' with questions submitted to the Tribunal which the Award left unanswered. The only role of the Committee here is to state whether there is one of the grounds for annulment set out in Article 52 of the Convention, and to draw the consequences under the same article. In this sense, the Committee defends the Convention's legal purity."[106]

120. The Committee also shares the view of the *ad hoc* committee in *Standard Chartered Bank v. TANESCO*, when it stated that:

> "[A]n annulment proceeding is not concerned with how the tribunal appreciated the arguments and evidence submitted by the parties or the conclusion it arrived therefrom. Instead, it is merely concerned that such assessment or evaluation indeed took place, on a fair and equitable basis, and that the findings of the Tribunal were based in its appreciation and analysis of said evidence and arguments, and thus is not arbitrary."[107]

121. As to the argument made by Latvia that, for an award to be annulled on this ground, the failure to state reasons has to relate to an issue that is material to the outcome of the case, the Committee notes that only failure to address a matter that would have been decisive for the outcome of the case could amount to a failure to state reasons leading to the annulment of the award.[108]

V. THE APPLICATION FOR ANNULMENT

122. According to Latvia, the Award suffers from five distinct defects in the Tribunal's findings on (i) applicable law, (ii) causation, (iii) quantum, (iv) interest and (v) jurisdiction. Latvia argues that due to each of these defects (taken together or separately), the Award should be annulled based on either or both manifest excess of power and failure to state reasons. UAB E energija objects to Latvia's application for annulment, arguing that the Tribunal's findings on the five aforementioned issues are not defective, and that, even if they were, they would not give rise to annullable errors based on the grounds invoked by Latvia.

123. In the present section, the Committee addresses the Tribunal's decision on the applicable law (**A.**), findings on causation (**B.**), decision on quantum (**C.**), reasoning on interest (**D.**), and decision on jurisdiction (**E.**).[109]

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[106] *Klöckner v. Cameroon* (ARLA-0009), ¶¶ 143-151.

[107] *Standard Chartered v. TANESCO* (ARLA-0072), ¶ 61.

[108] See, *Suez v. Argentina* (ACLA-0033), ¶ 163.

[109] At the Hearing, Latvia focused on the issue of causation, and connected it to the issue of quantum and interest. *See* Transcript Day 1, p. 5 lines 7-20; p. 5 line 24 – p. 6 line 8. While the Committee sees the reasons why Latvia decided

A. THE TRIBUNAL'S DECISION ON THE APPLICABLE LAW

1. Latvia's Position

124. Latvia submits that the Tribunal's decision on the law to be applied to the Arbitration was deficient and that the Award should be annulled based on both Articles 52(1)(b) and Articles 52(1)(e) of the ICSID Convention.

125. According to Latvia, "[a]n ICSID Tribunal will exceed its powers if it fails to apply the proper applicable law to the dispute before it."[110] Latvia refers to Article 42(1) of the ICSID Convention, and contends that, pursuant to this provision, "the application of the proper law is an essential element of the parties' consent to arbitrate and circumscribes the powers of an ICSID tribunal."[111]

126. Latvia submits that the Tribunal failed to address the Parties' dispute regarding the appropriate sources of law.[112] In particular, it claims that "[w]hile the Tribunal decided that there was an implicit agreement between the Parties that the primary sources of applicable law would be the BIT, 'general international law' and Latvian law, the Tribunal failed to resolve the Parties' dispute as to whether the PECL [Principles of European Contract Law], the UNIDROIT Principles and the Trans-Lex Principles formed part of 'general international law.'"[113] According to Latvia, the Tribunal should have made a determination as to the applicability of those principles, especially since Latvia relied on them in the Arbitration.[114] It argues that the Tribunal "ignored these principles,"[115] and that this should be considered as a failure "to identify and apply the correct applicable law."[116] Such failure, which is "a serious defect in the Tribunal's Award,"[117] constitutes

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to group these three issues during the Hearing, the present decision addresses the three issues separately, for the sake of clarity.

[110] Applicant's Memorial, ¶ 21 (citing, *inter alia*, *Malicorp v. Egypt* (ARLA-0050), ¶ 48; *Standard Chartered v. TANESCO* (ARLA-0072), ¶ 282).

[111] Applicant's Memorial, ¶ 21 (citing *Helnan v. Egypt* (ARLA-0043), ¶ 41).

[112] Applicant's Memorial, ¶¶ 25-26; Applicant's Reply, ¶¶ 7-10.

[113] Applicant's Memorial, ¶ 25, citing the Award (AR-0003), ¶ 792.

[114] Applicant's Reply, ¶ 9.

[115] Applicant's Reply, ¶¶ 10 and 20 (noting that "the Tribunal offered no explanation as to why the PECL, the UNIDROIT Principles and the Trans-Lex Principles were inapplicable, nor why no further reference to these principles was in order.").

[116] Applicant's Memorial, ¶ 26.

[117] Applicant's Memorial, ¶ 26. *See also*, Applicant's Reply, ¶ 18 (explaining that "The tribunal did not err in the application of the law agreed between the parties. It ignored altogether general principles of law, comprising the PECL, the UNIDROIT Principles and the Trans-Lex Principles, despite the fact that the Respondent relied on them. This is not simply an error in the application of the law or an 'inadvertent oversight of a detail in the law.'").

a "manifest excess of power," because it is both "textually obvious and substantively serious,"[118] and because Latvia's "substantive defenses to liability based on the application of the PECL, the UNIDROIT Principles and the Trans-Lex Principles were essential to the question of liability and could have led the Tribunal to reach a different decision."[119] Consequently, the Award should be annulled.[120]

127. Furthermore, Latvia contends that "[t]he Tribunal's disregard for the Parties' dispute regarding the scope and content of the applicable law also amounts to a failure to state reasons on an essential issue of consequence for the outcome of the case."[121]

128. More specifically, Latvia submits that in its written submissions in the Arbitration, it advanced defenses to liability under the BIT which were based on principles codified in the PECL.[122] In addition, Latvia contends that, during the hearing on the merits in the Arbitration, it explained, in response to a question asked by the Tribunal, the practical implications that would result from an application of the PECL in the case.[123] While Latvia demonstrated during the Arbitration proceedings that the PECL (as well as the UNIDROIT Principles and the Trans-Lex Principles) were relevant to the outcome of the dispute, the Tribunal did not address the applicability of these principles and offered no explanation for this. Latvia further argues that, even if the Tribunal implicitly decided that the above-referred principles were inapplicable, "it offered no reasoning to support such a conclusion."[124]

129. Latvia concludes that, as a result, the Award should be annulled pursuant to Article 52(1)(e) of the ICSID Convention for a "failure to state the reasons" on which it is based.[125]

130. At the Hearing, Latvia decided not to refer to the question of applicable law, explaining that it was "content to rely on its written submissions."[126]

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[118] Applicant's Memorial, ¶ 27 (citing, *inter alia*, *Soufraki v. UAE* (ARLA-0034), ¶ 40).
[119] Applicant's Memorial, ¶ 27.
[120] Applicant's Memorial, ¶ 23; Applicant's Reply, ¶ 21.
[121] Applicant's Memorial, ¶ 34.
[122] Applicant's Memorial, ¶ 36; Applicant's Reply, ¶ 15.
[123] Applicant's Memorial, ¶ 37.
[124] Applicant's Reply, ¶ 12.
[125] Applicant's Reply, ¶ 16.
[126] *See* Transcript Day 1, p. 5 lines 20-21.

2. UAB E energija's Position

131. According to UAB E energija, there is no basis to annul the Award with respect to the Tribunal's decision on the applicable law. Latvia's position on the applicable law is misguided because Latvia never argued in the Arbitration proceedings that "PECL, UNIDROIT Principles or Trans-Lex Principles formed part of the applicable law for the purposes of UAB E energija's claims under the BIT."[127] While UAB E energija admits that Latvia did refer to these principles in the Arbitration, it contends that Latvia did so "only as what it described as an 'extra verification' of the interpretation of the commercial contracts under their proper applicable law (Latvia law)."[128] As a result, according to UAB E energija, there was no dispute between the Parties as to the applicability of these principles, and the Tribunal could not have erred when it ruled not to decide on the applicability of these principles in its Award.[129]

132. In addition, UAB E energija argues that the Tribunal in any event "did make a decision on the applicable law, and did thereby consider Latvia's arguments (such as they may have been) in relation to the PECL, UNIDROIT Principles and the Trans-Lex Principles."[130] According to UAB E energija, the Tribunal "was very clear as to the applicable law"[131] and therefore abided by the "obligation to identify the applicable law to the dispute pursuant to Article 42(1) of the ICSID Convention."[132]

133. Based on these considerations, UAB E energija submits that the Tribunal "did not fail to apply the applicable law"[133] and that "there is no difficulty for a normal reader of the Award to understand the Tribunal's arguments and to follow its line of reasoning leading up to its final conclusions."[134]

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[127] Claimant's Counter-Memorial, ¶ 56; Claimant's Rejoinder, ¶ 16.

[128] Claimant's Rejoinder, ¶ 16.

[129] Claimant's Counter-Memorial, ¶ 58. *See also*, Transcript Day 1, p. 137, lines 5-6 (explaining that during the Arbitration, there was an "agreement between the parties that the relevant contracts concluded by the local Latvian parties were governed by Latvian law. The parties did not dispute that.").

[130] Claimant's Counter-Memorial, ¶ 65 (emphasis in the original). *See also*, Transcript Day 1, p. 142, line 24 – p. 143, line 2 (explaining that "the Tribunal did state its reasons for its decision on the applicable law. It did so by reference to Article 42 of the Convention").

[131] Claimant's Counter-Memorial, ¶ 66.

[132] Claimant's Counter-Memorial, ¶ 67. *See also*, Claimant's Rejoinder, ¶ 17.

[133] Claimant's Counter-Memorial, ¶ 70.

[134] Claimant's Counter-Memorial, ¶ 71.

UAB E energija therefore concludes that the Tribunal's decision on the applicable law does not constitute a manifest excess of power and the Tribunal did not fail to state reasons.[135]

3. The Committee's Analysis

134. The Committee recalls that, although the matter of the Tribunal's alleged failure to explain its decision on the applicable law was not addressed by Latvia in its oral submissions at the Hearing, Latvia confirmed at the Hearing that the submissions made in its written pleadings in this regard were maintained.[136]

135. Latvia claims that the Tribunal failed to apply the PECL, UNIDROIT Principles or Trans-Lex Principles as part of general international law, in spite of the fact that Latvia claimed that they were relevant to the Tribunal's determination. Latvia asserts that the Tribunal implicitly rejected these principles but provided no reasoning for the rejection. *Ergo*, the Tribunal failed to state reasons for its decision and the Award should be annulled on this ground. In addition, the fact that the Tribunal disregarded these general principles in spite of the Respondent's reliance on them also constitutes a manifest excess of power.

136. UAB E energija, for its part, argues that Latvia did not rely on these principles as part of the applicable law in the original Arbitration but merely invoked them for the interpretation of the relevant commercial contracts which were governed by Latvian law. In UAB E energija's opinion, Latvia's claims must fail for three reasons: (i) because the arguments that it makes in these annulment proceedings were not raised in the Arbitration; (ii) because the Tribunal provided reasons for its findings on the applicable law; and (iii) because, even if there was a failure to apply the relevant principles invoked by Latvia, such failure was not material to the outcome of the case and does not justify annulment.[137]

137. In proceeding with its analysis, the Committee is mindful not to engage in a process of *ex post facto* interpretation of Latvia's arguments in the Arbitration. Having said that, the Committee also considers it necessary to review these arguments in order to ascertain whether the Tribunal failed to consider the proper applicable law and thus exceeded its powers and/or failed to state reasons under Articles 52(1)(b) and (e) of the ICSID Convention, as Latvia alleges in these proceedings.

[135] Claimant's Counter-Memorial, ¶ 71.

[136] Transcript Day 1, p. 111, lines 6-11.

[137] Transcript Day 1, p. 138, lines 1-10.

138. Latvia argued in its written submissions in the Arbitration that the applicable law was composed of both Latvian law and international law and that the PECL, UNIDROIT Principles or Trans-Lex Principles formed part of the latter. For instance, the Counter-Memorial referred to the PECL Principles as "general principles of law recognized by civilized nations" pursuant to Article 38(1)(c) of the ICJ Statute[138] and as "guiding principles" in contractual interpretation.[139]

139. In the Rejoinder, Latvia referred to "general principles of law as suitable when gaps and uncertainties exist as to the particular situation" and mentioned the PECL Principles in that context.[140] The UNIDROIT and Trans-Lex Principles were also referred to in the Rejoinder as "inherent principles guiding the conclusion, interpretation and application of contractual terms in international business contracts."[141] Latvia added in the same pleading that:

> "additional justification for invocation of PECL is the need to have a neutral viewpoint (in the sense of international law) over the disputed aspects pertaining to commercial matters underlying the Concession Agreement and related commercial agreements (...) The Tribunal can have a neutral criterion in determining these matters, instead of indulging into a tedious and quarrelsome task of deciphering exactly what result stems from formal application of Latvian law (being the applicable law to the commercial agreements)."[142]

140. In addition, Latvia stated in the Rejoinder, in dealing with the Settlement Agreement: "Respondent also contends that the same result is achieved, when analyzing the Settlement Agreement from the standpoint of its formal applicable law (Latvian law)."[143] Apart from this reference made with respect to the Settlement Agreement, the Committee observes that nowhere in its submissions in the original Arbitration did Latvia explain what impact these principles would have had on the outcome of the case if they were specifically applied as part of the applicable law.

141. Thus, it can be concluded that, to the extent that Latvia relied on the PECL, UNIDROIT Principles or Trans-Lex Principles in its written pleadings, it did so because in its view these principles reflected a general practice and provided guidance in the interpretation and application of contracts, offering a "neutral criterion" of interpretation. It also appears that Latvia never relinquished Latvian

[138] Chart at Claimant's Counter-Memorial, ¶ 54, citing Arbitration Counter-Memorial, ¶ 3.10.

[139] Chart at Claimant's Counter-Memorial, ¶ 54, citing Arbitration Counter-Memorial, ¶ 3.16. *See also*, ¶ 3.37.

[140] Chart at Claimant's Counter-Memorial, ¶ 54, citing Arbitration Rejoinder, ¶ 18.

[141] Chart at Claimant's Counter-Memorial, ¶ 54, citing Arbitration Rejoinder, ¶ 19.

[142] Chart at Claimant's Counter-Memorial, ¶ 54, citing Arbitration Rejoinder, ¶ 20.

[143] Chart at Claimant's Counter-Memorial, ¶ 54, citing Arbitration Rejoinder, ¶ 24.

law as the proper applicable law to the contracts but referred to these principles as additional considerations to be employed in the process of interpretation.

142. This conclusion is confirmed further by Latvia's arguments at the hearing in the Arbitration, where only Latvian law and international law were mentioned in the analysis of the applicable law and no reference to any of these principles was made at all. It is particularly telling in this regard that Slides 7 and 8 of Latvia's opening presentation, entitled "Applicable Law (1)" and "Applicable Law (2)," respectively listed Latvian law "as a starting point" and international law "as a supervisor with BIT standards."[144] In Slide 8, Latvia provided a list of the different elements of Latvian law and international law that applied but did not expressly include the PECL, UNIDROIT Principles or Trans-Lex Principles.[145]

143. It follows that Latvia did not expressly, or clearly, formulate an argument in the Arbitration – as it does in these proceedings – that the PECL, UNIDROIT Principles or Trans-Lex Principles formed part of the applicable law for purposes of the Claimant's claims pursuant to the BIT. Instead, Latvia recognized that international law applied in the case but the relevant contracts were governed by Latvian law. For instance, in its Rejoinder in the Arbitration, Latvia stated:

> "[W]hile the Treaty and other public international law provisions (such as customary rules, general principles of law) are obviously the sole legal rules applicable in this case under international law, it also needs emphasizing that Treaty (both expressly and implicitly) authorizes application of compatible national law provisions. For these reasons, Respondent`s treatment of the Concession Agreement and the related agreements as commercial is concordant with the nature and contents of those documents, as well as legal provisions of applicable Latvian law (…). That is, treatment of those agreements as commercial complies both with the sense and meaning of the Treaty, as well as applicable Latvian law."[146]

144. It was on the basis of this case as pleaded by Latvia in the Arbitration that the Tribunal decided the matter of the applicable law in the Award. With these considerations in mind, the Committee turns to the Tribunal's findings as reflected in the Award.

145. The passages of the Award on the applicable law are at paragraphs 582-584 (summarizing the Claimant's position), 717-718 (summarizing the Respondent's position) and 790-793 (containing

[144] Respondent's Opening Presentation in the Arbitration, dated February 23, 2015 (AC-0011), pp. 9-10.

[145] Respondent's Opening Presentation in the Arbitration, dated February 23, 2015 (AC-0011), p. 10.

[146] Chart at Claimant's Counter-Memorial, ¶ 54, citing Arbitration Rejoinder, ¶¶ 14-15.

the Tribunal's reasoning). In particular, in describing the Respondent's position, the Tribunal noted as follows:

> "As the 'concession arrangement' was 'basically spelled out in commercial agreements', the Respondent invokes the application of the Principles of European Contract Law, the 2010 UNIDROIT Principles of International Commercial Contracts and the Trans-Lex Principles which may be considered as general principles of law recognised by civilized nations within the meaning of Article 38(1)(c) of the Statute of International Court of Justice, contending that the application of such principles is suitable where specific issues are to be decided and gaps are found to exist in the abstract principles set out in an investment treaty."[147]

146. In providing its reasons for the decision on liability, the Tribunal observed that – given its finding that the dispute was within its jurisdiction under the BIT and the ICSID Convention – it had to turn to Article 42 of the Convention in order to determine the applicable law.[148] On that basis, the Tribunal held as follows:

> "In the Tribunal's view, acceptance of the offer to arbitrate in Article 7 of the BIT establishes an implicit agreement that the applicable law consists primarily of the standards of protection contained in the BIT, but that recourse may be had to general international law as well as to the domestic law of Latvia."[149]

147. The Tribunal further considered that:

> "[I]t is not in dispute that *(i)* Article 1(1) of the BIT refers to Latvian laws and regulations, *(ii)* such laws and regulations apply to the actions of Latvian executive and judicial authorities and *(iii)* the agreements entered into by Latgales Enerģija with the Municipality, Rēzeknes Siltumtīkli and Rēzeknes Enerģija are governed by such laws and regulations. As follows from the preceding paragraph, the Tribunal considers that it is empowered by Article 42(1) of the ICSID Convention to interpret and apply such laws and regulations in so far as necessary to determine the dispute that has been referred to it.[150]

148. Thus – after a short introduction explaining Latvia's position – the Award does not discuss further Latvia's arguments on the PECL, the UNIDROIT Principles and the Trans-Lex Principles. Latvia contends that the Tribunal failed to identify and apply the applicable law because it "simply ignored

[147] Award (AR-0003), ¶ 718.

[148] Award (AR-0003), ¶¶ 790-791.

[149] Award (AR-0003), ¶ 792.

[150] Award (AR-0003), ¶ 793.

these principles," "with no reasons given."[151] in spite of the arguments advanced by Latvia in the Arbitration.

149. The Committee does not agree with Latvia's position. As explained below, the Committee finds that the fact that the Tribunal did not address all of Latvia's arguments on the applicable law does not constitute a failure to apply the law agreed by the Parties and thus does not amount to a manifest excess of powers. Further, the Committee considers that there was no failure to state reasons.

150. With regard to the allegation that the Tribunal manifestly exceeded its powers, the Committee finds that the Tribunal interpreted and applied the correct applicable law, which in its view consisted "primarily of the standards of protection contained in the BIT" and added that "recourse may be had to general international law as well as to the domestic law of Latvia."[152] The Award further recalls that it was undisputed between the Parties that Article 1 of the underlying BIT refers to Latvian laws and regulations, that these laws and regulations applied to the actions of the Latvian executive and judicial authorities and that the contracts were also governed by Latvian laws and regulations.[153] On this basis, the Tribunal concluded that it had the power under Article 42(1) of the ICSID Convention to interpret and apply such laws and regulations. Thus, the reasoning of the Tribunal on the applicable law follows the proper logical sequence and is clear and comprehensive.

151. The Committee shall not speculate as to the possible reasons why the Tribunal chose not to address Latvia's arguments on the PECL, UNIDROIT Principles or Trans-Lex Principles in the Award and whether it may have found this "unnecessary" as asserted by UA E energija in these annulment proceedings.[154] The fact remains that Latvia itself – as shown by the record of the Arbitration before this Committee – argued that "the Treaty and other public international law provisions (such as customary rules, general principles of law) are obviously the sole legal rules applicable in this case under international law."[155] In addition, Latvia stated that "it also needs emphasizing that Treaty (both expressly and implicitly) authorizes application of compatible national law provisions."[156] This was Latvia's primary case and the Award properly addressed and decided that case providing the necessary reasons in that regard.

[151] Applicant's Reply, ¶¶ 10 and 15.
[152] Award (AR-0003), ¶ 792.
[153] Award (AR-0003), ¶ 793.
[154] Claimant's Counter-Memorial, ¶ 67.
[155] Chart at Claimant's Counter-Memorial, ¶ 54, citing Arbitration Rejoinder, ¶¶ 14-15.
[156] Arbitration Rejoinder, ¶ 14.

152. This conclusion is corroborated by the way the Tribunal described Latvia's arguments on the application of the PECL, UNIDROIT Principles or Trans-Lex Principles when it stated that Latvia contended that these "*may* be considered as general principles of law recognised by civilized nations within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice, contending that the application of such principles is suitable *where specific issues are to be decided and gaps were found to exist in the abstract principles set out in an investment treaty*."[157] It appears from this statement that the Tribunal understood Latvia's position to rely on these principles only as secondary sources. This also appears to be the correct interpretation in the light of the position advanced by Latvia in the Arbitration as recalled above.

153. Moreover, Latvia did not explain in the Arbitration – nor does it now – whether, or how, the result would have been different if the Tribunal had expressly applied the principles in question. Latvia's Memorial on Annulment states that the "Tribunal's error was potentially material to the outcome of the case because … the Respondent's substantive defences based on the application of the PECL, the UNIDROIT Principles and the Trans-Lex Principles could have led the Tribunal to reach a different decision on liability."[158] However, this is a vague and hypothetical statement which does not explain why the application of those principles would have yielded a different result on liability.

154. Further, as recalled above, the argument as to the potential impact to the outcome of the case of the application of these principles appears to be an after-thought since Latvia's submissions in the Arbitration did not put much weight on these principles, nor did they state that these principles, if specifically applied, would have led to different conclusions as to the outcome. To the contrary, the Committee is of the view that, in the light of the position advanced by Latvia in the Arbitration, the fact that the Tribunal did not expressly refer to the PECL and the UNIDROIT Principles in the Award is of no consequence to the outcome of the Arbitration. What matters is that the Tribunal did not misinterpret or misapply the proper applicable law or that it did so in a gross or egregious manner. It follows that there was no manifest excess of powers for failure to apply the applicable law.

155. As to the alleged failure to state reasons, the Tribunal did provide reasons for its conclusions, which were reached on the basis of the applicable law. The section of the Award entitled "Applicable Law" sufficiently and clearly explains the Tribunal's reasoning in this regard: the Tribunal based

[157] Award (AR-0003), ¶ 718, referring to Latvia's Objections to Jurisdiction and Counter-Memorial, ¶ 3.10-3.11; Rejoinder ¶ 18-20. Emphasis added.

[158] Applicant's Memorial, ¶ 40.

its decision on Article 42 of the ICSID Convention and the relevant provisions of the BIT, according to which "the applicable law consists primarily of the standards of protection contained in the BIT, but that recourse may be had to general international law as well as the domestic law of Latvia." In the following parts of the Award, the Tribunal proceeded to apply international law to the BIT violations, and Latvian law to the contracts and to interpret the duties and powers of the Regulator, which were governed by that law.

156. The fact that there was no specific mention in the reasoning of the Award of the PECL, the UNIDROIT Principles and the Trans-Lex Principles is not in the Committee's opinion sufficient ground to annul the Award for a failure to state reasons. As held by other annulment committees, a tribunal is not under the obligation to address every single argument made by a party, particularly if it is not decisive for the outcome.[159]

157. Indeed, the Committee finds that, as explained above, on Latvia's own case in the Arbitration, international law and Latvian laws and regulations applied to the case. Even though Latvia argued that the principles may also be taken into account as part of the applicable law, there is no indication in the record that the express application of these principles by the Tribunal would have led to a different decision.

158. As held by the *ad hoc* committee in the *Soufraki v. UAE* Decision on Annulment, which was cited with favour by Latvia:

> "It is also possible that a tribunal may give reasons for its award without elaborating the legal and factual bases of such reasons. So long as those reasons in fact make it possible to connect the facts or law of the case to the conclusions reached in the award, annulment may appropriately be avoided."[160]

159. The Committee also concurs with the following position of the *Soufraki* committee:

> "[T]he Committee considers that, with regard to the reasoning of the award, if the Committee can make clear – without adding new elements previously absent – that apparent obscurities are, in fact, not real, that inadequate statements have no consequence on the solution, or that succinct reasoning does not actually overlook pertinent facts, the Committee should not annul the initial award. For example, as regards the ground that the award has failed to state the reasons on which it is based, if the *ad hoc* Committee can 'explain' the Award by clarifying reasons that seemed absent because they were only implicit, it should do so."[161]

[159] *TECO v. Guatemala* (ARLA-0061), ¶125; *Tza Yap Shum v. Peru* (ACLA-0024), ¶ 119.

[160] *Soufraki v. UAE* (ARLA-0034), ¶ 128.

[161] *Soufraki v. UAE* (ARLA-0034), ¶ 24.

160. In the present instance, the Committee finds that even though the Tribunal omitted to refer to the PECL, the UNIDROIT Principles and the Trans-Lex Principles in the Award, it did not fail to provide a clear or complete reasoning on a material point. To paraphrase Latvia's own arguments in these annulment proceedings, when it comes to this matter, the Award is not "arbitrary on a material point" and it does not "through a failure of reasoning, leave the reader thinking that it may be arbitrary."[162] Furthermore, even if the Tribunal had specifically mentioned these principles in its analysis on the applicable law, there is no reason to believe – based on Latvia's own pleaded case in the Arbitration – that such specific mention would have had an impact on the Tribunal's decision and changed the outcome of the case.

161. In the light of the above considerations, the Committee finds that annulment of the Award under Article 52(1)(b) and (1)(e) of the ICSID Convention with regard to the applicable law is not warranted and dismisses Latvia's request.

B. THE TRIBUNAL'S FINDINGS ON CAUSATION

1. Latvia's Position

162. According to Latvia, the Tribunal failed to establish or explain "how Latvia's breaches of the BIT caused [UAB E energija] to suffer the two specific heads of 'loss' that the Tribunal identified in the Award."[163] Latvia contends that such failure constitutes an annullable error pursuant to Article 52(1)(e) of the ICSID Convention.

163. By way of background, Latvia recalls that the Tribunal found that only three impugned acts out of the 73 separate breaches alleged by UAB E energija constituted a breach of the BIT,[164] and that the Tribunal awarded damages to UAB E energija under the following two headings:

- "outstanding shareholder loans that the Claimant had granted to Latgales Enerģija and which had allegedly not been repaid (the ***Shareholder Loans***);"[165] and

[162] Transcript Day 1, p. 48, lines 8-12.

[163] Applicant's Memorial, ¶ 42.

[164] Applicant's Memorial, ¶¶ 11-12 and 42; Transcript Day 1, p. 27, line 16 – p. 28, line 4. Latvia refers specifically to: (i) the Municipality's inaction and delay with respect to the establishment of a heat supply development plan, (ii) the declaration of an "energy crisis" by the Municipality and the consequences that this entailed for Latgales Enerģija, and (iii) the Municipality's appointment of Rēzekne Enerģija – a company owned by the Municipality – as the company responsible for district heating in Rēzekne.

[165] Applicant's Memorial, ¶ 47.

- "a payment by the Claimant under a bank guarantee that had been issued to cover the performance of certain obligations in relation to the Project (the ***Danske Bank Guarantee***)."[166]

164. However, according to Latvia, the Tribunal failed to establish the causal link between the three breaches and these two items,[167] even though it ruled that such causal link was required to award damages.[168]

165. To support this argument, Latvia refers, by way of background, to the factual parts of the Award where the Tribunal discussed the issue of the Shareholder Loans and the Danske Bank Guarantee,[169] as well as to exhibits and extract of the expert reports that were cited by the Tribunal to explain its factual findings on these loans and guarantee.[170] Latvia then points toward the sections of the Award where the Tribunal reached its conclusion on causation and damages, arguing that the Tribunal failed to consider "whether there was any evidence that the Shareholder Loans would have been repaid, and that the Danske Bank Guarantee would not have been drawn down, in the absence of the specific State conduct that it had determined was in breach of the BIT."[171]

166. In particular, Latvia focuses on paragraphs 1140 to 1144 of the Award,[172] where the Tribunal refers to the Shareholder Loans and Danske Bank Guarantee, and to the potential monetary losses that could result from them for UAB E energija.[173]

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[166] Applicant's Memorial, ¶ 47.

[167] Applicant's Memorial, ¶ 48 (explaining that "[t]he Tribunal simply stated that it regarded these items 'as representing an actual loss suffered by the Claimant and … therefore recoverable in principle.'").

[168] Applicant's Memorial, ¶¶ 48-49.

[169] Award (AR-0003), ¶¶ 377-380; 406-410; 411-413.

[170] Assignment Agreement No. 100/2008/0625, June 25, 2008, Arbitration Exhibit C-182 (AR-0013); Assignment Agreement No. 2009/08/11-01, Arbitration Exhibit C-197 (AR-0012); *Hansel Realty Management Spain S.L. v. Latgales Energija, SIA* (Case No 3-12/4490/18), Decision of the District Court, Arbitration Exhibit C-198 (AR-0014); Extract from E energija accounts, Financial Statements for the fiscal year ended September 30, 2010, Arbitration Exhibit C-0200 (AR-0015); First Witness Statement of Aleksas Jautakis, December 2013 (extract), exhibited as CWS-2 in the Arbitration; Expert Report of Dr Serena Hesmondhalgh (the Brattle Group), December 2013 (extract), exhibited as ER Hesmondhalgh I in the Arbitration; Expert report of Michael Peer (KPMG), April 17, 2014 (extract), exhibited as ER Peer I in the Arbitration.

[171] Applicant's Memorial, ¶ 51.

[172] Applicant's Memorial, ¶¶ 48-49. *See also*, Transcript Day 1, p. 33, lines 17-18 (arguing that the part of the Award starting at ¶1140 should be seen as "the crux of the matter").

[173] Award (AR-0003), ¶¶ 1140-1144.

167. According to Latvia, the Tribunal's reasoning in these paragraphs is both "incoherent"[174] and "perfunctory,"[175] because the Tribunal fails to identify the causation between the breach of the BIT and the losses suffered by UAB E energija, and because "evidence that [the Tribunal] described did not support the conclusion that it reached, and [the Tribunal] cited no evidence that did support that conclusion."[176] Specifically, Latvia argues that while the Tribunal admitted, in paragraphs 1143 and 1144 of the Award, that it had to determine "whether the Claimant is entitled" to damages,[177] and "to what extent the Claimant's actual loss was caused by the Respondent's breaches of Article 3(1),"[178] the Tribunal failed to make this determination, and instead reached the conclusion, in paragraph 1144, that "the Claimant and the Respondent have contributed to the losses suffered by the Claimant to an extent that is, all in all, broadly equivalent and that the Claimant should therefore be awarded 50% of the actual losses mentioned above." According to Latvia, the Tribunal did not give any reasons for this conclusion other than saying that it reached this finding after "[h]aving weighed all the evidence examined in the present Award."[179] For Latvia, this statement ("having weighed all the evidence…") "does not allow the reader to understand how the Tribunal when from A to B to the conclusion."[180] Latvia therefore contends that the Tribunal's finding on causation, and on the resulting loss, is "arbitrary."[181] In Latvia's counsel's own words, "To an objective reader who had paid attention to the factual part of the award, and to the factual and expert evidence that the Tribunal itself had referred to, it would be difficult to reach any conclusion other than that this was an arbitrary baby-splitting exercise because the Tribunal had found breaches and did not want to leave the Claimant empty-handed."[182]

168. According to Latvia, the Tribunal's lack of reasoning on the issue of causation was exacerbated by UAB E energija's own failure to argue "for a causal link between the limited breaches of […] the BIT ultimately established and the damages it claimed to have suffered" during the Arbitration.[183] Latvia emphasizes that UAB E energija "never sought to establish a causal link between the treaty

[174] Transcript Day 1, p. 38, line 21.
[175] Transcript Day 2, p. 5, lines 3-6.
[176] Transcript Day 2, p. 5, lines 7-9.
[177] Award (AR-0003), ¶ 1143.
[178] Award (AR-0003), ¶ 1144.
[179] Transcript Day 1, p. 65, lines 15-16.
[180] Transcript Day 1, p. 66, lines 19-21.
[181] Transcript Day 1, p. 67, line 4.
[182] Transcript Day 1, p. 67, lines 16-23.
[183] Applicant's Reply, ¶ 23.

breaches for which Latvia was held responsible and any specific type or amount of damage claimed."[184] The Tribunal in fact "recognized this flaw in [UAB E energija]'s case"[185] when it confirmed that UAB E energija's "approach to causation was 'inconsistent with its findings whereby the Regulator's revocation of the licenses was justified and whereby only certain actions or omissions of the Respondent breached Article 3(1) of the BIT.'"[186] Yet, "the Tribunal upheld damages claims for non-payment of the Shareholder Loans and the Danske Bank Guarantee drawdown, which suffered from precisely the same flaw in causation"[187] and "offered no explanation for this difference in conclusion."[188]

169. Latvia further argues that, contrary to UAB E Energija's allegations, it did raise causation defenses on the two above-referred loss claims during the Arbitration, as recorded by the Tribunal in the Award, and that the issue of causation was material for the Tribunal's decision. According to Latvia, had the Tribunal reasoned on the causation points made by Latvia during the Arbitration, "it is likely that the Claimant would have been awarded no damages," especially because it is on this basis that the Tribunal rejected other claims for losses made by UAB E Energija.[189]

2. UAB E energija's Position

170. UAB E energija contends that: (i) the Tribunal did demonstrate causation between Latvia's specific violations of the BIT and the losses it suffered; (ii) the Tribunal did establish causation and explained the reasons in the Award; and (iii) as a result, there is no ground for annulment of the Award.[190]

171. With respect to the Parties' positions in the Arbitration, UAB E energija argues that the damages suffered from the alleged breaches, which the Tribunal eventually rejected, overlapped with the three breaches for which the Tribunal found a violation of the BIT, and that it demonstrated that there was a causal link between all these breaches and the damages claimed.[191] In addition, UAB E energija insists that Latvia fails to point to any submission in the Arbitration in which it advanced

[184] Applicant's Reply, ¶ 27.
[185] Applicant's Reply, ¶ 27.
[186] Applicant's Reply, ¶ 27. *See also,* ¶ 1134 of the Award.
[187] Applicant's Reply, ¶ 27.
[188] Applicant's Reply, ¶ 27.
[189] Applicant's Reply, ¶¶ 29-31.
[190] Claimant's Counter-Memorial, ¶ 77.
[191] Claimant's Counter-Memorial, ¶¶ 79-80.

the argument now presented in the annulment proceeding, *i.e.* that the losses suffered in the form of the Shareholder loans and the Danske Bank Guarantee were not caused by the violations of the BIT that the Tribunal identified.[192]

172. UAB E energija argues that "the Tribunal was clear as to the reasons for awarding damages to E energija."[193] Quoting from the Award, UAB E energija submits that the Tribunal "very clearly concluded that there was a causal link between Latvia's actions and [UAB E energija]'s losses."[194] In particular, UAB E energija focuses on the parts of the Award where the Tribunal first established that "the conduct for which the Respondent is responsible is one of the principal causes that ultimately resulted in the Claimant being unable to recover loans granted to Latgales Energija and having to pay a guarantee"[195] and that the amounts that UAB E energija had to pay for the Shareholder loans and the Danske Bank Guarantee constituted "an actual loss suffered by the Claimant" which should therefore be recovered.[196]

173. Finally, UAB E energija recalls that "[a]nnulment committees do not have the power to review the adequacy of the reasons set forth by the tribunal in its award, or their correctness," and that the committees' role is "limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion."[197] According to UAB E energija, in the present case, the Tribunal "presented a reasoned and evidence-based explanation as to why it awarded E energija part of the quantum claimed," and therefore the Award cannot be annulled pursuant to Article 52(1)(e).

3. The Committee's Analysis

174. Latvia contends that the Tribunal failed to give reasons as to the causal link between the Claimant's loss and Latvia's breaches of Article 3(1) of the BIT. For Latvia, "a vague reference to contributory fault cannot replace an explanation of the causal link between the breaches and the loss."[198] UAB E energija, for its part, asserts that it is clear that the Award decided the issue of causation, that the

[192] Claimant's Rejoinder, ¶ 29.

[193] Claimant's Counter-Memorial, ¶ 83.

[194] Claimant's Counter-Memorial, ¶ 84.

[195] Claimant's Counter-Memorial, ¶ 84 (citing Award (AR-0003), ¶ 1065 (emphasis in the original)).

[196] Claimant's Counter-Memorial, ¶ 88 (citing Award (AR-0003), ¶ 1141 (emphasis in the original)).

[197] Claimant's Counter-Memorial, ¶ 93. *See also*, Claimant's Rejoinder, ¶ 34 (explaining that "in an annulment process the examination of the reasons presented by a tribunal in an award cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based" and that "[t]he Committee does not have the power to review the correctness of the reasons set forth by the Tribunal in its award.").

[198] Applicant's Reply, ¶ 31.

Tribunal's logic can be followed, the reasoning is explained and the decision is based on the evidence and Parties' submissions.[199] UAB E energija further indicates that Latvia did not raise causation arguments in relation to the Shareholders Loans and the Danske Bank Guarantee in the Arbitration, as it does in these annulment proceedings.[200]

175. Before it begins its analysis, the Committee stresses that it is not within its remit to review the merits of the Award or replace the Tribunal's decisions with its own. As recognized by ICSID case law and doctrine alike, "annulment is only concerned with the legitimacy of the process of decision: it is not concerned with its substantive correctness."[201] In this regard, the Committee shares the view of the *Soufraki* committee that an *ad hoc* committee "has to verify the *existence* of reasons as well as their *sufficiency* – that they are adequate and sufficiently reasonably to bring about the result reached by the Tribunal – but it cannot look into their *correctness*."[202] In other words, as also observed by Latvia's counsel at the Hearing in these proceedings, the question on annulment is not whether the Tribunal was right or wrong on the merits, but whether, in the light of the evidence before the Tribunal, the reasons provided on the issue of causation were "adequately coherent so as to explain logically the conclusions reached in the award."[203]

176. To determine whether Latvia correctly asserts that the Tribunal provided no reasons justifying the causal link between the conduct found to be wrongful and the harm suffered by the Claimant, the Committee will review the relevant parts of the Award.

177. To begin with, at paragraph 521, the Tribunal decided, for purposes of its jurisdiction *ratione materiae*, that the loans provided by Claimant to Latgales to fund its operations in Rēzekne, the guarantee provided in relation to the loans granted by Latvijas Unibanka, and the guarantee provided in relation to a loan granted by Sampo Banka (which later became Danske Bank) constituted an investment under Article 1(1)(c) of the BIT.

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[199] Transcript Day 1, p. 148, lines 13-19 (explaining that "the Tribunal clearly identified the relevant aspects of the causation decision that it needed to identify: it identified the breaches of the BIT, it identified the amount of the loss, it identified the causation between the two. It explained, to use Latvia's expression, how it proceeded from point A through point B to point C.").

[200] Claimant's Rejoinder, ¶¶ 28-29.

[201] Schreuer *et al*. (ARLA-0037), p. 901. *See also, CDC v. Seychelles* (ARLA-0029), ¶ 41; *Lucchetti v. Peru* (ARLA-0035), ¶ 97.

[202] *Soufraki v. UAE* (ARLA-0034), ¶ 131. Emphasis in the original.

[203] Transcript Day 1, p. 55, lines 23-24.

178. With regard to liability, the Tribunal's findings as to whether Latvia was in breach of Article 3(1) of the BIT are contained at paragraphs 842-1113 of the Award. The specific breaches found by the Tribunal were "founded on prejudice or preference rather than on reason or fact,"[204] and were therefore "arbitrary in a manner inconsistent with Article 3(1) of the BIT"[205] were as follows: (i) the delay and inaction by the Rēzekne Municipality's Council in adopting a heat supply development plan for the city of Rēzekne;[206] (ii) the attachment of Latgales' bank account, the failure to have the attachment discharged, together with the ultimatum issued to Latgales and the announcement that the newly established Municipality-owned company Rēzeknes Energija was ready to provide energy services in the middle of an energy crisis[207]; and (iii) the appointment of Rēzeknes Energija as the entity in charge of providing heating services to the city of Rēzekne.[208]

179. The next relevant passage is at paragraph 1065, where the Tribunal expressly referred to Latvia's conduct as one of the principal causes that led to the Claimant's inability to recover Latgales' loans and having to pay a guarantee. This paragraph reads as follows:

> "As to impairment of the management, maintenance, use, enjoyment or disposal of the Claimant's investment (as defined in paragraph 521 above) the conduct for which the Respondent is responsible is one of the principal causes that ultimately resulted in the Claimant being unable to recover loans granted to Latgales Enerģija and having to pay a guarantee in respect of Latgales Enerģija's unpaid debts to third parties. The Tribunal finds that such conduct and measures on the part of the Municipality amount to arbitrary measures impairing the use, enjoyment or disposal of the Claimant's investment in breach of Article 3(1), second paragraph, of the BIT."[209]

180. Later on in the Award, in the context of its analysis on *quantum*, the Tribunal first stated the principles underlying its decision and then recalled its finding that there was no compensable expropriation but that the Respondent breached Article 3(1) of the BIT in a number of respects.[210] The Tribunal also mentioned that the provisions of the BIT deal with compensation in relation to expropriation but are silent with regard to compensation for breaches of Article 3(1).[211]

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[204] Award (AR-0003), ¶ 887.
[205] Award (AR-0003), ¶ 1065.
[206] Award (AR-0003), ¶ 887.
[207] Award (AR-0003), ¶ 973.
[208] Award (AR-0003), ¶ 987.
[209] Award (AR-0003), ¶ 1065.
[210] Award (AR-0003), ¶ 1126.
[211] Award (AR-0003), ¶ 1127.

181. In respect of causation in particular, the Tribunal noted the following:

> "In order to be recoverable, the damage must have been caused by the State's internationally wrongful act complained of by the investor, Article 31 of the ILC Articles. Causation is, similarly, a requirement in the PCIJ decision in the *Factory at Chorzów* decision as expressed by the formula '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'. The requirement of causation has been applied in a number of awards in investment disputes. The burden of proof in relation to causation is on the Claimant."[212]

182. In the sections of the Award that followed this paragraph, the Tribunal applied the principles to the facts of the case. In particular, at paragraph 1132, the Tribunal stated that the expert opinions relied upon by the Claimant were "entirely based on the proposition that the Claimant was the victim of an unlawful expropriation in June 2008." This approach was found to be "of little assistance" by the Tribunal, given that it held that the revocation of the licenses was justified and did not amount to expropriation.[213]

183. The Tribunal then went on to respond to the Claimant's argument that the damage it suffered was the same, whether the breach was due to an unlawful expropriation or "a creeping breach of the fair and equitable standard having expropriatory effects."[214] In that regard, the Tribunal recalled that it did not find that "the Respondent's actions were expropriatory if their cumulative effect was considered."[215]

184. Having established that it was for the Claimant "to prove the damage caused by the Respondent's breaches of Article 3(1) of the BIT,"[216] the Tribunal proceeded to examine whether the breaches caused the alleged lost profits.[217] After consideration of a series of relevant facts, the Tribunal concluded as follows:

> "Having considered the evidence as a whole, the Tribunal is satisfied that the Claimant has not discharged its burden of proof in relation to the existence of future profits. The Tribunal has also found that the Claimant has failed to discharge its burden of proof in relation to the allegation that Latgales Enerģija's shares have

[212] Award (AR-0003), ¶ 1129. Emphasis in the original. Footnotes omitted.
[213] Award (AR-0003), ¶ 1132.
[214] Award (AR-0003), ¶ 1134.
[215] *Ibid.*
[216] Award (AR-0003), ¶ 1135.
[217] Award (AR-0003), ¶ 1136.

> become worthless due to the breaches of Article 3(1) of the BIT found by the Tribunal.[218]
>
> (…)
>
> The Tribunal finds that the Claimant is entitled to compensation for the actual proven losses (*damnum emergens*) suffered as a consequence of the Respondent's breaches of Article 3(1) of the BIT."[219]

185. In the following two paragraphs, the Tribunal considered and dismissed the Claimant's administrative costs claims and the claim regarding the 2006 and 2007 damages.[220] It then examined the amounts relating to the loans and the Danske Bank guarantee and noted that the relevant figures were not challenged by the Respondent or its expert. The Tribunal observed that Latvia "objected that Latgales Enerģija would not have been able to repay the loan based on Mr. Peer's [Latvia's expert] revised cash flow estimates and that there was no evidence that the Claimant had paid the amount of the guarantee to Danske Bank."[221] The Tribunal went on to state that it regarded "such figures as representing an actual loss suffered by the Claimant and finds that they are therefore recoverable in principle. The Respondent's first objection is therefore without merit insofar as it fails to take into account the distinction between actual losses and lost profits."[222]As to the Respondent's objection relating to the payment by the Claimant of the amount of the guarantee provided to Danske Bank, the Tribunal referred to its previous decision dismissing this objection (at paragraph 410 of the Award).

186. With particular regard to the loans and the Danske Bank guarantee, the Tribunal first found that the Claimant was entitled to damages for the losses actually proven and suffered "as a consequence of the Respondent's breaches of Article 3(1) of the BIT" (at paragraph 1137). Subsequently, the Tribunal noted that the relevant amounts had not been challenged by the Respondent and its expert (at paragraph 1140).

187. The Tribunal concluded as follows:

> 1143. The Tribunal must now determine whether the Claimant is entitled to a sum of EUR 3,170,000 in consideration of the fact that, on the basis of the totality of the evidence before the Tribunal, such loss arises from a conjunction of different causes. Whereas the Tribunal has found that the Municipality significantly

[218] Award (AR-0003), ¶ 1136.

[219] Award (AR-0003), ¶ 1137.

[220] Award (AR-0003), ¶¶ 1138-1139.

[221] Award (AR-0003), ¶ 1140. Footnotes omitted.

[222] Award (AR-0003), ¶ 1141.

> contributed to the difficult situation in which Latgales Enerģija found itself, and did so deliberately and in breach of Article 3(1) of the BIT, the Tribunal has also found that the Claimant's losses were caused by the fact that Latgales Enerģija's heating business came to an end due to its decision to stop paying the full price for the natural gas used and the revocation of the licences by the Regulator that followed, which the Tribunal found not to amount to a breach of Latvia's obligation under the BIT.
>
> 1144. The Tribunal must therefore determine to what extent the Claimant's actual loss was caused by the Respondent's breaches of Article 3(1) of the BIT. Having weighed all the evidence examined in the present Award, the Tribunal finds that the Claimant and the Respondent have contributed to the losses suffered by the Claimant to an extent that is, all in all, broadly equivalent and that the Claimant should therefore be awarded 50% of the actual losses mentioned above.
>
> 1145. The Tribunal therefore awards the Claimant a sum of EUR 1,585,000 (50% of EUR 3,170,000) as financial compensation for the damage caused by the Respondent's internationally wrongful act.

188. Thus, based on its review of the reasoning of the Tribunal with regard to causation, the Committee notes that the Tribunal's analysis proceeded as follows: (i) the Tribunal first established the existence of an investment for purposes of the BIT, (ii) it then moved on to identify the specific breaches of the BIT, (iii) it indicated that Latvia's conduct was one of the principal causes that led to the Claimant's inability to recover Latgales' loans and having to pay a guarantee, (iv) it recalled and applied the relevant principles applying to compensation (also mentioning that the BIT was silent with regard to compensation other than relating to expropriation), (v) it concluded that the Claimant had not proven future profits and was entitled to compensation only for the actual proven losses suffered as a consequence of the Respondent's breaches of Article 3(1) of the BIT, (vi) it found that the Claimant's loss arose from a conjunction of different causes, and having weighed all the evidence, and (vii) it concluded that both Parties contributed to the losses suffered by the Claimant to a broadly equivalent extent and awarded the Claimant 50% of the actual losses "as financial compensation for the damage caused by the Respondent's internationally wrongful act."[223]

189. In the Committee's opinion, this logical sequence shows that the Tribunal did not fail to establish causation of loss as Latvia argues. Even if the Committee were to accept Latvia's argument that the Claimant "did not articulate a case on causation with respect to the three breaches of the BIT that the Tribunal identified in the Award,"[224] the Tribunal's reasoning in granting those damages

[223] Award (AR-0003), ¶ 1145.

[224] Applicant's Memorial, ¶ 46.

follows from its finding that the Claimant's harm was caused by Latvia's conduct in breach of Article 3(1). The Award also makes it clear that the Claimant was only entitled to "actual proven losses" and not to future profits because it had not met its burden of proof in that regard.[225] It is therefore immaterial that the Tribunal did not explain "how it weighed the evidence, what that evidence was and why it produced a particular result."[226]

190. The Committee is not persuaded by the extensive arguments made by Latvia at the Hearing in connection with both causation and quantum. It is also the Committee's understanding that some of the arguments made by Latvia in these annulment proceedings, such as those relating to the loans and the bank guarantee and arguments based on the *quantum* expert evidence, were not formulated in those terms before the Tribunal. To the extent that this is the case, the Committee notes that a failure to state reasons cannot be invoked in annulment proceedings with regard to arguments that were not advanced in the original arbitration. As held by the *ad hoc* committee in *Wena v. Egypt*, "The award cannot be challenged under Article 52(1)(e) for a lack of reasons in respect of allegations and arguments, or parts thereof, that have not been presented during the proceeding before the Tribunal."[227]

191. As the Award states (and Latvia recognizes), the facts of the case were "uncontested to a considerable extent."[228] Latvia nevertheless contends that the issue is "whether, in the context of the largely uncontested facts, there was a causal relationship between the facts found to be wrongful and the loss for which compensation was awarded."[229] Latvia also finds the Tribunal's statement that the amounts relating to the loans and the Danske Bank guarantee were "recoverable in principle" "deeply problematic" and "incoherent."[230] In essence, for Latvia, the Tribunal misinterpreted the point that the Respondent and its expert were making.[231]

192. The Committee finds that the kind of appreciations that Latvia is requesting the Committee to make go well beyond the scope of review that must be carried out by an annulment committee. The Committee cannot enquire whether the Tribunal wrongly assessed the evidence before it or whether it reached the correct decision on the merits on the basis of that evidence. With regard to this

[225] Award (AR-0003), ¶¶ 1136-1137.
[226] Transcript Day 1, p. 40, lines 21-22.
[227] *Wena v. Egypt* (ARLA-0023), ¶ 82. *See also, MINE v. Guinea* (ARLA-0012), ¶ 4.04.
[228] Award (AR-0003), ¶ 52. *See also,* Transcript, Day 1, p. 8, lines 13-14.
[229] Transcript, Day 1, p. 8, lines 15-19.
[230] Transcript Day 1, p. 37, lines 12-20.
[231] *Ibid.*

particular ground of annulment, the Committee must determine whether the Tribunal gave reasons explaining its decision on causation; nothing more nothing less. To cite Professor Schreuer's *Commentary* on the ICSID Convention, on which both Parties have relied:

> "Once an *ad hoc* committee starts looking into whether the tribunal's explanation is sufficient to constitute a statement of reasons, it has already embarked upon a quality control of the award. The formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal… becomes blurred."[232]

193. In this instance, the Committee finds that the Tribunal carefully analyzed and reviewed in its Award the evidentiary record (including the expert evidence) and the Parties' submissions before it drew its conclusions on causation. The Award also refers on several occasions to the causes that led to the damages and expressly states that the losses that had been proven by the Claimant were caused by Latvia's conduct in breach of Article 3(1) of the BIT. Thus, the Tribunal did explain its thought process and its reasoning plainly follows the sequence of the findings made in the Award. It should be noted, incidentally, that – while it is true that the Parties' *quantum* experts opined on the basis of the alleged unlawful expropriation claimed by the Claimant – the Tribunal acknowledged as much. In any event, this matter is not relevant for purposes of causation, a topic which was not addressed by the experts.

194. Latvia also argued at the Hearing that the Tribunal engaged in an "arbitrary baby-splitting exercise because the Tribunal had found breaches and did not want to leave the Claimant empty-handed."[233] In this regard, the Committee notes that Latvia does not challenge the Award on the basis of a manifest excess of powers.[234] The application for annulment on this ground concerns a failure to state reasons because in Latvia's opinion the Tribunal stated that it had "weighed the evidence examined in the present Award" failing to identify the law on causation and without explaining what evidence it relied on and why it was relevant.[235] Similar arguments were made in Latvia's written submissions.[236]

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[232] Schreuer et al. (ARLA-0037), p. 1003. Footnote and cross-reference omitted.

[233] Transcript Day 1, p. 67, lines 16-23.

[234] It should be noted that, at the Hearing, Latvia's counsel stated that, had the Tribunal acknowledged that this "baby-splitting exercise" was in fact a judgment "*in equity*", there would have been a manifest excess of power (*see* Transcript, Day 1, p. 67, line 24 – p. 68, line 4).

[235] Transcript Day 1, p. 65, line 13 – p. 66, line 6.

[236] Applicant's Memorial, ¶¶ 48-49.

195. The Committee accepts the argument that more detailed reasoning could have been provided by the Tribunal with respect to its decision that there had been contributory fault. However, before reaching this conclusion, the Tribunal had already examined the evidence on the record, including the expert evidence in detail, and had considered whether damages should be awarded under international law and the BIT.

196. Furthermore, the Tribunal did explain how the Parties contributed to the loss. For instance, it clearly stated at paragraph 1143 of the Award that the Municipality "significantly contributed to the difficult situation in which Latgales Energija found itself, and did so deliberately and in breach of Article 3(1) of the BIT." At the same time, the Tribunal also found in the same paragraph that the Claimant's losses "were caused by" the fact that Latgales Energija's heating business ended due to Claimant's "decision to stop paying the full price for natural gas used."

197. It is not uncommon for tribunals to use their discretion to estimate how damages should be apportioned once it is established that both parties contributed to the loss. The Committee finds the following statement by the *MTD v. Chile* committee particularly apposite in this regard:

> "As is often the case with situations of comparative fault, the role of the two parties contributing to the loss was very different and only with difficulty commensurable, and the Tribunal had a corresponding margin of estimation. Furthermore, in an investment treaty claim where contribution is relevant, the respondent's breach will normally be regulatory in character, whereas the claimant's conduct will be different, a failure to safeguard its own interests rather than a breach of any duty owed to the host State. In such circumstances, it is not unusual for the loss to be shared equally. International tribunals which have reached this point have often not given any 'exact explanation' of the calculations involved. In the event, the Tribunal having analysed at some length the failings of the two parties, there was little more to be said – and no annullable error in not saying it."[237]

198. The Committee agrees with this position.

199. In the light of the above, the Committee rejects Latvia's request to annul the Award on the basis of Article 52(1)(e) of the ICSID Convention with regard to causation.

[237] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007 (ARLA-0033), ¶ 101.

C. THE TRIBUNAL'S DECISION ON QUANTUM

1. Latvia's Position

200. Latvia argues that the Tribunal did not provide reasons for its finding on the losses that UAB E energija suffered in relation to the Danske Bank Guarantee (*i.e.* one of the two headings for damages which the Tribunal elected to consider).[238] As a result, the Award should be annulled for a failure to state reasons pursuant to Article 52(1)(e) of the ICSID Convention.

201. Latvia's arguments on the lack of reasons in the Tribunal's decision on quantum are closely connected to its argument on causation. According to Latvia, the Tribunal failed to state reasons as to whether Latvia's conduct found to be wrongful under the BIT "caused the specific losses for which compensation was awarded."[239]

202. Latvia contends that, in the relevant part of the Award where the Tribunal reached its decision on the losses suffered by UAB E energija, the Tribunal did nothing but assert that the sums which UAB E energija paid resulted in "actual losses for the Claimant," and did not take into account some financial considerations relating to the payment (including possible offsets that UAB E energija could have benefitted from when proceeding to the payment of the Guarantee).[240]

203. Latvia takes issue with the Tribunal awarding UAB E Energija the sum of EUR 1,585,000, which corresponds to 50% of the aggregate amount of the Shareholder Loans and the Danske Bank Guarantee. According to Latvia, "there are […] no reasons provided for how and why even the 100% total constituted a loss to the Claimant in the first place, and still less that those three specific breaches that the Tribunal found caused 50% of that loss."[241]

204. Although Latvia admits that the Committee's role is not to assess "whether the Tribunal considered the expert reports on damages or all the factual evidence presented by the Parties that could potentially bear on this issue,"[242] it submits that the Committee "must take issue with a complete absence of any discussion of the issue and the relevant evidence in the Award."[243] According to

[238] Applicant's Memorial, ¶¶ 62-63.
[239] Transcript Day 1, p. 6, lines 3-5.
[240] Applicant's Memorial, ¶ 61.
[241] Transcript Day 1, p. 68, line 23 – p. 69, line 2.
[242] Applicant's Memorial, ¶ 65.
[243] Applicant's Memorial, ¶ 65 (emphasis in original – citing *MINE v. Guinea* (ARLA-0012), ¶¶ 6.98-6.108).

Latvia, the Tribunal failed to do so and "[w]ithout this reasoning, it is unclear to an informed reader how the Tribunal was able to decide that the Claimant was entitled to compensation equal to the full amount of all payments made under the Danske Bank Guarantee."[244]

205. Latvia further contends that the Tribunal's failure to elaborate on this quantum issue was material to the outcome of the case, as the damages awarded in relation to this claim correspond to "almost 60%"[245] of the total damages in the case. It disputes UAB E energija's argument that Latvia seeks to re-open the Tribunal's decision on quantum.[246] According to Latvia, it must be allowed to provide the factual and legal elements to prove its annulment claim, and that is what it has done.[247]

2. UAB E energija's Position

206. UAB E energija alleges that Latvia's argument constitutes nothing but an attempt to "re-evaluat[e] the evidence" and introduce "new merits arguments."[248] Such attempt should be barred as it falls outside the scope of the Committee's "power of review."[249]

207. UAB E energija insists specifically on the fact that Latvia's damages defenses in connection with the Danske Bank Guarantee were raised at a very late stage in the Arbitration and failed to challenge key evidentiary aspects.[250] According to UAB E energija, Latvia's arguments on the financial considerations relating to the payment of the Danske Bank guarantee are new. They cannot be the "basis for the Committee to find a failure to give reasons based on an argument that Latvia failed to raise during the Arbitration."[251]

208. For UAB E energija, it is clear that the Tribunal fully assessed the elements requiring analysis with respect to its damages claim in the Arbitration, and that as a result Latvia's annulment application on quantum is unfounded. This is even more so as "the annulment of quantum decisions face

[244] Applicant's Memorial, ¶ 65.

[245] Applicant's Memorial, ¶ 66.

[246] Applicant's Reply, ¶ 40.

[247] Applicant's Reply, ¶ 40 (citing *RSM v. Saint Lucia* (ARLA-0103), ¶ 153: "Obviously, the annulment stage is not one where facts not before the Tribunal can be introduced. At the same time, the arguments raised on annulment are those that relate to the grounds for annulment, which themselves need not have been raised in the original arbitration. An applicant cannot be inhibited from raising arguments in annulment relating to the interpretation or application of Article 52 that best support its position.")

[248] Claimant's Counter-Memorial, ¶ 100.

[249] Claimant's Counter-Memorial, ¶ 100.

[250] Claimant's Counter-Memorial, ¶ 102.

[251] Claimant's Counter-Memorial, ¶ 105.

'additional hurdles', given that: '*ad hoc* committees have consistently held that tribunals have a wide margin of discretion with respect to the calculation of damages.'"[252]

209. Finally, according to UAB E energija, Latvia does not argue that the Tribunal failed to state reasons when reaching its findings on quantum, but rather that the Tribunal's reasoning was "flawed."[253] In support of this contention, UAB E energija quotes from Latvia's Memorial where it states that "proper assessment of causation would have changed the Tribunal's decision on quantum."[254] According to UAB E energija, this very formulation demonstrates that Latvia itself admits that its application falls outside the scope of review under Article 52(1)(e) of the ICSID Convention. In UAB E energija's words, "Latvia cannot point to any question that the Tribunal failed to address. Rather, it resorts to creating an argument (that it failed to raise in the Arbitration), with which it asserts the Tribunal failed to deal."[255]

3. The Committee's Analysis

210. As seen from the summaries of the Parties' positions above, Latvia's arguments on quantum and causation are closely related. Latvia alleges that the Award contains no reasons at all as to how UAB E energija suffered any loss with regard to the loans it provided to Latgales to fund its operations in Rēzekne and with regard to the Danske Bank guarantee. This argument repeats some of the points made about the same transactions in the context of causation. UAB E energija in short contends that Latvia is asking the Committee to annul the Award "on the basis that the Tribunal failed to give reasons to explain its decision on an argument that was never made."[256]

211. The Committee does not agree with Latvia's argument that the Tribunal's reasoning on quantum "leaves the reader unable to understand the factual and legal premises that led the Tribunal's decision to award damages to the Claimant."[257] To the contrary, the Committee – reading the relevant paragraphs of the Award sequentially – has no difficulty discerning the reasoning of the Tribunal, however succinct.

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[252] Claimant's Counter-Memorial, ¶ 109 (citing, *inter alia*, *Occidental v. Ecuador* (ACLA-0026), ¶ 412; *Duke Energy v. Peru* (ARLA-0045), ¶ 256.

[253] Claimant's Rejoinder, ¶ 45.

[254] Claimant's Counter-Memorial, ¶ 113, quoting Applicant's Memorial, ¶ 55.

[255] Claimant's Counter-Memorial, ¶ 113.

[256] Transcript Day 1, p. 153, lines 23-25. *See also*, Claimant's Counter-Memorial, ¶ 100.

[257] Applicant's Memorial, ¶ 58.

212. As recalled above with respect to the loans and the Danske Bank guarantee, the Tribunal found that the figures provided by UAB E energija's expert, Dr. Hesmondhaigh, had not been challenged by Latvia or its expert (Mr. Peer), but also noted that Latvia contested that Latgales Energija would not be able to repay the loan based on Latvia's expert's revised cash flow estimates. The Tribunal added that there was no evidence that UAB E energija had paid the amount of the guarantee to Danske Bank.[258] The Tribunal had already found in a preceding paragraph that, "[h]aving considered the evidence as a whole," the Tribunal was satisfied that the Claimant had not discharged its burden of proof in relation to future profits.[259]

213. The Tribunal had also held that the Claimant was only entitled to compensation for "the actual proven losses (*damnum emergens*) suffered [by the Claimant] as a consequence of the Respondent's breaches of Article 3(1) of the BIT."[260] It logically follows that, in the light of its finding that the figures corresponding to the loans were "actual losses suffered by the Claimant," and as such "recoverable in principle," the Tribunal rejected Latvia's objection that Latgales would not be able to repay the loan based on Latvia's expert's revised cash flow estimates. In the Tribunal's view, Latvia's objection also "fail[ed] to take into account the distinction between actual losses and lost profits."[261]

214. Latvia disagrees with the Tribunal's conclusion that the argument made by the Respondent's expert, Mr. Peer, that Latgales could not pay its debts to the shareholders because it did not have sufficient cash flow was "without merit insofar as it fails to take into account the distinction between actual losses and lost profits."[262] Latvia argues that the Tribunal's finding is "incoherent" and confuses heads of loss with causation, the matter on which Mr. Peer opined.[263] However, the Committee is of the view that Latvia's arguments concern an appreciation of the merits of the Tribunal's ruling rather than a failure by the Tribunal to state reasons under Article 52(1) of the ICSID Convention. The Tribunal followed a clear line of reasoning and it did provide reasons in the Award for its assessment of the documentary and expert evidence. To the extent that it dismissed the arguments made by Latvia and its expert before it, the Tribunal did so with reasons.

[258] Award (AR-0003), ¶ 1140.
[259] Award (AR-0003), ¶ 1136.
[260] Award (AR-0003), ¶ 1137.
[261] Award (AR-0003), ¶ 1141.
[262] Award (AR-0003), ¶ 1141.
[263] Transcript, Day 1, p. 38, lines 18-23.

215. The Committee also agrees with the position expressed by a number of ICSID tribunals and *ad hoc* committees that arbitral tribunals enjoy a margin of appreciation in providing reasons with regard to quantum.[264] In *Rumeli v. Kazakhstan* for instance, the *ad hoc* Committee held that "[t]ribunals are generally allowed a considerable measure of discretion in determining issues of quantum."[265]

216. Counsel for Latvia spent considerable time at the hearing reviewing certain documents that were in the evidence of the Arbitration while recalling that the Tribunal gave "over the following hundreds of paragraphs [of the Award], a detailed recitation of the facts."[266] Attention was devoted to an assignment agreement between Latgales and UAB E energija which was signed on June 25, 2008 (defined in the Award as the "**2008 Assignment Agreement**").[267] It was recalled that this assignment was successfully challenged by the third-party debtor before the Latvian courts and the decision was overturned in appeal in 2013. Another document that was examined was an "Arrangement on Assignment Agreement" dated June 30, 2009 through which Latgales and UAB E energija cancelled the assignment between them of debts owed to Latgales by the third party and entered into a new loan agreement for the same amount. All of this factual background is recalled in the Award, at paragraphs 378-380 and 410-413.

217. Particular consideration was given by Latvia's counsel to another document, which is also in the record of the annulment proceedings as Exhibit AR-12: the Assignment Agreement dated August 11, 2009.[268] This document, which is also mentioned in the Award (at paragraph 413), shows that the Claimant had assigned its right to claim from Latgales to a Spanish company, Hansel Management Realty Spain SL. The Award recalls, on the basis of the testimony of the chief financial officer of the Claimant, Mr. Jautakis, that no moneys had been recovered from Latgales in spite of a judgment by the Riga District Court.

218. Following its review of the factual context and its analysis of the evidence and Mr. Jautakis' witness statement, Latvia argued at the hearing that the debt "was not owed any longer by Latgales to the Claimant; it was owed by Hansel to the Claimant."[269] On this basis, Latvia states that the Committee's task is "to determine whether the Tribunal provided reasons as to how the Claimant's

[264] *See e.g. Wena v. Egypt* (ARLA-0023) ¶ 91; *Duke Energy v. Peru* (ARLA-0045), ¶¶ 256-258.
[265] *Rumeli v. Kazakhstan* (ARLA-0042), ¶ 146.
[266] Transcript, Day 1, p. 9, lines 5-6.
[267] Assignment Agreement No. 100/2008/0625, June 25, 2008, Arbitration Exhibit C-182 (AR-0013).
[268] Assignment Agreement No. 2009/08/11-01, Arbitration Exhibit C-197 (AR-0012).
[269] Transcript, Day 1, p. 26, lines 3-4.

loss of the loan amount could have been caused by Latvia's unlawful treatment of Latgales, in circumstances where Claimant had assigned that loan for full value to Hansel, and Hansel had not paid the Claimant what it owed."[270]

219. The Committee notes that the Award repeatedly states that Mr. Jautakis' evidence, and the explanations and allegations contained in his two witness statements, were not challenged by Latvia. Moreover, the Award recalls that Mr. Jautakis was not cross-examined at the hearing.[271]

220. With regard to the Danske Bank guarantee, the Award states that the Claimant referred to this payment in its memorial and Latvia did not dispute this evidence in its counter-memorial.[272] In addition, Mr. Jautakis' evidence in this regard was not challenged by Latvia at the hearing. [273] The Award further notes that Latvia challenged the fact that the Claimant paid the amount of the Danske Bank guarantee for the first time in its post-hearing submission. The Tribunal dismissed the objection based on the documentary evidence and clearly stated that: "If the Respondent intended to challenge the statement made by Danske Bank to the Claimant's auditors, it should have raised this point in its pleadings and called the auditors and cross-examined them at the Hearing."[274]

221. It follows that, if the Tribunal did not consider the arguments that Latvia makes in these proceedings, it is because Latvia itself chose not to make arguments challenging the evidence submitted by UAB E energija. In the Committee's view, it cannot be said that the Tribunal failed to give reasons for its decision or that it did not rely on the evidence on the record in order to reach that decision. Once the Tribunal decided that the Claimant was only entitled to damages for the actual proven losses and that the loans and bank guarantee represented such losses, the reasons underlying the decision had clearly been provided and could be easily understood. Latvia disagrees with the Tribunal's assessment of the evidence examined in order to reach that decision, but that is not a ground for annulment. The time for Latvia to advance its arguments in that regard, and to challenge the evidence presented by the Claimant, was during the Arbitration, not in these proceedings. It is not for this annulment Committee to re-assess the evidence and verify the correctness of the Tribunal's rulings. As held by the *MINE v. Guinea* committee, "Annulment is

[270] Transcript, Day 1, p. 64, lines 7-13.
[271] Award (AR-0003), ¶¶ 315, 409 and 520.
[272] Award (AR-0003), ¶ 409.
[273] Award (AR-0003), ¶ 409.
[274] Award (AR-0003), ¶ 410.

not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52."[275]

222. On the basis of the above, the Committee rejects Latvia's request to annul the Award on the basis of Article 52(1)(e) of the ICSID Convention with regard to *quantum*.

D. THE TRIBUNAL'S REASONING ON INTEREST

1. Latvia's Position

223. Latvia argues that the Tribunal's four-paragraph decision on interest "lacks any stated legal or factual basis"[276] and that, therefore, the Award should be annulled pursuant to Article 52(1)(e) of the ICSID Convention.[277]

224. Latvia explains, by way of background, that the Tribunal ordered Latvia to pay interest on damages awarded, accruing from January 1, 2008, at various rates compounded annually.[278] Latvia notes that the Tribunal considered that "[t]he Respondent has not answered the Claimant's case on interest"[279] and, eventually concluded that "annual compounding would be appropriate in view of recent trends in investment arbitration."[280] According to Latvia, "[t]he Tribunal's reasoning on Latvia's liability to pay interest on the compensation granted in the Award was either absent or so cursory and conclusory that it amounted to no reasons at all."[281]

225. First, Latvia stresses that the Tribunal failed to identify any legal basis for the Claimant's alleged entitlement to interest, and therefore "'put the horse before the cart' by failing to identify an essential predicate for its decision – a principled legal basis under the applicable law for it to make

[275] *MINE v. Guinea* (ARLA-0012), ¶ 4.04.
[276] Applicant's Reply, ¶ 49.
[277] Applicant's Memorial, ¶ 68; Applicant's Reply, ¶ 49.
[278] Applicant's Memorial, ¶¶ 69-70.
[279] Applicant's Memorial, ¶ 69 (citing Award (AR-0003), ¶ 1151).
[280] Applicant's Memorial, ¶ 70 (citing Award (AR-0003), ¶ 1151).
[281] Applicant's Memorial, ¶ 73.

an award of interest."[282] This omission is even more flagrant as UAB E energija itself failed in the Arbitration to point to any legal source for the Tribunal's power to award interest.[283]

226. Second, Latvia submits that "the Tribunal's reasoning with respect to the appropriate compounding interval for its award of interest in this case is so vague and unsupported that it amounts to no reason at all."[284] Latvia takes issue especially with the Tribunal's reference to the "recent trends in investment arbitration"[285] to justify its decision on the annual compounding interest. According to Latvia, the Tribunal failed to explain what it meant by "recent trends," and why "such 'trends' were relevant to its decision to award compound interest."[286]

227. Third, Latvia criticizes the Tribunal's one-sentence decision on the date from which interest would accrue,[287] which reads as follows: "[t]he date from which interest is awarded is 1 January 2008 as the Claimant has failed to indicate any interest rate for the year 2007."[288] According to Latvia, such decision "is no more than an unsupported conclusion,"[289] and is all the more problematic because, at the dates referred to by the Tribunal, UAB E energija had not yet suffered losses with regard to the two heads of losses identified by the Tribunal (*i.e.* the Shareholder Loans and the Danske Bank Guarantee).[290] In the words of Latvia's counsel, the Tribunal "gave no reasons at all concerning the start date being 1st January 2008, except that the Claimants [*sic*] had not provided an interest rate for 2007. The Tribunal also provided no reason for why 2007 would have been the correct

[282] Applicant's Memorial, ¶ 75.

[283] Applicant's Memorial, ¶ 75 (noting, with respect, that the Claimant's reference to Article 4(2) of the BIT, which does refer to interest payable in case of a lawful expropriation was "inapposite given the Tribunal's rejection of the Claimant's expropriation claims.").

[284] Applicant's Memorial, ¶ 76.

[285] Applicant's Memorial, ¶ 76 (citing Award (AR-0003), ¶ 1151).

[286] Applicant's Memorial, ¶ 76.

[287] Applicant's Memorial, ¶ 77.

[288] Applicant's Memorial, ¶ 77 (citing Award (AR-0003), ¶ 1152, where the Tribunal found that "[t]he date from which interest is awarded is 1 January 2008 as the Claimant has failed to indicate any interest rate for the year 2007.").

[289] Applicant's Memorial, ¶ 77.

[290] Applicant's Reply, ¶ 46 (stating that "[t]he date of 1 January 2008 appears to be entirely divorced from the facts underlying the bank guarantee and shareholder loan claims. The Danske Bank Guarantee was called only 18 months later, on 30 June 2009, and the Claimant paid the guarantee amount only in November 2012. Meanwhile, the shareholder loan was only transferred to the Claimant in February 2008, and there is no indication in the Award when the loan was written off." (Footnotes omitted)).

point in time for interest to run on loss suffered years after, and of course there could be no such reason."[291]

228. Finally, Latvia submits that the Tribunal's determination on interest was material to the outcome of the case, given that the interest awarded to the Claimant constituted a substantial part of Latvia's overall liability under the Award.[292]

2. UAB E energija's Position

229. UAB E energija rejects all of Latvia's arguments on the Tribunal's decision on interest. The Tribunal provided clear reasoning on the award of interest, on the compounding interval it applied, and on the date selected for the accrual of interest.[293]

230. UAB E energija emphasizes that Latvia did not challenge in the Arbitration the Claimant's case for compound interest, and that as a result, the decision to award such compound interest necessarily remained at the discretion of the Tribunal. UAB E energija argues that the decision with respect to the date selected for the accrual of the interest is fully justified by the fact that Latvia did not provide the applicable interest rate for the year 2007. UAB E energija notes that such decision worked actually "to Latvia's advantage,"[294] and in any event does not lack an explanation.

231. Finally, as to the Tribunal's reference to the "recent trends in investment arbitration," UAB E energija argues that such reference was made "in the context of the Tribunal's recognition of E energija's case that simple interest would not reflect commercial reality"[295] and that the Tribunal's reasoning is therefore clear and sufficient.[296] In any event, UAB E energija recalls that "Article 52(1)(e) of the ICSID Convention does not permit any inquiry into the quality or persuasiveness of reasons,"[297] and the fact that Latvia does not like this reference to "recent trends" is therefore irrelevant.[298]

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[291] Transcript Day 1, p. 71, line 221 – p. 72, line 3.
[292] Applicant's Memorial, ¶ 79; Applicant's Reply, ¶ 48.
[293] Claimant's Counter-Memorial, ¶ 117.
[294] Claimant's Counter-Memorial, ¶ 122.
[295] Claimant's Counter-Memorial, ¶ 125.
[296] Claimant's Counter-Memorial, ¶ 125.
[297] Claimant's Counter-Memorial, ¶ 123.
[298] Claimant's Counter-Memorial, ¶¶ 123, 127.

3. The Committee's Analysis

232. Latvia contends that the Award sets out its reasoning on interest in "four short paragraphs" and fails to explain the legal basis for the Tribunal's decision to award compound interest, for the use of this type of interest, or for the date from which the interest accrues.[299] Latvia also argues that the Tribunal's decision in this regard is material since a different finding on interest "could have resulted in a substantial reduction of the amount awarded."[300] For its part, UAB E energija asserts that the reasoning of the Tribunal is clear and sufficient and based on the finding that UAB E energija was due full reparation for the injury caused by Latvia's unlawful conduct. UAB E energija also recalls that Latvia did not answer the Claimant's case on interest in the original Arbitration.[301]

233. The Committee finds that the legal foundation of the Tribunal's decision on compound interest is clearly explained by the statement that this type of interest should be awarded in order to achieve full reparation for the injury caused.[302] It is worth citing the actual reasoning; it reads as follows:

> "The Claimant's case for compound interest has remained unchallenged throughout these proceedings. The Tribunal finds that simple interest would not represent reparation for the injury caused. The Tribunal will therefore award compound interest."[303]

234. This sentence should be read in connection with the Tribunal's previous finding that, "[u]nder Article 31 of the ILC Articles the State responsible for an internationally wrongful act must make 'full reparation for the injury caused' by such act; that is also the principle set out by the PCIJ in the *Factory at Chorzow* decision."[304]

235. The Tribunal's reasoning logically follows. Full reparation for the injury caused must include compound interest in order to, as held in the well-known passage of the *Chorzow Factory* judgment, "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[305] For the Tribunal, an award of simple interest was not capable of affording "full reparation for the injury caused" by Latvia's

[299] Applicant's Reply, ¶¶ 42-43.

[300] Applicant's Reply, ¶ 48.

[301] Claimant's Rejoinder, ¶ 48. *See also*, Transcript Day 1, p. 159, lines 12-25.

[302] Award (AR-0003), ¶ 1151.

[303] Award (AR-0003), ¶ 1151.

[304] Award (AR-0003), ¶ 1127.

[305] *Factory at Chorzów* case, P.C.I.J., Judgment on the Merits, September 13, 1928, Collection of Judgment No. 13, Series A, No. 1, 1928 (ACLA-0049), p. 47. *See also*, Award (AR-0003), ¶ 1129.

wrongful act, only compound interest could. The Committee has no difficulty understanding this reasoning, which was clear and sufficient, albeit concise.

236. It is also a fact (recalled in the Award[306]) that Latvia did not advance its own position on interest and did not rebut the Claimant's case in this regard. In these proceedings, Latvia denies this and refers to paragraph 36 of the Rejoinder on the Merits filed in the Arbitration, where it made the following generic statement about the Claimant's claims for damages: "In other words, Claimant has not proved with a sufficient certainty (to avoid heavy speculations) that its business was profitable at all. In any case, Respondent denies that any damages that the Claimant has allegedly sustained was caused by Respondent."[307] The Committee reads this statement as amounting to a general denial of the Claimant's quantum case but not as advancing a specific argument on interest. Consequently, the Tribunal had to make its decision on this point without having had the benefit of Latvia's position given that the award of interest was a matter that Latvia chose not to address in the Arbitration.

237. With regard to the award of compound interest, Latvia objects that the Tribunal's statement that annual compounding was "appropriate in view of recent trends in investment arbitration"[308] further confirms the lack of reasoning on compound interest because there was no explanation and no citation of authority.[309] The Committee considers that, while it might have been preferable for the Tribunal to cite legal authority in support of its statement, the Tribunal was referring to an unquestionable trend in the investment case law, a trend which Latvia does not deny. It is not as if the Tribunal made up out of thin air an unsubstantiated legal conclusion. The absence of a specific citation for this uncontroversial statement does not amount to a failure to state reasons and is not a ground of annulment under Article 52(1)(e) of the ICSID Convention.

238. Latvia also contends that the Tribunal gave no reasons to explain why the start date of the interest should be January 1, 2008. Latvia acknowledges that the breaches occurred in 2006 and 2007 but recalls that the Claimant claimed interest from the date of the expropriation or from the date when

[306] Award (AR-0003), ¶¶ 1149-1150.

[307] Respondent's Rejoinder on the Merits and Reply on Preliminary Objections, December 12, 2014, ¶ 36.

[308] Award (AR-0003), ¶ 1151.

[309] Applicant's Memorial, ¶ 76.

the loss was incurred. For Latvia, it was necessary for the Tribunal to provide reasons why interest should be awarded starting from a date before any compensable harm had been suffered.[310]

239. It is true that, in deciding the date from which interest should start running, the Tribunal simply held: "The date from which interest is awarded is 1 January 2008 as the Claimant has failed to indicate any interest rate for the year 2007."[311] Indeed, as recalled in the Award, the Claimant asked for interest to be compounded quarterly at certain interest rates for the years 2008-2012 until the date of the final award and from that date until actual payment.[312] The Tribunal explained that it was satisfied that the rates provided by the Claimant were more appropriate than the LIBOR rate and recalled that those rates had not been challenged by Latvia.[313] The Tribunal also observed that the LIBOR rate applied to compensation for expropriation under the BIT but, since no expropriation had been found, there was "no compelling reason to apply a LIBOR-based interest in the present case."[314]

240. On Latvia's case, the Tribunal's conclusion that interest should start running from January 1, 2008 was incorrect because that date was long before any losses were actually suffered. However, in the Committee's opinion, what that means is that Latvia and the Tribunal disagree as to the dates when UAB E energija's losses (other than expropriation) were actually suffered.

241. As discussed above, Latvia made a number of arguments in these annulment proceedings on the losses arising from the loans and the Danske Bank guarantee which had not been submitted to the Tribunal in the original Arbitration proceedings. However, the Tribunal made its decision on the basis of the Parties' pleadings and the evidence in the record of the Arbitration. On that basis, the Award is not lacking in reasoning. To the extent that questions exist that go to the substance of the Tribunal's decision, there is no ground for annulment for failure to state reasons. As held by the *Wena v. Egypt* committee,

> "The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not. As stated by the *ad hoc* Committee in *MINE,* this ground for annulment refers to a 'minimum requirement' only. This requirement is based on

[310] Transcript Day 1, p. 71, lines 18-24.
[311] Award (AR-0003), ¶ 1152.
[312] Award (AR-0003), ¶ 1148.
[313] Award (AR-0003), ¶ 1150.
[314] Award (AR-0003), ¶ 1150.

> the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision. If such sequence of reasons has been given by the Tribunal, there is no room left for a request for annulment under Article 52(1)(e)."[315]

242. On the basis of the above, the Committee rejects Latvia's request to annul the Award on the basis of Article 52(1)(e) of the ICSID Convention with regard to interest.

E. THE TRIBUNAL'S DECISION ON JURISDICTION

1. Latvia's Position

243. Latvia's final argument for annulment relates to the jurisdiction of the Tribunal. According to Latvia, the Tribunal did not consider the issue of jurisdiction in full and failed to address whether the BIT, and in particular its Article 7(2), was still in force and applicable as between Latvia and Lithuania in 2012.[316]

244. Latvia's challenge to the Tribunal's conclusions on jurisdiction *ratione voluntatis* is two-fold: Latvia argues that the BIT was terminated by operation of Article 59(1) of the Vienna Convention on the Law of Treaties (the "**VCLT**" or "**Vienna Convention**") (**a.**), and that European Union Law ("**EU Law**") prevails over Article 7 of the BIT referring to ICSID arbitration (**b.**).

245. In reply to a defense developed by UAB E energija in its Counter-Memorial on Annulment, Latvia also explains that it did not waive any consent requirement during the Arbitration (**c.**). Finally, Latvia submits that because of the Tribunal's erroneous findings on jurisdiction, the Award should be annulled both pursuant to Article 52(1)(b) and Article 52(1)(e) of the ICSID Convention (**d.**).

a. Latvia's position on the termination of the BIT by operation of Article 59(1) of the VCLT

246. Latvia invokes Article 59(1) of the VLCT,[317] which provides:

> A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

[315] *Wena v. Egypt* (ARLA-0023), ¶ 79.

[316] Applicant's Memorial, ¶¶ 80, 82-83.

[317] Applicant's Memorial, ¶¶ 88-89 (citing 1969 Vienna Convention (ARLA-0006) and noting that "Latvia and Lithuania acceded to the Vienna Convention on 3 June 1993 and on 14 February 1992, respectively. In accordance with Article 4 of the Vienna Convention, the rules of the Vienna Convention apply therefore to the BIT between Latvia and Lithuania.").

> (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.[318]

247. According to Latvia, the conditions for Article 59 to apply are met and, as a result, the BIT should be considered as terminated due to the entry into force of the EU treaties for Latvia and Lithuania following their accession to the EU on May 1, 2004.[319]

248. First, Latvia explains that the BIT and the EU treaties relate to the same subject matter. The rights and obligations contained in the BIT and in the EU treaties do not need to be identical for the criteria relating to the "same subject-matter" to be satisfied.[320] Given that the EU treaties regulate the protection of investments within EU Member States, as does the BIT, the EU treaties and the BIT have the same subject matter.[321] In response to UAB E energija's defense on this issue, Latvia further contends that it does not matter that the EU treaties have a wider object and scope than the BIT.[322] What matters is that there is "sameness" in the rights and obligations contained in the treaties.[323]

249. Second, Latvia argues, in response to UAB E energija's position, that Latvia and Lithuania intended that the EU treaties should prevail. As explained by Latvia, Article 59(1) does not require that parties to two treaties with the same subject matter expressly indicate that one treaty takes precedence over the other; it is sufficient that they consider one treaty to apply between them in respect to issues governed by the other. Further, Latvia argues that "[w]hen acceding to the EU, Latvia and Lithuania accepted that the EU treaties and EU law would apply fully in their mutual relations, and that the treaties and EU law, including the law governing intra-EU investments would take precedence over agreements concluded between them before the entry into force of the EU Treaties."[324] To support this argument further, Latvia refers to a declaration made jointly by EU Member States on the issue of intra-EU BITs, which allegedly makes clear that EU Member States

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[318] Applicant's Memorial, ¶ 89 (citing Vienna Convention (ARLA-0006), Article 59(1)).

[319] Applicant's Memorial, ¶ 98. *See also,* Transcript Day 1, p. 80, lines 6-11.

[320] Applicant's Memorial, ¶ 91; Applicant's Reply, ¶ 55.

[321] Applicant's Memorial, ¶ 91; Applicant's Reply, ¶ 55.

[322] Reply, ¶¶ 56-57 (citing, *inter alia*, *Landesbank Baden-Württemberg et al v. Kingdom of Spain*, ICSID Case No. ARB/15/45) Decision on the "Intra-EU" Jurisdictional Objection, February 25, 2019 (ARLA-0102), ¶ 171 ("*Landesbank v. Spain*")).

[323] Applicant's Memorial, ¶ 91; Reply, ¶ 54. *See also,* Transcript Day 1, p. 88, lines 9-24.

[324] Applicant's Reply, ¶ 59.

consider that EU law prevails over their intra-EU-BIT obligations.[325] This declaration constitutes a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" in the sense of Article 31(3)(a) of the VCLT and should therefore have been taken into account by the Tribunal when interpreting the EU treaties and EU law and their relations with intra-EU BITs.[326]

250. Finally, Latvia rebuts UAB E energija's argument that the BIT cannot be terminated automatically and that there is a need to follow the termination procedure described in Article 65 of the VCLT. According to Latvia, this is incorrect as "Article 59 makes clear that termination is 'implied' by the conclusion of a later treaty, which necessarily excludes any additional formal process."[327]

b. Latvia's argument that EU Law prevails over the BIT

251. According to Latvia, even if the BIT was not terminated by virtue of Article 59(1) of the VCLT, Article 7 of the BIT is nevertheless invalid, because it is incompatible with Latvia's and Lithuania's obligations under the EU treaties. In support, Latvia refers to (i) the EU principle of primacy of the EU treaties which Latvia and Lithuania have accepted in their mutual relation, (ii) Article 30 of the VCLT, and (iii) the recent judgment by Court of Justice of the European Union (the "**CJEU**") in the case of *Achmea BV v. Slowakische Republik* (the "***Achmea* decision**").

252. First, on the principle of primacy, Latvia contends that "[i]n their mutual relations, Latvia and Lithuania accepted a special conflict rule in respect of the EU treaties" which is that "[t]he EU treaties and the law that derives from them impose absolute primacy over all other laws, including international treaties concluded between Member States."[328]

253. Second, with respect to Article 30 of the VCLT, Latvia notes that this provision provides, in its relevant part:

[325] Applicant's Reply, ¶ 61 (citing the Declaration of the Representatives of the Governments of the Member States on Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, January 15, 2019, (ARLA-0075), p. 2).

[326] Applicant's Reply, ¶ 61.

[327] Applicant's Reply, ¶ 63 (citing "Draft Articles on the Law of Treaties," ILC Yearbook, 1966, vol II, p. 177, (ARLA-0004), p. 252, ¶ (1) of the commentary to Article 56).

[328] Applicant's Reply, ¶ 67. *See also,* Applicant's Memorial, ¶¶ 111-115.

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> […]
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[329]

254. According to Latvia, in application of Article 30, because the BIT and the EU treaties have the same subject-matter, "the BIT, even if it remains in force, can apply between them only to the extent that its provisions are compatible with EU law."[330]

255. Third, Latvia refers to the *Achmea* decision, to argue that the BIT and EU law are, in fact, incompatible with each other. Latvia recalls the background and procedural history leading up to the *Achmea* decision,[331] and argues that, following this decision, which was later supported by the Commission,[332] Article 7 of the BIT is incompatible with the EU treaties based on EU law and with the principle of primacy of the EU treaties. According to Latvia, "[t]herefore, in accordance with Article 30(3) of the Vienna Convention, Article 7 of the BIT is inapplicable as between Latvia and Lithuania. It cannot serve as a valid offer to arbitrate, nor as 'consent in writing' for purposes of Article 25 of the ICSID Convention."[333]

c. Latvia's argument on the waiver of the consent requirement during the Arbitration

256. As further explained below, UAB E energija developed an argument in its Counter-Memorial that Latvia either waived its right to object to jurisdiction of the Tribunal or should be estopped from now raising such an argument in the annulment proceeding. Latvia argues that this argument is misguided.[334]

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[329] Applicant's Memorial, ¶ 100 (citing 1969 Vienna Convention (ARLA-0006), Article 30(1) and (3)).

[330] Applicant's Memorial, ¶ 101.

[331] Applicant's Memorial, ¶¶ 102-106 (citing Case C-284/16 *Slowakische Republik v. Achmea BV*, Judgment, March 6, 2018, ECLI:EU:C:2018:158 (ARLA-0069) ("*Slowakische Republik v. Achmea*")).

[332] Applicant's Memorial, ¶ 107 (citing "Protection of intra-EU investments," Communication from the Commission to the European Parliament and the Council, COM (2018) 547 final, July 19, 2018 (ARLA-0071), p. 2.

[333] Applicant's Memorial, ¶ 110.

[334] Applicant's Reply, ¶¶ 82-91.

257. According to Latvia, it did not accept during the Arbitration process "that it had made a standing offer to arbitrate."[335] In addition, Latvia submits that ICSID tribunals carry a duty to establish their own jurisdiction, regardless of possible objections raised by the parties,[336] a principle which it says finds its source under general international law,[337] and which has been applied by arbitral tribunals in the ICSID context.[338]

258. Latvia therefore concludes that "[i]t is a well-established principle of international law that 'a State may not be compelled to submit its disputes to arbitration without its consent'"[339] and that "[n]either acquiescence nor estoppel could validly replace the consent required under Article 25(1) of the ICSID Convention."[340]

d. Latvia's argument that the Award should be annulled pursuant to Article 52(1)(b) and Article 52(1)(e) of the ICSID Convention

259. Latvia argues that because the Tribunal lacked jurisdiction *ratione voluntatis* to decide the Parties' dispute, the Award must be annulled for manifest excess of powers.[341] Latvia further submits that the Tribunal's failure to address the consequence of the accession to the EU of Latvia and Lithuania constitutes a failure to state reasons on which the Award was based.[342]

260. First, on the issue of manifest excess of power, Latvia refers to UAB E energija's concession that "[t]here is an excess of powers where a tribunal acts outside of what it was authorized to do based on the parties' consent" and argues that "[t]his is *a fortiori* the case where no consent was given."[343]

261. Latvia argues that the Tribunal's excess of power is manifest, because nowhere in the Award did the Tribunal examine whether the consent to its jurisdiction was validly given.[344] According to

[335] Applicant's Reply, ¶ 83.

[336] Applicant's Reply, ¶ 84.

[337] Applicant's Reply, ¶ 87 (citing, *inter alia*, the decision of the International Criminal Tribunal for the former Yugoslavia held in the *Tadić* case, *Prosecutor v. Duško Tadić a/k/a "Dule"* (ICTY Case No IT-94-1-AR72) Appeals Chamber, Decision, October 2, 1995 (ARLA-0087), ¶ 18).

[338] Applicant's Reply, ¶¶ 85-86 and 89 (citing, *inter alia*, *Landesbank v. Spain* (ARLA-0102), ¶ 91; and Schreuer et al. (ARLA-0037), p. 518, ¶ 1).

[339] Applicant's Reply, ¶ 90.

[340] Applicant's Reply, ¶ 91.

[341] Applicant's Memorial, ¶ 118.

[342] Applicant's Memorial, ¶ 118.

[343] Applicant's Reply, ¶ 99.

[344] Applicant's Memorial, ¶ 121; Applicant's Reply, ¶ 102.

Latvia, the situation in the present case is similar to the one in *Patrick Mitchell v. Congo* where the *ad hoc* committee found a manifest excess of power due to the tribunal's decision to accept jurisdiction on the basis of an investment whose existence had not been clearly established in the arbitration, and decided to annul the award.[345]

262. Second, with respect to the alleged failure to state reason, Latvia notes that the Tribunal announced that it would "determine whether … the Parties consented to ICSID jurisdiction under Article 7 of the BIT and Article 25(1) of the ICSID Convention."[346] Yet, Latvia contends, "the Tribunal did not explain its decision (to the extent such a decision was made at all) concerning the existence of consent."[347]

263. According to Latvia, failure to address jurisdictional issues, and in particular an issue relating to the consent to arbitration, is particularly serious[348] and the Tribunal's ignorance and failure in this regard were all the more material to the outcome of the case.[349]

264. Latvia therefore concludes that "[t]he Tribunal should have examined the issue of the compatibility of the BIT and EU law" and that such "examination would have resulted in the dismissal of the Claimant's claims for lack of jurisdiction."[350] According to Latvia, "[t]he Tribunal therefore failed to give reasons on an issue that was necessary or essential to the outcome of the case and the resulting Award should be annulled under Article 52(1)(e) of the ICSID Convention."[351]

2. UAB E energija's Position

265. According to UAB E energija, Latvia has waived its jurisdictional objection regarding the validity of Article 7 of the BIT, given that it did not pursue this objection during the Arbitration (**a.**). In addition, the Tribunal had jurisdiction given that the agreement to arbitrate contained in Article 7 of the BIT remained valid (**b.**), and therefore there are no grounds for annulment of the Award regarding any alleged lack of jurisdiction (**c.**).

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[345] Applicant's Reply, ¶ 102 (citing *Patrick Mitchell v. Congo* (ARLA-0032), ¶¶ 45-46).

[346] Applicant's Reply, ¶ 92.

[347] Applicant's Reply, ¶ 92.

[348] Applicant's Reply, ¶ 94 (citing *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/00/2, Award, March 15, 2002 (ARLA-0089), ¶ 56).

[349] Applicant's Memorial, ¶ 128.

[350] Applicant's Memorial, ¶ 129.

[351] *Ibid.*

a. UAB E energija's argument that Latvia has waived its jurisdictional objection regarding the validity of Article 7 of the BIT

266. UAB E energija stresses that Latvia did not raise during the arbitral proceeding a jurisdictional objection based on the alleged invalidity of Article 7 of the BIT due to either the termination of BIT after Latvia's accession to the EU, or to the consequence of the *Achmea* decision.[352] This is not challenged by Latvia. For that reason, UAB E energija argues that "Latvia has waived any jurisdictional objection regarding the applicability of Article 7(2) of the BIT or is estopped from arguing that Article 7(2) is invalid."[353]

267. In particular, while UAB E energija recognizes that ICSID arbitral tribunals have either rejected the argument that a party can waive an intra-EU objection[354] or affirmed that intra-EU objections could be entertained on an *ex officio* basis,[355] UAB E energija contends that the situation in those cases is different than the one at hand. According to UAB E energija, the decisions in those other ICSID cases "were decisions taken by the tribunals constituted in those cases, and were arguments raised by the State parties in the course of the arbitrations."[356] UAB E energija argues that here, Latvia "agree[d] throughout the course of the Arbitration that it had validly consented to arbitrate E energija's claim, notwithstanding the EC's position on intra-EU BITs," and as a result "cannot now resile from its clearly expressed consent to arbitrate."[357]

268. UAB E energija further insists that the "time to raise the jurisdictional objection regarding an alleged failure on the part of Latvia to consent to the arbitration is well past."[358] According to UAB E energija, Latvia was, at the time of the arbitral proceeding, well aware of the various discussions within the EU about the validity of intra-EU BITs, or of the intra-EU related objections raised before other arbitral tribunals. Hence, as UAB E energija argues, Latvia could have raised such intra-EU objection, but it elected not to do so. As a result, Latvia should be considered having

[352] Claimant's Counter-Memorial, ¶ 132.

[353] Claimant's Counter-Memorial, ¶ 132.

[354] Claimant's Counter-Memorial, ¶ 133 (citing, *inter alia*, *Marfin Investment Group Holdings S.A. et al v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, July 26, 2018 (ACLA-0037), ¶ 578 ("*Marfin v. Cyprus*")).

[355] Claimant's Counter-Memorial, ¶ 135 (*Mr. Jürgen Wirtgen et al v. The Czech Republic*, PCA Case No. 2014-03, Final Award, October 11, 2017 (ACLA-0036), ¶ 250 ("*Wirtgen v. Czech Republic*")).

[356] Claimant's Counter-Memorial, ¶ 136.

[357] Claimant's Counter-Memorial, ¶ 136.

[358] Claimant's Rejoinder, ¶ 95.

validly consented to arbitrate and having therefore waived its right to raise any such intra-EU objection.[359]

b. UAB E energija's arguments on the validity of Article 7 of the BIT

269. UAB E energija agrees with Latvia that the question of the applicability of Article 7 of the BIT is a question of international law, governed by the VCLT. However, according to UAB E energija, Latvia incorrectly interprets and applies Articles 59 and 30 of the VCLT.

270. First, UAB E energija maintains that "the EU treaties do not relate to the same subject-matter as the BIT, at least for the purposes of Articles 59 and 30 of the VCLT"[360] and that this finding has been consistently reached by arbitral tribunals.[361]

271. UAB E energija also discusses the other conditions for Article 59 of the VCLT to apply, given that it is clearly not "established" in accordance with Article 59(1)(a) that Latvia and Lithuania intended the EU treaties to govern the relevant matters instead of the BIT.[362] UAB E energija stresses that "BITs do not only concern the obligations of states but also the rights of individuals."[363] As a result, Latvia cannot argue that the termination of such agreements need not to follow the procedure provided for by Article 65 of the VCLT. According to UAB E energija, "[t]o consider such treaties terminated or inapplicable without any notification to individuals as right-holders (or indeed without any notification at all) and contrary to their express terms, in circumstances where an entire arbitration has already taken place and an award rendered (with the full, informed, consent of both parties) clearly goes against the principles of legal certainty, legitimate expectations and non-retroactivity."[364] As a result, UAB E energija concludes that the BIT cannot be found to be terminated by operation of Article 59 of the VCLT.

272. Second, on the issue of the alleged prevalence of EU law over the BIT, UAB E energija notes that (i) "the *Achmea* ruling is not binding in the present ICSID proceedings"[365] given that "[t]he CJEU

[359] Claimant's Rejoinder, ¶¶ 95-108.

[360] Claimant's Counter-Memorial, ¶ 149.

[361] Claimant's Counter-Memorial, ¶¶ 143-145, 149; Claimant's Rejoinder, ¶ 58 (citing, *inter alia*, *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, October 22, 2012 (ARLA-0048), ¶ 185 ("*EURAM v. Slovakia*").

[362] Claimant's Counter-Memorial, ¶¶ 151-157; Claimant's Rejoinder, ¶ 62.

[363] Claimant's Rejoinder, ¶ 66.

[364] Claimant's Rejoinder, ¶ 66.

[365] Claimant's Counter-Memorial, ¶ 164.

has no role or authority within international law, and its decisions are not concerned with international law,"[366] and that (ii) in any event, the present case is distinct from the *Achmea* situation, as the Tribunal's jurisdiction is based on the ICSID Convention, operating in conjunction with Article 7(2) of the BIT.[367]

273. Further, UAB E energija also disputes the findings of the CJEU in the *Achmea* decision, noting that "as a matter of public international law, the substantive finding of the CJEU in *Achmea* is wrong" given that "[i]n the context of public international law, there is a presumption against conflict of treaties"[368] and that "[i]f it is possible to interpret treaties so that no incompatibility arises, this course of action is preferred to a finding of conflict."[369]

274. Finally, UAB E energija submits that, even if the *Achmea* decision was considered to be correct and binding on the Committee, its consequence would not be the invalidation of Article 7 of the BIT.[370] According to UAB E energija, even "if the CJEU in *Achmea* was right as a question of EU law, the only consequence is that Latvia may be in breach of EU law vis-à-vis the EC and other Member States. Even if this were the case, it could not, and does not, affect the entirely separate international law obligations in the BIT and, specifically, E energija's right established in the BIT to accept the standing offer to arbitrate disputes."[371]

c. UAB E energija's position on the grounds for annulment advanced by Latvia

275. UAB E energija rejects both annulment grounds put forward by Latvia on the issue of the Tribunal's jurisdiction. According to UAB E energija, "Latvia's arguments regarding the Tribunal's alleged manifest excess of powers are mostly beside the point, as they focus on the existence of consent to arbitration, and not the manifest nature of the alleged excess of powers."[372] UAB E energija thus argues that, in any event, "[i]n the present situation, the alleged lack of jurisdiction can in no way be considered 'manifest.' As a matter of international law, the overwhelming consensus is that

[366] Claimant's Counter-Memorial, ¶ 164.

[367] Claimant's Counter-Memorial, ¶ 166.

[368] Claimant's Counter-Memorial, ¶ 167 (citing A. Gourgourinis, "After *Achmea*: Maintaining the EU Law Compatibility of Intra-EU BITs Through Treaty Interpretation" in Mistelis and Lavranos (eds), *European Investment Law and Arbitration Review* (Brill-Nijhoff 2018) (ACLA-0045), pp. 297 *et seq*).

[369] Claimant's Counter-Memorial, ¶ 167.

[370] Claimant's Counter-Memorial, ¶¶ 169-170.

[371] Claimant's Counter-Memorial, ¶ 171.

[372] Claimant's Rejoinder, ¶ 91.

the *Achmea* decision has no bearing on a tribunal's jurisdiction under a bilateral investment treaty. Even if this Committee were to disagree, there could be no basis for finding the Tribunal's failure to address the argument to be a 'manifest' excess of powers."[373]

276. On the issue of the alleged failure to state reasons, UAB E energija argues that "Latvia's submissions disregard the Award, where the Tribunal clearly considered the question of consent of the parties and made a reasoned decision on the existence of consent. … [T]he Tribunal carefully considered all the preliminary objections of the Respondent regarding jurisdiction, and specifically analyzed the question of the Parties' consent to ICSID jurisdiction."[374]

277. According to UAB E energija, the Award clearly stated the reasons on which its jurisdictional decision, and specifically its decision on the consent of the parties, was based. UAB E energija therefore concludes that the conditions of Article 52(1)(e) of the ICSID Convention are not fulfilled in the present case.

3. The Committee's Analysis

278. Latvia contends that the Tribunal did not properly address the issue of consent to jurisdiction because it failed to examine whether Latvia's offer to arbitrate contained in Article 7(2) of the BIT still existed and was valid at the time UAB E energija accepted it with its Request for Arbitration. For Latvia, under international law, the BIT "was either terminated or Article 7 was inapplicable because Latvia and Lithuania, the two parties to the BIT, became both Member States to the European Union and acceded to the EU treaties on 1st May 2004."[375] While Latvia's primary argument is that the BIT was terminated by operation of Article 59(1) of the VCLT, Latvia also submits that Article 7 of the BIT is inapplicable because it is incompatible with the EU treaties pursuant to Article 30(3) of the VCLT.[376] Latvia invokes two grounds of annulment in this regard: failure to state reasons under Article 52(1)(e), because the Tribunal did not provide reasons on this issue, and manifest excess of powers under Article 52(1)(b) because the Tribunal exercised a jurisdiction that it did not have.

[373] Claimant's Counter-Memorial, ¶ 181.
[374] Claimant's Rejoinder, ¶ 85.
[375] Transcript Day 1, p. 80, lines 7-11; Applicant's Memorial, ¶¶ 111-115.
[376] Applicant's Memorial, ¶¶ 99-110, Reply, ¶¶ 71-79.

279. UAB E energija's position is that Latvia did not argue in the Arbitration that its consent to arbitration was invalid. UAB E energija states that "the whole arbitration proceeded on the very clear premise that both parties had already agreed to the jurisdiction of the Tribunal."[377] The Tribunal considered the issue of consent and found that consent was established, so there was no failure to state reasons. Latvia introduces a new argument, *i.e.* that written consent was no longer valid, that it did not make in the Arbitration, so the matter was not before the Tribunal. Latvia has waived this new argument or is now estopped from making it before the Committee. For UAB E energija, "the Tribunal's approach was reasonable and there can be no question of a manifest excess of powers."[378]

a. The Parties' arguments on the validity of Article 7 of the BIT and related legal questions

280. As recalled above, both Parties extensively discussed in their submissions the question of whether the Latvia-Lithuania BIT had been terminated by virtue of Articles 59(1) or 30 of the VCLT when the Claimant accepted the offer to arbitrate in Article 7(2). The Parties also expressed views on some related topics, notably: the *Achmea* decision of March 6, 2018 and the Declaration on the legal consequences of the *Achmea* decision and on investment protection signed by the EU Member States on January 15, 2019 (the "**2019 Declaration**").

281. The Committee considers that these questions, which have been raised for the first time in these annulment proceedings and were not before the Tribunal, do not need to be addressed and decided by this Committee as they are irrelevant for purposes of annulment of the Award.

282. The Committee agrees that the only question before it is whether "the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention."[379] In other words, the Committee has to decide whether the Award should be annulled because the Tribunal's lack of analysis as to the legal consequences of the alleged incompatibility between Article 7(2) of the BIT with the EU treaties amounts to grounds of annulment for manifest excess of powers pursuant to Article 52(1)(b) of the ICSID Convention and/or failure to state reasons under Article 52(1)(e). In order to make this decision, any *ex post facto* events (such as the *Achmea* decision or the 2019 Declaration) and new arguments made by the Parties have no role to play.

[377] Transcript Day 1, p. 165, lines 3-5.

[378] Transcript Day 1, p. 198, lines 6-7.

[379] *Lucchetti v. Peru* (ARLA-0035), ¶ 97.

283. Latvia does not dispute that it did not argue in the Arbitration – as it does in these proceedings – that its consent was no longer valid in 2012, when UAB E energija filed the Request for Arbitration. Latvia however contends that the Tribunal should have raised the argument about the inapplicability of Article 7 of the BIT on its own initiative because, "even in the absence of an objection on a jurisdictional issue, a tribunal has the authority and indeed the obligation (…) to establish its jurisdiction. (…) [T]hus, even in the absence of a specific objection concerning Latvia's consent to arbitrate, the Tribunal was not free to disregard the issue as it did."[380] Latvia adds that at least two members of the Tribunal were "well aware of the issue" because they served as arbitrators in cases where intra-EU BIT objections had been raised.[381]

284. In response to a question from the President of the Committee at the Hearing as to the relevance of the legal issues relating to the validity of intra-EU BITs for purposes of the annulment decision, counsel from Latvia clarified that the relevance of the outcome of the legal issues for these annulment proceedings is different for each annulment ground.[382] When it comes to failure to state reasons, counsel stated that it does not matter whether or not Latvia is correct on its assessment of the legal issues. What matters is that the Tribunal was aware of the issues, had an obligation to address them and yet it did not.[383] With regard to manifest excess of powers, Latvia contended that the excess of powers was manifest because the Tribunal did not deal with these issues at all.[384] Latvia added that the issue of the validity of Article 7 has to be examined by the Committee because its task "is to objectively determine whether the Tribunal had jurisdiction."[385] For Latvia, "the issue of jurisdiction is an objective one" that "has to be determined under the law, and objectively."[386]

285. Starting with Latvia's allegation that the Tribunal was aware of the legal issues that have been pleaded in these annulment proceedings, it goes without saying that the Tribunal could not have been aware of legal developments which had not yet taken place at the time, such as the *Achmea* decision and the 2019 Declaration.

286. While it is true that at the time the original Arbitration proceedings were on-going, in 2012-2017, a debate existed as to whether the investor-State arbitration clauses contained in BITs concluded

[380] Transcript Day 1, p. 106, line 13 – p. 107, line 1.
[381] Transcript Day 2, p. 29, line 23 – p. 30, line 17.
[382] Transcript Day 2, p. 107, lines 9-11.
[383] Transcript Day 2, p. 107, line 12 – p. 109, line 1.
[384] Transcript Day 2, p. 109, line 15 – p. 110, line 4.
[385] Transcript Day 2, p. 109, lines 21-22.
[386] Transcript Day 2, p. 109, lines 15, 19-20.

between EU Member States are contrary to EU law and thus inapplicable, it is not until the *Achmea* decision of the CJEU of March 6, 2018 (*i.e.* three months after the Award was rendered) that there was an actual decision officially stating the CJEU's position the matter.

287. By way of background, it may be useful to recall that already in 2006 the Commission had expressed the view that the so-called intra-EU BITs were incompatible with EU law and thus had to be terminated.[387] However, at the time, the Commission's position was that intra-EU BITs were not automatically terminated due to their incompatibility with EU law, but, rather, specific termination by the member States was required. To the extent that investor-State tribunals were called to decide the matter in the presence of preliminary objections raised by respondent States, they uniformly rejected the claims of incompatibility and upheld their jurisdiction.[388] The opinion of the Advocate General, Mr. Wathelet, on the *Achmea* case had been issued on September 19, 2017[389], *i.e.* three months before the Tribunal rendered the Award, but the Advocate General had taken the position that the underlying intra-EU BIT in *Achmea* was not incompatible with EU law and the EU treaties, in other words the opposite of what the CJEU finally held in 2018.

288. As things presently stand, a number of EU States appearing as respondents in investment arbitration proceedings have raised jurisdictional objections based on the incompatibility of BITs with the EU treaties and EU law. Moreover, the Commission has filed applications to intervene as *amicus curiae* in many intra-EU investment arbitrations. However, to date, while some tribunals have allowed EU interventions as *amici*, this objection to jurisdiction has never been upheld by investment tribunals. This led the *Blusun v. Italy* tribunal to state in its 2016 award:

> "Overall the effect of these decisions is a unanimous rejection of the intra-EU objection to jurisdiction. The tribunal in each case has found that the relevant BIT or the ECT was intended to bring about binding obligations between EU Member

[387] EC Letter of January 13, 2006, quoted in *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award, March 27, 2007 (ACLA-0007), ¶ 19 ("*Eastern Sugar v. Czech Republic*"); European Commission Observations, July 7, 2010, quoted in *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, October 26, 2010 (ARLA-0044), ¶ 180.

[388] *See*, for instance, amongst the cases that are on the record, *Eastern Sugar v. Czech Republic* (ACLA-0007), ¶¶ 160, 165, 167-8, 175, 180; *Rupert Binder v. Czech Republic*, Award on Jurisdiction (UNCITRAL Rules), June 6, 2007 (ACLA-0008), ¶¶ 60-1, 63-6; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, April 30, 2010 (ACLA-0012), ¶ 190 ("*Jan Oostergetel v. Slovakia*"); *EURAM v. Slovakia* (ARLA-0048), ¶¶ 185-6, 191-7, 209-10, 212, 218, 234, 236, 238, 248-87; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, December 11, 2013 (ARLA-0052), ¶¶ 319, 321, 326, affirmed on Annulment, *Micula v. Romania* (ARLA-0060), ¶¶ 189, 191-2, 195, 201-2; *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdiction Objection, June 26, 2019 (ACLA-0060), ¶ 146 ("*Rockhopper v. Italy*").

[389] *Slowakische Republik v. Achmea* (ACLA-35).

> States. The tribunals found no contradiction between the substantive provisions of EU law and the substantive or dispute resolution provisions of the BITs. No such system for investor-State arbitration exists in EU law, and it would be incorrect to characterise such disputes as inter-State disputes such that Article 267 of the TFEU could be said to preclude jurisdiction. These conclusions support those adopted by the Tribunal in this case."[390]

289. In a nutshell, this was the state of the law and jurisprudence on this matter and the general context in which the Arbitration was being conducted. In addition, it is important to stress that in the present case, unlike others that were on-going at the time, the Commission did not file an *amicus* application nor did Latvia raise a jurisdictional objection regarding the incompatibility of Article 7(2) with EU law of its own accord.

290. Thus, at the time when the Tribunal was hearing this case, there was general uncertainty and no conclusive position had been expressed by EU institutions on whether investor-State dispute resolution clauses contained in intra-EU BITs − such as Article 7(2) of the Latvia-Lithuania BIT in this case − were incompatible with EU law or the EU treaties. Moreover, the case law of investment tribunals had universally upheld[391] (and has continued to uphold, even after the *Achmea* decision was rendered by the CJEU, as shown by the *Blusun v. Italy* quotation above) the validity of intra-EU BITs. Investment tribunals also consistently rejected the argument that intra-EU BITs related to the same "subject-matter" as the EU treaties and found Articles 59 and 30 of the VCLT not applicable.[392] It follows that, given that there was no clear resolution on these difficult issues at the time the Tribunal rendered the Award, and given the consistent rejection of the intra-EU jurisdictional objection by investment tribunals, it cannot be said that, even if the Tribunal had considered this question, it would have rejected its jurisdiction.

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[390] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, December 27, 2016, ¶ 303 ("*Blusun v. Italy*"). While the *Blusun v. Italy* award is not on the record, the Committee notes that it is cited *verbatim* in *Rockhopper v. Italy* (ACLA-0060), ¶ 145. In any event, the Committee shares the view of other ICSID tribunals and committees that, when applying the law, it should not be bound by the sources invoked by the Parties. Pursuant to the principle *iura novit curia* (sometimes referred to as *iura novit arbiter* in the international arbitration context), this Committee is entitled to form its own opinion of the meaning of the law, as long as it does not surprise the Parties with a legal theory that was not subject to debate and that they could not anticipate. For a similar approach, *see Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, ¶ 92.

[391] *See Rockhopper v. Italy* (ACLA-0060), ¶ 146 and *Blusun v. Italy*, ¶¶ 277-292, 302-303.

[392] *See Jan Oostergetel v. Slovakia* (ACLA-0012); *PL Holdings S.a.r.l. v. Republic of Poland*, SCC Case No. V2014/163, Partial Award, June 28, 2017 (ACLA-34); *Wirtgen v. Czech Republic* (ACLA-0036); *Marfin v. Cyprus* (ACLA-0037); *UP and C.D Holdings Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, October 9, 2018 (ACLA-39); *United Utilities (Tallinn) B.V. v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, June 21, 2019 (ACLA-59); *Rockhopper v. Italy* (ACLA-0060). See ¶ references in Transcript Day 2, p. 97, lines 15-24.

291. The Committee agrees that the Tribunal might have been generally aware of the issue of the inter-play between EU law and EU treaties and intra-EU BITs. Having said that, Latvia itself should also have been aware of this debate and yet, not only did it not raise the preliminary objection that the Tribunal lacked jurisdiction *ratione voluntatis*, it also participated actively in the Arbitration thus *de facto* accepting the existence of a valid arbitration agreement. In the circumstances, the fact that the Tribunal did not discuss *proprio motu* whether the offer to arbitrate contained in Article 7(2) was still valid and could have been accepted by UAB E energija when it filed the Request for Arbitration in this case, is not surprising.

b. Latvia's argument that the Award should be annulled pursuant to Article 52(1)(b) and Article 52(1)(e) of the ICSID Convention

292. It is undisputed that Latvia only raised one objection relating to consent, regarding the lack of the Claimant's internal authorisation for instituting the arbitral proceedings. It is also a fact that the Award contains a section on the Parties' consent to jurisdiction, where the Tribunal recalled the Parties' positions and determined *inter alia* that the Parties had consented to ICSID jurisdiction under Article 7 of the BIT and Article 25(1) of the ICSID Convention.

293. The Tribunal's conclusions on the Parties' consent to jurisdiction are as follows:

> 499. The Tribunal finds that the Respondent offered to submit certain disputes to ICSID arbitration under Article 7 of the BIT provided *(i)* that the investor gave the host State a notice of dispute in writing including a detailed statement (Article 7(1) of the BIT), and *(ii)* that the Parties endeavoured to settle their dispute amicably in the six months following the notification of the notice of dispute (Article 7(2) of the BIT).
>
> 500. The Respondent did not dispute that these requirements were met.
>
> 501. The Tribunal concludes that the two requirements in Article 7(1) and 7(2) of the BIT were met in the present case. First, the Claimant delivered its Notice of Dispute on 2 September 2008 to the Respondent, thereby complying with Article 7(1) of the BIT. Secondly, the Respondent accepts that negotiations with the Claimant started on 1 September 2008 and continued until 14 July 2010 with a final meeting on 1 April 2011 without any settlement being reached. The Parties therefore tried to settle their dispute amicably for more than six months before the Claimant submitted the dispute to ICSID, as required by Article 7(2) of the BIT.
>
> 502. The Tribunal also finds that the Claimant accepted the Respondent's offer contained in the BIT to settle the dispute by ICSID arbitration by filing its Request for Arbitration on 15 August 2012. The Tribunal therefore concludes that the requirement of consent under Article 7(2) of the BIT was met, as was the requirement of "consent in writing" under Article 25(1) of the ICSID Convention.

294. The paragraphs cited above show that the Tribunal did examine whether it had jurisdiction, and complied with the *kompetenz-kompetenz* principle, as embodied in Article 41 of the ICSID Convention. The Tribunal reached the conclusion that the requirement of consent under Article 7(2) of the BIT was met on the basis of the Parties' arguments and the cases they pleaded before it. Specifically, with regard to Latvia's case, in addition to the absence of a specific objection to jurisdiction based on lack of consent under Article 7(2) of the BIT, the Tribunal's conclusions must have also been informed by Latvia's procedural conduct *de facto* accepting the validity of Article 7 of the BIT throughout the Arbitration.[393] Failure to raise a specific objection as to the applicability of Article 7(2), coupled with Latvia's conduct during the Arbitration, must have been interpreted by the Tribunal as an implicit consent to jurisdiction.

295. As recognized by in Schreuer's *Commentary* of the ICSID Convention, "the tribunal may rely on a party's failure to invoke the non-existence of its consent as an indication of its consent."[394] It is also important to stress in this regard that, while failure to raise jurisdictional objections may be interpreted as an implicit consent to jurisdiction, the objective legal requirements contained in Article 25 of the Convention: *i.e.* the existence of a legal dispute arising out of an investment and the nationality requirement cannot be replaced by the parties' agreement.[395]

296. The fact that the matter of lack of consent as an objection to the Tribunal's jurisdiction is being advanced for the first time in these annulment proceedings cannot be ignored. An argument that was not before the original tribunal cannot form the basis of a manifest excess of power in annulment proceedings. As held by the *ad hoc* committee in *Lahoud v. Congo*:

> " L'argument ayant été nouvellement soulevé dans la présente procédure d'annulation, le Tribunal n'a pas pu, par définition, commettre un excès de pouvoir manifeste dans le cadre de l'examen d'une question qui n'a pas été introduite." [396]

297. The Committee finds that a party that has not raised a preliminary objection to the tribunal's jurisdiction "as early as possible" and "no later than the expiration of the time limit fixed for the filing of the counter-memorial," in conformity with Rule 41(1) of the Arbitration Rules, has waived its preliminary objections. Consequently, these cannot be reintroduced in annulment proceedings

[393] See the examples provided in the Claimant's Rejoinder, ¶ 97.

[394] Schreuer et al. (ARLA-0037), p. 530, ¶ 50.

[395] Schreuer et al. (ARLA-0037), p. 529, ¶ 49.

[396] *Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud c/ République Démocratique du Congo,* Affaire CIRDI No. ARB/10/4, Décision sur la Demande en annulation de la République Démocratique du Congo, ¶ 149.

to argue that the Tribunal manifestly exceeded its powers. As noted in the Schreuer's *Commentary* in connection with the principle of *forum prorogatum* in the ICSID context:

> "[A] party that has indicated its consent during the proceedings either explicitly or by pleading on the merits of the case without objecting that consent was lacking, defective or too narrow is precluded from raising such an objection later on. This preclusion would apply in the original proceedings as well as to any annulment proceedings."[397]

298. In the Committee's opinion, there is nothing objectionable in the fact that the Tribunal limited its analysis on jurisdiction to the Parties' pleaded positions. This is not a situation where the Tribunal failed to examine its jurisdiction *ratione voluntatis*; it did so, but on the basis of the arguments advanced before it by the Parties and in the light of the Parties' procedural conduct. The Tribunal could have raised this jurisdictional question in the form of a question addressed to Latvia in the course of the proceedings in order to make sure of Latvia's consent to jurisdiction, but failure to do so cannot result in the extreme consequence of annulling the Award. The position taken by the Tribunal is reasonable and justified in the circumstances and it is not the Committee's role to second-guess the Tribunal's approach.

299. As held by the *Rumeli v. Kazakhstan* committee:

> "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."[398]

300. Thus, in the light of all the factors examined above, the Committee finds that there was no manifest excess of powers and the fact that the Tribunal failed to raise the question does not amount to a ground for annulment of the Award under Article 52(1)(b).

301. As to an alleged absence of reasons, there is no such failure in this case as the Tribunal did explain how it reached the conclusion that Latvia had provided its consent to arbitration. Latvia now disagrees on the basis of new arguments introduced for the first time in these annulment proceedings. But, as already noted in several instances in this Decision, annulment committees are not courts of appeal and annulment proceedings cannot be used to formulate new arguments which

[397] Schreuer et al. (ARLA-0037), p. 225, ¶ 498.

[398] *Rumeli v. Kazakhstan* (ARLA-0042), ¶ 96.

should have been introduced during the original arbitration. As held by the *ad hoc* committee in *Klöckner v. Cameroon, ad hoc* proceedings cannot:

> "be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments."[399]

302. Therefore, the Committee finds that the Tribunal did provide reasons in the Award for its decision that Latvia offered to submit the dispute to arbitration under Article 7 of the BIT. The Tribunal reached its conclusions on the basis of the arguments advanced by the Parties; if no reasons were provided regarding the arguments made by Latvia in these annulment proceedings, it is because they had not been submitted to the Tribunal for its consideration.

303. In the light of the above considerations, the Committee rejects Latvia's request to annul the Award on the basis of Article 52(1)(b) and 52(1)(e) of the ICSID Convention with regard to the Tribunal's decision on jurisdiction.

VI. COSTS

304. The Parties made their submissions on cost during the Hearing, and later submitted statements of costs.[400]

A. LATVIA'S COSTS SUBMISSIONS

305. In its submission on costs, Latvia argues that the issues debated in the annulment proceedings are serious ones, and that while it considers its arguments to be "very strong,"[401] it also recognizes that they are not based on any errors made by UAB E energija. Latvia further recalls that UAB E energija has "an award in its favour involving three breaches […] of the investment treaty."[402]

306. In light of this, Latvia submits that, irrespective of the outcome of the annulment proceeding, it "does not seek costs from the Claimant in these annulment proceedings,"[403] and that "the

[399] *Klöckner v. Cameroon* (ARLA-0009), ¶ 83.
[400] *See* above, ¶ 66.
[401] Transcript Day 2, p. 117, line 17.
[402] Transcript Day 2, p. 117, lines 19-21.
[403] Transcript Day 2, p. 117, lines 22-23.

appropriate order for the Annulment Committee to make would be for costs to lie where they fall, and for the costs of the Committee and ICSID to be shared equally between the parties."[404]

307. In its Statement on Costs, Latvia provides for the following information:

TYPE OF FEES AND EXPENSES	RESPONDENT/ LAW FIRM	AMOUNT	
		EUR	USD
ICSID filing fee	Republic of Latvia		25,000.00
Advances on the costs of the *ad hoc* Committee and ICSID	Republic of Latvia		330,000.00
	Freshfields Bruckhaus Deringer	489,648.72	
Party expenses (travel and accommodation for the Hearing held on 13 and 14 January 2020)	Republic of Latvia	3,943.44	
Total		**493,592.16**	**355,000.00**

B. UAB E ENERGIJA'S COSTS SUBMISSIONS

308. In its submission on costs, UAB E energija observes that both Parties have requested that the Committee award costs, and further asks the Committee to consider interest in its decision.[405]

309. UAB E energija further notes that the costs of the Annulment proceedings are likely to be "significant in proportion to the [A]ward,"[406] and that both Parties agree that "full reparation … is correct standard of relief in a treaty arbitration."[407] As a result, UAB E energija submits that if the Award is upheld, the Committee should award UAB E energija "its cost and interest."[408]

310. In its Statement on Costs, UAB E energija claims for legal and other costs for the Annulment Proceedings in a total amount of EUR 373,119.96, corresponding to:

- legal fees of Vinson & Elkins and Sorainen in an amount of EUR 350,000.00;
- Vinson & Elkins and Sorainen disbursements in an amount of EUR 18,052.76;

[404] Transcript Day 2, p. 117, line 24 – p. 118, line 3.
[405] Transcript Day 2, p. 103, lines 15-19.
[406] Transcript Day 2, p. 103, line 22.
[407] Transcript Day 2, p. 104, lines 1-2.
[408] Transcript Day 2, p. 103, lines 24-25.

- E energija expenses of EUR 5,067.20.

C. THE FEES AND EXPENSES OF THE COMMITTEE AND OF THE CENTRE

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

Committee Members' fees and expenses	
Ms. Loretta Malintoppi	74,780.15
Prof. Geneviève Bastid Burdeau	42,051.57
Mr. Makhdoom Ali Khan (prior to his resignation)	3,187.50
Dr. Andrés Rigo Sureda	38,748.04
ICSID's administrative fees	84,000.00
Direct expenses	20,989.87
Total	**263,757.13**

D. THE COMMITTEE'S DECISION ON COSTS

312. According to Article 52(4) of the ICSID Convention, Chapter VI of the Convention, entitled the "Cost of the Proceeding," "shall apply *mutatis mutandis* to proceedings before the Committee." In this connection, the relevant provision of Chapter VI is Article 61(2), which provides:

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

313. ICSID Arbitration Rule 53 further provides that the provisions of the Rules "shall apply *mutatis mutandis* to any procedure relating to […] annulment of an award and to the decision of the […] Committee." Rule 47 further specifies that "the [decision of a Committee] shall be in writing and shall contain […] any decision of the [Committee] regarding the cost of the proceeding."

314. On the basis of these provisions, the Committee has discretion to decide how to allocate the fees and expenses of Committee members, the Centre's administrative fees and direct expenses, and the Parties' fees and expenses.

315. Given that the Committee found Latvia's grounds for annulment to be without merit and on that basis rejected its Application for Annulment in its entirety, the Committee concludes that Latvia

should be wholly responsible for the Committee's fees and expenses and for ICSID's administrative fee and direct expenses. Each Party should be responsible for its legal fees. In the circumstances, a decision regarding interest to be awarded on the costs of these annulment proceedings (as requested by UAB E energija) is not needed.

VII. DECISION

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

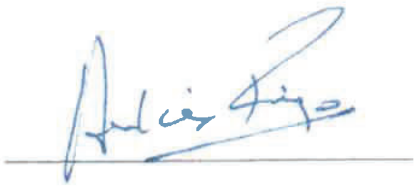
(1) The Application for Annulment of the Republic of Latvia is rejected in its entirety;

(2) The Applicant shall bear the costs of the proceeding as set out in paragraph 311 above, in the amount of USD 263,757.13;

(3) The stay of enforcement is lifted.

Geneviève Bastid Burdeau
Ad hoc Committee Member

Date: April 6, 2020



Andrés Rigo Sureda
Ad hoc Committee Member

Date: April 6, 2020

Loretta Malintoppi
President of the *ad hoc* Committee

Date: April 6, 2020