INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

GAMBRINUS, CORP.

Applicant

and

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

ICSID Case No. ARB/11/31
Annulment Proceeding

DECISION ON ANNULMENT

Members of the ad hoc Committee
Tan Sri Dato' Cecil W.M. Abraham, President
Ambassador Hussein A. Hassouna
Doctor Michael C. Pryles

Secretary of the Committee
Ms. Sara Marzal Yetano

Date of dispatch to the Parties: October 3, 2017

REPRESENTATION OF THE PARTIES

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

A-[#]	Applicant's Exhibit
AL-[#]	Applicant's Legal Authority
Applicant	Gambrinus Corp.
Application	Application for Annulment of the Award dated October 9, 2015
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
Arbitration Hearing	Hearing on jurisdiction and the merits held in Paris on March 10-13, 2014
Award	Gambrinus Corp. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/31), Award dated June 15, 2015
BIT or Treaty	The Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Reciprocal Protection of Investments dated 15 July 1994, which entered into force on 31 October 1995
Committee	*Ad Hoc* Committee composed of Tan Sri Dato' Cecil W.M. Abraham (president), Ambassador Hussein A. Hassouna and Doctor Michael C. Pryles and constituted on January 15, 2016
Counter-Memorial on Annulment	Respondent's Counter-Memorial on Annulment, dated September 2, 2016
D-[#]	Respondent's Exhibit
DL-[#]	Respondent's Legal Authority
Hearing on Annulment	Hearing Annulment held on February 9 and 10, 2017
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 on Annulment	Applicant's Memorial in Support of its Application for Annulment, dated April 15, 2016
Parties	Gambrinus Corp. and the Bolivarian Republic of Venezuela
Rejoinder on Annulment	Respondent's Rejoinder to the Application for Annulment, dated December 23, 2016
Reply on Annulment	Applicant's Reply in Support of Application for Annulment, dated October 28, 2016
Respondent or Venezuela	The Bolivarian Republic of Venezuela
Tr. 2014, Day [#] [page:line]	Transcript of the Arbitration Hearing
Tr. 2017, Day [#] [page:line]	Transcript of the Hearing on Annulment
Tribunal	Arbitral tribunal composed of Professor Piero Bernardini (president), the Honorable Marc Lalonde and Professor Pierre-Marie Dupuy

TABLE OF AUTHORITIES

AES Summit **(AL-0024)**	*AES Summit Generation Ltd. and AES-Tisza Erőmű Kft v. Hungary,* ICSID Case No. ARB/07/22, Decision on Annulment, June 29, 2012 ["*AES Summit*"] **(AL-0024)**.
Alapli **(AL-010)**	*Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014 ["*Alapli*"] **(AL-010).**
Amco II **(AL-007)**	*Amco Asia Corp. et. al. v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on Annulment, December 17, 1992 ["*Amco II*"] **(AL-007)**.
Caratube **(AL-020)**	*Caratube Int'l Oil Co. v. Republic of Kazakhstan,* ICSID Case No. ARB/08/12, Decision on Annulment, February 21, 2014 ["*Caratube*"] **(AL-020)**.
CDC Group **(AL-0009)**	*CDC Group Plc. v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005["*CDC Group*"] **(AL-0009).**
CMS	*CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007 ["*CMS*"].
Vivendi I **(AL-025)**	*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 ["*Vivendi I*"] **(AL-025)**.
Continental Casualty **(DL-19)**	*Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, September 16, 2011 ["*Continental Casualty*"] **(DL-19)**.
Crystallex **(AL-018)**	*Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016 ["*Crystallex*"] **(AL-018)**.
Desert Line Projects **(AL-033)**	*Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008 ["*Desert Line Projects*"]. **(AL-033).**

Lucchetti	*Empresas Lucchetti, S.A. and Lucchetti Perú, S.A., sub nom. Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Annulment Decision, September 5, 2007 ["*Lucchetti*"]
El Paso **(DL-8)**	*El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on the Application for Annulment, September 22, 2014 ["*El Paso*"] **(DL-8)**.
Fraport Annulment **(AL-008)**	*Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of Phillipines*, ICSID Case No. ARB/3/25, Decision on Annulment, December 23, 2010 ["*Fraport Annulment*"] **(AL-008)**.
Fraport **(DL-022)**.	*Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of Phillipines (ICSID Case No. ARB/3/25),* Award, August 16, 2007 *["Fraport"]* **(DL-022)**.
Soufraki **(DL-7)**	*Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee, June 5, 2007 ["*Soufraki*"] **(DL-7)**.
Klöckner I **(DL-13).**	*Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, May 13, 1985 ["*Klöckner I*"] **(DL-13)**.
MINE **(AL-006)**	*Maritime Int'l Nominees Establishment v. Gov't of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989 ["*MINE*"] **(AL-006).**
Metalpar **(AL-032)**	*Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, April 27, 2006 ["*Metalpar*"] **(AL-032).**
MTD **(DL-33).**	*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Annulment Decision, March 21, 2007 ["MTD"] **(DL-33)**.
Occidental **(AL-022)**	*Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015 ["*Occidental*"] **(AL-022)**.
RSM **(DL-4)**	*RSM Prod. Corp. v. Grenada*, ICSID Case No. ARB/05/14, Decision on Preliminary Ruling of

	October 29, 2009, December 7, 2009 ["*RSM*"] **(DL-4)**.
Rumeli Annulment **(DL-0017)**	*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 ["*Rumeli*"]. **(DL-0017)**.
Rumeli **(AL-0030)**.	*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 ["*Rumeli*"]. **(AL-0030)**.
Sempra **(AL-005)**	*Sempra Energy lnt'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, June 29, 2010 ["*Sempra*"] **(AL-005)**.
TECO **(AL-027)**	*TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016 ["*TECO*"] **(AL-027)**.
Tokios Tokelės **(AL-029)**	*Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004 ["*Tokios Tokelės*"] **(AL-029)**.
Total **(DL-1)**	*Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, February 1, 2016 ["*Total*"] **(DL-1)**.
Tulip **(DL-28)**	*Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015 ["Tulip"] **(DL-28)**.
Background Paper on Annulment **(DL-5)**.	*Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016 **(DL-5)**.
Venezuela Holdings **(AL-066)**	*Venezuela Holdings, B.V. et. al. v. Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Annulment, March 9, 2017 ["*Venezuela Holdings*"] **(AL-066)**.
Pey Casado **(AL-016)**	*Victor Pey Casado and Foundation Presidente Allende v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on Annulment, December 18, 2012 ["*Pey Casado*"] **(AL-016)**.

Wena Hotels **(DL-3)**	*Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Annulment, February 5, 2002 ["*Wena Hotels*"] **(DL-3)**.

I. INTRODUCTION AND OVERVIEW OF THE APPLICATION

1. This case concerns an application for annulment (the "**Application**") of the award rendered on June 15, 2015 in ICSID Case No. ARB/11/31 (the "**Award**") in the arbitration proceeding between Gambrinus Corporation ("**Gambrinus**" or the "**Applicant**") and the Bolivarian Republic of Venezuela (the "**Respondent**" or "**Venezuela**").

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

3. 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 Barbados and the Government of the Republic of Venezuela for the Promotion and Reciprocal Protection of Investments dated July 15, 1994, which entered into force on October 31, 1995 (the "**BIT**" or "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated March 18, 1965, which entered into force on October 14, 1966 (the "**ICSID Convention**").

4. The dispute relates to the alleged expropriation by the Respondent of Gambrinus' ten percent (10%) equity interest in a group of four Venezuelan companies, jointly referred to as "Fertinitro," which produces nitrogen fertilizers (ammonia and urea) for export and internal use in Venezuela, through the operation and maintenance of four petrochemical plants.

5. In the Award, the Tribunal reached the conclusion that Gambrinus did not own an investment in Venezuela at the time of the alleged BIT breaches and, therefore, declined jurisdiction.

6. Gambrinus applied for the annulment of the Award on the basis of Article 52(1) subparagraphs (b), (d), and (e) of the ICSID Convention, identifying three grounds for annulment: (i) manifest excess of powers; (ii) serious departure from a fundamental rule of procedure; and (iii) failure to state the reasons on which the Award is based.

II. PROCEDURAL HISTORY

7. On October 9, 2015, Gambrinus filed with the Secretary-General of ICSID the Application.

8. The Application was filed in accordance with Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"), within 120 days after the date of the Award.

9. On October 16, 2015, the Secretary-General of ICSID informed the Parties that the Application had been registered on that date and that the Chairman of the Administrative Council of ICSID would proceed to appoint an *ad hoc* committee pursuant to Article 52(3) of the ICSID Convention.

10. By letter of January 15, 2016, in accordance with ICSID Arbitration Rule 52(2), the Secretary-General notified the Parties that the *ad hoc* committee (the "**Committee**") had been constituted and that the annulment proceeding was deemed to have begun on that date.

11. The Committee was composed of Tan Sri Dato' Cecil W.M. Abraham, a national of Malaysia, President; Ambassador Hussein A. Hassouna, a national of Egypt; and Doctor Michael C. Pryles, a national of Australia. Ms. Sara Marzal Yetano, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.

12. The first session of the Committee was held by teleconference on March 10, 2016. In addition to the Committee and its Secretary, participating in the conference were:

For the Applicant:

Timothy G. Nelson	Skadden, Arps, Slate, Meagher & Flom LLP
Gunjan Sharma	Skadden, Arps, Slate, Meagher & Flom LLP
Antonio Planchart Mendoza	Dirección de Asuntos Legales y Regulatorios, Empresas Polar

For the Respondent:

Laurent Gouiffès	Hogan Lovells Paris
Thomas Kendra	Hogan Lovells Paris
Melissa Ordonez	Hogan Lovells Paris

Luis Bottaro	Hogan Lovells Caracas
Gonzalo Rodríguez-Matos	Hogan Lovells Caracas
Carlos Rodríguez	Hogan Lovells Caracas

13. Following the first session, on March 16, 2016, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Committee on disputed issues.

14. On April 15, 2016, Gambrinus filed its Memorial in Support of its Application for Annulment ("**Memorial on Annulment**").

15. On September 2, 2016, the Respondent filed its Counter-Memorial to the Application for Annulment ("**Counter-Memorial on Annulment**").

16. On October 28, 2016, Gambrinus filed its Reply in Support of the Application for Annulment ("**Reply on Annulment**").

17. On December 23, 2016, the Respondent filed its Rejoinder to the Application for Annulment ("**Rejoinder on Annulment**").

18. On January 26, 2017, the Committee issued Procedural Order No. 2 in which it ruled on certain pending procedural matters related to the organization of the hearing on annulment.

19. A hearing on annulment was held at the seat of the Centre in Washington D.C. on February 9 and 10, 2017 (the "**Hearing on Annulment**"). In addition to the Committee and its Secretary, present at the Hearing on Annulment were:

For the Applicant:

Timothy G. Nelson	Skadden, Arps, Slate, Meagher & Flom LLP
Julie Bédard	Skadden, Arps, Slate, Meagher & Flom LLP
Gunjan Sharma	Skadden, Arps, Slate, Meagher & Flom LLP
Jordan Wall	Skadden, Arps, Slate, Meagher & Flom LLP
Margarita Morales-Dííaz	Skadden, Arps, Slate, Meagher & Flom LLP
John Pegues	Skadden, Arps, Slate, Meagher & Flom LLP
Paula Henin	Skadden, Arps, Slate, Meagher & Flom LLP

For the Respondent:

Laurent Gouiffès	Hogan Lovells (Paris)
Gonzalo Rodríguez-Matos	Hogan Lovells (Caracas)
Melissa Ordonez	Hogan Lovells (Paris)
Carlos Rodríguez Estanga	Hogan Lovells (Caracas)
Lucie Chatelain	Hogan Lovells (Paris)
Henry Rodríguez	Procuraduría General de la República

Court Reporters:

Michelle Kirkpatrick	B&B Reporters
Margie R. Dauster	B&B Reporters
Elizabeth Cicoria	DR Esteno
Marta Rinaldi	DR Esteno

Interpreters:

Silvia Colla
Stella Covre
Charlie Roberts

20. The Respondent filed its submission on costs on March 10, 2017 and the Applicant on March 12, 2017.

21. By letter of March 14, 2017, the Applicant requested leave to introduce into the record the recent annulment decision in *Venezuela Holdings.*[1] After considering the Respondent's observations of April 5, 2017, the Committee granted the request and invited both Parties to submit their observations. The Parties' observations were received by the Committee on April 24, 2017.

22. The proceeding was closed on August 4, 2017.

[1] *Venezuela Holdings, B.V. et. al. v. Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Annulment, March 9, 2017 ["*Venezuela Holdings*"] **(AL-066)**.

III. THE AWARD

23. Below is a brief summary of the relevant sections of the Award, including a summary of the facts that are relevant for the purpose of the present annulment proceedings.[2]

A. SUMMARY OF RELEVANT FACTS

24. During the 90's Venezuela decided to increase its production of fertilizers.[3] During that time, Venezuela through its State-owned entity, Petroquímica de Venezuela S.A.[4] ("**Pequiven**"), sought private partners to participate in the development of a fertilizer production facility.[5]

25. As a result, on April 8, 1998, Pequiven, Polar Uno C.A., later named Inversiones Polar S.A.[6] (hereinafter, "**Polar**"), a company incorporated in Venezuela, Koch Oil S.A. (later denominated Koch Minerals S.à.r.l.) ("**Koch**"), a company incorporated in Switzerland, and Snamprogetti B.V. ("**Snamprogetti**"), a company incorporated in the Netherlands, concluded a Joint Investors' Agreement (the "**JIA**"), setting forth the contractual framework for the construction, operation and investment terms of two ammonia plants (the "**Project**").[7]

26. Pursuant to the JIA, the four joint investors (also referred as "**Owners**" under the JIA), agreed to the creation of four Venezuelan companies, jointly referred to as "Fertinitro": Fertilizantes Nitrogenados de Oriente, S.A. (the "**Company**"); Fertilizantes Nitrogenados de Oriente C.E.C. (the "***Comandita***"); Fertilizantes Nitrogenados de Venezuela S.R.L.; and Fertilizantes Nitrogenados de Venezuela, Fertinitro C.E.C. (the "**Operating Company**").[8]

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[2] This factual summary is based on the facts described in the Award and is not intended to be an exhaustive and detailed narrative of all such facts. Rather, its purpose is simply to provide the general context of this Decision.

[3] Award, ¶ 34.

[4] *Id.*, ¶ 8 ("Petroquímica de Venezuela ('Pequiven') [is] a wholly owned subsidiary of Petróleos de Venezuela S.A. (or "PDVSA") the state-owned oil company.

[5] *Id.*, ¶ 35.

[6] On May 12, 1998, Polar Uno C.A. changed its name to Inversiones Polar S.A. *Id.*, ¶ 46.

[7] *Id.*, ¶ 38.

[8] *Id.*, ¶ 38.

27. According to Section 2.1 of the JIA, the ownership structure of Fertinitro was as follows: 35% owned by Pequiven; 35% owned by Koch; 20% owned by Snamprogetti and 10% owned by Polar.

28. Koch and Polar owned their respective interests in the Project through wholly owned "Special Purpose Subsidiaries" (as defined in the JIA), namely Koch José Cayman Islands Limited ("**Koch José**"), and Polar José Investments Limited, ("**Polar José**") respectively, both companies organized under the laws of Cayman Islands. In accordance with Section 2.4 of the JIA and its Recitals, Koch and Polar as Owners, remained responsible together with the Special Purpose Subsidiaries for compliance with all the obligations under the JIA. Moreover, the only assets of the Special Purpose Subsidiaries were the shares or debt in the Fertinitro Companies. By February 18, 1998, Koch transferred 28.571% of its interest in Koch José to Latin American Investment Fund ("**LAIF**"). LAIF then became a 10% shareholder of Fertinitro.[9]

29. Article VI of the JIA regulated the transfer of Fertinitro's shares. Sections 6.1. and 6.2 provided as follows:

> *6.1. Restriction on Transfer. No Owner shall give, sell, assign, transfer, pledge, hypothecate, mortgage, grant a security interest in, or otherwise dispose of and/or encumber any of its interests or any interest therein ("Disposition") other than a Disposition permitted under Section 6.2 unless such Owner complies with the provisions of this Article VI.* ***Any Disposition attempted or made without full compliance with this Article VI in its entirety shall be null, void and of no force or effect.***
>
> *6.2 Permitted Dispositions. The following Dispositions shall be permitted without compliance with any other provision of this Article VI other than Section 6.7:*
>
> *6.2.1 by Pequiven to VIE as contemplated in Section 2.1.1;*
>
> *6.2.2 by an Owner to an Affiliate of such Owner (including any Special Purpose Subsidiary) if: (a) such Owner has provided at least thirty (30) days written notice of such Disposition to the Company,*

[9] *Id.*, ¶ 40.

> *Comandita and each of the other Owners; [...] (d) the transferring Owner agrees, pursuant to instruments in form and substance reasonably satisfactory to the non-transferring Owners, to remain responsible with the transferee Affiliate for compliance with all the obligations of the transferring Owner under this Agreement, including execution of a Parent Performance Agreement by any Parent Company of the transferee, if applicable; and (e) the transferee Affiliate becomes a party to this Agreement pursuant to the instruments in form and substance reasonably satisfactory to the non-transferring Owners. [...]*

30. In accordance with Section 6.2 of the JIA, all "Permitted Dispositions" are subject to the requirements set forth in Section 6.7, which provides as follows:

> *6.7. Additional Interest Transfer Requirements. Any Disposition of Interests is subject to the satisfaction of each of the following conditions:*
>
> *(i)* ***Any Disposition shall be made exclusively for cash or cash equivalents to the exclusion of any other consideration****;*
>
> *(ii) Any Disposition must be for a Proportionate number of Shares and Comandita Passive Shares;*
>
> ....
>
> *(v) Any transferee of Interests, including an Affiliate of the transferor, shall, by a written instrument executed and delivered to the Company and the Remaining Owners before the Disposition is agreed to or concluded, (a) authorize, approve and adopt this Agreement and assume all of the obligations of an Owner hereunder as if it were an original, named, party hereto, including execution of a Parent Performance Agreement by any Parent Company, if applicable, (b) make representations and warranties substantially equivalent to those made by Pequiven, Koch, Snamprogetti and Polar in Article III, and (c) provide an address and facsimile number to the Company and the Owners for purposes of Section 13.14.*

31. In 2001, Snamprogetti completed the construction of the Fertinitro plants and facilities and commercial production commenced the same year.[10]

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[10] *Id.*, ¶ 45.

32. On August 6, 2001, Polar decided to remove Polar José (the Special Purpose Subsidiary of the Cayman Island) from the Fertinitro investment structure, and, instead, to own its shares through Inversiones Polar S.A., the parent company. Polar José completed the transaction without objection from the other shareholders.[11]

33. On January 21, 2008, pursuant to Section 6.2.2 of the JIA and Section 12(b) of the articles of incorporation and bylaws of the Company and the *Comandita* (the "**Fertinitro By-Laws**"), Polar notified Pequiven, Koch, Snamprogetti, the *Comandita* and the Company, of its intention to "transfer all the Polar Interests to Gambrinus Corporation." In that same letter, Polar specified that it "desired to consummate the transfer as soon as practicable, and no later than 24 January 2008." Polar then requested from the addressee's shareholders a "waiver" of the 30-day prior notice requirements contemplated in the JIA for transfers to affiliates.[12]

34. The January 21, 2008 notice was accompanied by an "Assumption Instrument" dated January 22, 2008, to be signed by Polar and Gambrinus "before the consumption of the Transfer, all in compliance with Sections 6.2.2 and 6.7 of the [JIA] and Section 12(b) of [Fertinitro By-Laws]." Under the terms of the executed Assumption Instrument:

- Polar agreed to remain jointly and severally "responsible" with Gambrinus for compliance with all the obligation of Polar under the JIA;
- Polar agreed to repurchase its interest in Fertinitro should Gambrinus cease to be an affiliate of Polar; and
- Gambrinus agreed to become a part to the JIA, adopted the JIA and assumed all of the obligations as if it were an original "named party thereto."[13]

[11] *Id.*, ¶ 46.
[12] *Id.*, ¶ 55.
[13] *Id.*, ¶ 56.

35. On January 22 and 23, 2008, Pequiven, Koch, Snamprogetti, the Company and the *Comandita* granted the requested waivers.[14]

36. On January 24, 2008, Gambrinus and Polar executed a share purchase agreement (the "**Share Purchase Agreement**" or the "**2008 Transfer**"). Pursuant to clause THREE of the Share Purchase Agreement, Gambrinus would pay USD eighty million and one hundred dollars (USD 80,000,100.00) for Polar's 10% equity interest in Fertinitro "at a future date following the granting of this document." On that same date, Simón Guevara, the Secretary of Fertinitro's Board, sent an email to Tony Parra, Koch-appointed Director, stating that the 2008 Transfer complied with the requirements under the purchase and financing documents, including Section 6.2 of the JIA.[15]

37. On February 15, 2008, Gambrinus and Polar subscribed a common share subscription agreement (the "**Common Share Subscription Agreement**"). In accordance with the terms of this agreement, Gambrinus issued 800,001 (eight hundred thousand and one) common shares in itself to Polar for an amount of USD 80,000,100.00. The Common Share Subscription Agreement further stipulated that "as a result of the capitalization of the Subscription Amount by [Polar] in [Gambrinus], the account receivable that [Polar] has against [Gambrinus] is hereby extinguished." No cash was exchanged between Gambrinus and Polar for this transaction.[16]

38. On October 11, 2010, Venezuela enacted Decree No. 7,713, which provided the forced acquisition of Fertinitro (the "**Expropriation Decree**").[17]

39. On November 8, 2011, Gambrinus filed before ICSID its Request for Arbitration against Venezuela.[18]

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[14] *Id.*, ¶ 57.
[15] *Id.*, ¶ 58.
[16] *Id.*, ¶ 59.
[17] *Id.*, ¶ 75.
[18] *Id.*, ¶ 86.

B. THE PARTIES' ARGUMENTS

40. In Section V of the Award, the Tribunal addressed the jurisdictional objections raised by Respondent. Venezuela objected to the jurisdiction of the Tribunal *ratione personae*, *ratione temporis* and *ratione materiae*, under Article 25 of the ICSID Convention and the BIT alleging, *inter alia*, that (A) Gambrinus is not a protected foreign investor and Polar's use of Gambrinus' legal personality is an abuse of corporate personality; (B) the dispute pre-dates the "interposition" of Gambrinus in the corporate structure and/or was reasonably foreseeable at that time; and (C) Gambrinus made no investment, as it has not proved title to the Fertinitro shares and its purported interest is not an "investment" for purposes of the ICSID Convention and the BIT.

41. In Section V.B. and V.C of the Award, the Tribunal analyzed and rejected the objections *ratione personae* and *ratione temporis* (A and B above), and in Section 5.D of the Award, the Tribunal addressed Respondent's *ratione materiae* objection, which is the sole object of the present annulment proceedings. A brief summary of the Parties' relevant arguments on the *ratione materiae* objection follows.

42. According to the Respondent, the detailed restrictions of the JIA regarding share transfers were the result of careful drafting and analysis given the importance of the Owners and their identity, each of whom had been carefully selected to participate in the Project. Any attempted transfer in violation of the restrictions of Section 6 would be null, void and legally ineffective. These restrictions equally applied to a transfer of shares to an affiliate. Although a "Permitted Disposition" under Section 6.2, a transfer to an affiliate would also be subject in any case to satisfaction of each of the conditions of Section 6.7, including the requirement that "any Disposition shall be made exclusively for cash or cash equivalents to the exclusion of any other considerations." According to the Respondent, this condition would have assisted in ensuring, among other things, the solvency and economic standing of the transferee, the transparency as to the value of the disposition and the genuine character of the operation.[19]

[19] *Id.*, ¶ 250.

43. In addition, the Respondent pointed out that Articles 11 and 15 of the Fertinitro By-Laws contain a mirror validity requirement that all transfers be made "in cash or cash equivalent to the exclusion of any other forms of consideration," and that any non-compliant disposition of interests would be null and void.[20]

44. The Respondent further argued that Gambrinus did not make a payment in "cash or cash equivalent." Instead, Polar and Gambrinus devised a "share for share transaction."[21] Under the Common Share Subscription Agreement, the amount owed by Polar for the subscription of the newly issued Gambrinus shares was set-off against the identical sum that Gambrinus owed to Polar under the Share Purchase Agreement. The Respondent argued that, under this arrangement, no funds were transferred from Gambrinus to Polar and that the issuance of the new shares could not be considered as payment in cash or having been made through a "cash equivalent."[22]

45. On this basis, the Respondent argued that the 2008 Transfer was, in accordance with Section 6(1) of the JIA, null and void *ab initio*, which pursuant to Venezuelan law, has the same effect as non-existence. Accordingly, the 2008 Transfer never materialized, Gambrinus never acquired ownership of the shares in Fertinitro and it never became an owner under the terms of the JIA.[23]

46. Finally, the Respondent claimed that the 2008 Transfer was made in breach of the general principle under Venezuelan law of good faith, so that even if Gambrinus had actually acquired the ownership of Fertinitro shares, Gambrinus would nevertheless not be entitled to claim the BIT protection.[24] [25]

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[20] *Id.*, ¶ 208.

[21] *Id.*, ¶ 209.

[22] *Id.*, ¶¶ 212 and 213.

[23] *Id.*, ¶¶ 215 and 217.

[24] *Id.*, ¶ 270.

[25] As part of its jurisdictional objection *ratione materiae*, Respondent also argued that, even if the Tribunal found that the 2008 Transfer was valid, Gambrinus would still not own a protected investment under the terms of the ICSID Convention and the BIT. Yet, having reached the conclusion that Gambrinus did not own the Fertinitro shares at the time of the alleged breach of the BIT, the Tribunal decided that it would not address Respondent's second argument.

47. In response, Gambrinus contended that there is no basis, either in the JIA or the Fertinitro By-Laws for challenging the 2008 Transfer. The 2008 Transfer was made in good faith, fully disclosed to all shareholders and accompanied by cash/cash equivalent consideration – namely, the obligation assumed by Gambrinus at the time of the transfer to pay Polar the sum of USD 80,000,100. [26]

48. Applicant argued that the "set-off" of two matching cash equivalent obligations satisfies the cash equivalency requirement under Section 6(7) of the JIA and that, in any case, the cash equivalency transfer requirement of the JIA and the Fertinitro By-Laws did not apply to inter-affiliate transfers.[27]

49. Relying on the legal opinion of Mr. James Otis Rodner (the "**Rodner Opinion**"), Gambrinus argued that the requirement that the transfer be for cash or cash equivalent was to facilitate the "right of first refusal." However, since no right of first refusal arises with respect to inter-affiliate transfers, there is no reason why the cash equivalency requirement should be applicable in such cases.[28]

50. According to the Rodner Opinion, to apply the cash equivalency requirement to any transfers between affiliates would lead to the absurd result of disallowing various "Permitted Dispositions" under Section 6.2, specifically inter-affiliate transfers pursuant to liquidation or merger under Section 6.2.2 or a share-for-share transfer under Section 6.2.1 since these Dispositions cannot be made "exclusively" for "cash equivalent consideration" as expressed by Section 6.7(i).[29]

51. Gambrinus further contended that the Fertinitro By-Laws, far from being identical to the JIA as asserted by Respondent, actually state that inter-affiliate transfers may be made without complying with the "cash equivalent" requirement.[30] According to the Rodner Opinion, under the Fertinitro By-Laws, the cash equivalent requirement under Article 14

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[26] *Id.*, ¶ 226.
[27] *Id.*, ¶ 231.
[28] *Id.*, ¶¶ 232 and 251.
[29] *Id.*, ¶¶ 243 and 252.
[30] *Id.*, ¶ 253.

for a shareholder's sale of its shares, applies with the express exclusion of the transactions mentioned in Article 12 regarding inter-affiliate transfers, such as the 2008 Transfer.[31]

52. Also on the basis of the Rodner Opinion, Gambrinus argued that contracts in Venezuela, as in many civil law countries, are interpreted taking into account the real intentions of the parties, avoiding absurd results and looking at the contract as a whole, meaning that one must not read individual provisions without relating them to the parties' intention when entering into the contract and to the remaining clauses in the contract.[32]

53. The Rodner Opinion added that in civil law, including Venezuelan law, when the same parties enter into several contracts that deal with the same subject, if there is contradiction in the terms used in these contracts, the language of the later contract prevails over the language of the earlier contract. In accordance with this principle, Gambrinus argued that the terms of the Fertinitro By-Laws prevail over the terms of the JIA.

54. Furthermore, Gambrinus contended that the Respondent cannot dispute Gambrinus' titles to the shares since, regardless of whether cash equivalence was satisfied, failure to satisfy this requirement: (i) does not, under Venezuelan law, lead to absolute nullity,[33] and (ii) cannot divest the Tribunal of jurisdiction under the Treaty since "no fundamental principle of morality," "public policy" or "illegality" is implicated here.[34]

55. In reply to Gambrinus' argument that the real intention of the parties was not to apply the cash equivalency requirement to inter-affiliate transfers, the Respondent pointed out, *inter alia*, that Section 6.7 of the JIA does not deal with pre-emption rights and therefore situations of pre-emption cannot have been the reason for including the cash or cash equivalent requirement.[35] The Respondent further argued that, had the parties wished to exclude inter-affiliate transfers from the cash or cash equivalent requirement, they could

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[31] *Id.*, ¶ 254. Gambrinus also pointed out that neither the JIA nor the Fertinitro By-Laws require that the price set out for an inter-affiliate transfer be disclosed, nor is there a requirement to disclose the kind or extent of the payment, in contrast to third-party transfers under Section 6.4 of the JIA. See *Id.*, ¶ 236.

[32] *Id.*, ¶ 255.

[33] *Id.*, ¶ 239.

[34] *Id.*, ¶¶ 240 and 241.

[35] *Id.*, ¶ 258.

easily have done so, as tribunals are not supposed to rewrite the parties' agreement by resorting to rules of interpretation that are applicable in case of obscurity, ambiguities or deficiencies in the parties' intention, which is not the present case.[36]

C. THE TRIBUNAL'S ANALYSIS ON THE *RATIONE MATERIAE* OBJECTION

56. As mentioned above, the Tribunal rejected the Respondent's objections *ratione personae* and *ratione temporis*, but upheld the Respondent's *ratione materiae* objection, which is the sole object of the present annulment proceedings. Thus, the following summary of the Tribunal's analysis will exclusively deal with the *ratione materiae* objection.

57. The Tribunal analyzed Article VI of the JIA and noted that the terms of Section 6.2 of the JIA make any disposition of shares, including transfers to affiliates, subject to the condition of "cash or cash equivalents" consideration under Section 6.7(i).

58. The Tribunal also found that, pursuant to Section 2.1 of the JIA, to the extent that the terms of the Fertinitro By-Laws conflict with the terms of the JIA, the terms of the latter prevail.[37]

59. Moreover, the Tribunal analyzed the Fertinitro By-Laws and noted that, in accordance with the last part of Article 14 of the Fertinitro By-Laws, any disposal or transfer of shares must comply with the provisions contained in the JIA. Thus, the Tribunal concluded that also under the Fertinitro By-Laws, transfers of shares to affiliates are subject for their validity to the condition of payment being made in cash or cash equivalent, as provided by Section 6(7)(i) of the JIA.

60. The Tribunal further noted that both Parties and their legal experts had made reference to Article 12 of the Venezuelan Code of Civil Procedure, according to which:[38]

> *En la interpretación de contratos o actos que presenten oscuridad, ambigüedad o deficiencia, los jueces se atendrán al propósito y a la intención de las partes o de los otorgantes, teniendo en mira las exigencias de la Ley, de la verdad y de la buena fe.*

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[36] *Id.*, ¶ 257.

[37] *Id.*, ¶ 261.

[38] *Id.*, ¶ 265.

61. The Tribunal found that this provision means that under Venezuelan law the intention of the parties will only take precedence over the contract language when there is "obscurity, ambiguity or deficiency."[39] In this regard, the Tribunal also held that there is no "obscurity, ambiguity or deficiency" in the provisions of the JIA regulating the transfer of shares, including with regard to the condition under Section 6.7(i) that any transfer, including transfers to affiliates, such as the 2008 Transfer, "be made for cash or cash equivalents."[40]

62. On this basis, the Tribunal concluded that it was not supposed to "modify" or "rewrite" the JIA "merely because one might believe that requiring the application of this condition also in case of inter-affiliate transfers would serve no useful purpose,"[41] or "only because it is reasonable to think that the real purpose of that condition is to permit the exercise of the right of first refusal of the other shareholders."[42]

63. The Tribunal was comforted in its conclusion by the statement of Polar in its letter of January 21, 2008 to the other Owners stating that the 2008 Transfer would take place "in compliance with Sections 6.2.2 and 6.7 of the [JIA] and Section 12(b) of the [Fertinitro By-Laws]."[43]

64. Further, the Tribunal agreed with Respondent that the Common Share Subscription Agreement established a share-for-share payment and that such payment for the Fertinitro shares did not comply with the cash equivalency requirement under Section 6.7 of the JIA, since the Gambrinus shares are not "an immediately realizable liquid asset," Gambrinus not being traded publicly.[44]

65. The Tribunal determined that the cash equivalency requirement under Section 6.7(i) of the JIA was considered by the parties to the JIA to be an essential element of the contract,

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[39] *Id.*, ¶ 265.

[40] *Id.*, ¶ 266.

[41] *Id.*, ¶ 266.

[42] *Id.*, ¶ 267. In this same paragraph, the Tribunal adds that, "[b]y the same token, [it] should not rewrite the parties' agreement because otherwise the condition of a 'cash or cash equivalent' consideration under Section 6.7(i) would not permit implementing some of the Permitted Dispositions under Section 6.2 of the JIA."

[43] *Id.*, ¶ 268.

[44] *Id.*, ¶ 269.

given the seriousness of the sanction that had been agreed in case of breach of such condition – the "nullity" and the "no force of effect" of the purported transfer.[45]

66. On this basis, the Tribunal determined that the 2008 Transfer may not be given effect in the present case.[46] Accordingly, the Tribunal concluded that Gambrinus owned no investment at the time of the alleged expropriation of Fertinitro, due to the Share Purchase Agreement being of no force and effect. "Having made no investment which may fall within the BIT protection, [Gambrinus'] claim is not subject to the Tribunal's jurisdiction which, accordingly, must be declined."[47]

[45] *Id.*, ¶ 272.

[46] *Id.*, ¶ 273. According to paragraph 274 of the Award, this conclusion dispenses the Tribunal from dealing with Respondent's subordinate claim whereby, since the investment was not made in good faith, it should in any case be denied protection. Yet, the Tribunal adds that, "[f]or what may be of relevance in the present case, the Tribunal is of the view that [Gambrinus] did not act in breach of the [sic] good faith, its conduct being rather motivated by an erroneous interpretation of the relevant provisions of the JIA and the By-Laws."

[47] *Id.*, ¶ 276.

IV. THE PARTIES' POSITIONS

A. THE APPLICANT'S POSITION

67. As mentioned above, Gambrinus seeks annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention: (i) that the Tribunal manifestly exceeded its powers; (ii) that there was a serious departure from a fundamental rule of procedure; and (iii) that the Award failed to state the reasons on which it is based.

68. Below is a summary of Gambrinus' arguments:

(1) The Relevant Standards of Review

69. Citing the annulment decision in *Sempra v. Argentina*,[48] the Applicant argues that, when interpreting the grounds for annulment under Article 52 of the ICSID Convention, the Committee should not apply neither a narrow nor a broad approach, nor a presumption in favour of the Award's validity.[49]

70. With regards to the annulment ground based on a tribunal's "manifest excess of powers" (Article 52(1)(b)), the Applicant states that an excess of jurisdiction, or a failure to exercise jurisdiction where it actually exists, is a "paradigm form of excess of powers."[50]

71. The Applicant contends that in order for the excess to be "manifest," an error need not be obvious on its face. Instead, in some cases, extensive argumentation and analysis may be required.[51]

72. The Applicant points out that a manifest excess of powers may also occur when a tribunal fails to apply the relevant law, and argues that although a mere misinterpretation or misapplication of the proper law will not suffice, a "gross or egregious error of law,

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[48] *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, June 29, 2010 ["*Sempra*"] **(AL-005)**.

[49] Memorial on Annulment, ¶¶ 150 and 151.

[50] *Id.*, ¶ 152.

[51] *Id.*, ¶ 153. In this regard, Applicant cites *Caratube Int'l Oil Co. v. Republic of Kazakhstan,* ICSID Case No. ARB/08/12, Decision on Annulment, February 21, 2014 ["*Caratube*"] **(AL-020)** and *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015 ["*Occidental*"] **(AL-022)**.

acknowledged as such by any reasonable person, could be construed to amount to a failure to apply the proper law, and could give rise to the possibility of annulment."[52]

73. Moreover, the Applicant argues that when the ground for annulment is based on a jurisdictional excess of power, the committee must apply a more rigorous approach and undertake a "searching inquiry."[53] If a committee finds that the tribunal did not conduct a "properly analysis" of a jurisdictional issue, such failure constitutes an annullable error.[54] The Applicant supports this argument on the recent annulment decision in *Venezuela Holdings*, in which the committee accepted that "there is some force in the argument advanced by Venezuela [which in that annulment proceeding was the applicant] that matters of jurisdiction may call for a more rigorous approach than other grounds for annulment, simply because a tribunal ought not to be allowed to exercise a judicial power it does not have (or vice versa)."[55]

74. As to the annulment ground based on the Tribunal's "failure to state the reasons" (Article 52(1)(e)), the Applicant argues that an award will be annullable "as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point."[56] In addition, the Applicant contends that, as established by the annulment committee in *MINE v. Guinea*,[57] an award will also be annullable when the Tribunal offers "inconsistent reasons or frivolous reasons."[58]

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[52] Memorial on Annulment, ¶ 155. In support of this, Applicant cites *Caratube* **(AL-020)**, *Sempra* **(AL-005)** and *AES Summit Generation Ltd. and AES-Tisza Erőmű Kft v. Hungary,* ICSID Case No. ARB/07/22, Decision on Annulment, June 29, 2012 ["*AES Summit*"] **(AL-0024)**.

[53] Tr. 2017, Day 2, 270:14-15.

[54] Applicant's letter of April 24, 2017.

[55] *Venezuela Holdings* **(AL-066)** ¶ 110. According to this same ¶ 110: "It is plain on the face of it that the reference in Article 52(1)(b) to a tribunal having "manifestly exceeded its powers" fits most naturally into the context of jurisdiction, in the sense that it covers the case where a tribunal exercises a judicial power which on a proper analysis had not been conferred on it (or vice versa declines to exercise a jurisdiction which it did possess)."

[56] Memorial on Annulment, ¶ 157. In support of this argument, the Applicant cites *Victor Pey Casado and Foundation Presidente Allende v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on Annulment, December 18, 2012 ["*Pey Casado*"] **(AL-016)** , as well as *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 ["*Vivendi I*"] **(AL-025)**.

[57] *Maritime Int'l Nominees Establishment v. Gov't of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989 ["*MINE*"] **(AL-006).**

[58] Memorial on Annulment, ¶ 158.

75. Citing the annulment decision in *TECO v. Guatemala*,[59] the Applicant argues that the award must be annulled where "the Tribunal's reasoning is not clear at all," *i.*e., where "the Committee, despite having the benefit of the Parties' submissions and of the entire record before it, has struggled to understand the Tribunal's line of reasoning," or where there is a "'complete absence of any discussion of the Parties' [submissions] within the Tribunal's analysis of the' overarching claim or defense."[60]

76. In particular, on the basis of the annulment decision in *Venezuela Holdings*, the Applicant argues that a tribunal's failure to address relevant principles of the applicable law concerning existence and scope of property rights constitutes a failure to state the reason under Article 52(1)(e) as well as a manifest excess of powers under Article 52(1)(b).[61]

77. With regards to the annulment ground based on a serious departure from a fundamental rule of procedure (Article 52(1)(d)), the Applicant highlights that the object and purpose of this ground is to protect the integrity of the arbitral procedure,[62] and that an award will only be annullable on this basis when the relevant rule of procedure is "fundamental," that is, "when it 'concerns a rule of natural justice' i.e., is 'concerned with the essential fairness of the proceeding.'"[63]

78. Citing *Fraport*,[64] *Amco II*,[65] *Alapli*[66] and *Pey Casado*,[67] the Applicant states that such fundamental rules of procedure comprise the right to procedural equality and the right to be heard, which also includes the right to have a meaningful opportunity to rebut a new

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[59] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016 ["*TECO*"] **(AL-027)**.

[60] Memorial on Annulment, ¶ 159.

[61] See Applicant's letter of April 24, 2017. The Applicant refers to *Venezuela Holdings* **(AL-066)**, ¶¶ 166 and 187.

[62] Memorial on Annulment, ¶ 160. In support of this argument, the Applicant cites *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of Phillipines*, ICSID Case No. ARB/3/25, Decision on Annulment, December 23, 2010 ["*Fraport Annulment*"] **(AL-008)**; *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2010 ["*Alapli*"] **(AL-010)**; and *CDC Group Plc. v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005 ["*CDC Group*"] **(AL-0009)**.

[63] Memorial on Annulment, ¶ 162.

[64] *Fraport Annulment* **(AL-008)**, ¶ 200.

[65] *Amco Asia Corp. et. al. v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on Annulment, December 17, 1992 ["*Amco II*"] **(AL-007)**, ¶ 9.08.

[66] *Alapli* **(AL-010)**, ¶ 131.

[67] *Pey Casado* **(AL-016)**, ¶ 184.

argument or claim.[68] In addition, and on the basis of the annulment decisions in *Caratube*,[69] and *TECO*,[70] the Applicant also contends that, the failure to properly apportion the burden of proof between the parties may, in certain circumstances constitute a breach of a fundamental rule of procedure.[71]

79. Additionally, the Applicant contends that a departure from the fundamental rule of procedure will be "serious" when it is "substantial" and "deprives a party of the benefit or protection which the rule was intended to provide."[72] In this regard, the Applicant further argues that "[w]hen a procedural breach relates to a serious issue of contention between the parties that is vital to the determination of the case, and concerns a break of a party's fundamental right, it is almost unqualifiedly 'serious'".[73]

80. Finally, the Applicant argues that in contrast with the other grounds for annulment, Article 52(1)(d) encompasses "not only procedural breaches committed by the Tribunal, but also those committed by other actors, such as the parties [...] or their counsel."[74]

(2) The Tribunal's Manifest Excess of Powers and the Award's Failure to State the Reasons upon which it is based

81. Gambrinus argues that the Tribunal committed "annullable errors" that constitute a manifest excess of power under Article 52(1)(b) and/or a failure to state the reasons under Article 52(1)(e) in six (6) different ways: (i) in its treatment of the 2008 Transfer as being void *ab initio*; (ii) in its application of the cash equivalency clause to inter-affiliate transfers; (iii) in its conclusion on whether the 2008 Transfer involved cash/cash-consideration; (iv) in its conclusion regarding the Common Share Subscription Agreement; (v) in its failure to address and apply the 5-year prescription period and (vi) in its failure to apply and address relevant international law.

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[68] Memorial on Annulment, ¶¶ 232 to 237. Reply on Annulment, ¶ 105.

[69] *Caratube* **(AL-020)**, ¶ 97.

[70] *TECO* **(AL-027)**, ¶ 131

[71] Memorial on Annulment, ¶ 239.

[72] *Id.*, ¶ 251.

[73] *Id.*, ¶ 252. See also Reply on Annulment, ¶¶106 to 108.

[74] Memorial on Annulment, ¶ 161.

a. The Tribunal's treatment of the 2008 Transfer as being void ab initio

82. Gambrinus argues that, under Venezuelan law, a contractual transaction can only be viewed as absolutely null and void if it fails to satisfy very basic conditions (*e.g.*, if a contract was signed by someone lacking basic capacity to consent) and a lawful end, and if it violates an absolute norm of public policy.[75] According to the Applicant, this is supported by the Rodner Opinion, which is in turn supported by fourteen exhibits and references to Venezuelan law and legal authorities.[76]

83. In this sense, Gambrinus further argues that under Venezuelan law, the non-adherence to a technical legal condition of transfer – a condition that was fully capable of being waived, such as the cash equivalency requirement under Section 6.7 of the JIA – cannot make that transfer null and void *ab initio*.[77] At the most, that transfer would only be *potentially* capable of being invalidated at the suit of a contract counterparty having standing to seek such relief (relative nullity), and until such a time that a competent court has declared that transfer null, the transfer would remain valid and have full effect.[78]

84. Based on the above, the Applicant argues that the 2008 Transfer must be regarded as real and extant from the moment of the Share Purchase Agreement and that the Tribunal manifestly exceeded its powers by refusing to recognize Gambrinus' investment on the basis of Article VI of the JIA.[79]

85. The Applicant supports its position on the annulment decision in *Occidental v. Ecuador,*[80] which, according to Gambrinus, "bears striking parallels to the present case."[81] For the

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[75] *Id.*, ¶ 165.

[76] *Id.*, ¶ 165.

[77] *Id.*, ¶¶ 166 and 169. The Applicant further argues that the Award "fails to take account of the principle, explained by Mr. Rodner, that a transaction cannot be regarded as 'inexistent' based upon the contractual condition that was capable of being waived, particularly where that [sic] the shareholders had confirmed the shareholding." Reply on Annulment, ¶ 48.

[78] Memorial on Annulment, ¶¶ 167 to 169. In support of its argument regarding the need of a declaration of nullity from a competent tribunal, the Applicant cites the expert opinion of Prof. Iribarren in another ICSID arbitration, *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016 ["*Crystallex*"] **(AL-018)**. In such case Prof. Iribarren acted as legal expert for Venezuela.

[79] Memorial on Annulment, ¶¶ 170 and 171.

[80] *Occidental* **(AL-022).**

[81] Memorial on Annulment, ¶ 172.

Applicant, the *Occidental v. Ecuador* annulment decision shows that in a civil law system like Venezuela or Ecuador, the violation of a transfer restriction – such as the cash equivalency requirement in this case – does not result in nullity *ab initio*, even if the restriction declares non-conforming transfers to be null. Instead, in such circumstances, a tribunal must treat the transfer as valid and to do otherwise would constitute a manifest excess of jurisdiction.[82]

86. Additionally, the Applicant argues that a corollary error committed by the Tribunal in this case (and as further illustrated by *Occidental v. Ecuador*) was that it assumed, without proper foundation, that it actually possessed jurisdiction to declare the investment non-existent, while in fact only a properly constituted tribunal, having jurisdiction under the JIA and Fertinitro By-Laws, had such power.[83]

87. Finally, the Applicant claims that the Tribunal's excess of powers was "manifest" since applicable Venezuelan law had been articulated in the record and it was undisputed that the JIA was subject to Venezuelan law, including the distinction between relative and absolute nullity.[84] In response to Respondent's contention that the issue of absolute versus relative nullity was never raised before the Tribunal, the Applicant notes that the argument

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[82] *Id.*, ¶ 175. See also Reply on Annulment, ¶¶ 36 to 44. The Applicant maintains that on this point Ecuadorian law and Venezuelan law are in full harmony (Reply on Annulment, ¶42):

> (a) Both Ecuadorian and Venezuelan law have different classes of "nullity," namely, inexistence, absolute nullity and relative nullity; these are separately delineated.
>
> (b) Thus, under both Ecuadorian and Venezuelan law, a failure to meet certain fundamental conditions for the existence of a contract leads to inexistence, and a failure to satisfy certain conditions as demanded by fundamental public policy leads to absolute nullity.
>
> (c) Under both Ecuadorian and Venezuelan law, when an alleged pre-condition to a contract or legal act is capable of being waived by the party in whose interest it is made, and/or ratified, then the contract or legal act is only subject to "relative nullity" – i.e., it is operative, and it is not null and void until and unless a party with standing obtains a declaration of nullity from a competent tribunal.

[83] Memorial on Annulment, ¶ 176. The Applicant argues that the *Occidental* **(AL-022)** annulment decision "underscores that an excess of powers occurs, and that excess is manifest, when an ICSID tribunal declares as inexistent or null an event that was not inexistent or null (and which could only have been declared so by a different tribunal) especially when such a declaration is contrary to the position taken by the parties who would have had standing. It bears emphasis that a lawsuit seeking such a declaration would be a matter for Fertinitro's shareholders and creditors – who consented to and benefited from Gambrinus' role as a shareholder – to litigate." Reply on Annulment, ¶ 44.

[84] *Id.*, ¶ 177.

was squarely raised in (i) its July 21, 2014 submission (the "**July 2014 Submission**");[85] (ii) Rodner's Opinion of the same date,[86] "which formed an integral part of Gambrinus' submissions;"[87] and Gambrinus' September 26, 2014 post-hearing reply (the "**2014 Post-Hearing Reply**").[88]

b. The Tribunal's application of the cash equivalency clause to inter-affiliate transfers

88. The Applicant argues that the Tribunal acknowledged that the text of Article VI of the JIA contained obscurities, ambiguities, or deficiencies that would lead to illogical results never contemplated by the parties to the JIA.[89]

89. For instance, according to the Applicant, the Tribunal agreed with Gambrinus that the application of the cash equivalency requirement in Section 6.7(i) to the "Permitted Disposition" in Section 6.2 would render most of those dispositions literally impossible.[90] The Tribunal also "explicitly" found that the cash equivalency requirement served no purpose for inter-affiliate or other "Permitted Dispositions" under the JIA.[91] Additionally, the Tribunal acknowledged that "the cash equivalency provisions in the [Fertinitro] By-Laws did not so clearly apply to inter-affiliate transfers."[92]

90. The Applicant argues that, faced with such obscurities, ambiguities or deficiencies, Venezuelan law mandated that the Tribunal give effect to the actual intent of the parties in the JIA – which would have led to the conclusion that the cash equivalency requirement did not apply to inter-affiliate transfers – and that the Tribunal failed to do so.[93]

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[85] Claimant's Response to Respondent's New Argument and May 16 Submission dated July 21, 2014, ¶ 47 footnote 66 **(A-53)**.

[86] Legal Opinion on Venezuelan Law of James Otis Rodner , July 18, 2014 [the "Rodner Opinion"] **(A-54)**, ¶¶ 21, 42, 43, 44, 45, 80 and 81.

[87] Reply on Annulment, ¶ 31.

[88] Claimant's Post-Hearing Reply of September 26, 2014, ¶ 22 (A-57). Reply on Annulment, ¶ 31.

[89] Memorial on Annulment, ¶ 179.

[90] *Id.*, ¶ 179.

[91] *Id.*, ¶ 185. See also Reply on Annulment, ¶¶ 53 to 57.

[92] Memorial on Annulment, ¶ 181. See also Reply on Annulment, ¶¶ 60 to 63.

[93] Memorial on Annulment, ¶¶ 182 and 186. Reply on Annulment, ¶¶ 58 and 59.

91. For the Applicant, this omission is particularly telling given: (i) "the evidence that Fertinitro's Corporate Secretary and the Company's lawyers, David Polk & Wardwell (who drafted the JIA), knew about the inter-affiliate transfer [...] and yet made no inquiry whatsoever concerning the 'consideration' being paid for the transfer;" and (ii) the shareholders' post-acquisition conduct, which "not only accepted Gambrinus as a shareholder but relied on Gambrinus' contractual obligations."[94]

92. In view of this omission, the Applicant concludes that the Tribunal committed two annullable errors: first, the Tribunal manifestly exceeded its powers, and second, the Award failed to state the reasons upon which it is based.[95]

c. The Tribunal's conclusion on whether the 2008 Transfer involved cash/cash-consideration

93. The Applicant argues that, even assuming that the Tribunal was correct in applying the cash equivalency requirement to inter-affiliate transfers, its analysis of whether the 2008 Transfer actually met such requirement incurred an "annullable error."

94. In particular, the Applicant contends that the Tribunal's conclusion that the cash equivalency requirement was not met because Gambrinus' shares were not "an immediately realizable liquid asset" was based only on the International Accounting Standard 7 ("**IAS 7**") which was introduced into the record by the Respondent without seeking prior permission in breach of the Tribunal's Procedural Order No. 2.[96]

95. Instead, the Tribunal should have based its analysis on Venezuelan law under which – according to the Rodner's Opinion – a set-off of monetary obligations would comply with the cash equivalency requirement provided under Section 6.7(i) of the JIA.

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[94] Memorial on Annulment, ¶ 187. In this sense, the Applicant also claims that the Award failed to consider, for example, that the post-acquisition conduct of the shareholders, by application of the doctrine of good faith, also provided a separate basis for finding that the cash equivalency requirement did not apply to the 2008 Transfer.

[95] *Id.*, ¶ 188.

[96] *Id.*, ¶ 116. Reply on Annulment, ¶ 69.

96. According to the Applicant, by relying only on the IAS 7 and failing to apply Venezuelan law of set-off to the transaction, the Tribunal manifestly exceeded its powers.[97]

97. Furthermore, citing the annulment decision in *TECO v. Guatemala*,[98] the Applicant argues that by failing to explain why the law of set-off could not apply or why Mr. Rodner's analysis could not be accepted, the Award failed to state the reasons upon which it is based.[99]

d. The Tribunal's conclusion regarding the Common Share Subscription Agreement

98. The Applicant argues that the Tribunal's holding that the Common Share Subscription Agreement had the effect of "converting" the transaction "into a share-for-share payment" represents a further annullable error.[100]

99. The Applicant contends that, while the Tribunal applied a strict literalist approach to the JIA, it applied a non-textual approach when it construed the Common Share Subscription Agreement "as 'converting' the terms of the January 2008 Share Purchase Agreement into an agreement to engage in a share-for-share transaction."[101]

100. According to the Applicant, if a strict textual reading of the Share Transfer Agreement and the Common Share Subscription Agreement had also been taken, this same approach would inevitably have led to the conclusion that the cash equivalency requirement was satisfied, since the Share Purchase Agreement created a money obligation payable in cash which was discharged when Polar assumed a matching and offsetting cash payment obligation to Gambrinus by virtue of the share subscription.[102]

101. The Award's failure to reconcile these different approaches leads to an unexplained inconsistency in its treatment of the cash equivalency requirement which represents a

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[97] Memorial on Annulment, ¶ 196. See also Reply on Annulment, ¶¶ 65 to 68.

[98] *TECO* **(AL-027)**.

[99] Memorial on Annulment, ¶ 197.

[100] *Id.*, ¶ 199.

[101] *Id.*, ¶¶ 200 and 201.

[102] *Id.*, ¶ 200.

failure to state the reasons under Article 52(1)(e) of the ICSID Convention, as well as a manifest excess of powers of the Tribunal under Article 52(1)(b) of the ICSID Convention.

e. The Tribunal's failure to address and apply the 5-year prescription period

102. The Applicant argues that the Award never addressed the effect of the 5-year prescription period for declaring nullity in Venezuelan law, which the Respondent's own legal expert acknowledged would have been applicable to any action for annulment of the 2008 Transfer.[103] For the Applicant, the Tribunal's failure "to address the prescription period and to apply its finding of good faith to the prescription period under Venezuelan law," represents a failure to give reasons under Article 52(1)(e) of the ICSID Convention as well as a manifest excess of powers under Article 52(1)(b) of the ICSID Convention.[104]

103. In response to the Respondent's contention that the 5-year prescription period was never raised by Gambrinus before the Tribunal, the Applicant notes that the issue was raised (i) in footnote no. 57 of its July 2014 Submission in response to the Respondent's legal expert, Dr. García Montoya,[105] and (ii) in the Rodner Opinion.[106][107]

104. Moreover, the Applicant argues that the Tribunal also failed to consider the impact of the 5-year prescription period established in the Fertinitro By-Laws themselves and that this failure also constitutes both a failure to give reasons under Article 52(1)(e) of the ICSID Convention, as well as a manifest excess of powers under Article 52(1)(b) of the ICSID Convention.[108]

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[103] *Id.*, ¶ 204.

[104] *Id.*, ¶ 206.

[105] July 2014 Submission, ¶ 47, footnote no. 57 **(A-53)**. The Applicant argues that the Respondent's legal expert, Dr. García Montoya, agreed that an application for nullity was subject to a prescription period of 5 years. In fact, the Applicant contends that both Mr. Rodner and Dr. García Montoya agreed that Venezuelan law establishes a distinction between relative versus absolute nullity. Furthermore, the Applicant argues that the legal authorities submitted by both legal experts on this issue are all in accord. See Reply on Annulment, ¶¶ 75 and 76.

[106] Rodner Opinion, ¶ 43 **(A-54)**.

[107] Reply on Annulment, ¶¶ 71 to 73.

[108] Memorial on Annulment, ¶ 207.

f. The Tribunal's failure to apply and address relevant international law

105. According to the Applicant, the Tribunal failed to address the argument made by Gambrinus during the arbitration proceedings that international legal principles clearly hold that jurisdiction should not be denied on the basis of a minor, non-prejudicial noncompliance with contractual or regulatory provisions, such as the cash equivalency requirement set forth in Section 6.7(i) of the JIA.[109] In support of this argument, the Applicant cited *Rumeli Telekom A.S. v. Kazakhstan*,[110] *Tokios Tokeles v. Ukraine*,[111] *Desert Line Projects LLC v. Yemen*,[112] and *Metalpar S.A. v. Argentina*.[113]

106. The Applicant contends that this *lacuna* of the Award is "particularly troubling, given the finding by the Tribunal that *Gambrinus had acted in good faith in acquiring Fertinitro shares in January 2008* and had not engaged in misrepresentation or bad faith conduct at any time."[114]

107. The Applicant further argues that the Tribunal's failure to apply the said international legal principles constitutes a manifest excess of powers under Article 52(1)(b) of the ICSID Convention and that the absence of any discussion of this issue in the Award constitutes a failure to give reasons under Article 52(1)(e) of the ICSID Convention.[115]

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[109] *Id.*, ¶¶ 206 to 211.

[110] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 ["*Rumeli*"]. **(AL-0030)**.

[111] *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004 ["*Tokios Tokelės*"] **(AL-029)**.

[112] *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008 ["*Desert Line Projects*"] **(AL-033).**

[113] *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, April 27, 2006 ["*Metalpar*"] **(AL-032).**

[114] Memorial on Annulment, ¶ 209 (emphasis in original). Reply on Annulment, ¶ 82.

[115] Memorial on Annulment, ¶¶ 210 and 211. The Applicant further argues that the Tribunal also failed to address the legal consequences that under Venezuelan and international law emerged from the fact that all of the other shareholders consented to and benefited from the 2008 Transfer. For the Applicant, these facts "compelled the conclusion that, by application of good faith (*actos propios*), Venezuela was precluded from denying Gambrinus' status as shareholder." Reply on Annulment, ¶ 83.

(3) Serious Departure from a Fundamental Rule of Procedure

108. The Applicant also requests that the Award be annulled on the ground that there was a serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention).

109. The Applicant argues that the Respondent was allowed to raise an allegedly entirely new defense (the issue of whether or not the 2008 Transfer complied with the JIA's cash equivalency requirement, hereinafter the "**JIA Defense**") during the first day of the hearing on jurisdiction and the merits (the "**Arbitration Hearing**"), that is, after the closure of the written phase of the proceedings, and in violation of the Tribunal's Procedural Order No. 1.[116]

110. The Applicant argues that the timing of the Respondent's JIA Defense "was not accidental," but a "deliberate ambush" "timed to obtain maximum surprise" and "strategic advantage,"[117] that ultimately resulted in "a fundamentally imbalanced oral procedure, in which [Gambrinus] was not able to prepare to argue the one point that was to prove dispositive."[118] Furthermore, according to the Applicant, although the Tribunal's Procedural Order No. 2 attempted to give Gambrinus an opportunity to argue the issue, "it is all too clear that these procedures were fundamentally inadequate."[119]

111. For the Applicant, the untimely introduction of this new jurisdictional objection deprived Gambrinus of its right to participate effectively in the oral phase of the Arbitration Hearing.

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[116] Memorial on Annulment, ¶ 112. In particular, the Applicant refers to Sections 13.9 and 13.10 of the Tribunal's Procedural Order No. 1 of 23 July 2012, according to which: "13.9. The Parties have agreed to include with their written submissions (i.e., memorials, counter-memorials, replies and rejoinders) not only their legal arguments, but also all the evidence on which they rely for the legal and factual positions advanced therein, including written witness testimony, any expert testimony, documents and all other evidence in whatever form [...]13.10. Replies and rejoinders shall respond strictly to the prior submission filed by the other Party and shall not raise new issues. The Parties shall not be permitted to supplement their written submissions without authorization of the Tribunal." The Applicant notes that the Tribunal itself held, in its Procedural Order No. 2, that Respondent's JIA Defense was a new argument not allowed under Section 13.9 of Procedural Order No. 1. Reply on Annulment, ¶ 20.

[117] Memorial on Annulment, ¶ 223.

[118] *Id.*, ¶ 212. In response to the Respondent's claim that it only became aware of the facts about the transfer when it reviewed Gambrinus' Rejoinder on Jurisdiction in January 2014, the Applicant contends that Gambrinus had disclosed full copies of the January 2008 Share Purchase Agreement and the February 2008 Share Subscription Agreement by the time it filed its Reply on August 30, 2013, that is, 7 months prior to the hearing. Reply on Annulment, ¶ 25.

[119] Memorial on Annulment, ¶ 212.

In particular, the Applicant contends that the Respondent's "ambush tactics" created the following fundamental imbalances during the oral procedure:

- An imbalance in the opening: Gambrinus' counsel presented opening submissions based solely upon the case as pleaded in written submissions while Respondent's counsel unveiled its new defense.[120]
- An imbalance in testimony on Day 2: Gambrinus' witness, Mr. Gabaldón, was cross-examined on the JIA Defense on Day 2 of the Arbitration Hearing, while Gambrinus' counsel was not in a position to adduce testimony from him on the issue.[121]
- Further testimonial imbalances: Gambrinus' decision not to call Mr. Haberman and Dr. García Montoya "was predicated, *inter alia*, on the jurisdictional and merits arguments as then pled by Respondent" and therefore Gambrinus did not cross-examine them on the opinions they had and would render with respect to the JIA Defense.[122]
- An imbalance in the closing arguments: "Gambrinus' counsel had not had the opportunity to research and marshal their arguments on the JIA/cash equivalency point."[123]

112. The Applicant contends that all of these imbalances led to an impairment of the decision making process that was not redressed or cured by the Tribunal's Procedural Order No. 2, which attempted to give Gambrinus an opportunity to address the JIA Defense, "albeit with constraints of a page-limited brief and single expert opinion."[124] In this regard, the Applicant argues that the "damage" to the decision making-process is manifested in the fact that Gambrinus' post-hearing submissions on the JIA Defense did not receive "the same level of attention as Respondent's oral submissions and slide presentations"[125] and

[120] *Id.*, ¶ 218.

[121] *Id.*, ¶ 219.

[122] *Id.*, ¶ 220.

[123] *Id.*, ¶ 222. The Applicant argues that the untimely introduction of the JIA Defense also created an imbalance in the disclosure phase of the proceedings, since it "foreclosed any hope of getting disclosure on this key issue." *Id.*, ¶ 221.

[124] *Id.*, ¶¶ 225 and 226.

[125] *Id.*, ¶ 227.

in the fact that numerous arguments contained in its post-hearing submissions "were not subject of substantive deliberations"[126] or were simply ignored.[127]

113. On this basis, the Applicant concludes that the imbalances led to a manifest and serious violation of Gambrinus' fundamental right to procedural equality and right to be heard,[128] and that the Tribunal's failure to address numerous potentially dispositive points of law and fact (particularly those identified in the Rodner Opinion), constituted a failure to properly apportion the burden of proof which also constitutes a serious departure from a fundamental rule of procedure.[129]

114. Finally, in response to the Respondent's argument that Gambrinus agreed to the procedures set forth by the Tribunal to address the JIA Defense and therefore waived its right to challenge the Award on this basis, the Applicant contends that Gambrinus "consistently opposed the admission of the new defense."[130] For the Applicant, the fact that Gambrinus agreed to the timetable for the post-hearing briefs, after its objections to the admissibility of the JIA Defense had been overruled, cannot be considered a waiver of the original objection.[131]

B. THE RESPONDENT'S POSITION

115. The Respondent contends that Gambrinus is attempting to use the annulment mechanism as an appeal procedure against the Award[132] and requests that the Committee dismiss Gambrinus' Application in its entirety.

116. Below is a summary of the Respondent's arguments:

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[126] *Id.*, ¶ 227.

[127] *Id.*, ¶ 228. *Inter alia*, the Applicant points out that the Award failed to address the correspondence by Fertinitro's Secretary, Mr. Guevara, which proved that the 2008 Transfer complied in all respects with the JIA and that the shareholders routinely demonstrated their acceptance of Gambrinus' shareholding. Reply on Annulment, ¶ 102.

[128] Memorial on Annulment, ¶ 238.

[129] *Id.*, ¶¶ 239 and 240.

[130] Reply on Annulment, ¶¶ 89 to 98.

[131] *Id.*, ¶ 99.

[132] Counter-Memorial on Annulment, ¶ 2.

(1) Relevant Standards of Review

117. The Respondent highlights that the annulment remedy under the ICSID Convention is not an appeal. It is an "exceptional" or extraordinary remedy for "unusual and important" cases, which does not allow to review an award on the merits, but only under the five limited grounds listed in Article 52(1) of the ICSID Convention.[133] In support of this, the Respondent cites Prof. Schreuer[134] and the annulment decisions in *MINE v. Guinea*,[135] *TECO v. Guatemala*[136] and *RSM v. Grenada*.[137]

118. For the Respondent, the exceptional or restricted nature of the annulment remedy explains why, since the establishment of ICSID, only a very limited number of cases have resulted in a full or partial annulment of an award.[138]

119. Citing the annulment decisions in *El Paso v. Argentina*[139] and *Sempra v. Argentina*,[140] the Respondent notes that the annulment ground based on a "manifest excess of power" (Article 52(1)(b)) requires that the excess be "obvious, evident, clear, self-evident and extremely serious," as well as "quite evident without the need to engage in an elaborate analysis of the text of the Award."[141] Furthermore, contrary to what is suggested by the Applicant, the Respondent argues that this requirement is applicable irrespective of whether the tribunal's decision is on the merits or on jurisdiction and cites, among others, the annulment decision in *Total v. Argentina*.[142]

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[133] *Id.*, ¶¶ 149 to 153.

[134] Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd ed. 2009), p. 901 at ¶ 11 **(DL-2)**.

[135] *MINE* **(AL-006)**, ¶ 4.04.

[136] *TECO* **(AL-027)**, ¶ 73.

[137] *RSM Prod. Corp. c. Grenada*, Caso CIADI No. ARB/05/14, Decisión sobre Solicitud de Sentencia Preliminar de 29 de octubre de 2009, 7 de diciembre de 2009 ["*RSM*"] **(DL-4)**, ¶ 31.

[138] Counter-Memorial on Annulment, ¶ 154. Citing the Centre's *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016, ¶ 68 **(DL-5)**, ¶ 68.

[139] *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on the Application for Annulment, September 22, 2014 ["*El Paso*"] **(DL-8)**, ¶ 142.

[140] *Sempra* **(AL-005)**, ¶ 213.

[141] Counter-Memorial on Annulment, ¶ 168.

[142] *Id.*, ¶¶ 258 – 261, citing *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, February 1, 2016 ["*Total*"] **(DL-1)**, ¶¶ 241-242. See also Tr. 2017, Day 1, 223:22-225:11 and Day 2, 338:6-22.

120. In addition, in relation to the failure to apply the relevant law, the Respondent contends that misinterpretation or misapplication of the proper law, even if serious, does not justify annulment.[143] Furthermore, according to the Respondent, the distinction between failure to apply the proper law and a misapplication or misinterpretation of the law is well-established and has been recognized by a clear line of *ad hoc* committee decisions.[144] Relying on *Continental Casualty v. Argentina*,[145] the Respondent adds that it is for the Tribunal, not *the ad hoc* Committee, to determine the relevant provisions of the applicable law, their content, their relevance and their legal effect and a tribunal's decision on such issues cannot amount to a manifest excess of power.[146]

121. As for the annulment ground based on the Tribunal's failure to state the reasons upon which the award is based (Article 52(1)(e)), the Respondent cites the annulment decision in *MINE v. Guinea*[147] according to which, this ground does not apply "as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or law."[148] Citing *Wena v. Egypt*,[149] the

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[143] Counter-Memorial on Annulment, ¶ 169.

[144] See for example, *MINE* **(AL-006)**, ¶ 5.04: "Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment;" *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee, June 5, 2007 ["*Soufraki*"] **(DL-7)**, ¶ 85: "[...] *a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment*;" *Occidental*, ¶ 56: "*Misinterpretation or misapplication of the proper law to be applied to the merits, even if serious, does not justify annulment;*" *TECO* **(AL-027)**, ¶ 80 : "[...] *when determining whether a tribunal failed to apply the applicable law, an annulment committee must determine whether that tribunal correctly identified the applicable law and whether it endeavored to apply it to the facts in dispute. Whether or not the tribunal made an error in the application of that law is beside the point.*" In this regard, the Respondent highlights *El Paso* ¶ 144, in which the Committee held: "[I]*t is necessary to distinguish between the failure to apply the proper law and an error in the application of that law. The first is a ground for annulment under Article 52, the second is not. Reviewing the substantive reasoning by which an arbitral tribunal reached its conclusions would require reexamining how the tribunal applied or interpreted the law, which would transform annulment committees into appellate tribunals. Under this scenario, committees would necessarily have to evaluate the facts and the evidence as well as the legal principles put forward by the parties all of which were already analyzed by the respective arbitration tribunal. This would change the very nature of the ICSID arbitration system.*"

[145] *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, September 16, 2011 ["*Continental Casualty*"] **(DL-19)**, ¶ 91.

[146] Counter-Memorial on Annulment, ¶ 249.

[147] *MINE* **(AL-006)**, ¶ 5.09.

[148] Counter-Memorial on Annulment, ¶ 163.

[149] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Annulment, February 5, 2002 ["*Wena Hotels*"] **(DL-3)**, ¶ 79.

Respondent further argues that this ground does not allow an *ad hoc* committee to "reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not."[150]

122. Relying on *TECO v. Guatemala*[151] and *Wena v. Egypt*,[152] the Respondent also contends that insufficient reasoning, as opposed to a complete failure to state reasons, does not warrant annulment, and that the obligation to state the reasons does not require that each reason be stated expressly, but may be implicit in the Tribunal's reasoning.[153] Moreover, citing *Soufraki v. United Arab Emirates*,[154] the Respondent argues that some *ad hoc* committees have also suggested that they have discretion to further explain or clarify the tribunal's reasoning rather than annulling the award.[155]

123. The Respondent further stresses that, under Article 48 of the ICSID Convention, a tribunal need not address and respond to each and every argument raised by the parties and that, in fact, even a failure to deal with every question under ICSID Convention Article 48 is not a ground for annulment under ICSID Convention Article 52(1)(e).[156]

124. With regards to the annulment ground based on a serious departure from a fundamental rule of procedure (Article 52(1)(d)), the Respondent argues that the award should only be annulled on this basis when *the tribunal* has departed from a fundamental rule of procedure, since it is for the tribunal to ensure that such fundamental principles are respected throughout the arbitration.[157]

125. The Respondent notes that *ad hoc* committees have only admitted this ground in "extreme" cases given that, as explained by the *Wena v. Egypt*[158] *ad hoc* committee, the "serious

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[150] Counter-Memorial on Annulment, ¶ 162.

[151] *TECO* **(AL-027)**, ¶ 249.

[152] *Wena Hotels* **(DL-3)**, ¶ 81.

[153] Counter-Memorial on Annulment, ¶¶ 164 and 165.

[154] *Soufraki* **(DL-7)**, ¶ 24.

[155] Counter-Memorial on Annulment, ¶ 166.

[156] *Id.*, ¶ 220.

[157] *Id.*, ¶ 158. In support of this argument the Respondent relies on *Occidental* **(AL-022)**, ¶ 60 and in *Vivendi I* **(AL-025)**, ¶ 83.

[158] *Wena Hotels* **(DL-3)**, ¶ 58.

departure" requirement means that the departure from the fundamental rule of procedure "must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed."[159]

126. Finally, the Respondent argues that when this annulment ground is based on an alleged violation of a party's right to be heard the "bar is set high."[160] In this regard, the Respondent cites the recent annulment decision in *Venezuela Holdings* according to which "[i]n the limited number of cases in which *ad hoc* committees have given serious consideration to the contention that a party has been denied the right to be heard, it has been on the basis that a tribunal reached its ultimate award on a ground that one or both parties had had no opportunity to address at all in its argument."[161]

(2) The Tribunal's Manifest Excess of Powers and the Award's Failure to State the Reasons upon which it is based

127. The Respondent contends that Gambrinus' allegations regarding the Award's alleged failure to state the reasons and the Tribunal's manifest excess of powers constitute an attempt to completely re-litigate its case on jurisdiction and to introduce new jurisdictional arguments that had never been raised before the Tribunal, such as the lack of jurisdiction over the question of the existence of the 2008 Transfer.[162]

128. According to the Respondent, the Award unambiguously sets out the reasons which led the Tribunal to conclude that it lacked jurisdiction.[163] Furthermore, the Tribunal decided well within the scope of its powers when it declined jurisdiction over Gambrinus' claims, applying the proper law to the issue of the ownership over the alleged investment.[164]

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[159] Counter-Memorial on Annulment, ¶¶ 159 and 160.

[160] See Respondent's letter of April 24, 2017.

[161] *Venezuela Holdings* **(AL-066)**, ¶ 133.

[162] Counter-Memorial on Annulment, ¶¶ 19 and 25.

[163] *Id.*, ¶¶ 20 and 206 to 234.

[164] *Id.*, ¶¶ 23 and 235 to 280. In response to the Applicant's argument, based on the annulment decision in *Venezuela Holdings* **(AL-066)**, that a tribunal's failure to address relevant principles of the applicable law concerning existence and scope of property rights constitutes an annullable error (see ¶ 76 above), the Respondent contends that, unlike in *Venezuela Holdings* **(AL-066)**, in the present case the Tribunal carefully applied the relevant sources of law. In particular, the Respondent points out that the Tribunal examined the 2008 Transfer under Venezuelan law and

129. Below is a more detailed summary of the Respondent's position on each of the annullable errors identified by Gambrinus.

a. The Tribunal's treatment of the 2008 Transfer as being void ab initio

130. The Respondent contends that the Applicant's argument that the Tribunal manifestly exceeded its powers by finding that the 2008 Transfer as being void *ab initio* must fail because it is based on a defence that Gambrinus never raised before the Tribunal.

131. According to the Respondent, the Applicant's argument regarding relative versus absolute nullity suggests (i) that Venezuela had no standing to raise the inexistence of the 2008 Transfer in the arbitration proceeding and (ii) that the Tribunal had no jurisdiction to declare the investment non-existent.[165] Yet, at no point did Gambrinus make these submissions to the Tribunal.[166] In fact, the Respondent notes that the Applicant requested the Tribunal to decide on the validity of the 2008 Transfer when it included this question in the joint list of questions submitted by the Parties to the Tribunal after the submission of the post-hearing reply briefs (the "**Joint List of Questions**").[167]

132. For the Respondent, the very fact that these defenses were not explicitly submitted by the Applicant in any of its submissions is the best evidence that the Tribunal did not "manifestly" exceed its powers by not subscribing them.[168]

133. In response to the Applicant's argument that "the evidence showed" that under Venezuelan law, even if Gambrinus had failed to comply with Section 6.7(i) of the JIA, the 2008 Transfer had to be given effect, the Respondent contends that the legal evidence submitted

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concluded that it was ineffective because of the essential nature given to the "cash or cash equivalent" requirement. See Respondent's letter of April 24, 2017.

[165] Counter-Memorial on Annulment, ¶ 264.

[166] Rejoinder on Annulment, ¶ 98. In response to the Applicant's allegations that it had properly raised this issue before the Tribunal, the Respondent contends that the "vague" references identified by Gambrinus (the footnote in the July 2014 Submission and the sentence in the 2014 Post-Hearing Reply) cannot, "under any possible definition, qualify as an objection to the Tribunal's jurisdiction." Additionally, the Respondent contends that the statements made in the Rodner Opinion on this issue cannot be considered as an integral part of Grambrinus' submissions, since it was not the role of the legal expert to present objections to the Tribunal's jurisdiction that Gambrinus had failed to submit. See Rejoinder on Annulment, ¶¶ 100 to 104.

[167] Counter-Memorial on Annulment, ¶ 266.

[168] *Id.*, ¶ 268.

by the Parties in this regard differed. The Respondent points out that, in contrast with the views of Mr. Rodner (which were not even endorsed in Gambrinus' submission), the evidence submitted by Venezuela, including the opinion of Dr. García Montoya, "showed that the parties had agreed on the consequences of such a failure in the JIA and the By-Laws and that, pursuant to these specific provisions, the [2008 Transfer] had no effect *ipso iure*."[169]

134. The Respondent contends that, contrary to what is argued by the Applicant, the findings of the *ad hoc* committee in *Occidental v. Ecuador* in no way support Gambrinus' application for annulment. According to the Respondent, the issue at stake in such a case was whether the majority of the tribunal had manifestly exceeded its powers when granting to Occidental a compensation based on 100% of the value of a participation contract in an oil field while 40% of this amount corresponded to the rights assigned to Andes (a Chinese company not protected by the investment treaty between Ecuador and the United States).[170]

135. For the Respondent, Gambrinus' attempts to apply the findings of the *ad hoc* committee in *Occidental v. Ecuador* to this case must fail for several reasons.

136. First, the Respondent notes that while Occidental was seeking to benefit from its own breach of Ecuadorian law by inflating the amount of compensation it was claiming against Ecuador, in the present case Venezuela showed that Gamrbinus had failed to make an investment under the BIT because of Gambrinus' failure to comply with an essential contractual requirement.[171]

137. The Respondent also points out that an essential finding of the *Occidental ad hoc* committee was the contradictory reasoning of the tribunal, which had based its decision on the inexistence of the assignment of rights to Andes while at the same time recognizing

[169] *Id.*, ¶ 271. Rejoinder on Annulment, ¶¶ 93 to 95.

[170] Counter-Memorial on Annulment, ¶ 273.

[171] *Id.*, ¶ 276.

Andes' rights in order to justify its conclusion. Instead, in the present case Gambrinus has failed to show any such contradiction.[172]

138. Additionally, the Respondent argues that the governing law in this case is Venezuelan law and therefore Gambrinus cannot simply extrapolate some of the findings of the *Occidental* committee regarding Ecuadorian laws and Ecuadorian Supreme Court decisions and claim that the same principles apply to this case.[173]

139. Furthermore, the Respondent notes that the *Occidental v. Ecuador* case concerned the consequences of a failure to obtain a relevant authorization under the Ecuadorian Hydrocarbon Law, and that under the Ecuadorian Civil Code such a failure would entail absolute nullity, which would need to be declared by a judge. The Respondent highlights that, in contrast with the present case, these provisions of Ecuadorian law were discussed at length before the *Occidental* tribunal. Furthermore, they are of no relevance for the case at hand "where an essential contractual requirement was at stake, in relation to which the JIA and Fertinitro's By-Laws expressly provided that non-compliant transfers would automatically be null, void and without effect [...], manifestly excluding any need for a prior declaration by the judge."[174]

b. The Tribunal's application of the cash equivalency clause to inter-affiliate transfers

140. The Respondent argues that the Tribunal applied the proper law to the interpretation of Section 6.7(i) of the JIA and arrived to the conclusion that this provision applied to inter-affiliate transfers.

141. The Tribunal assessed the weight to be given to the intention of the parties to the JIA, applying the relevant rule of contract interpretation set forth in Article 12 of the Venezuelan

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[172] *Id.*

[173] *Id.*

[174] *Id.* See also Rejoinder on Annulment, ¶ 108. Similarly, the Respondent also contends that Gambrinus' arguments regarding Prof. Iribarren expert opinion in *Crystallex* **(AL-018)** must fail, because such case concerned the validity of the decision of a public organ in Venezuela "which is inapposite to issues of Venezuelan private contract law, pursuant to which the parties are free to agree that a failure to comply with certain essential requirements would automatically result in share transfers being 'null, void and of no force or effect.'" See Counter-Memorial on Annulment, ¶ 278. See also Rejoinder on Annulment, ¶ 109.

Code of Civil Procedure, which had been relied upon by both Parties' legal experts. On this basis, the Tribunal reached the conclusion that: (i) the intention of the parties would only take precedence over the contract language in case the contractual provisions were obscure, ambiguous or deficient; and (ii) "because Article 6.7(i) of the JIA clearly applied on its face to all transfers – and as such contained no 'obscurity, ambiguity or deficiency' - the Tribunal was not entitled under Venezuelan law to simply disregard it in the light of any alleged 'purpose' or 'real intention' of the parties."[175]

142. Thus, for the Respondent, the Tribunal relied on the relevant Venezuelan law on the record and applied it to the facts of the case.[176] As explained by the *ad hoc* committee in *CDC v. Seychelles*,[177] the fact that the Tribunal did not rely on the arguments put forward by Gambrinus' legal expert, does not mean that it failed to apply the proper law.[178]

143. Furthermore, the Respondent contends that the Award clearly states the reasons which led the Tribunal to this conclusion and such "reasons are consistent, they are not frivolous and they enable the reader to understand how the Tribunal reached its conclusion in this respect."[179]

144. Contrary to Gambrinus' reading of the Award, the Respondent argues that the Tribunal did not agree with Gambrinus that the application of Section 6.7(i) of the JIA to all permitted dispositions would render these dispositions literally impossible, nor did it "explicitly find," as alleged by the Applicant, that cash equivalency served no purpose for inter-affiliate or other permitted dispositions under the JIA.[180] If anything, the Tribunal simply took note of the arguments put forward by Gambrinus and found that, pursuant to the

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[175] Counter-Memorial on Annulment, ¶ 244.

[176] *Id.*, ¶ 245.

[177] *CDC Group* **(AL-0009)**, ¶ 45.

[178] The Respondent notes that its legal expert, Dr. García Montoya, demonstrated that, in the absence of obscurity, ambiguity or deficiency, the text of the contract prevailed as an expression of the intention of the parties under Venezuelan law and, according to the Respondent, the Tribunal upheld the argument of Dr. García Montoya on this point. Rejoinder on Annulment, ¶¶ 51 and 52.

[179] Counter-Memorial on Annulment, ¶ 214.

[180] The Respondent also argues that Gambrinus' allegation that the Tribunal identified a contractual ambiguity both within the Fertinitro By-Laws and between the Fertinitro By-Laws and the JIA is wrong. On the contrary, after carefully analyzing the text of the different relevant provisions in the By-Laws, the Tribunal expressly found that there was no ambiguity. Rejoinder on Annulment, ¶¶ 47 to 50.

relevant principles of interpretation under Venezuelan law, a determination on these points was immaterial and, therefore, unnecessary.[181]

c. The Tribunal's conclusion on whether the 2008 Transfer involved cash/cash-consideration

145. The Respondent contends that the Tribunal applied the proper law when assessing whether the 2008 Transfer had been made in accordance with the cash equivalency requirement set forth in Section 6.7(i) of the JIA. In doing this assessment, the Tribunal agreed with the Respondent's submission and legal expert's opinion that, under Venezuelan law, the Gambrinus' shares are not "cash equivalent" since they are not readily convertible into cash on a short-term basis.[182] Contrary to Gambrinus' suggestion, when reaching this conclusion, the Tribunal did not even refer to (let alone exclusively rely on) the standard provided by IAS 7.[183]

146. In this regard, the Respondent argues that there can be no doubt that the Tribunal sought to apply Venezuelan law and that Gambrinus should not use this annulment proceeding to challenge whether the Tribunal was right in its conclusion, since this would go to the substance of the Tribunal's decision and as such, as explained in *Continental Casualty v. Argentina*,[184] cannot amount to a manifest excess of power.[185]

d. The Tribunal's conclusion regarding the Common Share Subscription Agreement

147. In response to Gambrinus' argument regarding the alleged inconsistency in the Tribunal "non-textual" approach when qualifying the Common Share Subscription Agreement as a

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[181] Counter-Memorial on Annulment, ¶ 213. See also Rejoinder on Annulment, ¶¶ 53 to 55.

[182] Counter-Memorial on Annulment, ¶¶ 247 and 248.

[183] *Id.*, ¶ 250. In response to the Applicant's argument regarding the Tribunal's alleged failure to address Mr. Rodner's opinion as to whether a set-off of monetary obligations had to be regarded as satisfying the cash equivalency requirement, the Respondent contends that the Tribunal was under no duty to address this, given that the issue was irrelevant in light of the Tribunal's finding that the Common Share Subscription Agreement was a share-for-share transaction. Rejoinder on Annulment, ¶¶ 57 to 62. Furthermore, the Respondent argues that the Applicant's arguments in this regard are misleading since the mere fact that an obligation is denominated in money is completely irrelevant when assessing whether such obligation has been paid in cash or cash equivalency, as required by the JIA. Rejoinder on Annulment, ¶¶ 84 to 87.

[184] *Continental Casualty* **(DL-19)**, ¶ 91.

[185] Counter-Memorial on Annulment, ¶ 249.

"share-for-share" transaction, the Respondent argues that the Applicant has failed to show how this allegation could be relevant for the purpose of the annulment.

148. For the Respondent, the fact that the Applicant is not convinced by the reasons put forward by the Tribunal is irrelevant since, as explained in *El Paso v. Argentina*,[186] unconvincing reasons do not amount to lack of reasons and thus it is not within the power of an *ad hoc* committee to decide whether it agrees or disagrees with the reasons expressed by the tribunal.[187]

e. The Tribunal's failure to address and apply the 5-year prescription period

149. Citing *Wena v. Egypt*,[188] the Respondent argues that a tribunal cannot reasonably be expected to respond in its reasoning to a defense which was never articulated by any of the parties.[189] In this regard, the Respondent contends that the Tribunal did not fail to address and apply the 5-year prescription simply because the Applicant never submitted that Venezuela's jurisdictional objection based on the 2008 Transfer was time-barred.[190]

150. For the Respondent, the only reference to the prescription period in Gambrinus' submissions appears in a footnote of its July 2014 Submission, in which it both misread and criticized Venezuela's legal expert argument in this regard. The Respondent notes that the Applicant did not put forward in that submission – or in any of its subsequent briefs – any defense that the Respondent's objection should be declared time-barred and dismissed. Similarly, the Respondent adds that nowhere did Gambrinus' legal expert, Mr. Rodner, opine on the issue.[191]

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[186] *El Paso* **(DL-8)**, ¶ 217.

[187] Counter-Memorial on Annulment, ¶¶ 218 and 2019.

[188] *Wena Hotels* **(DL-3)**, ¶ 82.

[189] Counter-Memorial on Annulment, ¶ 231.

[190] *Id.*, ¶ 226. Rejoinder on Annulment, ¶ 63.

[191] Counter-Memorial on Annulment, ¶¶ 228 and 229. Rejoinder on Annulment, ¶ 64.

151. Furthermore, the Respondent points out that the Tribunal invited the Parties to submit a list of the questions that they deemed should be addressed in the Award and that Gambrinus did not include the prescription period issue in this list.[192]

f. The Tribunal's failure to apply and address relevant international law

152. With regards to the Applicant's argument that the Tribunal failed to address relevant principles of international law, the Respondent contends that the Tribunal had no reason to address the awards cited by Gambrinus, since such awards dealt with the scope of the provision contained or implied in some investment treaties that investment must be made in accordance with the host State law and were thus irrelevant and immaterial to the Tribunal's decision.[193]

(3) The Serious Departure from a Fundamental Rule of Procedure

153. Contrary to the Applicant's arguments on the Respondent's "ambush tactics," the Respondent contends that its JIA Defense was a legitimate complement to its jurisdictional objection based on the lack of Gambrinus' investment, which was prompted by Gambrinus' late submission of the details of the 2008 Transfer.[194]

154. The Respondent further argues that, contrary to the Applicant's suggestion, under the Tribunal's Procedural Order No. 1 the Tribunal had the discretion to authorize (or not) a supplement to the Parties' written submissions and it was in the light of this power that the Tribunal admitted the Respondent's JIA Defense.[195]

155. The Respondent points out that the procedures put in place by the Tribunal in Procedural Order No. 2 were in no way imposed upon the Applicant. On the contrary, the Respondent argues that the Applicant "specifically suggested, negotiated and agreed on the very procedural arrangements that it now claims 'failed to erase the imbalance that arose at the

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[192] Counter-Memorial on Annulment, ¶¶ 221 and 222. Rejoinder on Annulment, ¶ 65.

[193] Counter-Memorial on Annulment, ¶¶ 232 to 234. Rejoinder on Annulment, ¶¶ 68 to 72.

[194] Counter-Memorial on Annulment, ¶¶ 172 to 182.

[195] Rejoinder on Annulment, ¶¶ 5 and 22.

hearing.'"[196] In this regard, according to the Respondent, the fact that Gambrinus objected to the introduction of the JIA Defense is irrelevant. What matters is that Gambrinus never raised any objection in relation to the subsequent post-hearing procedure agreed to ensure Gambrinus' right to be heard.[197]

156. Furthermore, the Respondent notes that the post-hearing phase agreed by the Parties lasted more than six months and that throughout this time Gambrinus never took issue with the agreed procedure, nor did it request that this procedure be amended or that further arrangements be put in place.[198]

157. On this basis, the Respondent contends that, pursuant to Arbitration Rule 27, the Applicant is precluded form alleging that the established procedure constituted a serious departure from a fundamental rule of procedure.[199]

158. In any event, the Respondent argues that the procedure was fair to both Parties, guaranteeing the right to be heard and the equality between both Parties.[200] In this regard, the Respondent notes that the Parties were given the opportunity to submit specific written submissions and a legal opinion dealing exclusively with the JIA Defense and that Gambrinus had yet another opportunity to supplement this submission or to rebut the points made by Venezuela in two rounds of post-hearing briefs and reply briefs.[201]

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[196] Counter-Memorial on Annulment, ¶ 185. Among other things, the Respondent highlights that, contrary to the Applicant's suggestion that it was precluded from submitting evidence after the Arbitration Hearing, Gambrinus expressly agreed that no further factual evidence would be submitted in the post-hearing brief. Counter-Memorial on Annulment, ¶ 189.

[197] Rejoinder on Annulment, ¶23. In this sense, the Respondent highlights that it was Gambrinus' counsel who, when they objected to the introduction of the JIA Defense by the Respondent at the Arbitration Hearing, requested that they be able to address this issue in written submissions. The Respondent notes that "[t]he bulk of these procedural arrangements – and not only their 'timetable' – were then negotiated between the Parties' respective counsel, who reached an agreement on all aspects of the procedure to be implemented – including the number, content, order, calendar and length of submissions and the extent of any evidence to be enclosed." According to the Respondent, in fact, the principle that this issue would be addressed in specific submissions before post-hearing briefs was agreed before the exact "timetable" for such submissions was set. Rejoinder on Annulment, ¶¶ 24 to 26.

[198] Counter-Memorial on Annulment, ¶ 192.

[199] *Id.*, ¶ 194. In support of this argument the Respondent cites the annulment decision in *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, May 13, 1985 ["*Klöckner I*"] **(DL-13)**, ¶ 88; *Fraport Annulment* **(AL-008)**, ¶ 206; and *RSM* **(DL-4)**, ¶ 27.

[200] Counter-Memorial on Annulment, ¶ 198.

[201] *Id.*, ¶ 199. According to the Respondent, the Applicant's reliance on *Pey Casado* **(AL-016)**, *TECO* **(AL-027)** and *Fraport Annulment* **(AL-008)** is misplaced. For the Respondent, such cases only serve to confirm that, because

159. Additionally, and contrary to the Applicant's suggestion that its inability to address the JIA Defense during the Arbitration Hearing constitutes a violation of its fundamental right to present its case, the Respondent contends that Arbitration Rule 29 expressly contemplates the possibility for the Parties to agree that all or some issues be addressed on a document-only basis, with no hearing.[202]

Gambrinus was clearly given the opportunity to present its position on the JIA Defense, the "*principe du contradictoire*" was fully complied with in the present case. Rejoinder on Annulment, ¶ 30.

[202] Counter-Memorial on Annulment, ¶ 202.

V. ANALYSIS

160. Article 52(1) of the ICSID Convention reads as follows:

> *(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *a. that the Tribunal was not properly constituted;*
>
> *b. that the Tribunal has manifestly exceeded its powers;*
>
> *c. that there was corruption on the part of a member of the Tribunal;*
>
> *d. that there has been a serious departure from a fundamental rule of procedure; or*
>
> *e. that the award has failed to state the reasons on which it is based.*

A. ARTICLE 52(1)(B) – MANIFEST EXCESS OF POWERS

(1) Relevant Standard of Review

161. The Applicant seeks annulment pursuant to Article 52(1)(b) of the ICSID Convention. The underlying arguments on which the Applicant relies upon to seek annulment on this ground are to some extent common to the ones used to seek annulment under Article 52(1)(e) of the ICSID Convention. It should be noted that the standard to set aside an award under the two provisions is neither similar nor identical. The Committee will, despite the reliance by the Applicant on similar underlying arguments, deal with the application for annulment under the two provisions separately.

162. The *ad hoc* committee in the *Klöckner I* annulment decision stated as follows:

> *[A]n arbitral tribunal's lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an "excess of powers" under Article 52(1)(b).*[203]

163. The ground of manifest excess of power is not merely limited to lack of jurisdiction. This ground of annulment is also applicable when the tribunal disregards the applicable law or

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[203] *Klöckner I* **(DL-13)**, ¶ 4. This wording was later cited in *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007 ["*CMS*"], ¶ 47.

grounds its decision in the award on a law other than the law applicable under Article 42 of the ICSID Convention.[204]

164. The *ad hoc* committee in the *CMS* annulment decision stated as follows:

> *A complete failure to apply the law which a tribunal is directed by Article 42(1) of the ICSID Convention can also constitute a manifest excess of powers.*[205]

165. There is a distinction between non-application of the applicable law and an incorrect application of the applicable law. The former is a ground for annulment while the latter is not.[206]

166. In the annulment decision in *MINE*, the committee stated as follows:

> *Disregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment.*[207]

167. The Committee is of the view that in order for the Award to be annulled under this ground, there are two requirements. First, the Tribunal must have exceeded its powers by "deciding questions" not submitted to it or refusing to decide questions properly before it, or by failing to apply the proper law.[208] Second, the excess must be manifest. The excess of power must be "obvious, evident, clear, self-evident and extremely serious."[209]

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[204] *Klöckner I* **(DL-13)**, ¶¶ 58-59; *MINE* **(AL-006)**, ¶ 5.03; *CMS*, ¶ 49; *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A., sub nom. Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Annulment Decision, September 5, 2007 ["*Lucchetti*"]; ; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Annulment Decision, March 21, 2007 ["MTD"], ¶ 44; *Soufraki* **(DL-7)**, ¶ 45.

[205] *CMS*, ¶ 49.

[206] Some annulment committees have stated that an egregious error in the application of the law could also be a ground for annulment under Article 52(1)(b) of the ICSID Convention.

[207] *MINE* **(AL-006)**, ¶ 5.04.

[208] *CDC Group* **(AL-0009)**.

[209] *El Paso* **(DL-8)**, ¶ 142.

(2) The Annullable Errors Identified by the Applicant under the Ground of Manifest Excess of Powers

168. As explained above, the Applicant argues that the Tribunal committed annullable errors that constitute a manifest excess of powers under Article 52(1)(b) of the ICSID Convention in six (6) different ways: (i) in its treatment of the 2008 Transfer as being void *ab initio*; (ii) in its application of the cash equivalency clause to inter-affiliate transfers; (iii) in its conclusion on whether the 2008 Transfer involved cash/cash-consideration; (iv) in its conclusion regarding the Common Share Subscription Agreement; (v) in its failure to address and apply the 5-year prescription period; and (vi) in its failure to apply and address relevant international law. The Committee will now analyze each one of them.

a. The Tribunal's treatment of the 2008 Transfer as being void ab initio

169. The contention of the Applicant is that the Tribunal's conclusion that the 2008 Transfer was void due to Gambrinus' failure to abide by the cash equivalency requirement of Section 6.7(1) of the JIA represents a manifest excess of jurisdiction. The contention of Gambrinus is that, even if the transfer was a technical non-compliance of Article VI of the JIA and Chapter III of the Fertinitro By-Laws, *quod non*, it would merely be a technical breach and therefore the 2008 Transfer should not have been treated by the Tribunal as being null and void.

170. The Applicant relies heavily on the annulment decision in *Occidental v Ecuador*[210] to further argue that the 2008 Transfer was valid and effective until declared otherwise by the competent court under the JIA (*i.e.* arbitral tribunal under the rules of the International Chamber of Commerce) and not by the Tribunal. Gambrinus also relies on the expert opinion provided by the Respondent's legal expert, Prof. Iribarren, in *Crystallex International Corp v Venezuela*[211] and on the opinion of its own expert, Mr. Rodner.

171. The Respondent, on the other hand, contends that Gambrinus is in effect putting forward an entirely new defence.

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[210] *Occidental* **(AL-022)**.

[211] *Crystallex* **(AL-018)**.

172. The Committee notes that the question of whether failure to comply by the cash equivalency requirement would render the contract voidable as opposed to it being void *ab initio* was not in the Joint List of Questions submitted to the Tribunal. Hence, the Tribunal cannot be reproached for not having addressed the issue that it was not asked to consider.[212]

173. The Tribunal in the Award considered Article VI of the JIA and in particular Section 6.7(i) and held that the transfer of the Fertinitro shares was null and void and of no effect. The Tribunal was not asked to consider whether the transfer was voidable and hence the Tribunal cannot be faulted for its decision.

174. The Committee is also of the view that the Tribunal did not have to decide whether the 2008 Transfer can be said to be a nullity before a competent court made such a determination in view of the fact that the issue was not raised nor argued comprehensively before the Tribunal.

175. When arguments were addressed during the Hearing on Annulment with regard to the *Occidental* annulment decision, the Committee asked the Applicant whether Venezuelan law and Ecuadorian law on this issue are sufficiently similar for the decision in *Occidental* to be applicable to the present proceedings.[213] The Committee was not able to obtain a satisfactory answer from the Applicant. The Respondent submitted that the Venezuelan Civil Code does not include an equivalent provision to Article 1698 of the Ecuadorian Civil Code.

176. It should be noted that in the *Occidental* case, the issue of whether a competent court should declare whether the transfer of shares was null or void *ab initio* was raised before the tribunal, whereas in the present case this issue is being raised for the very first time before the Committee. In this regard, it should also be noted that this was an issue that was not included among the Joint List of Questions[214] that the parties submitted to the Tribunal.

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[212] *Wena Hotels* **(DL-3)** ¶82

[213] *Occidental* **(AL-022)**.

[214] Joint List of Questions **(A-59)**.

177. In light of the above, the decision in *Occidental* whilst being persuasive, is distinguishable on the facts and in law and is not applicable to the present dispute.

178. The Committee is therefore of the view that the Tribunal did not manifestly exceed its powers.

b. The Tribunal's application of the cash equivalency clause to inter-affiliate transfers

179. The Applicant's principal argument is that, when determining whether the cash equivalency requirement applied to inter-affiliate transfers, the Tribunal manifestly failed to ascertain and apply the real intent of the parties under the JIA and the Fertinitro By-Laws, as required under Venezuelan law and thus, failed to apply the proper law.

180. The Committee is satisfied that the Tribunal applied Venezuelan law. In particular, the Tribunal considered Article 12 of the Venezuelan Code of Civil Procedure in order to interpret the JIA and the Fertinitro By-Laws. Article 12 reads as follows:

> *En la interpretación de contratos o actos que presenten oscuridad, ambigüedad o deficiencia, los jueces se atendrán al propósito y a la intención de las partes o de los otorgantes, teniendo en mira las exigencias de la Ley, de la verdad y de la buena fe.*

181. The English translation reads as follows:

> *When interpreting contracts that are obscure, ambiguous or, defective the judge shall look to the purpose and intention of the parties or the issuer, taking into account the requirements of the law, truth and good faith.* [emphasis added]

182. In applying this Article, the Tribunal analysed the provisions of the JIA regulating the transfer of shares, including the cash equivalency requirement under Section 6(7)(i), and came to the conclusion that there was no obscurity ambiguity or deficiency in such provisions and that, therefore, it was not allowed to look beyond the plain contract language which required all transfers to be made for cash or cash equivalent.[215]

[215] Award, ¶¶ 265 and 266.

183. The Tribunal also carefully analysed the Applicant's argument that Article 12 of the Fertinitro By-Laws does not subject inter-affiliate transfers to a cash equivalency requirement. It was further argued that Article 14 of the Fertinitro By-Laws is subordinate to Article 12 and that, in light of the conflict with Section 6 of the JIA, the Tribunal should have analysed or ascertained the real intention of the parties.

184. The Tribunal expressly dealt with these issues in its Award.[216] It first stated that there is no prevalence of the Fertinitro By-Laws over the text of the JIA.

185. It then considered Articles 12 and 14 of the Fertinitro By-Laws and came to the conclusion that there was no conflict between the Fertinitro By-Laws and the JIA by holding as follows:

> *The Tribunal notes that differently from Section 6.2 of the JIA which makes any Disposition of shares, not excluding transfers to Affiliates, subject to the condition of a "cash or cash equivalents" consideration under Section 6.7(i), no similar condition is apparently prescribed by the Fertinitro By-Laws regarding transfers to Affiliates. Under Article 12 of the By-Laws (entitled "Exception to the Restriction on Disposal and Encumbrance of Company Shares"), the shareholders may transfer or confer rights on their shares without being obligated to comply with the provisions of Chapter III (inclusive of Articles 11 to 15), "except where provided for under paragraph three of clause thirteen," in case (under B) of disposal of shares to Affiliates. Paragraph three of Article 13, dealing with "Transfers to Third Parties," is no exception to the unconditioned disposal of shares to Affiliates under Article 12, considering that transfers to Affiliates are not transfers to Third Parties.*[217]
>
> *However, the conflict is removed by the starting language of Article 14, making its provisions applicable "[n]otwithstanding any other provision contained in these Articles of Incorporation/ By-Laws," the reference to any other provision including Article 12.*[218]
>
> *The prevalence of Article 14 over the exemption of transfer to Affiliates under Article 12 is confirmed by the last part of same Article 14, providing (under B) that "[a]ny disposal or transfer of*

[216] *Id.*, ¶ 261.

[217] *Id.*, ¶ 262.

[218] *Id.*, ¶ 263.

> *Company shares must be carried out pursuant to the provisions contained in the Agreement," where "Agreement" cannot but refer to the JIA. Also under the By-Laws, therefore, transfers of shares to Affiliates are subject for their validity to the condition of payment being made in cash or cash equivalents, as provided by Section 6.7(i) of the JIA.*[219]

186. The Committee considers that the proper law that had to be applied is Venezuelan law and that the Tribunal was mandated to interpret the provisions of the JIA and the Fertinitro By-Laws to ensure that the transfer of the Fertinitro shares to the Applicant complied with Venezuelan law.

187. The Tribunal did just that. It interpreted the provisions of the JIA and the Fertinitro By-Laws in accordance with Venezuelan law and expressly dealt with the relationship between the JIA and the Fertinitro By-Laws, as explained above.

188. Accordingly, in the Committee view, the Tribunal cannot be faulted in its application of Venezuelan law and its interpretation of the latter does not give rise to a manifest excess of power.

c. The Tribunal's conclusion on whether or not the 2008 Transfer involved cash/cash consideration

189. The Applicant contends that the Tribunal's reliance on IAS 7 for defining cash or cash equivalency is flawed[220] and constitutes a manifest excess of power, as it represented the failure to apply proper principles of Venezuelan law. The Applicant further contends that IAS 7 has no status under Venezuelan law. It also contends that IAS 7 was introduced in breach of the Tribunal's Procedural Order No. 2.

190. According to the Applicant, Venezuelan law recognizes set-off as a proper manner of discharging money obligations. The Applicant further contends that the Tribunal failed to discuss and apply the principles of set-off, while these principles are part of Venezuelan law, in particular Article 1333 of the Venezuelan Civil Code.

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[219] *Id.*, ¶ 264.

[220] *Id.*, ¶¶ 247, 248, 249 and 250.

191. In the Award, the Tribunal did allude to the issue of set-off.[221] It also referred to Mr. Rodner's opinion as to whether the set-off of money obligations would satisfy the requirements of Section 6.7 of the JIA and came to the conclusion that the transfer of shares did not comply with such requirement. Accordingly, there is no merit in the Applicant's argument that the Tribunal did not address the issue of the set-off and thereby committed an annullable error.

192. Furthermore, contrary to what is argued by the Applicant, the Tribunal did not rely upon IAS 7 for its conclusion.

193. Therefore, the Committee is of the view that the Tribunal considered in the Award whether the 2008 Transfer complied with the cash equivalency requirement under Venezuelan law and its interpretation does not give rise to a manifest excess of powers.

d. The Tribunal's conclusion regarding the Common Share Subscription Agreement

194. As explained above, Gambrinus argues that, while the Tribunal applied a strict literalist approach to the JIA, it applied a non-textual approach when it construed the Common Share Subscription Agreement "as 'converting' the terms of the January 2008 Share Purchase Agreement into an agreement to engage in a share-for-share transaction."[222] According to the Applicant, the Award's failure to reconcile this different approaches leads to an unexplained inconsistency in its treatment of the cash equivalency requirement which represents a manifest excess of powers of the Tribunal under Article 52(1)(b) of the ICSID Convention (as well as a failure to state the reasons under Article 52(1)(e)).

195. The Respondent takes the view that there is no error in the manner in which the Tribunal construed the Common Share Subscription Agreement. It further takes the view that it is not within the purview of an *ad hoc* committee to decide whether it agrees or disagrees with the reasons expressed by the Tribunal.

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[221] *Id.*, ¶¶ 230, 258, 260

[222] Memorial on Annulment, ¶ 200 and 201.

196. Having considered both the arguments of Gambrinus and Venezuela on this issue, the Committee is of the view that there is no merit in Gambrinus' argument. The Tribunal has given reasons as to the manner in which it construes the JIA, the Fertinitro By-Laws and the Common Share Subscription Agreement.

197. In the Committee's view, these reasons are not frivolous. It is not within the powers of the Committee to decide whether it agrees or disagrees with the conclusion of the Tribunal. The Committee may only assess whether, in reaching its conclusion, the Tribunal manifestly exceeded its powers.

e. The Tribunal's alleged failure to address and apply the 5-year prescription period

198. The argument of the Applicant is that, pursuant to the Venezuelan Civil Code Article 1346 and the Fertinitro By-Laws, a 5-year prescription period was applicable for nullity actions. The Applicant contends that the Tribunal did not address the issue of the prescription period.

199. This was another issue that was not raised by the Applicant in the Joint List of Questions that the Tribunal was requested to consider. The only reference to the issue of limitation or prescription period is in footnote 57 of the July 2014 Submission. The Committee is therefore of the view that the Tribunal cannot be faulted in not addressing the issue of prescription period or limitation when it was not raised specifically as an issue or argued *in extensor* by the Applicant before the Tribunal.

f. The Tribunal's alleged failure to apply and address relevant international law

200. The argument of the Applicant is that the Tribunal did not address or take into account the principle of public international law that purported minor technical non-compliance with contractual or regulatory provisions - such as the cash equivalency requirement set out in Section 6.7 of the JIA -, cannot deprive an investor of its treaty rights under international

law, "particularly where the alleged technical error arose from a good faith misunderstanding."[223] The Applicant relied on 4 authorities in its submissions.[224]

201. The Committee is of the view that the contractual provisions of an underlying agreement may not be minor technical defects which can be disregarded.

202. Further, the Committee has also considered very carefully the 4 authorities cited by the Applicant and they relate to whether the claimants had a protected investment under the different applicable bilateral investment treaties given the alleged failure of the investors to comply with the laws of the host State when making their investments. However, the issue in this annulment proceeding is not whether Gambrinus failed to comply with local legislation thereby losing the procedural protections granted by the BIT. Thus, the Committee agrees with the Respondent that the authorities are neither relevant nor applicable. In the present case, there was no investment within the meaning of the JIA, read with the BIT and the laws of Venezuela.

203. The Committee is therefore of the view that the Tribunal did not make a manifest error in not dealing with the international law argument specified in paragraph 200 above, as it was not applicable.

B. ARTICLE 52(1)(E) – FAILURE TO STATE THE REASONS

(1) Relevant Standard of Review

204. Article 52(1)(e) of the ICSID Convention reads as follows:

> *(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *(e) that the award has failed to state the reasons on which it is based.*

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[223] Reply on Annulment, ¶ 81.

[224] *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of Phillipines*, ICSID Case No. ARB/3/25, Award, August 16, 2007 ["*Fraport*"] **(DL-022)**, ¶ 396; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 26, 2016 ["*Rumeli*"] **(AL-0030)**, ¶ 319; *Tokios Tokelės* **(AL-029)**, ¶ 86; *Desert Line Projects* **(AL-033)**, ¶ 104; *Metalpar* **(AL-032)**, ¶ 84.

205. This Article is connected to Article 48(3) of the ICSID Convention according to which:

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

206. The annulment committee in *MINE v. Guinea*[225] held that to annul an award under Article 52(1)(e) of the ICSID Convention, the committee has to ascertain how the tribunal proceeded from Point A to Point B in arriving at its decision and stated the test in the following words:

> *In the Committee's view, the requirement to state the 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 law.*

207. In *Wena Hotels v. Egypt* the annulment committee was of the view that when construing Article 52(1)(e) of the ICSID Convention, the committee is not empowered to reconsider "whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not."[226]

208. Furthermore, as stated by the *TECO v. Guatemala* and other annulment committees,[227] the Tribunal's failure to address "every argument, piece of evidence or authority in the record" is not a ground for annulment.[228]

209. The Committee has considered the pronouncements of the *ad hoc* committees that are referred to in the preceding paragraphs and will apply the principles enunciated in those cases in its analysis.

(2) The Annullable Errors Identified by the Applicant under the Ground of Failure to State the Reasons

210. The Committee sought to determine how the Tribunal arrived at its decision that jurisdiction did not exist under the ICSID Convention in respect of Gambrinus' claim. The

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[225] *MINE* **(AL-006)**, ¶ 5.09

[226] *Wena Hotels* **(DL-3)**, ¶ 79

[227] *Rumeli Annulment* **(DL-0017)**, ¶ 84.

[228] *TECO* **(AL-027)**, ¶ 249.

Tribunal had to determine whether the Applicant is a protected foreign investor within the meaning of Article 25 of the ICSID Convention read with Article 1(a) of the BIT. In the Committee's view, after having considered all the arguments of the Applicant and the Respondent, the Tribunal correctly expressed the reasons on which its conclusion is based, in the following terms:

> *Claimant owned no investment at the time of the alleged expropriation of Fertinitro shares on 10 October 2010, due to the Share Purchase Agreement with Inv. Polar being of no force and effect. Having made no investment which may fall within the BIT protection, Claimant's claim is not subject to the Tribunal's jurisdiction which, accordingly, must be declined.*[229]

211. As explained above, the Applicant has identified five (5) annullable errors under Article 52(1)(e) of the ICSID Convention. In particular, the Applicant argues that the Tribunal failed to state the reasons upon which the Award is based: (i) in its application of the cash equivalency clause to inter-affiliate transfers; (ii) in its conclusion on whether the 2008 Transfer involved cash/cash-consideration; (iii) in its conclusion regarding the Common Share Subscription Agreement; (iv) in its failure to address and apply the 5-year prescription period and (v) in its failure to apply and address relevant international law. The Committee will now consider these five (5) arguments.

212. The Committee has dealt with the arguments (iii) to (v) when considering the Applicant's arguments under Article 52(1)(b) of the ICSID Convention. It will adopt the reasons and conclusions set out therein. As to the arguments under (i) and (ii) above, the Committee is of the view that these two arguments raised by the Applicant are inter-related and can be dealt with together.

213. This necessitates a determination of whether it is possible to follow the Tribunal's construction of the sections of the JIA and the By-Laws which regulate the transfer of the Fertinitro shares and the reasons for the Tribunal's conclusion.

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[229] Award, ¶ 276.

214. In the Award,[230] the Tribunal construed the provisions of Article VI of the JIA, in particular Sections 6.1 and 6.2 which deal with restrictions on transfer and permitted dispositions. The Tribunal also considered Section 6.7(i) in particular, which provides "that any disposition shall be made exclusively for cash or cash equivalent to the exclusion of any other consideration."

215. The Tribunal considered the Fertinitro By-Laws and also the argument of the Applicant that the Fertinitro By-Laws are inconsistent with the JIA and concluded that there was no conflict between the provisions of the two instruments regarding the transfer of shares.

216. The Tribunal considered Article 12 of the Venezuelan Code of Civil Procedure, which was relied on by both experts, and noted that the Parties and their legal experts had discussed the rules of interpretation of Venezuelan law and that they reached different conclusions. The Tribunal came to the conclusion that the intention of the parties to the JIA had to be considered only if there was any ambiguity, as a supplementary means of interpretation.

217. The Tribunal further concluded that there was no obscurity, ambiguity or deficiency in the interpretation of Section 6.7(i) and that, therefore, the alleged intention of the parties should not take precedence over the contract language.

218. In considering these provisions of the JIA, the Tribunal did not accept the Applicant's argument that despite the clear wording of Section 6.7(i), such Section was not applicable to transfers to affiliates. The Tribunal also did not accept Gambrinus' additional argument that the Fertinitro By-Laws were inconsistent with the JIA. In fact, the Tribunal took the view that when the Sections of the JIA and the Fertinitro By-Laws were considered, they had the same effect.

219. The Tribunal then went on to deal with the Respondent's argument that the share-for-share transaction which Gambrinus relied upon as being in compliance with the JIA, was untenable because the shares in Gambrinus are not of cash equivalent. The Tribunal agreed with the Respondent that the shares in the Applicant are not a cash equivalent due to the

[230] *Id.*, ¶ 247.

reason that they are not immediately realisable liquid assets since they are not traded publicly.

220. The Tribunal subsequently considered the consequences of a breach of the JIA in particular Section 6.1 which provided that no owner of the shares shall sell its shares save in compliance with the provisions of Article VI and non-compliance with Article VI shall cause the transfer to be null, void and of no force or effect. The Tribunal therefore concluded that the 2008 Transfer could not be given effect to because the essential provisions of the JIA had not been complied with as there was no cash or cash equivalent provided for in respect of the sale of shares in the Common Share Subscription Agreement.[231]

221. Gambrinus did not explicitly plead that the evidence showed that, even if Gambrinus had failed to comply with Section 6.7 of the JIA, the transfer had to be given effect. Before the Tribunal there was the expert opinions of Mr. Rodner and Dr. García Montoya and it was up to the Tribunal to decide which of the two experts it found more persuasive and the fact that it preferred the evidence of one expert is not an annullable error.

222. In the Committee's view, the Tribunal stated the reasons on which the conclusion is based and therefore cannot be faulted. In the circumstances, there is no annullable error as such.

223. Gambrinus further argued that, in order to declare the 2008 Transfer null and void, there has to be a declaration by a competent tribunal under the JIA, namely an arbitral tribunal established pursuant to the Arbitration Rules of the International Chamber of Commerce. However, the Committee agrees with Venezuela that such argument was not in the Joint List of Questions that was submitted to the Tribunal nor was it explicitly pleaded before the Tribunal. Hence, the Tribunal was not in error in not dealing with this issue.

224. In conclusion, the Committee is of the view that in reading the Award one is able to proceed from Point A to Point B and does not find that the reasons given by the Tribunal for holding that it has no jurisdiction are frivolous or contradictory. In the Committee's view, the Tribunal has painstakingly construed the provisions of the JIA, the Fertinitro By-Laws and

[231] *Id.*, ¶¶ 272, 273, 265, 267.

Venezuelan law, in coming to the conclusion that the provisions of the JIA and the By-Laws were not complied with by Gambrinus in respect of the transfer of shares.

225. The Committee therefore finds no merit in respect of the request by Gambrinus to annul the Award pursuant to Article 52(1)(e) of the ICSID Convention.

C. ARTICLE 52(1)(D) – SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

(1) Relevant Standard of Review

226. Article 52(1)(d) reads as follows:

> *Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *(d) that there has been a serious departure from a fundamental rule of procedure...*

227. The critical words in Article 52(1)(d) are "serious" and "fundamental." There has been an adoption of a dual analysis by *ad hoc* committees that the departure from a rule of procedure must be "serious" and the rule of procedure must be "fundamental."[232]

228. The Committee is of the view that the right to be heard and to be able to present one's case is a fundamental principle encompassed within Article 52(1)(d). The Committee therefore has to determine whether the Tribunal has violated the Applicant's right to be heard in delivering its Award. The Committee should be concerned with the essential fairness of the proceedings.[233] Another important consideration is whether the breach is serious and "could potentially have affected the award."[234]

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[232] *MINE* **(AL-006)**, ¶ 4.06; *Wena Hotels* **(DL-3)**, ¶ 56; *CDC Group* **(AL-0009)**, ¶ 48; *Occidental* **(AL-022)**, ¶ 62; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015 ["*Tulip*"] **(DL-28)**, ¶ 70; *TECO* **(AL-027)**, ¶ 81.

[233] *CDC Group* **(AL-0009)**, ¶ 49.

[234] *TECO* **(AL-027)**, ¶ 85.

229. The Committee also refers to the annulment decision in *Vivendi*[235] where the committee held as follows:

> *[u]nder Article 52(1)(d), the emphasis is clearly on the term "rule of procedure," that is, on the manner in which the Tribunal proceeded, not on the content of its decision.*

230. In the *MINE* annulment decision,[236] it was held that for this ground of annulment to be operative, the departure from the rule of procedure must be a "serious one" and the rule of procedure which is breached must be "fundamental."

231. In the *Wena Hotels* annulment decision[237] it was held that:

> *In order to be a "serious" departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.*

232. The Committee agrees with the standard set out in the decisions that the Committee has referred to in the preceding paragraphs. The Committee will now apply those principles to determine whether the Tribunal seriously departed from a fundamental rule of procedure as alleged by Gambrinus.

(2) The alleged annullable error

233. The Applicant contends that the introduction of the JIA Defense during the first day of the Arbitration Hearing on March 10, 2014 breached a fundamental procedural principle of equality of treatment and equal right to be heard and that this created a fundamental imbalance at the Arbitration Hearing, namely that the Respondent was able to present arguments and evidence on the JIA Defense whilst the Claimant was deprived of that opportunity. The Applicant further contends that the post-hearing procedure did not rectify the prejudice caused by that imbalance.

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[235] *Vivendi I* **(AL-025)**, ¶ 83.

[236] *MINE* **(AL-006)**, ¶ 4.06.

[237] *Wena Hotels* **(DL-3)**, ¶ 58.

234. The Committee is of the view that in order to determine whether the submissions of the Applicant can constitute a breach of Article 52(1)(d), it is necessary to consider what transpired before, during and after the Arbitration Hearing.

a. Pre-Hearing Developments

235. Gambrinus filed its Memorial on Jurisdiction Merits and Quantum on November 30, 2012 accompanied by a witness statement of Mr. Reinaldo Gabaldon and an expert report which evidenced that Polar had agreed to transfer its shares in Fertinitro to Gambrinus for USD 80 million pursuant to the Share Purchase Agreement.

236. The Respondent filed its Counter-Memorial on Jurisdiction Merits and Quantum on May 17, 2013 which was accompanied by witness statements, legal opinions and a valuation report.

237. Gambrinus filed its Reply on Merits and its Counter-Memorial on Jurisdiction on August 30, 2013 accompanied by a witness statement, legal opinion and an expert report and a valuation report.

238. The Respondent filed its Rejoinder on Jurisdiction, Merits and Quantum on November 29, 2013 accompanied by witness statements as well as legal opinions and a valuation report.

239. Gambrinus filed its Rejoinder on Jurisdiction on January 17, 2014 accompanied by a witness statement and a valuation report.

240. The contention of the Respondent is that the Applicant produced no evidence of its title in its Request for Arbitration, as the only exhibit relating to share transfer was the Notice of Waiver dated January 22, 2008.

241. The Respondent contends that when the Memorial of the Applicant dated November 30, 2012 was filed, the Applicant produced the Share Purchase Agreement which provided a transfer of the shares to Gambrinus for a price of USD 80 million to be paid at a future date. The Respondent contends that Gambrinus in its Counter-Memorial of May 17, 2013 produced the Common Share Subscription Agreement.

242. The Respondent contends that Gambrinus in its Rejoinder of January 17, 2014 admitted that a share-for-share transaction had taken place and that no cash had been paid and that this was confirmed by the Applicant's counsel.

243. The Committee is of the view that the issue of whether Gambrinus had paid for the shares in cash within the meaning of Section 6.7(i) of the JIA was an important issue pertaining to jurisdiction. It should have been one of the principal issues that the Respondent should have considered when the arbitration commenced. The issue that the Committee has to consider is whether the fact that the Tribunal considered the JIA Defense despite being raised for the first time on March 10, 2014 during the Arbitration Hearing constitutes a ground for annulment under Article 52(1)(d). This necessitates a consideration of what transpired at the Arbitration Hearing which commenced on March 10, 2014.

b. March 10, 2014 – Day 1

244. On February 17, 2014, Gambrinus indicated that it was not necessary to call Mr. Haberman and Dr. García Montoya for examination. The Hearing commenced on March 10, 2014 with the Claimant's opening presentation. Gambrinus' counsel addressed the Common Share Subscription Agreement and argued that it did not matter whether cash or economic detriment was sustained by Gamrbinus on January 24, 2008 or in February 2008 when shares-for-shares were issued.

245. Gambrinus' counsel was specifically asked by the Chairman of the Tribunal whether the sum of USD 80 million was actually paid by Gambrinus. Gambrinus' counsel's response was that cash was not paid but what was done was that the assets were acquired by Gambrinus in exchange for shares.[238]

246. The Respondent in addressing the 2008 Transfer submitted that this raised a jurisdictional issue, namely, that there was no investment and the Tribunal had no jurisdiction. Venezuela relied on the provisions of Section 6.7 of the JIA which required that "any

[238] Tr. 2014, Day 1, page 74:9-18 **(A-43)**.

disposition shall be made exclusively for cash or cash equivalent to the exclusion of any other consideration."

247. Gambrinus' counsel intervened at that point to state that the issue of non-compliance with Section 6.7 of the JIA had not been specifically pleaded and that this was a new argument. Gambrinus took the view that this new argument could be addressed through proper briefing during closing arguments and written memorials.[239]

c. March 11, 2014 – Day 2

248. Gambrinus took the view that the Respondent had to make a formal application to raise this new argument in view of the provisions of the Tribunal's Procedural Order No. 1.

249. The Arbitration Hearing before the Tribunal proceeded with the examination of Mr. Gabaldon and objections were raised by the Gambrinus' counsel with regard to questions posed by Venezuela which Gambrinus submitted were in respect of the "new" argument.

d. March 12, 2014 – Day 3

250. There appears to have been a dialogue between the Parties and discussions had taken place as to how the post-hearing arrangements could address the JIA Defense. Gambrinus' counsel then informed the Tribunal that there had been a "constructive dialogue" and that discussions were taking place about the timing and structure of the post-hearing briefing.[240]

251. The Respondent's counsel formally applied to raise the JIA Defense. The Tribunal having heard arguments, adjourned and deliberated and handed down its decision in the following manner:

> *The Tribunal considers that Respondent, in particular in its rejoinder in paragraph 63, has addressed the issue of the lack of payment by Gambrinus of the agreed sum to Polar as required by the share transfer agreement.*
>
> *However, the Tribunal considers the reference made by Respondent in its opening submission to the failure by Claimant to comply with the terms of Article 6.7 of the joint investors' agreement, resulting,*

[239] *Id.*, page 174:7-17 **(A-43)**.

[240] Tr. 2014, Day 3, page 237 **(A-45)**.

according to Respondent, in Claimant's failure to achieve valid title to the Fertinitro shares, is a new argument which, as such, was not allowed under paragraph 13.9 of Procedural Order No. 1.

Under paragraph 13.10 of the same order, any supplement by the parties of their written submission must be authorised by the Tribunal.

Having considered Respondent's request to be authorised to deal with the described new argument, as well as Claimant's objection under its letter of March 14th 2014, the Tribunal has decided to grant the Respondent the requested authorisation.

That is our decision. All this is on record. Both Claimant and Respondent will be able, if they so wish, to deal with this new argument tomorrow in their closing, and certainly in the further steps of the proceeding, including post-hearing briefs.[241]

e. March 13, 2014 – Day 4

252. Having presented their closing arguments, the Parties mutually agreed on the procedure by which the JIA Defense would be dealt with.[242]

253. The Chairman of the Tribunal addressed the Parties on the procedural steps with regard to closing statements and post-hearing submissions. He also invited the Parties to confer and agree on issues. The Chairman also requested the Parties to agree to a Joint List of Questions which the Parties wished to be addressed in the Award.

254. On March 18, 2014, the Tribunal issued Procedural Order No. 2 which formally restated the agreement reached by the Parties at the end of the hearing. The relevant parts of the Tribunal's Procedural Order No. 2 read as follows:

WRITTEN SUBMSSIONS ON THE "NEW ARGUMENT"

By Friday, 16 May 2014, Respondent shall file a written submission of maximum twenty (20) pages, accompanied by nothing more than a legal opinion, on the question of the validity under Venezuelan law of the purported share transfer of 24 January 2008. The legal

[241] *Id.*, 251:3-25, 252:1-3 **(A-45)**.

[242] Tr. 2014, Day 4 page 41 **(A-46)**.

opinion shall be brief, but need not be restricted to the twenty-page limitation.

By Friday, 18 July 2014, Claimant shall file a written submission of the same length (i.e. 20 pages), addressing Respondent's submission of 16 May 2014, as identified above. Claimant's submission may also be accompanied by a brief legal opinion and nothing more.

POST-HEARING BRIEFS

On Friday, 29 August 2014, the Parties shall file simultaneous post-hearing briefs, of no more than fifty (50) pages.

By no later than Friday, 26 September 2014, the Parties shall file simultaneous post-hearing reply briefs of no more than thirty (30) pages.

With the post-hearing reply briefs, the Parties will submit an agreed upon list of questions that they consider shall be addressed by the Tribunal for purposes of Article 48 of the ICSID Convention.

255. On October 1, 2014, and pursuant to the Tribunal's Procedural Order No. 2, the Parties submitted the Joint List of Questions that should be addressed by the Tribunal for purposes of Article 48 of the ICSID Convention. There were 16 questions to be addressed.[243]

256. The issue that arises for the Committee to consider is whether Gambrinus through its counsel having agreed on the procedure for the new point to be raised, can now contend that they were "ambushed" and that there was a serious departure from a fundamental rule of procedure.

257. The chronology of events clearly indicates that the Applicant agreed consensually to the procedure by which the JIA Defense was to be addressed by the Tribunal. It is therefore the Committee's view that there is no basis for the Applicant to characterise the procedure they agreed as one in which they were "ambushed."

258. The Committee is also of the view that Gambrinus was accorded ample opportunity to address the JIA Defense. There were legal opinions submitted by Dr. García Montoya on

[243] Joint List of Questions **(A-59)**.

behalf of Venezuela. Gambrinus submitted the legal opinion of Mr. Rodner which was 45 pages together with 56 exhibits.

259. Given the Committee's prior findings that Gambrinus consented without any qualification to the procedure to present its arguments to address the JIA Defense and that such procedure provided ample opportunity to address it, in the Committee's view, there is in the circumstances no serious departure from a fundamental rule of procedure.

260. Another one of the arguments raised by Gambrinus is that the JIA Defense was raised very late in the day and hence the Tribunal could have already commenced its deliberations. This is mere speculation on the part of Gambrinus as there is no evidence to support that the Tribunal had, prior to issuing its Procedural Order No. 2, in any way, deliberated on the JIA Defense. The Committee is of the view that if Gambrinus was of the view that it needed more time, then it should not have agreed to the timetable and the procedure that was proposed and should have objected. The proceedings indicate that Gambrinus did not register any such objection but had actually reached a consensus with Venezuela as to how to deal with the JIA Defense. The Tribunal was cognisant of the fact that the Respondent had raised a new argument and gave Gambrinus an opportunity to present its arguments to the contrary.

261. The Committee is also of the view that the procedure that was agreed to by the Parties, as enshrined in the Tribunal's Procedural Order No. 2, does not in any way violate fundamental rules of procedure. The Applicant was given every opportunity to present its case as to why it had complied with the provisions of Section 6.7 of the JIA. The conduct of the Tribunal in permitting a new argument to be raised with the consent of both Parties is not a ground for annulment under Article 52(1)(d) of the ICSID Convention.

262. The Applicant has also argued that the Tribunal wrongly permitted the introduction of IAS 7 and therefore committed a breach of the Tribunal's Procedural Order No. 2 and this constituted an annullable error within the meaning of Article 52(1)(d). The Tribunal did not rely on IAS 7 in order to reach its conclusion on whether the cash equivalency requirement was complied with. There is therefore, in the Committee's view, no breach of Article 52(1)(d) by the Tribunal in respect of this allegation.

263. The Committee relies on the words of the annulment committee in *MINE v Guinea* which reads as follows:

> *A first comment on this provision concerns the term "serious". In order to constitute a ground for annulment the departure from a "fundamental rule of procedure" must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.*
>
> *A second comment concerns the term "fundamental": even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is "fundamental". The Committee considers that a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: "The parties shall be treated with equality and each party shall be given full opportunity of presenting his case." The term "fundamental rule of procedure" is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.*[244]

264. The statement of the annulment committee in *Wena Hotels* is also relevant.

> *In order to be a "serious" departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.*[245]

265. The Committee is of the view that there is no merit in the Applicant's contention that there was a serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention.

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[244] *MINE* **(AL-006),** ¶¶ 5.05-5.06

[245] *Wena Hotels* **(DL-3),** ¶ 58.

VI. COSTS

A. GAMBRINUS' STATEMENT OF COSTS

266. Pursuant to its submission on costs dated March 12, 2017, the Applicant has incurred the following costs in connection with this annulment proceedings:

Professional fees (consisting of attorney time)		USD 460,473.35
Out of Pocket disbursements		USD 63,360.91
	TOTAL	USD 523,834.26

B. VENEZUELA'S STATEMENT OF COSTS

267. Pursuant to its submissions on costs dated March 10, 2017, the Respondent has incurred the following costs in connection with this annulment proceedings:

Hogan Lovells' Fees and Disbursements		USD 1,052,363.00
Disbursements		USD 84,588.00
	TOTAL	USD 1,136,951.00

C. COMMITTEE'S DECISION

268. Pursuant to Article 52(4) of the ICSID Convention, Chapter VI of the ICSID Convention, including Article 61(2), shall apply *mutatis mutandis* to the proceedings before this Committee. According to Rule 53 of the ICSID Arbitration Rules, "[t]he provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee."

269. 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. ...*

270. In exercise of its discretion under Article 61(2) of the ICSID Convention, the Committee has the authority to decide on an appropriate allocation of costs in the present proceedings.

271. Rule 47(1) of the ICSID Arbitration Rules provides that the tribunal's award "shall contain [...] (j) any decision [...] regarding the cost of the proceeding."

272. Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations further provides that in annulment proceedings:

> [...] *the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.*

273. The Applicant in seeking annulment of the Award, has been responsible for making all the advance payments to cover the costs of the Committee and the Centre. The Committee has discretion to decide on the final allocation of these costs of the proceeding, as well as of the costs incurred by the Parties in respect of their legal representation in this annulment proceeding.

274. The Respondent requests that the Committee order the Applicant to bear the costs of the proceedings as well as the Respondent's legal costs and expenses in full based on the following arguments:

- the annulment proceedings were unnecessary and there were no merits in the Applicant's claims; and
- there was a misuse of the annulment proceedings.

275. The Committee cannot agree with the Respondent that Gambrinus' Application for Annulment was unnecessary. The ICSID Convention explicitly provides for the right to seek annulment. The Committee is not convinced that there is any illegitimacy in the Applicant's motives to seek annulment in the present case.

276. The Committee in the exercise of its discretion sees no justification for ordering the Applicant to bear the legal costs and expenses that the Respondent has incurred in connection with this annulment proceedings.[246]

277. The Committee agrees with the recent trend in ICSID cases that it is generally reasonable for a party whose application has been rejected in its entirety to bear the costs of the proceeding in full. There are no special circumstances that would warrant a different conclusion in the present case. The Committee is of the view that the Applicant shall bear all costs of the proceeding, consisting of the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre.

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

Committee Members' fees and expenses	
Tan Sri Dato' Cecil W.M. Abraham	93,006.17
Ambassador Hussein A. Hassouna	77,098.06
Doctor Michael Pryles	67,168.06
ICSID's administrative fees	64,000.00
Direct expenses (estimated)[247]	46,348.67
Total	**347,620.96**[248]

279. The Applicant has advanced the entire amount of the costs of the proceeding pursuant to Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations and hence no reimbursement order is required.

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[246] The Committee concludes that Gambrinus' Application for Annulment cannot be considered "fundamentally lacking in merit", or "to any reasonable and impartial observer, most unlikely to succeed." CDC Group, ¶ 89.

[247] This amount includes estimated charges relating to the dispatch of this Decision on Annulment (courier, printing and copying).

[248] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

VII. DECISION

280. For the reasons referred to above, the Committee issues the following decision:

(1) The Applicant's request for annulment of the Award rendered on June 15, 2015 in ICSID Case No. ARB/11/31 is denied.

(2) Each Party shall bear its own legal costs and expenses incurred in connection with this annulment proceeding.

(3) The Applicant shall bear the total costs of the proceedings, consisting of the fees and expenses of the members of the Committee and the charges for the use of the ICSID facilities.

(4) All other requests by the Parties are dismissed.

Ambassador Hussein A. Hassouna
Member of the Committee

Date: September 12, 2017

Doctor Michael C. Pryles
Member of the Committee

Date: September 1, 2017

Tan Sri Dato' Cecil W. M. Abraham
President of the Committee

Date: September 5, 2017