INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

HYDRO S.R.L. AND OTHERS

and

REPUBLIC OF ALBANIA

ICSID Case No. ARB/15/28 – Annulment

DECISION ON ANNULMENT

Members of the* ad hoc *Committee
Ms. Lucinda A. Low, President
Mr. Colm Ó hOisín SC
Dr. Jacomijn van Haersolte-van Hof

Secretary of the* ad hoc *Committee
Mr. Francisco Abriani

Date of dispatch to the Parties: April 2, 2021

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TABLE OF SELECTED ABBREVIATIONS

Albania	The Republic of Albania
Application	Application for Annulment filed by Albania on August 22, 2019
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	Award issued by original arbitral Tribunal on April 24, 2019
BIT	Agreement between the Government of the Republic of Italy and the Government of the Republic of Albania on the Promotion and Protection of Investment, which entered into force on January 29, 1996
C-[#]; CEA-[#]	Hydro's Exhibit
CL-[#]; CAA-[#]	Hydro's Legal Authority
Committee	*Ad hoc* Committee constituted on November 6, 2019
Counter-Memorial or C-M	Hydro's Counter-Memorial on Annulment dated July 6, 2020
Decision on the Stay	Decision on the Republic of Albania's Request for the Continued Stay of Enforcement of the Award dated March 13, 2020
Hearing	Hearing on Annulment held on January 25-26, 2021
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial or Mem.	Albania's Memorial on Annulment dated April 15, 2020
R-[#]; REA-[#]	Albania's Exhibit

Rejoinder or Rej.	Hydro's Rejoinder on Annulment dated September 14, 2020
Reply	Albania's Reply on Annulment dated August 10, 2020
RL-[#]; RAA-[#]	Albania's Legal Authority
Tr. [Day:page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal that rendered the Award

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an application for annulment of the Award rendered on April 24, 2019 in the arbitration proceeding between Hydro S.r.l., a company incorporated under the laws of Italy; Costruzioni S.r.l., a company incorporated under the laws of Italy; Mr. Francesco Becchetti, a natural person having the nationality of the Italian Republic; Mr. Mauro De Renzis, a natural person having the nationality of the Italian Republic; Ms. Stefania Grigolon, a natural person having the nationality of the Italian Republic; and Ms. Liliana Condomitti, a natural person having the nationality of the Italian Republic (collectively the "Claimants" or "Hydro and others") and the Republic of Albania (the "Respondent" or "Albania") (ICSID Case No. ARB/15/28) (the "Award") by a Tribunal composed of Dr. Michael C. Pryles, President, Mr. Ian Glick QC, and Dr. Charles Poncet. This Decision will continue to use the "Claimants" to refer to Hydro and others and the "Respondent" for Albania, as in the original proceeding. The Claimants and the Respondent are collectively referred to as the "parties". The parties' representatives and their addresses are listed above on page (i).

2. The Award decided on a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Agreement between the Government of the Republic of Italy and the Government of the Republic of Albania on the Promotion and Protection of Investment, which entered into force on January 29, 1996 (the "BIT") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "ICSID Convention").

3. The dispute in the original proceeding related to the alleged expropriation, and unfair and inequitable treatment, of the Claimants' investments in Albania, including the Kalivaç Project (a hydroelectric project in Albania), in a wind farm project, and in Agonset Sh.p.k. (a broadcasting project described more fully below).

4. In the Award, the Tribunal found that it did not have jurisdiction to hear the claim over the wind farm project because it did not qualify as an investment, and rejected all of the other

jurisdictional objections filed by Albania. On the merits, the Tribunal upheld the expropriation claim regarding the broadcasting project, awarding damages to certain of the Claimants,[1] and rejected all of the other claims.

5. Albania applied for annulment of the Award on the basis of Article 52(1) of the ICSID Convention, identifying three grounds for annulment (one relating to jurisdiction, one relating to the merits, and one relating to damages), each of which was based on an alleged failure to state reasons (Article 52(1)(e)).

II. PROCEDURAL HISTORY

6. On August 22, 2019, ICSID received the Application for Annulment of the Award of the same date from Albania (the "Application"). The Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules") for the stay of enforcement of the Award until the Application was decided (the "Request for Stay").

7. On August 27, 2019, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the Secretary-General of ICSID registered the Application. On the same date, in accordance with Arbitration Rule 54(2), the Secretary-General informed the parties that the enforcement of the Award had been provisionally stayed.

8. By letter of September 19, 2019, ICSID wrote to the parties informing them of its intention to propose the following candidates for the *ad hoc* Committee (the "Committee") to the Chairman of the Administrative Council: Ms. Lucinda A. Low, a national of the United States of America, as President, and Ms. Sylvia Tonova, a national of Bulgaria and the United States of America, and Dr. Jacomijn van Haersolte-van Hof, a national of the Netherlands, as members. The parties were invited to submit their comments, if any, by September 26, 2019.

[1] Damages were awarded to those Claimants holding a direct or indirect interest in Agonset Sh.p.K. as follows: Mauro De Renzis, €46,751,000; Stefania Grigolon, € 11,688,000; and Francesco Becchetti €41,048,000. Award, ¶914.

9. By letter of September 26, 2019, Albania requested further information from the candidates.

10. By email of September 26, 2019, the Claimants confirmed that they had no objection to the proposed candidates for the Committee.

11. By letter of October 7, 2019, ICSID transmitted the proposed Committee Members' responses to Albania's request for further information to the parties. ICSID invited any further comments from the parties by October 10, 2019.

12. By letter of October 10, 2019, Albania confirmed its agreement to the appointment of Ms. Low as President, but objected to the appointments of Ms. Tonova and Dr. van Haersolte-van Hof.

13. By letter of October 14, 2019, the Claimants objected to Albania's October 10, 2019 letter and asked ICSID to proceed with the appointment of the Committee.

14. By letter of October 16, 2019, ICSID provided a further disclosure from Ms. Tonova and asked for the parties' comments, if any, by October 23, 2019.

15. By letter of October 23, 2019, Albania reiterated its objections to the appointments of both Ms. Tonova and Dr. van Haersolte-van Hof.

16. By letter of October 28, 2019, ICSID took note of the parties' comments and stated its intention to propose to the Chairman of the Administrative Council Ms. Low, as President, Dr. van Haersolte-van Hof, and Mr. Colm Ó hOisín SC, a national of Ireland, as Members of the Committee. The parties were invited to provide their comments by November 1, 2019.

17. By letter of November 1, 2019, Albania confirmed its agreement to Mr. Ó hOisín's appointment.

18. By letter of November 4, 2019, ICSID confirmed receipt of Albania's November 1, 2019 letter and noted that it had not received a response from the Claimants. Accordingly, ICSID

informed the parties that the Chairman of the Administrative Council would proceed with the appointments.

19. By letter of November 5, 2019, ICSID informed the parties that the Chairman of the Administrative Council had appointed Ms. Low, Mr. Ó hOisín, and Dr. van Haersolte-van Hof, and that ICSID was in the process of seeking their acceptance in accordance with ICSID Arbitration Rules 5(2) and 53.

20. By letter of November 6, 2019, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the parties were notified that a Committee composed of Ms. Lucinda A. Low, a national of the United States of America, appointed to the Panel by the Chairman of the Administrative Council, and designated as President of the Committee, Mr. Colm Ó hOisín SC, a national of Ireland, appointed to the Panel by Ireland, and Dr. Jacomijn van Haersolte-van Hof, a national of the Netherlands, appointed to the Panel by the Netherlands, had been constituted. On the same date, the parties were notified that Mr. Francisco Abriani, Legal Counsel, ICSID, would serve as Secretary of the Committee.

21. By letter of November 13, 2019, the Committee asked the parties to confirm their availabilities for a first session to be held on December 18 or 19, 2019 by November 19, 2019.

22. By letter of November 14, 2019, the Claimants submitted their Opposition to the Continuation of the Provisional Stay (the "Opposition to the Stay") with accompanying documentation. By the same letter, the Claimants confirmed their availability for the proposed December first session dates.

23. By letter of November 19, 2019, Albania confirmed its availability for a first session on either December date.

24. By letter of November 20, 2019, Albania objected to the Claimants' Opposition to the Stay and asked that it remain in effect until the parties had submitted written briefings for the Committee's consideration.

25. By letter of November 25, 2019, the Claimants objected to the contents of Albania's November 20, 2019 letter and asked that the Committee rule on the continuation of the stay of enforcement within 30 days of the constitution of the Committee in accordance with ICSID Arbitration Rule 54.

26. By letter of November 27, 2019, the Committee (i) confirmed that the first session would be held on December 18, 2019, (ii) circulated a draft Procedural Order No. 1, and (iii) asked for the parties' comments on the draft by December 11, 2019.

27. By letter of November 28, 2019, the Committee set a briefing schedule for submissions from the parties on the continuation of the stay of enforcement. In the interim, the Committee decided to maintain the provisional stay.

28. On December 4, 2019, Albania submitted its Response to the Claimants' November 14 Submission with accompanying documentation.

29. On December 11, 2019, the parties submitted their joint comments and points of disagreement on draft Procedural Order No. 1.

30. On December 11, 2019, the Claimants submitted their Response to the Respondent's December 4 Submission with accompanying documentation.

31. By letter of December 17, 2019, the Claimants provided an update on certain Albanian court proceedings.

32. On December 17, 2019, Albania filed its Response to the Claimants' December 11 Submission with accompanying documentation.

33. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the parties on December 18, 2019 by teleconference.

34. On December 20, 2019, Albania submitted an additional legal authority.

35. By letter of December 23, 2019, the Claimants objected to Albania's submission of a new legal authority without the Committee's approval and stated that the authority should not inform the Committee's decision on the stay.

36. On January 21, 2020, the Committee sent the parties a further version of Procedural Order No. 1 and asked for any additional proposed changes by January 28, 2020.

37. By letter of January 24, 2020, the Claimants provided their dates of availability for the hearing on annulment. By letter of January 28, 2020, Albania provided its availability for the hearing and confirmed that it had no further comments on Procedural Order No. 1.

38. By letter of January 30, 2020, the Tribunal asked the parties to provide, *ex parte*, their availabilities for the hearing on annulment, with ICSID sharing the letters with the parties after both had been received.

39. On February 6, 2020, the parties submitted their availabilities to ICSID.

40. On February 7, 2020, Albania submitted a report of the Albanian Government's needs assessment following the earthquake that struck the country on November 26, 2019.

41. By letter of February 18, 2020, the Claimants referred to a news story confirming that the Albanian government had received enough international assistance to cover its budgetary shortfall following the earthquake and stated that this could therefore no longer be considered as a reason to continue the stay of enforcement.

42. By letter of February 19, 2020, the Committee informed the parties that it was close to finalizing its decision on the stay of enforcement and reminded the parties that further submissions should be made only with leave of the Committee.

43. By letter of February 20, 2020, Albania objected to the Claimants' February 18, 2020 letter and sought leave from the Committee to make a submission in response.

44. By email of February 21, 2020, the Committee granted Albania leave to make a two-page submission by February 24, 2020, with the Claimants given until February 26, 2020 to file a two-page response.

45. On February 24, 2020, Albania filed its response to the Claimants' February 18, 2020 letter with accompanying documentation.

46. By letter of February 24, 2020, ICSID informed the parties that the hearing on annulment would be held from January 26-28, 2021 in London.

47. On February 26, 2020, the Claimants filed their response to Albania's February 24, 2020 submission with accompanying documentation.

48. On February 27, 2020, the Committee issued Procedural Order No. 1 recording the agreement of the parties on procedural matters. Procedural Order No. 1 provided, *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 London, United Kingdom. Procedural Order No. 1 also set out the agreed procedural calendar for the proceeding.

49. On March 13, 2020, the Committee issued its Decision on the Republic of Albania's Request for the Continued Stay of Enforcement of the Award (the "Decision on the Stay"), ordering as follows:

> a) The Claimants shall establish an escrow account as provided in this Decision as soon as is practicable and shall confirm in writing its establishment to the Committee.
>
> b) Upon the Committee's review of the escrow arrangement and a determination that the arrangement is satisfactory in addressing the non-recoupment risk, and a communication of that determination to the Parties, the provisional stay, as extended, shall immediately terminate.
>
> c) The Respondent shall bear 25% of the costs incurred by the Claimants in addressing the stay issue, with the precise monetary amount to be determined by the Committee at a later date on the basis of cost submissions to be made within 30 days of the date of dispatch of this decision, *i.e.*, by April 13, 2020, with the applicable interest rate to be determined subsequently.

50. By letter of March 20, 2020, Albania asked that the deadline for the submission of its Memorial on Annulment be extended from March 25, 2020 to April 15, 2020, with additional adjustments for the parties' remaining submissions.

51. By letter of March 20, 2020, the Claimants provided confirmation that an escrow account had been establish in accordance with the Decision on the Stay.

52. By letter of March 21, 2020, Albania requested that the Claimants be required to disclose the terms of the established escrow account.

53. By letter of March 23, 2020, the Claimants asked the Committee to reject Albania's request that the terms of the escrow account be disclosed.

54. By letter of March 23, 2020, the Committee confirmed that it was in receipt of the parties' respective letters and that the provisional stay was lifted as of that date.

55. By further letter of March 23, 2020, the Committee approved Albania's requested amendments to the procedural calendar.

56. By letter of April 13, 2020, the Claimants submitted their statement of costs incurred in relation to addressing the stay of enforcement pursuant to the Decision on the Stay.

57. On April 15, 2020, Albania submitted its Memorial on Annulment (the "Memorial") with accompanying documentation.

58. On July 6, 2020, the Claimants filed their Counter-Memorial on Annulment (the "Counter-Memorial") with accompanying documentation.

59. On August 10, 2020, Albania filed its Reply on Annulment (the "Reply") with accompanying documentation.

60. On September 14, 2020, the Claimants filed their Rejoinder on Annulment (the "Rejoinder") with accompanying documentation.

61. By letter of October 8, 2020, the Committee modified the dates for the hearing on annulment to January 25-27, 2021 and asked the parties, in light of the ongoing pandemic,

if they still preferred to try to hold the hearing in person or would like to switch to a virtual format.

62. By email of October 13, 2020, the Claimants stated that the revised hearing dates were acceptable and asked that the booking for the IDRC hearing facilities be retained.

63. By letter of October 13, 2020, Albania also confirmed its availability to start the hearing on January 25, 2021 and expressed a strong preference for the hearing to be held in person or rescheduled if that were not an option in January 2021.

64. By letter of October 16, 2020, the Committee confirmed that the IDRC booking in London would be maintained and proposed to make a final determination during a December 2020 pre-hearing conference call. To that end, the parties were invited to provide their availability for a call between December 15-18, 2020. The parties jointly confirmed their availability by email of October 23, 2020.

65. By letter of November 2, 2020, the Committee confirmed the pre-hearing conference would be held on December 16, 2020.

66. By letter of December 14, 2020, Albania stated that its preference remained for an in-person hearing and asked the Committee to consider rescheduling the hearing until July 2021.

67. By letter of December 15, 2020, the Claimants asked the Committee to reject Albania's request to reschedule the hearing.

68. By letter of December 15, 2020, the Committee informed the parties it would address Albania's request during the pre-hearing conference the following day.

69. On December 16, 2020, the Committee held a pre-hearing conference with the parties.

70. By letter of December 17, 2020, the Committee confirmed that the hearing on annulment would be held *via* Zoom on January 25 and 26, 2021. The parties were invited to provide their comments on the proposed schedule for the hearing by January 4, 2021.

71. On January 4, 2021, the parties submitted their comments on the organization of the upcoming hearing.

72. By letter of January 5, 2021, Albania requested permission to respond to the Claimants' January 4, 2021 comments on the hearing. By email of the same date, the Committee granted Albania's request.

73. By further letter of January 5, 2021, Albania provided its comments on the Claimants' proposals for the hearing.

74. On January 19, 2021, the Committee issued Procedural Order No. 2 concerning the organization of the hearing.

75. A hearing on annulment was held by video conference on January 25 and 26, 2021 (the "Hearing"). The following persons were present at the Hearing:

Committee:	
Ms. Lucinda A. Low	President
Mr. Colm Ó hOisín SC	Member of the Committee
Dr. Jacomijn van Haersolte-van Hof	Member of the Committee
ICSID Secretariat:	
Mr. Francisco Abriani	Secretary of the Committee
For Hydro:	
Mr. David W. Rivkin	Debevoise & Plimpton LLP
Ms. Catherine Amirfar	Debevoise & Plimpton LLP
Mr. Romain Zamour	Debevoise & Plimpton LLP
Ms. Azeezah Goodwin	Debevoise & Plimpton LLP
Ms. Moeun Cha	Debevoise & Plimpton LLP
Ms. Mary Grace McEvoy	Debevoise & Plimpton LLP
Mr. Philippe Pinsolle	Quinn Emanuel Urquhart & Sullivan LLP
Mr. Alexander Leventhal	Quinn Emanuel Urquhart & Sullivan LLP
Party Representative:	
Mr. Francesco Becchetti	Party Representative
For Albania:	
Mr. Andrew B. Loewenstein	Foley Hoag LLP
Mr. Derek C. Smith	Foley Hoag LLP
Mr. Kenneth Figueroa	Foley Hoag LLP
Mr. Yuri Parkhomenko	Foley Hoag LLP
Mr. Nicholas M. Renzler	Foley Hoag LLP

Mr. Peter Tzeng	Foley Hoag LLP
Ms. Rumbidzai Maweni	Foley Hoag LLP
Ms. Paulina Alvarado Medina	Foley Hoag LLP
Mr. Siddharth Dhar	Essex Court Chambers
Party Representatives:	
Enkelejda Mucaj	State Advocate General, Republic of Albania
Ms. Julinda Mansaku	Head of Office for Legal Representation in Foreign Courts and International Arbitration Tribunals, State Advocates Office, Republic of Albania
Ms. Boriana Nikolla	State Advocate, Office for Legal Representation in Foreign Courts and International Arbitration Tribunals, State Advocates Office, Republic of Albania
Court Reporter:	
Ms. Claire Hill	Court Reporter

76. By email of January 28, 2021, ICSID transmitted corrections to the transcripts from the court reporter to the parties.

77. By letter of February 2, 2021, Albania provided its observations on the Claimants' Submission on Costs of April 13, 2020 in connection with Albania's Request for the Continued Stay of Enforcement of the Award.

78. By letter of February 4, 2021, the Claimants sought the Committee's leave to submit documents from *Valeria Italia v. Albania*, PCA Case No. 2018-49, into the record.

79. By letter of February 9, 2021, Albania objected to the Claimants' request of February 4, 2021.

80. By letter of February 10, 2021, the Committee denied the Claimants' February 4, 2021 request.

81. On February 10, 2021, the Claimants submitted the parties' agreed corrections to the transcripts. By email of the same date, ICSID asked Albania to confirm its agreement.

82. By letter of February 11, 2021, Albania agreed to the transcript corrections submitted by the Claimants and proposed three further corrections.

83. By letter of February 12, 2021, the Claimants objected to the changes to the transcript proposed by Albania in its February 11, 2021 letter.

84. By letter of February 22, 2021, the Committee took note of the parties' letters and admitted both sets of corrections to the transcripts. The parties were further invited to provide an update on their discussions about submissions on costs. The Committee reserved its decision on the Claimants' cost submission related to the Stay of Enforcement for the Decision on Annulment.

85. By emails of February 23, 2021, the parties confirmed that they had agreed on a deadline of March 19, 2021 to submit their submissions on costs.

86. The parties filed their submissions on costs on March 19, 2021.

87. The proceeding was closed on March 29, 2021.

III. STANDARD OF REVIEW

88. The Application sets forth three grounds for annulment, one relating to a jurisdictional decision of the Tribunal, one relating to a merits decision, and one relating to damages. Each of the three grounds for annulment advanced by Albania relies on the last of the five grounds set forth in Article 52 of the ICSID Convention, paragraph (1)(e), "that the award has failed to state the reasons upon which it is based".[2] The parties have made general submissions on the standard of review with respect to this provision as well as more targeted submissions on the three specific grounds on which Albania's Application for Annulment is based. Accordingly, the Committee will first consider the overall standard of review for applications based on Article 52(1)(e). The Committee will begin with a summary of the submissions of the parties and then turn to its own analysis.

[2] ICSID Convention, Regulations and Rules (2006), **REA-004**.

A. SUBMISSIONS OF THE PARTIES

1. Respondent

89. The Respondent's submissions on the standard of review begin with a contextual analysis of Article 52(1)(e) of the ICSID Convention.

90. While acknowledging that the ICSID Convention adheres to the principle of finality, the Respondent argues that the principle is not absolute, and that the exceptions set forth in Article 52 of the Convention are essentially designed to protect the fundamental procedural integrity of the ICSID dispute-settlement system.[3] The Respondent then points to Article 48(3) of the Convention, requiring that the award "deal with every question submitted to the Tribunal" and "state the reasons upon which it is based", and the comparable provision in Arbitration Rule 47(1)(i).[4] It describes Article 52(1)(e) of the Convention as "enforcing" the requirements of Article 48(3).[5]

91. The requirement to state reasons for its decisions is therefore, in the submissions of the Respondent, a "core" or "central" duty of the Tribunal.[6] Citing to several decisions of *ad hoc* committees, the Respondent emphasizes that the purpose of a statement of reasons is to explain to readers of the award, and especially the parties, the "how and why" the tribunal was motivated to reach the decisions that it reached.[7]

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[3] Mem., ¶25, citing *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, December 27, 2016, **RL-155**, ¶124 ("*Tidewater v. Venezuela*").

[4] Mem., ¶26.

[5] Id.

[6] Mem., ¶27; Reply, ¶8.

[7] Mem., ¶27; Reply, ¶9 (citing to *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015, **RL-149** ("*Tulip v. Turkey*"); *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award, December 22, 1989, **RL-141/RAA-012** ("*MINE v. Guinea*"); and *Poštová Banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Poštová Banka's Application for Partial Annulment of the Award, September 29, 2016, **RL-154** ("*Poštová Banka v. Greece*")).

92. The Respondent relies in particular on the so-called "test" articulated by the *ad hoc* committee in *Maritime International Nominees Establishment v. Republic of Guinea ("MINE v. Guinea")*,[8] and cited with approval by other tribunals,[9] to the effect that

> The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law.… A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.
>
> In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B., and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.[10]

93. The Respondent accepts that reasons can be implicit in a tribunal's decision, but cautions that reasons cannot be constructed by an annulment committee to justify such decision if they do not necessarily follow from what is expressed.[11]

94. Relying on the decision of the *ad hoc* committee in *TECO v. Guatemala*, the Respondent, while acknowledging that a tribunal is not obliged to address every piece of evidence put before it, further argues that it is not permissible to gloss over evidence on which a party has placed significant evidence without explanation.[12] It also emphasizes the importance of providing reasons on points that are outcome-determinative.[13]

95. In its Reply, the Respondent dismisses the Claimants' arguments that its application is really an appeal in disguise and that it has misconstrued and misapplied the standard for

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[8] *MINE v. Guinea*, **RL-141/RAA-012**.

[9] *E.g.*, *Tulip v. Turkey*, **RL-149**, ¶100; *Poštová Banka v. Greece*, **RL-154**, ¶90; *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, January 15, 2016, **RL-150**, ¶261 ("*Adem Dogan v. Turkmenistan*").

[10] *MINE v. Guinea*, **RL-141/RAA-012**, ¶¶5.08-5.09, cited at Mem., ¶32 and in the Respondent's Opening Statement at the Hearing. Albania's Opening Statement, Slide 5; Tr. 1:12:3-15; 2:15:21-16:13.

[11] Mem., ¶35; Reply, ¶19, quoting *Adam Dogan v. Turkmenistan*, **RL-150**, ¶263.

[12] Mem., ¶¶37-38, citing *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016, **RL-153** ("*TECO v. Guatemala*").

[13] *E.g.*, Mem., ¶33.

review on annulment.[14] It criticizes the Claimants for seeking to divert attention to "extraneous" issues and argues that even if an annulment committee has the discretion not to annul where grounds for annulment are present, as the Claimants have submitted, such authority has never been exercised by an *ad hoc* committee following a finding that there had been a failure on the part of the tribunal in question to state reasons.[15]

96. These arguments were reprised at the hearing.[16]

2. Claimants

97. The Claimants characterize the Respondent's application as an impermissible appeal rather than a true annulment. They also argue that Albania mischaracterizes and misapplies the standard under Article 52(1)(e) of the Convention.[17]

98. The Claimants do not disagree that the purpose of annulment is to protect the fundamental procedural integrity of the ICSID dispute-resolution process. They emphasize, however, that annulment under Article 52 of the ICSID Convention is an "extraordinary and limited" exception to the general principle of finality,[18] that it is a remedy reserved for "egregious violations of certain basic principles",[19] and that the bar for annulment is very high.[20] They also argue that *ad hoc* committees have recognized discretion not to annul even when a basis for such action is found under Article 52(1) (without distinction among the various sub-grounds).[21]

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[14] Reply, ¶¶13-22.

[15] Reply, ¶20 (citing at fn. 25 to cases in which the Respondent indicates that such a finding inevitably resulted in annulment in whole or in part).

[16] Tr. 1:10:14-15:18.

[17] C-M, Section III; Rej., Section II.B.

[18] C-M, ¶62 (citing multiple authorities); Rej., ¶¶9-10.

[19] C-M, ¶63 (citing to *Tulip v. Turkey*, **RL-149**, and Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press (Second Edition, 2009) **CL-276** ("Schreuer"). Claimants' Opening Statement on Annulment at the Hearing, Slide 19, citing to *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, May 1, 2018, **RL-157**, ¶¶84-85.

[20] C-M, ¶64.

[21] C-M, ¶65; Rej., ¶10.

99. Turning to Article 52(1)(e) of the ICSID Convention in particular, the Claimants, citing Professor Schreuer, caution that this ground for annulment represents not only the easiest ground for a party to invoke but also the ground most at risk of crossing over into an appeal.[22] They therefore argue, citing *Vivendi I v. Argentina* and other authorities, that annulment under Article 52(1)(e) should only occur in a clear case, where the failure to state reasons leaves the Tribunal's decision essentially lacking in rationale and the point is necessary to the decision.[23] As will be discussed further *infra* in connection with the second ground for annulment put forward by Albania, they urge the committee to seek to find consistency in an award, rather than searching for its "inner contradictions".[24]

100. They dispute that the so-called *MINE v. Guinea* test (which they also assert has been selectively presented by the Respondent) represents the touchstone for assessing claims under Article 52(1)(e), asserting that the "point A to point B" construct highlighted by the Respondent is merely intended to capture the minimum standard of intelligibility, and that the test is more correctly characterized as a "total absence of reasons for one of the tribunal's decisions, making it unintelligible".[25]

101. Further, they criticize the Respondent's framing of the decisions at issue as requiring "reasons for reasons" rather than "reasons for decisions".[26] They emphasize that *ad hoc* committees should not look at the adequacy or correctness of a tribunal's reasoning under Article 52(1)(e), but simply its intelligibility.[27] Finally, they submit that there is no prescribed manner in which a tribunal need articulate its reasons, and that *ad hoc*

[22] C-M, ¶68, citing Schreuer, **CL-276**.

[23] C-M, ¶71, citing *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, **CL-273** ("*Vivendi I v. Argentina*").

[24]The language is from *TECO v. Guatemala*, **RL-153**, ¶102.

[25] Rej., ¶¶19-21.

[26] Rej., ¶25 (citing multiple authorities). See also Claimants Opening Statement Slides, at 32, citing, *inter alia*, to *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, **RL-151**, ¶334 ("*EDF v. Argentina*") ("…a tribunal is required only to state the reasons for its decision, not to give reasons for each and every one of those reasons").

[27] C-M, ¶¶73-76.

committees can review not only the award or decision of the tribunal in question as a whole, but also the record on which it was based, in order to understand the tribunal's decision.[28]

102. These submissions were emphasized and explained further at the hearing both in general and in terms of the specific grounds for Albania's Application.[29]

B. THE COMMITTEE'S ANALYSIS

103. In this section of its decision, the *ad hoc* Committee will deal only with the overarching question of the standard of interpretation of Article 52(1)(e), and will leave to subsequent sections of this Decision the application of the standard to the specific aspects of the Award that have been cited by the Respondent as deficient. The Committee has carefully considered the submissions of the parties, both in their written memorials and at the hearing, regarding the scope and interpretation of Article 52(1)(e), whether or not explicitly set forth in this decision.

104. There is no dispute regarding the basic framework for the application. Article 52(1) of the ICSID Convention permits a party to request annulment on five grounds, the last of which, in subparagraph (e), is "that the award has failed to state the reasons on which it is based".[30] This provision corresponds to the second part of Article 48(3) of the Convention, paragraph (3) of which requires that "the award shall deal with every question submitted to the Tribunal, and shall state the reasons on which it is based".[31] The Arbitration Rules implement the requirement of Article 48(3), stating that "[t]he award…shall contain

[28] Rej., ¶¶27-28. See also Claimants' Opening Slides at 27, citing to *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, May 29, 2019, **CL-288**, ¶209 ("*Teinver v. Argentina*"); *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, **CL-277**, ¶179(1) ("*Rumeli v. Kazakhstan*"); and *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee, March 1, 2011, **CL-279**, ¶205 ("*Duke v. Peru*").

[29] Tr. 1:122:21-131:7; 2:50:13-54:1.

[30] ICSID Convention, Regulations and Rules (2006), Convention Art. 52(1)(e), **REA-004**.

[31] ICSID Convention, Regulations and Rules (2006), Convention Art. 48(3), **REA-004**.

(1)…the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based".[32]

105. At the outset, the Committee notes its agreement with the parties that the ICSID Convention favors the finality of awards and provides only limited exceptions to that principle in the interest of fundamental procedural integrity. The Committee is also in full agreement with the position, not disputed by the parties at least in principle, that annulment is not an appeal. Indeed, Article 53 of the ICSID Convention makes clear that there are no rights of appeal against awards rendered pursuant to the Convention and that the only remedies are the ones set forth in the Convention itself.

106. This point has particular force when the ground for annulment is a failure to state reasons under Article 52(1)(e). In the Committee's view, *ad hoc* committees must be especially cautious when considering this ground for annulment not to venture into territory that would implicate an appeal, for example, by requiring the examination of the adequacy or correctness of the reasoning of the Tribunal in rendering the Award. The Committee considers well-founded the admonition of Professor Schreuer that the risks of crossing the line into impermissible territory are greatest with applications for annulment that rely on Article 52(1)(e).

107. The Claimants have argued for a narrow application of the 52(1)(e) exception. But the Committee questions whether characterizing the standard as "narrow" versus "broad", or the threshold for annulment as "high" versus "low" provide much assistance in this context. Given the undisputed fact that annulment in the ICSID system is an exceptional remedy, running contrary to the principle of finality, it seems clear to the Committee that all of the grounds for annulment, including Article 52(1)(e), need to be strictly construed in light of their fundamental purpose, on which the parties agree, of safeguarding the fundamental procedural integrity of the proceedings. If the principle of finality is to be set aside, the basis for doing so should be clearly identifiable in one or more of the relevant grounds for annulment, with doubts resolved in favor of the arbitral tribunal.

[32] ICSID Arbitration Rules, Art. 47(1)(i), **REA-004**.

108. Having said this, Article 52(1)(e) presents specific challenges in both interpretation and application. As already noted, it presents particular risks of crossing into the terrain of appeal.

109. Although the parties have argued extensively about the standard, the Committee finds the authorities put forward by the parties in many respects in broad agreement on how applications under this provision should be approached. The *MINE v. Guinea ad hoc* committee, on whose decision the Respondent so heavily relies, spoke of the requirement to state reasons as a "minimum requirement" that is not satisfied by "contradictory or frivolous" reasons.[33] *Adem Dogan v. Turkmenistan*, another case cited by the Respondent, spoke of reasons that are "unintelligible or contradictory or frivolous" as well as absent.[34]

110. In *TECO v. Guatemala*, another case on which the Respondent relies, the *ad hoc* committee indicated that

> annulment of an award for failure to state reasons can only occur when a tribunal has failed to set out the considerations which underpinned its decision in a manner that can be understood and followed by a reader. Article 52(1)(e) may not be used so as to obtain the reversal on the merits of an award for allegedly providing incorrect or unconvincing reasons.[35]

"Intelligibility"—i.e., the ability to understand and follow the reasoning of the Tribunal—is thus a key touchstone.[36]

111. At the same time, it is clear *ad hoc* committees should not impose a particular mode of expression on tribunals, but should defer to their chosen way of expressing the motivation for their decisions. *Wena Hotels v. Egypt*, a case frequently cited in annulment decisions,

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[33] *MINE v. Guinea*, **RL-141/RAA-012**, ¶5.09.

[34] *Adem Dogan v. Turkmenistan*, **RL-150**, ¶262 (quoting *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014, **RL-147**, ¶202 ("*Alapli v. Turkey*")).

[35] *TECO v. Guatemala*, **RL-153**, ¶87.

[36] *See, e.g., AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012, **CL-280**, ¶17 ("*AES v. Hungary*") ("the ordinary meaning of a failure to state the reasons on which the decision is based is the absence of reasons or a presentation which is unintelligible in relation to the decision thus equating a lack of reasons".)

including the *TECO v. Guatemala* decision on which the Respondent relies, stated as follows:

> Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.[37]

112. As the Respondent has pointed out, however, *ad hoc* committees have cautioned that reasons cannot be constructed in circumstances where they cannot be reasonably inferred.[38]

113. *Vivendi I v. Argentina*, another oft-cited case, also provides helpful guidance on the interpretation and application of Article 52(1)(e):

> Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.[39]

114. As noted above, although contradictory reasons have been cited as a basis for annulment, *ad hoc* committees have urged caution in assessing allegedly conflicting reasons. It has been emphasized that a contradiction is not different in principle from a wrong or inadequate reason, neither of which gives rise to annulment, unless the contradiction is so fundamental that the reasons essentially cancel each other out, resulting in an absence of

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[37] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award, February 5, 2002, **RL-142**, ¶81. *See also id.*, ¶83: "The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision".

[38] *Adem Dogan v. Turkmenistan*, **RL-150**, ¶263.

[39] *Vivendi I v. Argentina*, **CL-273**, ¶64.

reasons.[40] In the words of the tribunal in *TECO v. Guatemala*, an annulment committee "should prefer an interpretation which confirms an award's consistency as opposed to its inner contradictions".[41]

115. Multiple authorities have also emphasized the need to look to the totality of an award to understand the motivation of a decision, and not just particular parts.[42]

116. These authorities provide substantial guidance to this Committee in approaching its task. But they do not resolve all issues regarding the legal standard that this Application requires the Committee to confront. In particular, the parties have disagreed strongly on the issue of how far a tribunal needs to go in stating reasons. Stated somewhat differently, they have disagreed as to the analytic unit to which the "reasons" requirement should apply.

117. The Respondent has argued, both in its written submissions and at the hearing, that anything outcome-determinative, even "sub-issues" such as the components of a damages calculation which have a material impact on the damages awarded, must be accompanied by reasons.[43] The Claimants, in contrast, have pointed to authorities indicating that the "reasons" requirement applies only to the ultimate decisions of a tribunal,[44] criticizing the Respondent for seeking to require that there be "reasons for reasons" and even "reasons for reasons for reasons".[45]

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[40] *Rumeli v. Kazakhstan*, **CL-277**, ¶82.

[41] *TECO v. Guatemala*, **RL-153**, ¶102 (citing *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, **RL-143** ("*CDC v. Seychelles*")).

[42] *E.g., Teinver v. Argentina*, **CL-288**, ¶209.

[43] Mem., ¶33 (citing to *Adem Dogan v. Turkmenistan*, **RL-150**, ¶262); Reply, ¶63 (citing *TECO v. Guatemala*, **RL-153**, ¶¶135, 138; *Tidewater v. Venezuela*, **RL-155**, ¶¶191-193; and *MINE v. Guinea*, **RL-141/RAA-012**, ¶¶6.99-6.108); Tr. 1:82:6-10; 1:84:24-85:17; 1:86:15-87:06.

[44] *See, e.g.,* C-M, ¶¶3, 25 (citing to *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, May 19, 2014, **CL-284**, ¶141 ("*SGS v. Paraguay*"); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, January 24, 2014, **C-283**, ¶158 ("*Impregilo v. Argentina*"); *EDF v. Argentina*, **RL-151**, ¶151; and *AES v. Hungary*, **CL-280**, ¶111), 98-100. *See* Tr. 1:111:19-112:01; 1:128:8-131:7 (citing, *inter alia*, to *Alapli v. Turkey*, **RL-147**, ¶120).

[45] C-M, ¶¶98-100; Rej., ¶¶3, 25; Tr. 1:140:15-21; 1:141:9-14; 1:142:1-143:20.

118. Notwithstanding the submissions of the Claimants to the contrary,[46] in the view of the Committee, the text of the ICSID Convention and the Arbitration Rules are not as clear as might be desirable in relation to this issue. Article 48(3), to which both parties have referred in their submissions, states that:

> (3) The award shall deal with *every question* submitted to the Tribunal, and shall state the reasons upon which *it* is based [emphasis added].

119. But while thus requiring the award to "deal with" (notably, a term different from "decide") every question, the Convention does not make it an annullable error for an award not to state reasons for every question that is before a tribunal. Article 52(1)(e) of the Convention is to some extent the analogue to Article 48(3), as the *MINE v. Guinea* committee has pointed out.[47] But Article 52(1)(e) only provides for a right to seek annulment in relation to the second clause of Article 48(3), the requirement for the award to state reasons, and not in relation to the first part, the requirement for it to deal with "every question". This would seem to indicate that a failure to deal with every "question" is not annullable error,[48] and further, that the "reasons" requirement does not attach to every question. Indeed, a close textual reading of both Articles 48(3) and 52(1)(e) indicates that the requirement to state reasons and the right to seek annulment for a failure to state reasons, both relate back to the award.[49] The components of the award would seem to be the questions submitted for decision, as distinct from every issue or argument raised by the parties in the proceedings.

120. In contrast to the Convention provisions, Rule 47(1)(i) refers to "the *decision* of the Tribunal *on every question* submitted to it, together with the reasons on which *the decision* is based". This indicates that the "questions" are the key unit to which the "reasons" requirement pertains.

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[46] *Cf.* Tr. 1:128:4-130:6.

[47] *MINE v. Guinea*, **RL-141/RAA-012**, ¶5.07.

[48] *See MINE v. Guinea*, **RL-141/RAA-012**, ¶¶5.10-5.13.

[49] As observed by the *MINE v. Guinea* committee, the failure to deal with a question can give rise to a right for supplementation of the award, but not annulment. *MINE v. Guinea*, **RL-141/RAA-012**, ¶¶5.10-5.13.

121. A number of *ad hoc* committees also appear to have focused on the "questions" as the relevant unit. Because these decisions focus on the first part of Article 48(3), however, they do not fully grapple with the second part, which relates to reasons.

122. The *Alapli v. Turkey ad hoc* committee, for example, viewed the obligation to deal with "every question" under Article 48(3) broadly, stating that:

> Article 48(3), on the other hand, refers to the tribunal's obligation to "*deal with*" "*every* question" submitted to it when rendering an "award". It is the *ad hoc* Committee's view that Article 48(3) of the ICSID Convention refers to the tribunal's obligation to deal with, either directly or indirectly, the parties' *heads of claim* within its award.[50]

123. The *EDF v. Argentina ad hoc* committee, focusing on Article 48(3), defined the term "question" more broadly:

> Nevertheless, Article 48(3) requires only that a tribunal decide every *question* submitted to it. A "question" within the meaning of Article 48(3) is an issue which must be decided in order to determine all aspects of the rights and liabilities of the parties relevant to the case at hand.[51]

124. But even in relation to this formulation, the *EDF v. Argentina ad hoc* committee expressed some limitations, going on in the same paragraph to state:

> In making its case in relation to such a question, a party may advance several distinct arguments and refer to one or more items of evidence and legal authorities in support thereof. A tribunal is not required to rule separately on each argument of law or point of fact on which the parties are in disagreement, so long as it decides the question to which those arguments relate. What does, or does not, constitute a question that has to be decided is an objective matter and not one which can be shaped by the way in which a party chooses to put its case or the emphasis which it places on any particular point.[52]

[50] *Alapli v. Turkey*, **RL-147**, ¶120.

[51] *EDF v. Argentina*, **RL-151**, ¶346.

[52] *EDF v. Argentina*, **RL-151**, ¶346.

It thus emphasized that what is a "question" is not simply a matter of pleading but an objective one.

125. The *Duke v. Peru ad hoc* committee likewise focused on the term "question". Picking up on the *MINE v. Guinea* formulation, it characterized "Point A" as the question for determination, and "Point B" as the conclusion on that question, and negated any obligation on the part of tribunals to elaborate. It stated:

> This set of reasoning steps…very well explains how the Tribunal got from point A (the question for determination) to point B (its conclusion on the point). The Committee accepts that the Tribunal does not cite legal authorities or passages from the expert evidence in support of its reasons. But, as the *Soufraki* Committee pointed out, 'a tribunal may give reasons for its award without elaborating the factual or legal basis for such reasons.' [53]

126. Multiple *ad hoc* committees have disclaimed a need for tribunals to express reasons for reasons.[54] This also strongly implies to this Committee that the unit of analysis does not mean every sub-issue that may be raised by the parties' arguments as matters of either fact or law, as other *ad hoc* committees have concluded.

127. For example, the *ad hoc* committee in *Tza Yap Shum v. Peru* negated any need for a tribunal to address every argument or piece of evidence, although it did highlight the issue of "outcome-determinative" evidence:

> Article 52(1)(e) of the ICSID Convention does not require than an arbitral tribunal explains itself in respect of each piece of evidence adduced by either party which is not outcome determinative or to give reasons for preferring some evidence over other evidence. Rather, the award has to enable the reader to see the reasons upon which the award itself is based.
>
> […]

[53] *Duke v. Peru*, **CL-279**, ¶217.

[54] *E.g.*, *Duke v. Peru*, **CL-279**, ¶205; *SGS v. Paraguay*, **CL-284**, ¶141; *Impregilo v. Argentina*, **CL-283**, ¶158.

> [T]he obligation to provide reasons does not require that a detailed answer be given to each of the parties' arguments [emphasis added].[55]

128. Other decisions of *ad hoc* committees have likewise focused the need for reasons on "outcome determinative" questions.[56] In *Adem Dogan v. Turkmenistan*, the *ad hoc* committee, declining to annul, noted that the tribunal had "properly stated the reasons for each important step in its decision making process".[57]

129. But if it is correct that only the failure of a tribunal to give reasons for its award, and not a failure to "deal with" every question, is a basis for annulment, then the "reasons" requirement must attach to "decisions". The Committee finds it difficult to draw a line *a priori* on the question of to what "decisions" precisely the "reasons" requirement attaches. In our view, the answer is at least to some extent contextual, and ultimately best addressed in the analysis of the specific grounds on which annulment is requested.

130. Nonetheless, the foregoing strongly indicates to the Committee that the "Point A to Point B" formulation of *MINE v. Guinea* cannot be taken to mean that every finding, assumption, or legal conclusion en route to an ultimate decision, whether it relate to jurisdiction, the merits of a dispute, or the issue of quantum, must be expressed in detail. It must have boundaries. Otherwise the exercise would devolve into endless subpoints, making the drafting of awards a much more laborious task than it already is. On the other hand, the Committee doubts that only ultimate decisions need be explained. Rather, it appears to this Committee that *ad hoc* committees must strike a balance, and search for intelligibility in the award as a whole, particularly with respect to outcome-determinative questions or

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[55] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, February 12, 2015, ¶¶110, 119 (cited in *TECO v. Guatemala*, **RL-153**, ¶125). The *Rumeli v. Kazakhstan* decision on annulment, also cited by both parties, makes the point that not every piece of evidence adduced by the parties needs to be explained. **RL-277**, ¶104 ("The purpose of the reasons requirement under Article 52(1)(e) of the ICSID Convention is not to require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party, surely an excessive burden for any court or tribunal. Rather, it is to enable the reader (and specifically the parties) to see the reasons upon which the award itself is based".).

[56] *E.g., TECO v. Guatemala*, **RL-153**, ¶¶135, 138; *Tidewater v. Venezuela*, **RL-155**, ¶¶191-93.

[57] *Adem Dogan v. Turkmenistan*, **RL-150**, ¶265.

analytical units,[58] while recognizing that arbitral tribunals need discretion in how to express the motivation for their decisions.

131. Having considered the overall standard of review under Article 52(1)(e) of the Convention, the Committee now turns to an application of this standard to the three grounds for annulment put forward by Albania in its Application.

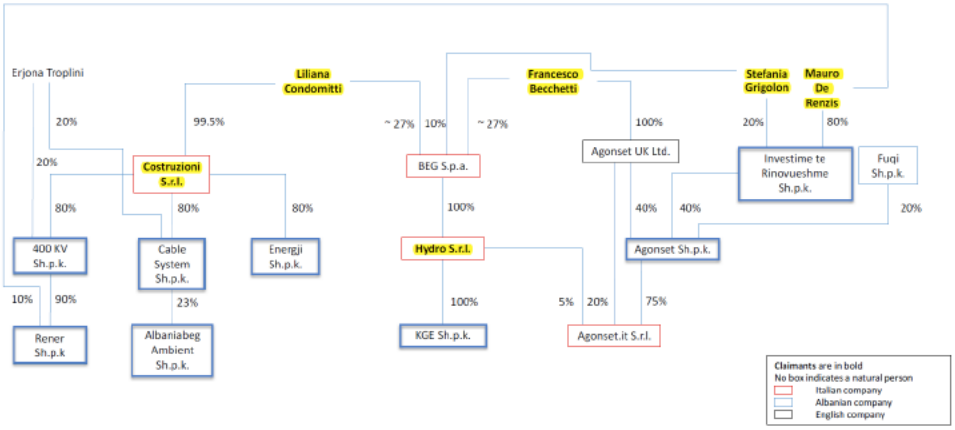
IV. FAILURE TO STATE REASONS: JURISDICTION

A. BACKGROUND

132. The first ground for Albania's annulment Application is that the Award failed to state reasons for its decision that indirect investors are protected by the BIT in question.

133. The three Claimants who were awarded damages by the arbitral tribunal were individuals, all of whose investments in an Albanian firm, Agonset Sh.p.k., were held indirectly through at least one intermediate entity.

134. The following chart from the record of the proceedings before the Tribunal, and included in the Respondent's Memorial,[59] depicts these indirect holdings:



Flowchart of shareholdings dated 10 June 2015, the date of the Request for Arbitration, submitted with the Claimants' letter dated 28 July 2017

[58] *See* ¶116, *supra.*

[59] Mem., ¶10; Award, ¶7.

135. The issue before the Tribunal was whether the BIT, which was silent on the issue of indirect investors, covered such investors. The Committee notes that this was one of multiple jurisdictional objections put forward by the Respondent—eight in total, all of which were each individually assessed and ultimately rejected by the Tribunal.

136. In its decision dealing with this jurisdictional question (in Section VI.B. of the Award), the Tribunal first set out the positions of each of the parties. Following those summaries of positions came a section entitled "The Tribunal's Analysis", comprising three paragraphs, the full text of which is set out below:

> 495. The Tribunal accepts the Claimants' analysis of the language of the BIT and agrees with the Claimants that there are no material reasons to distinguish the present case from that before the tribunals in *Mobil*, *Kardassopolous* and *Noble*, all of which reached the same conclusion.
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> 496. The Tribunal also accepts, with the tribunals in *Noble* and *Enron*, that concerns may arise if minority shareholders seek to claim for harm alleged to have been done to the company at the end of a corporate chain. However, that is not a concern that arises on the present facts. The Claimants are right to point out that the present investments come within the "two intermediate layers" said to be permissible by the tribunal in *Noble*. More importantly, the corporate structure through which the indirect investments were made in this case was established for the purpose of the Claimants investing in Albania (as described in section II.A above and discussed further in section VI.A(2) below).
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> 497. For these reasons, this objection to jurisdiction also fails [footnotes omitted].

137. With this background, the Committee turns to the positions of the parties regarding the approach taken by the Tribunal in reaching its decision on this issue.

B. SUBMISSIONS OF THE PARTIES

1. Respondent

138. The Respondent's objection to the Tribunal's decision on indirect investors can be succinctly stated: the Tribunal failed to meet the standard, particularly as reflected in the *TECO v. Guatemala* decision, for setting forth "within its analysis" the "how and why" of the reasons for its decision that the BIT protected indirect investments.[60] It thus failed in the Respondent's view in demonstrating how it progressed from Point A to Point B, *i.e.*, its conclusion.

139. The Respondent considers that the brief textual treatment of the issue appearing in the "Analysis" subsection of Section VI.B., particularly that of paragraph 495 quoted above, is insufficient as a statement of reasons.[61] The Respondent argues further that a mere summary of the parties' positions which preceded the Tribunal's analysis of this issue does not satisfy the requirement for a statement of reasons, that the reasons must be "within its [the tribunal's] analysis"[62] and that annulment must follow if a tribunal's reasoning "on a point essential to an award's outcome" is "unintelligible or contradictory or frivolous or absent".[63]

140. In the Respondent's view, the Tribunal should have undertaken a step-by-step analysis of the text of the BIT, and discussed why it concluded that the authorities on which the Claimants relied were found to be more persuasive than those on which the Respondent

[60] Mem., ¶50; Reply, ¶¶27-32. The Respondent also asserted it has been the practice of annulment committees to look only to the "analysis" section in assessing whether the requirement for stating reasons has been met. Mem., ¶¶27-32.

[61] Mem., ¶¶50-54; Reply, ¶¶27-33. As discussed below, however, at the hearing, the Respondent conceded the adequacy of paragraph 496.

[62] Citing to *TECO v. Guatemala*, **RL-153**, ¶131 ("The Committee takes issue with the complete absence of any discussion of the Parties' expert reports within the Tribunal's analysis of the loss of value claim. While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion").

[63] Mem., ¶¶33-34, citing in particular to *Adem Dogan v. Turkmenistan*, **RL-150**; Reply, ¶¶10-11.

relied.[64] The Respondent compared unfavorably the approach taken by the Tribunal in the Award with the approach taken by other arbitral tribunals, particularly in the *Poštová Banka v. Greece* case, which conducted a detailed analysis starting with the language of the treaty at issue in that case.[65] While agreeing that the statement of reasons can be brief, the Respondent harked back to the standard it submitted was articulated in the *MINE v. Guinea* case, and proffered the example of the *Standard Chartered Bank v. TANESCO* tribunal's decision as an example of a concise decision that met that test.[66]

141. The Respondent also criticized the so-called "policy" reason (described more fully below) for the Tribunal's decision set forth in paragraph 496 of the Award, which dealt with the issue of whether the Claimants' holdings in Agonset Sh.p.k. were too remote and limited to be recognized. At the hearing, however, while continuing to debate the role this paragraph played in the Tribunal's analysis, the Respondent appeared to concede that this paragraph of the Award was not deficient in terms of reasons at least in relation to the so-called "policy" issue.[67]

2. Claimants

142. The Claimants found no fault with the Tribunal's statement of reasons on the issue of indirect investors. They identified three bases for the Tribunal's decision on this point, which they described as a "textual" reason, a "precedential" reason derived from a consistent line of past decisions, and—at least initially—a "policy" reason.[68]

143. For the first two reasons, the Tribunal took the approach of adopting the Claimants' arguments as its own, an approach with which, contrary to the position of the Respondent, the Claimants considered to be perfectly appropriate and no different from adopting the *ratio* of a prior decision.[69] The Claimants disputed the position that only the section labeled

[64] Mem., ¶¶43, 50-60; Reply, ¶¶31-34.
[65] Mem., ¶¶55-59; Reply, ¶¶42-45.
[66] Reply, ¶¶37-39.
[67] Tr. 1:34:9-10; Tr. 2:18:11-19.
[68] C-M, ¶80; Rej., ¶¶33-34.
[69] C-M, ¶¶86-92; Rej., ¶¶44, 52.

"The Tribunal's Analysis" should be considered when examining whether the statement of reasons requirement is satisfied.[70] Rather, they submitted, the Award should be read in its entirety.[71] They cited to *Rumeli v. Kazakhstan* in particular for the proposition that if the tribunal summarizes the parties' arguments, this demonstrates that those arguments were duly considered, and they do not all need to be addressed by the tribunal.[72]

144. Regarding the Respondent's argument based on *TECO v. Guatemala*, the Claimants sought to dispute the Respondent's reading of "within the analysis" and distinguished that case, arguing that the problem in *TECO v. Guatemala* was the absence altogether of any discussion of the expert reports with respect to damages.[73] They dismissed the submissions of the Respondent that sought to compare the manner in which the Tribunal addressed the indirect investor issue to the approach of the tribunal in *Poštová Banka v. Greece* as not providing a basis for annulment.[74]

145. On the so-called "policy" argument, the Claimants initially criticized the Respondent for failing to set forth the full statement of the Tribunal in its Award;[75] in their subsequent submission, they backed away from the initial characterization of this argument as a policy argument, indicating that it was part of Albania's argument as to why indirect investors should not be covered by the BIT.[76]

146. Finally, they argued that the Respondent's criticism amounts to seeking "reasons for reasons", rather than reasons for the decision, going beyond what is required of tribunals.[77] The "decision" of relevance in this context, they submitted, was the ultimate conclusion of the Tribunal that the BIT covered indirect investors. The Claimants also noted that paragraph 497 of the Award indicates, by its "For these reasons", language at the beginning

[70] C-M, ¶¶82-83; Rej., ¶45.
[71] C-M, ¶¶82-83; Rej., ¶45.
[72] C-M, ¶¶105-106; Rej., ¶¶46-47.
[73] C-M, ¶107; Rej., ¶49.
[74] C-M, ¶¶110-111.
[75] C-M, ¶¶93-95.
[76] Rej., ¶¶30, 37.
[77] C-M, ¶¶97-111, citing multiple cases; Rej., ¶¶53-57.

of the paragraph, that the Tribunal believed it had articulated its reasons for its decision on jurisdiction.

147. Additional submissions made by the parties at the hearing are discussed in the section that follows.

C. THE COMMITTEE'S ANALYSIS

148. The resolution of this first ground for annulment, in the Committee's view, turns on the sufficiency of the Tribunal's approach to the indirect investor question reflected in paragraphs 495-497 of the Award, and in particular paragraph 495, as a statement of reasons. In these paragraphs, and particularly in paragraphs 495 and 496, the Tribunal dealt with several arguments that had been made in relation to the indirect investor issue by the Respondent.

149. The Committee agrees with the Claimants' observation at the hearing[78] that paragraph 497 provides evidence that the Tribunal believed it was setting forth reasons in the two paragraphs that preceded it. That subjective view is entitled to some weight, as it demonstrates that the Tribunal was at least attempting to satisfy the requirement for stating reasons. It should cause this Committee to be searching in its efforts to identify those reasons in recognition of the fact that tribunals have discretion in how they express themselves. At the end of the day, however, the standard cannot be purely a subjective one. Rather, the touchstone of fundamental procedural integrity requires that the standard be objectively discernible.

150. Paragraph 496 of the Award, dealing with the issue originally characterized as a "policy" issue, but perhaps more usefully described as a "remoteness" issue, has been accepted by the Respondent as sufficiently reasoned. And indeed, assuming *arguendo* the "reasons" requirement applies to this point (a point to which the Committee will return later in this section), this appears to the Committee to be the case. The Tribunal starts by identifying a potential concern that has been raised by the Respondent about claims by minority

[78] Tr. 1:146:20-147:14; Tr. 2:56:20-57:06.

shareholders, but goes on to explain, including by reference to legal authority, that that concern does not arise on the present facts, because of the degree of proximity of the indirect investors' holdings to the investment and because the intermediate holding structure was established for the purposes of the investment in question. The reader can readily follow the logical flow of the Tribunal's conclusion on this point and perceive the justification for the Tribunal's conclusion that remoteness is not a concern in this case.

151. This takes the Committee to paragraph 495 as the next focus of inquiry. The full text of this paragraph bears repeating:

> The Tribunal accepts the Claimants' analysis of the language of the BIT and agrees with the Claimants that there are no material reasons to distinguish the present case from that before the tribunals in *Mobil*, *Kardasspoulos*, and *Noble*, all of which reached the same conclusion.

152. Unquestionably this paragraph of the analysis is brief. It is only a single sentence, albeit a conjunctive one, as the use of the word "and" after the first clause ending with "the BIT" makes clear.

153. The Committee agrees with the Claimants that this sentence, through its conjunctive feature, expresses two different reasons: the first, a textual one, relating to the language of the BIT; and the second a precedential one, relating to the findings in other cases dealing with the same issue. In both cases, these expressed reasons refer back to the submissions of the Claimants: regarding the textual element, the Tribunal states that it "accepts the Claimants' analysis"; regarding the precedential element, it states that it "agrees with the Claimants that there are not material reasons to distinguish this case" from the others identified.

154. Undoubtedly the Tribunal could have been considerably more detailed in its analysis in multiple respects. Whether its references to the Claimants' positions are characterized as a kind of shorthand, as incorporation by reference, or as simply the Tribunal's reliance on

the prior statements of position,[79] the approach results in the stated reasons being as brief as one can imagine being possible. And in the Committee's view, it would have been preferable for the Tribunal to address in more detail the arguments that the Respondent had put forward on both of these points, as it effectively did in paragraph 496. The result would have been a more accessible and detailed discussion as to why it reached the decision that indirect investors were covered by the BIT. As a policy matter, the Committee has some sympathy with the Respondent's argument that, particularly for sovereign states having to explain to their citizens why they did not prevail, a more detailed discussion would be helpful and potentially enhance legitimacy.

155. But as set forth earlier, the Committee's task as a matter of the legal standard is not to be prescriptive as to how a tribunal should set out its reasoning. Multiple authorities have made it clear that the adequacy of a tribunal's reasoning is not a basis for annulment. The question is whether the decision meets the minimum standard of intelligibility. And on this critical point, the Committee can follow perfectly well from this sentence both how and why the Tribunal reached the initial conclusion that indirect investors are covered by the BIT.

156. The Committee does not agree with the Respondent that this was a case of a mere summary of party positions followed by an unreasoned conclusion. Rather, the Tribunal's analysis made two points, each with explicit references back to those submissions of the Claimants that it accepted and in doing so, adopted as its own. The Committee sees no bar to the Tribunal's decision to refer back to the submissions of the Claimants on the two points covered by paragraph 495 so as to effectively amplify its reasoning. The Committee agrees with those *ad hoc* committees cited earlier that have held that other parts of an award, whether or not immediately proximate, can be referenced to provide further insight into the reasoning of a tribunal on a particular question. And given that the points referenced appeared in the immediately preceding subsection of the section on indirect investor coverage, their identification presents no material hurdle for the reader to identify them as relevant, to follow the Tribunal's logic, and to give it further content. To require that the

[79] At the hearing, the Claimants accepted that an "incorporation by reference" approach could be valid, but expressed a preference for an approach that considered the Award as a whole. Tr. 2:54:08-61:06; 2:132:06-135:19.

analysis be wholly confined to the "analysis" section alone would not only be unduly formalistic but undesirable and inconsistent with the recognized ability of *ad hoc* committees to imply reasons. It would lead to even lengthier awards than are typically seen today, with a potential plethora of adverse consequences—possibly even to the overall accessibility of awards. To that extent, this Committee disagrees with the submissions of the Respondent regarding the "within its analysis" aspect of the *TECO v. Guatemala* decision, finding it difficult to reconcile with the multiplicity of decisions of *ad hoc* committees that have emphasized the need to look at the award in its entirety as well as the ability to imply reasons, and have even endorsed a resort to the record for the purpose of identifying reasons.

157. The conclusion that sufficient reasons are stated for the conclusion that indirect investors are covered is reinforced when the totality of the "Analysis" section is considered. Paragraph 496 adds an additional reason specific to this case why the Tribunal does not need to reconsider its conclusion based on text and precedent, while paragraph 497 indicates that both paragraphs 495 and 496 represent the aggregate of its statements of reasons for the conclusion that the Respondent's jurisdictional objection fails.

158. Moreover, the analysis of the indirect investor protection question must be placed in its full context within the Award, in the view of the Committee. Far from being the only jurisdictional objection with which the Tribunal had to contend, it was, as noted earlier, only one of eight covered in Section VI of the Award, along with an admissibility objection. The interest of the Tribunal in being concise in explaining its decision on this question is therefore understandable.

159. To be clear, the question at issue with respect to this first ground for annulment, in the view of the Committee, is whether indirect investors are protected by the BIT. This was the way the Tribunal framed the question in the Award, Section VI.B., both in its captioning and in the text that followed, and it was the question for decision, to which the "reasons" requirement therefore attached.

160. At the hearing, for the first time, the Respondent argued that rather than one question—the BIT's coverage of indirect investors—there were three separate sub-questions presented in

relation to the BIT's scope, including an issue, based on an argument made in its Reply on Jurisdiction, concerning the "irrevocable obligation" language of Article 1 of the BIT.[80] Given that this issue was not raised in any of the pleadings in this proceeding, the Committee ruled to exclude the slide accompanying Albania's Opening Statement that raised the "irrevocable obligation" issue, but not to exclude other references to this language in the context of the Article 1 textual issues more generally.[81]

161. The Committee considers that the "question" of relevance to this ground for the application is one question, not three: whether the BIT covers indirect investors. While there may have been multiple arguments put forward regarding this question, there was only one decision to which the reasons requirement attached. The Committee therefore considers the combination of paragraphs 495 and 496 of the Award to reflect the reasons for the Tribunal's decision on the question of indirect investment coverage.

162. In any event, although the Committee agrees with those *ad hoc* committees that have held that a tribunal is not required to address all arguments advanced by the parties in its decision on a question, in this case, the Committee is satisfied that the analysis addressed all three of the topics put forward by the Respondent. In particular, the Tribunal's reference in paragraph 495 to "the Claimants' analysis of the language of the BIT" encompasses an interpretation of the "irrevocable commitment" terminology, something the Claimants had explicitly argued in their submissions, as the Award reflects.[82]

163. In sum: the Tribunal was highly concise in its treatment of the jurisdictional question regarding the BIT's coverage of indirect investors, but the Committee finds that it was sufficient in its statement of reasons. The reasons are intelligible and in fact deal with all of the issues presented. The Committee finds no annullable error in the Tribunal's decision to accept the arguments of one party on certain points and effectively adopt them as its own. While the Committee acknowledges the arguments of the Respondent that the legitimacy of the ICSID system may be enhanced by tribunals providing more explanation

[80] Tr. 1:18:20-19:14.

[81] Tr. 2:1:9-23.

[82] Award, ¶492.

of why certain arguments put forward by the Respondent were not found persuasive, it is not for the Committee to second guess the concrete decisions of the Tribunal as to how best to reflect its reasons in the context of the entire set of jurisdictional questions before them in the proceedings below. The Committee therefore declines to annul this part of the Award.

V. FAILURE TO STATE REASONS: MERITS

A. SUBMISSIONS OF THE PARTIES

1. Respondent

164. The Respondent has made several arguments as this proceeding has progressed in relation to its allegation that the Tribunal failed to state reasons for its decision on the merits in the Award. In its Memorial, it argued that the Tribunal's analysis was contradictory in that Agonset Sh.p.k., an Albanian entity (hereinafter referred to as "Agonset Albania" or "Agonset Sh.p.k.") and its affiliate Agonset.it, an Italian entity (hereinafter referred to as "Agonset Italy" or "Agonset.it") were considered to be a single integrated operation for purposes of both jurisdiction and damages,[83] but when it came to a determination on the merits of the expropriation claim, applying a "substantial deprivation" test, the Tribunal only focused on Agonset Albania, without explaining why it did so.[84] This approach, according to the Respondent, failed the *MINE v. Guinea* test, because it made it impossible to understand how the Tribunal got from "Point A" (that the two entities were an integrated whole) to "Point B" (that to see if the investment was destroyed, only Agonset Albania was considered).[85] The converse "Point A to Point B" flaw in the merits to damages analysis was also posited.[86]

[83] Award, ¶¶564, 565-579 (jurisdiction), 839-48 (causation), 730 (damages).
[84] Mem., ¶¶63-79, particularly ¶¶71-75.
[85] Mem., ¶76.
[86] Mem., ¶79.

165. In its Reply, the Respondent first reiterated that there was no explanation in the Award for why the "substantial deprivation" test for expropriation was applied only to Agonset Albania following the determination that the investment extended to Agonset.it as well, and then reverted to an integrated approach for damages.[87] Noting the Claimants' position that inconsistency is only a ground for annulment if there is so much inconsistency that the reasons cancel each other out, the Respondent indicated it was not arguing that "the Tribunal has given contrary reasons in its award", but rather applying the *MINE v. Guinea* standard with respect to the ability to follow the logic of a Tribunal's analysis from Point A to Point B.[88] The Respondent further denied any quarrel with the findings of the Tribunal as such.[89] This was also its position at the hearing.[90]

166. In relation to the merits section of the Tribunal's Award, the Respondent argued that the references to entities by the Tribunal there were only to "Agonset", a defined term that meant only the Albanian entity.[91] In the Respondent's submissions, the key paragraphs of the decision on the merits of relevance to this issue are paragraphs 695-697, which demonstrate that the substantial deprivation determination was for Agonset Albania only.[92]

167. At the hearing, the Respondent stated that it was a misportrayal of its position for the Claimants to argue that the award adopted contradictory reasons.[93] Rather, it sought to emphasize that it was not the inconsistency itself that it challenged, but the Tribunal's failure to state reasons for its inconsistent treatment of Agonset.it in the context of jurisdiction, merits, and damages.[94] What was missing, according to the Respondent, was an explanation of "the seemingly inconsistent approaches that have been adopted by the Tribunal".[95]

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[87] Reply, ¶49.

[88] Reply, ¶¶50-52.

[89] Reply, ¶53.

[90] *E.g.,* Tr. 1:62:22-63:14.

[91] Reply, ¶54.

[92] Reply, ¶¶56-57. They also point to other parts of the merits section that in their view make it clear the Tribunal is only considering Agonset Albania, Reply, ¶58.

[93] Tr. 1:62:24-63:1 (Loewenstein); Tr. 1:63:5-7; Tr. 2:21:8-24; 2:117-120:04.

[94] Respondent's Opening Statement, PPT slide 42. *See also* note 95 *infra.*

[95] *See* Tr. 2:117:25-118:03.

168. Citing the *Adem Dogan v. Turkmenistan* Decision on Annulment,[96] it cautioned that while reasons may be implicit if they can reasonably be inferred from terms used in the decision, they should not be constructed in order to justify the decision of the tribunal.

2. Claimants

169. The Claimants' Counter-Memorial begins by arguing, citing various authorities, that only reasons that are so deeply contradictory as to cancel each other out can rise to the level of a failure to state reasons.[97] The Claimants also argue that the Committee needs to look at the merits decision in context and interpret the decision towards consistency.[98]

170. The Claimants then go on to set forth why they believe there is no contradiction when the Award is properly read, and posit that Albania simply disagrees with the Tribunal's decisions.[99] They do not dispute that the jurisdictional and damages sections of the award concluded that the two entities were integrated.[100] In their view, therefore, the only issue is whether the merits section is in contradiction, which they say it is not.[101] First, they submit that the Respondent only quoted part of paragraph 697 of the Award in paragraph 74 of its Memorial, and that both prior and subsequent paragraphs that it references, or that refer back to it, encompass both entities. They identify Section IV.J., and paragraphs 839 and 840, of the Award in this regard.[102]

171. In their Rejoinder, the Claimants reiterate the position that the bar for contradictory reasons constituting a failure to state reasons is very high—basically involving the contradictions cancelling each other out. They argue that given the finding of an integrated whole, if there was an expropriation of Agonset Albania, it necessarily entailed the expropriation of Agonset Italy.[103] They assert that the Respondent's efforts to deny it is arguing

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[96] *Adem Dogan v. Turkmenistan*, **RL-150**, ¶263. *See* PPT slide 65 and Tr. 1:14:25-15:18.
[97] C-M, ¶¶112-115, 117-118 (citing *AES v. Hungary*, **CL-280**, and others).
[98] C-M, ¶116 (citing *Vivendi I v. Argentina,* **CL-273**).
[99] C-M, ¶¶119-139.
[100] C-M, ¶¶121-128.
[101] C-M, ¶129.
[102] C-M, ¶¶129-138.
[103] Rej., ¶61.

contradictory reasons failed, and repeat their earlier position that *ad hoc* committees should seek to construe awards wherever possible in a manner that leads to consistency.[104]

172. As to the Respondent's argument that "Agonset" was a defined term repeatedly used in the expropriation section of the Award that meant only Agonset Albania, they criticize this approach as "formalistic" and not correct, given the integrated whole finding.[105] They reprise many of the points made in the Counter-Memorial on other references in the Award that they submit are relevant, and cite *Teinver v. Argentina* for the proposition that the Award needs to be considered in its entirety to assess the decision of the Tribunal.[106]

173. At the hearing, the Claimants argued that the Respondent had sought to distance itself from its initial position that the Tribunal adopted contradictory reasons, recognizing the high burden that would be the consequence of that position.[107] It maintained that the treatment of the investment was not inconsistent, that the Tribunal found an expropriation of the "investment", even if it focused principally in its expropriation analysis on Agonset Albania, and that there was no logical gap in the Tribunal's treatment of the two entities.

B. THE COMMITTEE'S ANALYSIS

174. As a threshold matter, the Committee notes that the issue presented by this ground for annulment is somewhat different than the typical question. In contrast, for example, to the jurisdictional decision just considered, which might be termed a vertical issue, the issue raised by this ground is horizontal—spanning jurisdiction, merits and damages.

175. The Respondent has conceded that each section implicates a different question, which for the Committee raises the issue of whether the same overall considerations apply when the

[104] Rej., ¶¶62-65. *See CDC v. Seychelles*, **RL-143**, ¶81; *OI European Group B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/25, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela, December 6, 2018, **RL-158**, ¶319; *Alapli v. Turkey*, **RL-147**, ¶201.

[105] Rej., ¶¶66-78.

[106] Rej., ¶78.

[107] Tr. 1:178:02-179:13.

issue is a horizontal rather than a vertical one. For the reasons expressed below, however, this issue may not need to be reached.

176. Whether the issue on annulment is possible inconsistency between the merits decision, on the one hand, and the jurisdiction and damages decisions, on the other, or a gap in relation to the merits analysis, as the Respondent now prefers to argue, the issue to be confronted by the Committee is not confined to a single "question". But perhaps the central issue under either approach is what was the Tribunal's expropriation decision—was it in fact limited to Agonset Albania, or did it cover both entities, either explicitly or implicitly? Only if it was not, is there any basis for arguing inconsistency. The answer will also influence the analysis of whether there was a gap in the Tribunal's reasoning on the decision.

177. The Committee observes at the outset that the Award is not as clear as would be ideal. In particular, there is substantial inconsistency in the Tribunal's use of terminology in relation to the Agonset entities. The Committee is sympathetic to the submissions of the Respondent that once a term is defined, it should be used consistent with the definition. The Claimants have not, in the Committee's view, fully grappled with the extent to which the Tribunal's use of defined terms varies. Despite this lack of uniformity in use of terminology, the Committee is able to discern and follow the reasoning of the Tribunal.

178. The Committee finds it useful to retrace the steps of the Tribunal, beginning with jurisdiction, then turning to the issue of expropriation and finally to damages.

Jurisdiction

179. For there to be jurisdiction *ratio loci* under the BIT at issue and the ICSID Convention, the Tribunal had to find that there was an "investment" within the territory of Albania. Agonset Albania clearly met this territorial requirement, but Agonset.it, standing alone, indisputably did not.[108] Consequently, the only way Agonset.it would be covered by the

[108] Award, ¶562. Yet as the Tribunal noted, a "significant proportion of the Claimants' claim concerning Agonset is constituted by the revenues that were to be generated by Agonset.it, an Italian company". These revenues derived from advertising and exclusive broadcasting rights granted by Agonset Albania to Agonset Italy.

BIT would be if "the relationship between Agonset.it and Agonset Albania was sufficiently close for the Tribunal to treat them as one indivisible whole".[109]

180. Section VI.F. of the Award is entitled "Whether the Tribunal Lacks Jurisdiction *Ratio Loci* over Agonset". Subsection (3) of that Section is headed "Whether Agonset was an indivisible single investment in the territory of Albania".

181. After reviewing the relationship between the two Agonset entities, and discussing the line of cases that had addressed this issue, the Tribunal found that the two companies "were, from the outset, conceived as an integrated whole"—the delocalized production model involving production in Albania of programming to be broadcast in the more lucrative Italian market.[110] It noted that both parties' quantum experts had considered the two entities to be "inextricably linked".[111]

182. Ultimately, the Tribunal found that the substantive integration of the two companies, not simply their economic interdependence, was what made them constitute a single investment. Paragraph 579 of the Award reflects that key conclusion on jurisdiction:

> The Tribunal also disagrees with the Respondent's claim that finding the two companies here form an indivisible single investment would lead to "wide-ranging" or chaotic results. Simple economic dependence combined with a bare contractual relationship is insufficient to show two entities are one investment for the purposes of the BIT. It is only due to the substantive integration of these two companies in the particular business model they implemented that the Tribunal finds they constitute a single investment [footnotes omitted].

183. Accordingly, the two Agonset companies were found to constitute a single "investment" for purposes of the BIT. Its reasoning was clear, although even in this section, the Committee notes some inconsistent usage of terminology in relation to the Agonset companies. Of particular note in relation to the discussion of expropriation that follows, it appears to the Committee that the term "Agonset" in the header to this section was intended

[109] Award, ¶564.

[110] Award, ¶575.

[111] Award, ¶576.

to encompass both the Albanian and Italian entities. The Tribunal therefore decided that, due to the substantive integration of these two companies in the particular business model they implemented, they constitute a single investment in the territory of Albania.[112]

Expropriation

184. From the outset, many of the Tribunal's references to entities by name in its expropriation analysis were to "Agonset".[113] The Respondent is correct in pointing out that this is a defined term set forth in a table preceding the text of the Award that means Agonset Sh.p.k., while "Agonset.it" is defined to mean Agonset.it S.r.L. There is no defined term that comprises the two entities. As set forth both above and below, however, it appears that the Tribunal used the term "Agonset" in a broader sense in a number of instances, and in a narrower sense in others. Moreover, the Tribunal also used the term "investment" or "investments" in a number of instances as a key term tying into the requirements of the BIT, rather than just relying on the entity names.

185. At the beginning of the discussion of whether "Agonset" had been expropriated in Section VII.E of the Award, the Tribunal quoted Article 5 of the BIT dealing with expropriation, paragraphs 1 and 2 of which both use the term "investments".[114] Because of its finding that the Claimants' investment was "completely and permanently destroyed", however, it appears that the Tribunal only applied what it considered to be the "more onerous" standard of Article 5(2).[115]

186. In discussing the takings issue in paragraphs 686 *et seq*. of the Award, the Tribunal referred to "Agonset" in a context that indicated it was discussing the Albanian entity, and at other times referred to "Agonset Albania".[116] This is further illustrated in this section by the

[112] Award, ¶¶575, 578, 579 and 580.

[113] *See* Header to Award, ¶666

[114] Award, ¶666 (paragraph 1 refers to "investments covered by this Agreement", while paragraph 2 covers "investments of investors of one of the Contracting Parties").

[115] Award, ¶¶682-683.

[116] *See, e.g.,* Award, ¶¶686-690, 693-95 (referencing "Agonset" in the context of actions against Agonset Albania); but see Award, ¶¶690a, b, and c, and 691 (referencing "Agonset Albania").

reference to Agonset.it as "Agonset Italy"[117], clearly to distinguish it from Agonset Albania referred to in the previous subparagraph.[118]

187. But it also used the term "investment" or "investments" in key places, including in relation to the "substantial deprivation" test it applied to determine whether a violation of Article 5 had occurred. For example, in paragraph 692 of the Award, the Tribunal stated as follows:

> When considering these matters, a tribunal must focus on the substance of the effect of the impugned measures on *the protected investments*. As Dolzer and Schreuer point out, "In recent jurisprudence, the formula most often found is that an expropriation will be assumed in the event of a 'substantial deprivation' of an investment". If the Tribunal accepts the Claimants' contention that the practical effect of the measures of which they complain was to deprive them of the substantive value of their *investments*, this will be sufficient [emphasis added; footnote omitted].

188. Paragraph 697 of the Award, a section emphasized by the Respondent, and the concluding paragraph of the Tribunal's takings analysis, used the term "Agonset" but also used the term "investments":

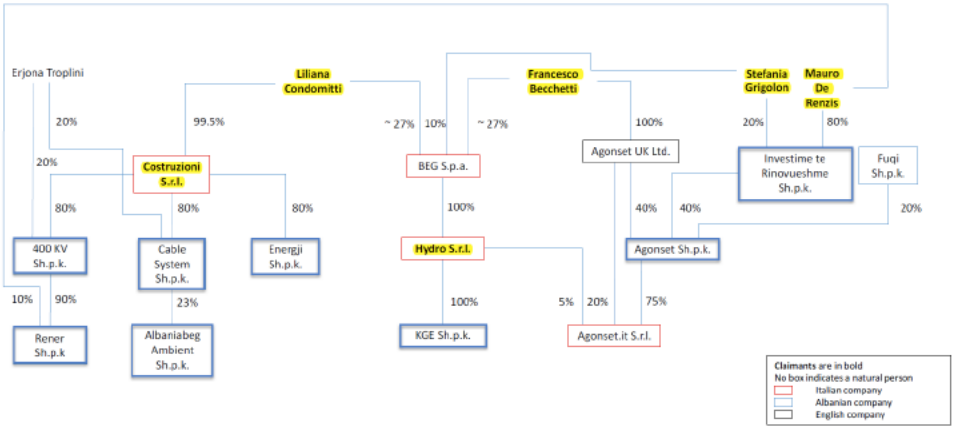
> The Tribunal therefore finds that there was a permanent deprivation of the substantial value of Mr. De Renzis', Mr. Becchetti's, Ms. Grigolon's and Hydro's *investment* in *Agonset*. The deprivation developed over a period of time and crystallised on or around 5 June 2015 with the Seizure Decisions. At that point, access to finance was effectively cut off and so continuation of the *investment* became effectively impossible. This expropriation occurred as the culmination of a series of actions by the State which harmed the *investment* directly or indirectly by targeting its supporting shareholders that are described in section IV.J above [emphasis added].

189. Notably, the Tribunal's reference in this paragraph in relation to "*investment in Agonset*" is to the investments of "Mr. De Renzis', Mr. Becchetti's, Ms. Grigolon's and Hydro." The import of the Tribunal's inclusion of Hydro is, in the Committee's view, telling. As a chart

[117] Award, ¶691f.

[118] Award, ¶691e.

at paragraph 7 of the Award, reproduced again below, makes clear, Hydro is not a shareholder in Agonset Albania. Rather, it is only a shareholder in Agonset.it.



Flowchart of shareholdings dated 10 June 2015, the date of the Request for Arbitration, submitted with the Claimants' letter dated 28 July 2017

190. This fact ultimately prevents it from receiving a damages award. In Section VI.C.(7)b. of the Award, the Tribunal, in a section entitled "Proof of the Claimant's interest in Agonset" [sic], determines the direct and indirect ownership interests of the Claimants in both Agonset Albania and Agonset Italy.[119] Consistent with the earlier chart, Hydro is identified in this section as holding only a 5% interest in Agonset Italy.[120] But Agonset Italy was determined by the Claimants' damages expert to have a negative value.[121]

191. Leaving damages aside, given this shareholding structure, while the references to the three individual shareholders in paragraph 697 of the Award relate to Agonset Albania, the reference to Hydro in that paragraph can only be seen as relating to Agonset Italy. Coupled with the use of the term "investment" in that same paragraph in its key conclusion, it signifies to the Committee that, despite the inconsistent use of terminology, the Tribunal did in fact conclude within the expropriation section that the expropriation extended to what it had previously determined to represent the full scope of the investment in the

[119] Award, ¶¶870-877 (note that although the section refers to "Agonset" in its header, the discussion references both entities).

[120] Award, ¶870.

[121] Award, ¶880.

territory of Albania, namely Agonset Albania and Agonset Italy, operating as an "indivisible whole".[122]

192. This conclusion is reinforced in subsequent sections of the Award, when the Tribunal turns to damages.

Damages

193. The Award's section on damages does more than simply calculate the amount of damages on the basis of the combined companies—an approach, it has been noted, that had the effect of reducing, not increasing, the damages payable to the Claimants.[123] In several places, the Tribunal describes its earlier decision on expropriation in a way that leaves little doubt that it considered that it had determined that both companies had been expropriated.

194. In the section on standard of compensation, for example, the Tribunal stated: "In this case, the Tribunal has found that the cumulative nature of the Respondent's breaches destroyed *the Claimants' investments*" [emphasis added].[124]

195. In turning to the issue of causation, after citing from the award in *Crystallex v. Venezuela* to the effect that there must be shown to be a "sufficient causal link between the treaty breach by th[e] state and the loss sustained by the claimant" for compensation to be due,[125] the Tribunal characterized its findings with respect to the treaty breach as follows:

> The Tribunal has found in section VII.E above that through a culmination of various actions the Respondent has completely destroyed the value of the Agonset companies. In the Tribunal's view, where a tribunal finds that there has been an expropriation or total destruction of an investment, it is unnecessary to consider the causal link between each specific act and claimed loss, rather it is

[122] The Committee agrees with the Claimants that it is understandable that much of the conduct of the State referenced in this Section is focused on Agonset Albania, as it would be the entity that is physically based in Albania that would be the direct target of that conduct. Tr. 2:86:14-18; 2:114:01-12.

[123] *See, e.g.,* Award, ¶866 (chart showing that the combined value of the Agonset companies is substantially less than the value of Agonset Albania alone).

[124] Award, ¶826.

[125] Award, ¶837.

> merely a matter of compensating the claimant for the market value of its investment [footnotes omitted].[126]

196. It goes on to say in the next paragraph:

> In these circumstances, and given that the Claimants' only claim is for the value of Agonset, the Tribunal considers that the causal link between the aggregate actions of the Respondent and the destruction of the Agonset companies is clear, as explained in paragraphs 695 to 697 above. The only question that therefore remains is how the fair market value of the destroyed investments is to be quantified.[127]

197. These paragraphs, referring to the "Agonset companies" having been destroyed, and the "investment" and the "destroyed investments", coupled with the explicit reference to Section VII.E (the expropriation section), are strong evidence in the view of the Committee that, notwithstanding the inconsistent entity references in the expropriation section (and indeed, in the Award more generally), the Tribunal believed it had decided in its merits analysis that there had been an expropriation of the Agonset companies.

198. This cannot be dismissed, as the Respondent seeks to have the Committee do, simply because these references appear in the section on damages and are made in the context of causation, which is a separate element. The description of the expropriation finding in paragraph 839 sets up the causation issue, but the description stands on its own as a confirmation of the decision on expropriation in the previous Section of the Award.

199. There is nothing problematic with treating it as such. As noted earlier, it is incumbent on the Committee to find the Award's reasoning and logic by reading it in its entirety, and to read the Award in a way that seeks consistency rather than an award's inner contradictions.

200. To be sure, the Tribunal could have been clearer and more consistent in its usage of terminology and more explicit about its findings in the expropriation section (and elsewhere in the Award). But there is no gap in the logic. Once there was a finding that the two companies constituted an indivisible whole and therefore represented "the

[126] Award, ¶839.

[127] Award, ¶840.

investment" in the territory of Albania, a finding of a substantial deprivation of Agonset Albania would, as was pointed out at the hearing, necessarily imply the destruction of Agonset Italy as an integral part of that investment. Thus, to the extent the expropriation decision is not as explicit as it could have been on that point, the Committee considers that that finding would at least be implicit and logically follows from the earlier finding. And it may well be that the Tribunal considered that it was being explicit, including through the reference to Hydro in paragraph 697, as well as the bookending of the expropriation section with references to the "investments". In either event, the decision of the Tribunal on expropriation is the same: both companies, which together constituted but a single "investment", were effectively expropriated. Whether the finding was implicit or explicit is therefore ultimately a distinction without a difference for present purposes.

201. Accordingly, the Committee concludes that the Award a) does not suffer from inconsistency rising to the level of annullable error in its decisions regarding jurisdiction and the merits, or between the merits and damages, by virtue of its decision on expropriation, nor b) does it fail to state reasons for its decisions, particularly its decision on expropriation. Stated somewhat differently, the Committee, reading the Award as a whole, does not find any logical gap in the reasoning of the Tribunal by virtue of its treatment of the issue of expropriation. Using the *MINE v. Guinea* test favored by the Respondent, notwithstanding the failure of the Tribunal to adhere consistently to its defined terms in the Award, it is entirely possible for the reader to follow the reasoning of the Tribunal from jurisdiction to expropriation to quantum.

202. To be sure, the facts recited in Section VII.E. of the Award relate almost exclusively to Agonset Albania. As the Claimants submitted at the hearing,[128] this is only natural given the location of Agonset Albania within the territory of Albania. It therefore does not undermine the conclusion that the substantial deprivation test was ultimately applied to both Agonset companies.

203. Given the Committee's analysis, there is no reason to consider further any argument based on alleged inconsistency between the jurisdictional and merits sections, or between the

[128] *See, e.g.,* Tr. 2:86:14-20.

merits and quantum section. We also therefore do not need to consider any additional "horizontal" issues.

204. Based on the Committee's findings as set forth above, this ground of the Application therefore must also fail.

VI. FAILURE TO STATE REASONS: QUANTUM

A. SUBMISSIONS OF THE PARTIES

1. Respondent

205. The Respondent's final ground for annulment is that the Tribunal failed to state reasons in determining damages. Specifically, the Respondent takes issue with the Tribunal's assumption in its damages calculation of a projected audience share of Agonset.it of 3% by 2020 for the 2015-2020 period, which it says was a critical element of the discounted cash flow (DCF) methodology adopted by the Tribunal.[129] This assumption was not only fundamental but material to the damages calculation, since every 1% of market share reflected approximately 30 million EUR of calculated damage.[130]

206. The Respondent points out that neither party's quantum experts put forward the precise figure the Tribunal ultimately used: the Claimants' expert projected audience share growth from a starting point of 0.1% in 2015 to 4% in 2020, while the Respondent's expert calculated that it would be 0.5% to 2.0% under certain circumstances during this period.[131] The Respondent also highlighted what it deemed certain factual errors of the Tribunal which it said cast doubt on the strength of the Tribunal's reasoning.[132]

[129] Mem., ¶¶81-82.
[130] Reply, ¶61.
[131] Mem., ¶¶83-88.
[132] Mem., ¶¶92-94; Reply, ¶¶67-70.

207. The Respondent also criticizes the Tribunal for not telling the reader how it got to a starting point of 0.1% (which it terms "Point A"),[133] for its "Point B" annual rate of growth assumption of 0.74%,[134] and for "Point C", the selection of La7 as the comparator channel.[135]

208. Besides invoking the *MINE v. Guinea* test in connection with its Point A to B to C argument, the Respondent relies heavily on the *TECO v. Guatemala* decision[136] and others for the proposition that any element of a decision, including significant elements of a damages calculation that is outcome-determinative, must be addressed with reasons.[137]

2. Claimants

209. The Claimants argue that the Tribunal was exhaustive in stating its reasons on damages, and criticize Albania's application on this issue as legally flawed and based on a misreading of the Award. In the Claimants' view, the reasons requirement only attaches to the ultimate decision of the Tribunal on damages and not every assumption that is made along the way to the final determination.[138] After reviewing each issue or step considered by the Tribunal in its damages calculation,[139] from the standard of compensation, to the valuation date, to causation, to the standard of proof, the valuation method, the application of the chosen method, the allocation of value among the Claimants, interest, and double recovery, the Claimants go on to argue that the Respondent is basically seeking to have the Committee second guess the decisions of the Tribunal. Citing to decisions such as *Rumeli v. Kazakhstan* and *Wena Hotels v. Egypt*, the Claimants argue that tribunals have a special degree of discretion with respect to quantum decisions and thus their decisions have to receive greater deference.

[133] Mem., ¶91; Reply, ¶¶66-70.
[134] Mem., ¶91; Reply, ¶¶71-74.
[135] Mem., ¶¶100-102; Reply, ¶¶75-76.
[136] Mem., ¶81; Reply, ¶¶61, 63.
[137] Reply, ¶63.
[138] C-M, ¶¶140-141.
[139] C-M, ¶¶143-156.

210. Focusing on the specific audience share issue, the Claimants assert that the Award makes it clear that the Tribunal weighed the competing evidence, made an assessment of that evidence on balance, and explained its findings on the appropriate starting point, rate of growth and comparator. This is not, in the Claimants view, comparable to what the *ad hoc* committee confronted in the *Rumeli v. Kazakhstan* case, where there were no reasons expressed for the Tribunal's damages decision.[140]

211. The Claimants argue that the relevant "decision" here was the damages award, and that the Respondent's quarrel is with the reasons for that decision, not the decision itself, which is not a ground for annulment.[141] It also took issue with the Respondent's assertion that the Tribunal made factual errors, and with their relevance to the issue before the Committee.[142]

B. THE COMMITTEE'S ANALYSIS

212. The Committee finds itself in agreement with the Claimants as well as other *ad hoc* committees such as *Rumeli v. Kazakhstan* that, when it comes to the realm of damages, the decisions of a tribunal should be accorded a special degree of deference. This follows from the proposition that once the fact of damage has been established from the elements of breach and causation, there is a degree of inherent uncertainty in awarding damages that are forward-looking. As long as the damages are not speculative or uncertain, but proven with reasonable certainty, the inherent difficulty of proof is factored in and there is no requirement that a claimant prove its damage with exactitude.[143] If this is correct as the standard of proof, then it follows that an arbitral tribunal will likewise be engaged in a process of trying to weigh evidence, often in the form of conflicting expert opinions, to determine what it considers to have been reasonably established. The tribunal is not required to adopt a binary, take it or leave it, approach to the submissions of the parties but may—indeed, should—make its own judgments regarding the evidence that has been

[140] Mem., ¶¶166-179.

[141] Rej., ¶¶80-82, 86-89.

[142] Rej., ¶¶90-92.

[143] *Rumeli v. Kazakhstan*, **CL-277**, ¶¶136-148. This was also the position taken by the Tribunal. *See* Award, ¶742 (citing to *Lemire v. Ukraine* and *Crystallex v. Venezuela).*

submitted. In many cases it will be assessing and making judgments about the appropriateness or reasonableness of assumptions that underlie a damages calculation.

213. The adequacy or correctness of this exercise is, it is undisputed by the parties, not subject to annulment. Rather, when the application is based on a failure to state reasons, as it is here, the question is whether the analysis of the Tribunal with respect to quantum is intelligible, and capable of being followed in terms of the progression of the analysis.

214. *Ad hoc* committees have annulled awards in part when, for example, a tribunal made assumptions in calculating damages that were inconsistent with its own findings. This was the case, for example, in the *MINE v. Guinea* case on which the Respondent relies.[144] Grounds for annulment have also been found where a decision completely failed to address key evidence such as the parties' expert reports in relation to a loss of value in their analysis.[145]

215. The question of what constitutes a "decision" in the context of damages, *i.e.*, what the "analytical units" are that need to be spelled out and evaluated by means of a statement of reasons is one on which the authorities are not clear. The Claimants say it is the ultimate decision on damages. The Respondent says it must be any key outcome-determinative assumption.

216. In the view of the Committee, it goes too far to say that every issue (or sub-issue) to be decided by a tribunal that has more than a *de minimis* impact on the determination of quantum requires a statement of reasons. And yet there is some force to the argument that, where a tribunal has discretion, it should explain how it exercised that discretion, which requires spelling out the basic steps and the reasons for deciding these. As noted earlier, past decisions of *ad hoc* committees have emphasized that tribunals do not need to address every piece of evidence that is submitted by the parties (although some have underscored the need to address those pieces on which a party has placed considerable reliance), nor do they need to address every argument made by a party.

[144] *MINE v. Guinea*, **RL-141/RAA-012**, ¶6.105.

[145] *TECO v. Guatemala*, **RL-153**, ¶¶130-131.

217. What is clear to the Committee is that it needs to look at the challenged aspect of the damages determination in the context of the overall ratio of the damages award, and not in isolation. This is especially true when what is challenged is an assumption—in effect, a factual finding of a tribunal—that is then factored into an overall calculation, as is the case here.

218. In the Committee's view, it is not enough, however, that the damages section of an award be lengthy and detailed. It could be both those things and still be fundamentally contradictory, illogical or unintelligible. The touchstone, as with other aspects of an award, for the Committee is the overall intelligibility, lack of fundamental contradiction and cohesiveness of the ultimate decision on damages.

219. With the above as guidance, the Committee turns to an examination of the challenged aspects of the Award in relation to damages.

220. After discussing the standard of compensation, the valuation date, and the issue of causation (reviewed above), the Tribunal in Section VIII.C(4) of the Award turned to the issue of proof, stating the following:

> In light of the above, the Tribunal considers that the Claimants must prove the existence of the *fact* of damage with sufficient certainty and then provide a reasonable basis for the Tribunal to determine the *amount of loss*. The Tribunal considers this a fair outcome considering that any difficulty that the Claimants may face in proving the amount of loss will have flowed from the Respondent's wrongdoing.[146]

221. This statement may be viewed as framing the analysis that followed, not only with respect to valuation method—from which the Tribunal concluded that it should apply the DCF method—but also with respect to the application of that method to the case before it.

222. The Tribunal recognized that in doing so, the evidence on which it had to rely was not perfect:

[146] Award, ¶845.

> The Tribunal sees some limitations in the application of the DCF method to value Agonset, namely that the 2012 Business Plan is not particularly detailed and both businesses have only been operating for a short period of time. Mr. MacGregor, a chartered accountant, says there is insufficient evidence to undertake a valuation using the DCF Method. However, the Tribunal has a mandate, having found breach of the BIT, to arrive at a valuation on such evidence as it has. The tribunal in *Kardassopoulos* drew a similar conclusion stating that "The Tribunal's duty is to make the best estimate that it can of the amount of the loss, on the basis of the available evidence. That must be done even if there is no absolute documentary proof of the precise amount lost". Further, discarding the DCF method for lack of sufficient evidence in this case would, in effect, reward a State for expropriating promising businesses shortly after their founding.[147]

223. The Respondent's submissions in this case are critical of the 2012 Business Plan referenced in this article, among other evidentiary matters.[148] But the above-cited paragraph in the Committee's view is further evidence that the Tribunal provided reasons for its overall approach to the calculation of damages, of which the issues complained of by the Respondent are a part.

224. After this initial framing, the Tribunal then goes on to apply the DCF methodology to the available evidence in this case. It accepts all of the assumptions of the Claimants' experts save two—relating to the power ratio and the audience share, which they go on to address.[149] Its assessment of the issue of audience share and its reasons for not accepting the view of the Claimants' expert at paragraphs 859 to 862 of the Award are set out in full below.

> b. Audience share
>
> 859. Mr. Rathbone projected that the audience share, under the ex-post valuation, would grow from 0.1% in 2015 to 4.0% in 2020. Mr. Rathbone based this calculation on the 2012 Business Plan and then adjusted it with appropriate public information as a reasonableness cross-check. Mr. Pasquale considered this audience share was

[147] Award, ¶848.

[148] Mem., ¶82.

[149] Award, ¶¶851-52.

> reasonable "in light of Agon Italia's programming strategy and in comparison to other channels". La7, which Mr. Pasquale considers is the most appropriate comparator to Agonset.it, was relaunched in 2002 achieving an audience share of 1.8% that year and went on to obtain an audience share of 3.2% in 2014.
>
> 860. Mr. MacGregor points out that Mr. Rathbone has not relied on Agonset's actual audience share figures in 2015 and states that extrapolating Agonset's income in 2015 over 12 months would only result in an audience share of 0.03%. Similarly, Mr. Borrell considered that an initial audience share of between 0.3 to 0.6% would be more reasonable given the estimated actual revenue by the end of 2015.
>
> 861. On balance, the Tribunal considers that a starting 0.1% audience share is reasonable. While the estimated actual revenue based on historical results for 2015 is lower, the Tribunal considers that the record shows that new channels have significant growth potential (the average audience share of Nove, Cielo and TV8 grew 0.74% audience between August 2015 and August 2016) that might not be reflected by historical results.
>
> 862. Given that the Tribunal has already found that La7 is the most appropriate comparator to Agonset, La7 only obtained an average audience share of 3.2%, and the Tribunal has concerns regarding the likely success of Agonset's programming strategy in the competitive Italian market, the Tribunal is not convinced that Agonset could achieve an audience share of 4% by 2020. The Tribunal decides that a projected audience share of 3% by 2020 should instead be used when assessing the value of Agonset.

225. In the view of the Committee, the reasoning of the Tribunal on this point is perfectly intelligible. The Tribunal weighed the evidence submitted by the parties, and reached a judgment that the submissions of the Claimants' expert on this point as to the 2020 audience share were unduly optimistic. It therefore made adjustments, something that the Tribunal clearly had the discretion to do (and something that tribunals commonly do). There is a mistake, as the Respondent has pointed out, in paragraph 860 when Mr. Borrell's initial audience share calculations are referenced. But in the Committee's view there is insufficient evidence to establish that it was a mistake that undermined the conceptual reasoning of the Tribunal to the extent of rendering it unintelligible or patently frivolous. Indeed, the context in which this mistake appears establishes for the Committee with

sufficient certainty that it was a typo, not a conceptual error. Errors of such a nature are not annullable.

226. The Tribunal ultimately was not convinced by the Claimants' evidence that Agonset (which we noted in this case again implies the combined enterprise) could achieve an audience share of 4% by 2020, and therefore reduced this number to a level that it deemed reasonable. These therefore became factual inputs to the DCF model.

227. It is not for this Committee to decide whether the numbers ultimately chosen, or the use of La7 as a comparator, were correct or not; the Committee can readily follow the reasoning of the Tribunal. Moreover, the Tribunal went on to apply its findings regarding the DCF assumption to the calculation of damages. It did not make one finding and then contradict itself by calculating the damages on a different basis. Nor did it fail to address the expert views submitted on damages.

228. Even if these damages findings were to be considered a "question" to which the reasons requirements attach, a point on which the Committee harbors doubt, the Committee considers that the award is sufficiently reasoned on the issue of audience share. It agrees with the Claimants that requiring anything more of the Tribunal than what it has done on this issue would unleash an endless cycle of reasons for reasons. It therefore finds that the Tribunal adequately stated its reasons for the damages award, including with respect to the challenged issue of audience share, and declines to annul the Award on this basis.

229. The third ground for the annulment application therefore fails as well.[150]

[150] Given the Committee's determinations on the three grounds for annulment put forward by Albania, there is no need to address the Claimants' arguments regarding the residual discretion of the Committee not to annul even if grounds for annulment are present.

VII. COSTS

A. ALBANIA'S COST SUBMISSIONS

230. In its written submissions and at the Hearing, Albania requested that the Committee order that the Claimants pay all costs and expenses of this proceeding.[151]

231. By agreement of the parties, accepted by the Committee, only cost figures were submitted following the Hearing, without any accompanying argument. Both parties provided their cost submissions on March 19, 2021.

232. Albania has submitted the following claims for legal and other costs incurred during these proceedings (excluding advances made to ICSID): USD $1,480,603.18.[152]

233. With regard to the Committee's decision on costs incurred in connection with the Provisional Stay, Albania has argued that the costs incurred by the Claimants, 25% of which the Committee determined should be borne by Respondent, are excessive and should not be fully charged to it.[153]

B. HYDRO'S COST SUBMISSIONS

234. Hydro requested that the Committee order Albania to pay, on a full indemnity basis and with interest, its legal and other costs in connection with this proceeding.[154]

235. Hydro submitted its costs in connection with the Provisional Stay on April 13, 2020, and reiterated those costs in its overall cost submission on March 19, 2021. Hydro's legal fees and expenses totaled USD $2,830,973.14, of which USD $446,497.97 were incurred in

[151] Mem., ¶105(b); Reply, ¶78(b); Tr. 2:47:21-22.

[152] This includes USD $1,283,862.50 in outside legal fees of Foley Hoag LLP, USD $ 63,078.00 in fees for the Albania State Advocate's Office, and "other costs" (unspecified) of USD $133,662.68.

[153] Albania letter of February 2, 2021.

[154] C-M., ¶180.b; Rej., ¶93.b.

connection with the Provisional Stay, and the remainder, USD $2,384,475.17, were incurred in the balance of the proceeding.[155]

C. THE COMMITTEE'S DECISION ON COSTS

236. Article 61(2) of the ICSID Convention provides:

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

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

238. In its decision on the Provisional Stay, the Committee determined that costs should follow the event, at least to some extent.[156] The Committee recognizes that such an approach is increasingly the trend in ICSID proceedings.

239. In the following paragraphs, the Committee will first address the legal and out-of-pocket costs incurred by the parties in the course of this proceeding ("costs of representation"), and subsequently address the costs of the proceeding itself, including the Committee members' fees and expenses, ICSID's administrative fees, and any direct expenses of ICSID in the proceeding ("costs of the proceeding"). In the Committee's view, these two types of costs do not necessarily raise the same issues and therefore merit separate attention.

[155] In relation to the continued stay expenses, this total amount of USD $446,497.97 was comprised of legal fees of USD $433,701.18, and costs of USD $12,796.79. In relation to the remainder of the proceeding, the total of USD $2,384,475.17 broke down into legal fees of USD $2,376,539.02 and expenses of USD $7,936.15.

[156] Decision on the Provisional Stay, ¶141.

Costs of Representation

240. In this Decision, the Committee regards the "costs follow the event" approach as an appropriate starting point in relation to the costs of representation. However, there may also be additional factors which the Committee may need to take into account and which may require some adjustment to a pure "costs follow the event" approach, in order to make an appropriate determination. The Committee acknowledges the view expressed by some other *ad hoc* committees that the costs of representation should turn on whether an application for annulment is "manifestly without merit".[157]

241. In this case, although the Committee has rejected the Application in its entirety, it does not consider that the Application as a whole was manifestly without merit. The Application was not a broad-gauged attack on the Award, but a more targeted set of claims that raised important legal and policy issues about the application of Article 52(1)(e) of the Convention. Moreover, as the Committee has noted in several places in this Decision, the Award, particularly in relation to the jurisdictional and merits grounds for the Application, was not as fully developed or consistent in its use of terminology as it ideally might have been, requiring the Committee to engage in detailed review and consideration of the issues presented.

242. Although the costs incurred by the Claimants are significantly higher than those incurred by the Respondent, the Committee does not find the time spent by counsel for the Claimants to be materially disproportionate either to the issues presented or in relation to that incurred by the Respondent, taking into account in particular the number of claimants and the evident need for review and coordination among them, as well as the need for coordination between counsel for the Claimants.

243. Given these factors, the Committee considers that giving full effect to the "costs follow the event" principle in respect of the costs of representation in this case would be inappropriate. It has determined that two-thirds of the costs of representation incurred by the Claimants

[157] *Rumeli v. Kazakhstan,* **CL-277**, ¶183; *Standard Chartered Bank v. United Republic of Tanzania,* ICSID Case No. ARB/10/12, Award, November 2, 2012, **CL-233**, ¶¶755-757.

in this proceeding other than those relating to the Provisional Stay, *i.e.*, USD $1,589,634.22, should be borne by the Respondent, with the remainder to be borne by the Claimants.

244. With respect to the costs of representation incurred by the Claimants in connection with the Provisional Stay, 25% of which the Committee determined in its Decision on the Provisional Stay should be apportioned to the Respondent, the Committee is of the view that in light of all the relevant factors (in particular the extensiveness of the briefing and the need to coordinate among the Claimants and between the Claimants' counsel), the amount is not unreasonable. It therefore does not consider it necessary to discount the number submitted by the Claimants. Accordingly, it has determined that USD $111,624.49 (25% of USD $446,497.97) should be borne by the Respondent, with the remainder to be borne by the Claimants.

245. The foregoing amounts shall bear interest at the same rate as set forth in the Award, namely, LIBOR +3%, compounded quarterly.[158] Should LIBOR cease to exist as a reference rate prior to the payment of such amounts in full, the Secured Overnight Funding Rate (SOFR) shall be substituted for LIBOR, with the remaining provisions relating to interest continuing to apply unchanged.

Costs of the Proceeding

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

Committee Members' fees and expenses	
Ms. Lucinda A. Low	68,812.50
Mr. Colm Ó hOisín	54,001.32
Dr. Jacomijn van Haersolte-van Hof	60,787.50
ICSID's administrative fees	84,000
Direct expenses	16,596.99
Total	**284,198.31**

[158] Award, ¶¶884-885.

247. The above costs have been paid out of the advances made by the Respondent pursuant to Administrative and Financial Regulation 14(3)(e).[159]

248. Accordingly, the Committee determines that the Respondent should bear all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, as well as USD $1,701,258.71 to cover the proportions of the Claimants' legal fees and expenses allocated to it as set forth above of in relation to a) the Provisional Stay and b) the remainder of the proceeding.

VIII. DECISION

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

(1) The Application is rejected;

(2) The escrow account established by the Claimants following the Decision on the Provisional Stay may be terminated and the funds therein distributed to the Claimants; and

(3) The Respondent is directed to pay to the Claimants the principal sum of USD $1,701,258.71, together with interest at LIBOR (or the SOFR as its successor reference rate in the event LIBOR ceases to exist before full payment is made) + 3% from the date hereof, compounded quarterly.

[159] The remaining balance will be reimbursed to the Applicant.

Colm Ó hOisín SC
Member of the *ad hoc* Committee

Date: 31 March 2021

Jacomijn van Haersolte-van Hof
Member of the *ad hoc* Committee

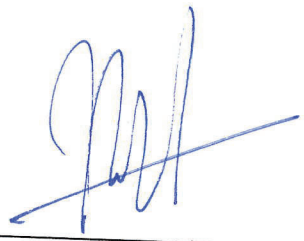
Date:

Lucinda A. Low
President of the *ad hoc* Committee

Date:

Colm Ó hOisín SC
Member of the *ad hoc* Committee

Date:



Jacomijn van Haersolte-van Hof
Member of the *ad hoc* Committee

Date: 31 March 2021

Lucinda A. Low
President of the *ad hoc* Committee

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