CL-0156

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ADEM DOGAN

(*Claimant*) (*Respondent on Annulment*)

v.

TURKMENISTAN

(*Respondent*) (*Applicant on Annulment*)

ICSID CASE NO. ARB/09/9
ANNULMENT PROCEEDING

DECISION ON ANNULMENT

Members of the ad hoc Committee
Professor Piero Bernardini, President
Mr. Makhdoom Ali Khan, Member
Dr. Jacomijn van Haersolte-van Hof, Member

Secretary of the ad hoc Committee
Ms. Lindsay Gastrell

Date of dispatch to the Parties: 15 January 2016

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GLOSSARY

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings, April 2006
Award	Award rendered on 12 August 2014 in *Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9)
Application	The Respondent's Application for Annulment
BIT or Treaty	Treaty Between the Government of the Federal Republic of Germany and the Government of Turkmenistan Concerning the Encouragement and Reciprocal Protection of Investments, which entered into force on 19 February 2001
Claimant	Mr. Adem Dogan, the respondent on annulment
Counter-Memorial	The Claimant's Counter-Memorial on Annulment
Committee	The *ad hoc* Committee composed of Professor Piero Bernardini, Mr. Makhdoom Ali Khan and Dr. Jacomijn van Haersolte-van Hof
Decision on Jurisdiction or DOJ	Decision on Jurisdiction issued on 29 February 2012 in *Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9)
Farm or Poultry Business	A poultry business venture which involved the leasing of land near Ashgabat, and the restoration, outfitting and use of buildings for a poultry business (as defined in the Award)
Gurbannazarovs	Turkmen nationals involved in the Farm
Hearing	Hearing on annulment held in Paris, France, on 21 July 2015
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Memorial	The Respondent's Memorial on Annulment
Parties	Mr. Adem Dogan and Turkmenistan
Rejoinder	The Claimant's Rejoinder on Annulment
Reply	The Respondent's Reply on Annulment
Respondent	Turkmenistan, the applicant on annulment
Tr. [page:line]	Transcript of the Hearing on annulment
Tribunal	The tribunal that rendered the Award
Turkmen Companies	Şöhrat-Anna and Samşyt

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an application dated 25 August 2014 (the "Application") by which Turkmenistan requests annulment of the award rendered on 12 August 2014 (the "Award") in the ICSID arbitration proceeding No. ARB/09/9 between Mr. Adem Dogan and Turkmenistan. This Decision will continue to use the "Claimant" to refer to Mr. Dogan and the "Respondent" for Turkmenistan, as in the original proceeding.

2. The Respondent filed the Application with the Secretary-General of ICSID on 26 August 2014, pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"). The Application was submitted within the time period specified in Article 52(2) of the ICSID Convention.

3. The Claimant is a national of the Federal Republic of Germany. He submitted the original dispute to ICSID on the basis of the Treaty Between the Government of the Federal Republic of Germany and the Government of Turkmenistan Concerning the Encouragement and Reciprocal Protection of Investments, which entered into force on 19 February 2001 (the "BIT" or "Treaty").

4. The Award was rendered by an arbitral tribunal composed of Professor Jan Paulsson (President), Professor Philippe Sands and Dr. Markus Wirth (the "Tribunal"). The Award incorporates the Decision on Jurisdiction of 29 February 2012 (the "Decision on Jurisdiction" or the "DOJ"), in which the Tribunal found that it had jurisdiction over the Claimant's claims.

5. In the Award, the Tribunal decided that the Respondent had violated its obligations under Articles 4(2) (expropriation) and 2(1) (fair and equitable treatment) of the BIT. It ordered the Respondent to pay the Claimant [redacted] in damages (including interest),

plus [redacted] for the cost of the arbitration and [redacted] for "costs reasonably incurred in presenting his case".[1]

6. This Decision of the *ad hoc* Committee (the "Committee") rules on the Respondent's request to annul the Award based on the grounds set forth in Article 52(1)(b), (d) and (e) of the ICSID Convention, namely that: (i) the Tribunal manifestly exceeded its powers; (ii) the Award has failed to state the reasons on which it is based; and (iii) there has been a serious departure from a fundamental rule of procedure.

II. PROCEDURAL HISTORY

7. On 28 August 2014, the Secretary-General of ICSID registered the Application in accordance with Rule 50(2) of the Arbitration Rules and transmitted the Notice of Registration to the Parties. As the Application contained a request for a stay of enforcement of the Award, the Secretary-General also notified the Parties that enforcement of the Award was provisionally stayed pursuant to Rule 54(2) of the Arbitration Rules.

8. By letter of 30 September 2014, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the Parties that the Committee had been constituted, composed of Professor Piero Bernardini (Italian) as President and Mr. Makhdoom Ali Khan (Pakistani) and Dr. Jacomijn van Haersolte-van Hof (Dutch) as Members. Thus, the annulment proceeding was deemed to have begun on that date. The Parties were also informed that Ms. Lindsay Gastrell, ICSID Legal Counsel, would serve as Secretary of the Committee.

9. On 6 October 2014, the Committee set a schedule for the Respondent to file a request specifying the circumstances requiring the stay of enforcement, and the Claimant to file his observations on that request. In accordance with this schedule, the Respondent filed its Request for a Continuation of the Stay of Enforcement of the Award on 15 October 2014, and the Claimant filed his Observations on the Stay Request on 24 October 2014. In his observations, the Claimant asked the Committee to terminate the provisional stay of enforcement or, in the alternative, to order the Respondent to post a security in the total

[1] Award, ¶316(ii).

amount of the Award plus interest. He also requested that the Committee rule on the matter within 30 days, pursuant to Arbitration Rule 54(2).

10. On 27 October 2014, the Committee proposed a second round of written submissions on the request for a stay of enforcement. The Respondent filed its Reply to the Claimant's Observation on the Stay of Enforcement of the Award on 4 November 2014, and the Claimant filed his Rejoinder to Respondent's Reply to Claimant's Observations on the Stay of Enforcement of the Award on 11 November 2014.

11. The Committee held the first session by telephone conference on 7 November 2014, during which the Committee and the Parties discussed the procedure that would govern the annulment proceeding. On the same date, following the session, the Committee issued Procedural Order No. 1 reflecting the Parties' agreements and the Committee's decisions on procedural matters.

12. On 24 November 2014, the Committee issued its Decision on Turkmenistan's Request for a Continuation of the Stay of Enforcement of the Award (the "Decision on the Stay"). The Committee decided that:

> [T]he stay of enforcement of the Award is confirmed on condition that Turkmenistan, within 30 days from the date of this Decision, provides an irrevocable and unconditional bank guarantee from an internationally reputable first-class bank having its principal office outside of Turkmenistan in the total amount of the award plus interest as security for compliance with the Award, if upheld.[2]

13. By email of 17 December 2014, counsel for the Respondent informed the Committee that the Respondent had provided the Claimant with an unconditional and irrevocable bank guarantee issued on 16 December 2014 by Deutsche Bank (the "Payment Guarantee"), a copy of which was attached to the email.

14. The Payment Guarantee requires that a demand for payment from the beneficiary be accompanied by a copy of a letter from the ICSID Secretary-General stating that a final decision by the Committee has been rendered and that the Award has not been annulled and

[2] Decision on the Stay, ¶61(a).

has become payable. In response to an inquiry from the Claimant regarding this provision, on 18 December 2014, the ICSID Secretariat confirmed that the Secretary-General would provide such a letter if required.

15. On 23 December 2014, the Claimant wrote to the Committee concerning the Payment Guarantee, noting the expiration date of 31 January 2016. The Claimant asked the Committee to indicate whether a final decision was likely to be rendered and served upon the Parties by mid-January 2016, so that the Claimant would have sufficient time to benefit from the Payment Guarantee should the Committee uphold the Award. By a letter of 24 December 2014 from the Secretary, the Committee informed the Parties that it was reasonable to expect a final Decision on Annulment by mid-January 2016.

16. Subsequently, the Parties filed the following written submissions:

a) Respondent's Memorial on Annulment dated 21 January 2015 (the "Memorial");
b) Claimant's Counter-Memorial on Annulment dated 2 April 2015 (the "Counter-Memorial");
c) Respondent's Reply Memorial on Annulment dated 11 May 2015 (the "Reply"); and
d) Claimant's Rejoinder Memorial on Annulment dated 19 June 2015 (the "Rejoinder").

17. A hearing on annulment was held at the ICC Hearing Centre in Paris, France on 21 July 2015 (the "Hearing"). The following persons attended the Hearing:

***Ad hoc* Committee**	
Prof. Piero Bernardini	President
Mr. Makhdoom Ali Khan	Member
Dr. J.J. van Haersolte-van Hof	Member
ICSID Secretariat	
Ms. Lindsay Gastrell	Secretary of the Committee
On behalf of the Claimant	
Counsel:	
Dr. Stephan Wilske	Gleiss Lutz
Dr. Lars Markert	Gleiss Lutz
Mr. Todd J. Fox	Gleiss Lutz

Dr. Laura Braeuninger	Gleiss Lutz
Dr. Melanie Eckardt	Gleiss Lutz
Ms. Sarah Kimberly Hughes	Gleiss Lutz
Parties:	
Mr. Adem Dogan	
Mr. Volkan Dogan	
On behalf of the Respondent	
Counsel:	
Mr. Peter Wolrich	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Ali R. Gürsel	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gabriela Alvarez-Avila	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Sabrina Aïnouz	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Victor Datry	Curtis, Mallet-Prevost, Colt & Mosle LLP
Court Reporter	
Mr. Trevor McGowan	The Court Reporter Ltd.
Interpreters	
Ms. Barbara Bethaussar	Independent interpreter
Ms. Brigitte Schneider	Independent interpreter

18. The Committee met to deliberate in Paris, France on 22 July 2015 and continued its deliberations thereafter by various means of communication.

19. Also on 22 July 2015, the Committee issued Procedural Order No. 2, which reflected the Parties' agreements and the Committee's decisions on certain procedural matters addressed at the close of the Hearing. Specifically, Procedural Order No. 2 set forth the process of correcting the Hearing transcripts and the guidelines for the Parties' submissions on costs.

20. As contemplated by Procedural Order No. 2, the Parties filed their joint corrections to the Hearing transcripts on 31 July 2015.

21. Subsequently, on 21 September 2015, each Party submitted its Statement of Fees and Costs, together with brief reasoning supporting its position on the allocation of costs, in accordance with paragraph 6.1 of Procedural Order No. 2. On 12 October 2015, each Party submitted

observations on the other Party's Statement of Fees and Costs, in accordance with paragraph 6.2 of Procedural Order No. 2.

22. The annulment proceeding was declared closed on 17 December 2015, pursuant to ICSID Arbitration Rules 38(1) and 53.

III. THE APPLICABLE LEGAL FRAMEWORK: ARTICLE 52 OF THE ICSID CONVENTION

23. Article 52 of the ICSID Convention governs applications for annulment of ICSID awards and provides in relevant part:

> (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.
>
> (2) The application shall be made within 120 days after the date on which the award was rendered […].
>
> (3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. […] The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).
>
> (4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee. […]

IV. GROUNDS FOR ANNULMENT

24. The Respondent seeks annulment of the Award in its entirety on the basis that: (i) the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) of the Convention; (ii) the Tribunal committed serious departures from fundamental rules of

procedure, in violation of Article 52(1)(d) of the ICSID Convention; and (iii) the Award has failed to state the reasons on which it is based, contrary to Article 52(1)(e) of the Convention.

25. The Claimant contends that the Respondent has failed to establish any of the asserted grounds for annulment of the Award and instead simply reargues the merits of the underlying arbitration in an attempt to appeal the Award, which is impermissible under the ICSID Convention. Even if an annullable error were present, the Committee should exercise its discretion under Article 52(1) and decline to annul the Award.[3]

26. This Section addresses the submissions of the Parties on the three grounds for annulment. For each ground, the Committee summarises the Parties' positions and then sets forth its analysis. The Committee has considered all of the extensive factual and legal arguments presented by the Parties in their written submissions and oral argument during the Hearing. The fact that a specific argument, document or legal authority is not cited does not mean that the Committee has not considered it.

27. Before examining the Parties' positions with regard to the grounds of annulment relied on by the Respondent, it is convenient to recall that under the ICSID system annulment is a limited remedy with the aim of achieving a careful balance between the Convention's objective to ensure the finality of awards and the need to guarantee the fundamental integrity of the arbitral process.

28. Annulment is a remedy of limited scope. Article 53 provides for the finality of awards by stating that they shall not be subject to "any appeal or any other remedy except those provided for in this Convention". Article 52 sets out the limits of that exception by listing the grounds on which a party may seek annulment. The list is exhaustive. The decision to annul cannot be based on a ground other than the five listed in Article 52(1). It is now well settled that this exhaustive list of grounds safeguards the integrity and not the outcome of the arbitration proceedings. The Committee agrees with Professor Schreuer that:

[3] Rejoinder, Section IV; Tr. 111:5. The Claimant submits that there is a presumption in favor of the validity of ICSID awards, Rejoinder, ¶346, citing Exhibit RL-153, *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, ¶52(e).

> There are two potentially conflicting principles at work in the review process. One is the principle of finality; the other is the principle of correctness. Finality is designed to serve the purpose of efficiency in terms of an expeditious and economic settlement of disputes. Correctness may be an elusive goal that takes time and effort and may involve several layers of control, a phenomenon that is well known from domestic court procedure. In international arbitration the principle of finality is often seen to take precedence over the principle of correctness. The desire to see a dispute settled is regarded as more important than the substantive correctness of the decision. Annulment is the preferred solution to balance these two objectives. It is designed to provide emergency relief for egregious violations of a few basic principles while preserving the finality of the decisions in most respects.[4]

29. Accordingly, it is not within the Committee's remit to review the substantive correctness of the Award, either in fact or in law. However, the Committee must examine the legitimacy of the arbitration proceedings resulting in the Award. This means that it is not the Committee's function to sit in appeal on the Award of the Tribunal. It must not substitute its views for those of the Tribunal.

30. The Committee must carefully consider whether the Tribunal ensured the correctness, fundamental fairness and hence the legitimacy of the arbitration proceedings. In this case it must particularly do so because of the repeated observations, in the Decision on Jurisdiction and the Award, of the scarcity and ambiguity of the evidentiary material and the investor's "operat[ion] in an artisanal fashion" in the absence of professional advice in properly structuring and documenting the nature and extent of his investment.[5] These circumstances lead the Respondent to contend that the Tribunal's reasoning is full of compassion for an unsophisticated and inexperienced investor and that the Award should be annulled since the Tribunal exercised *ex aequo et bono* powers that it did not have.

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[4] *Christoph Schreuer et al*, The ICSID Convention: A Commentary, 2nd ed., Cambridge University Press (2009) (hereinafter *Schreuer*, The ICSID Convention), p. 903.

[5] DOJ, ¶85.

A. MANIFEST EXCESS OF POWERS

1. The Respondent's Position

31. The Respondent states that its "one main argument in support of its claim for the annulment of the Award" is that the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) of the Convention "by assuming *ex aequo et bono* powers that the Parties never agreed to give it".[6]

32. The Respondent observes that the Parties appear to generally agree regarding the applicable legal standard for "manifest excess of power".[7] To fall within Article 52(1)(b), there must be an excess of the scope of the Tribunal's powers as defined in the Parties' agreement to arbitrate, which may happen when a "tribunal fails to apply the proper law, or otherwise fails to exercise its mandate in accordance with the parties' agreement".[8] The Respondent agrees with the Claimant's point that an error of law or fact is not a ground for annulment, but further submits that "an egregious error of law can justify annulment, if it amounts to non application of the law".[9] In addition, any such excess of powers must be "manifest", which is defined by reference to "the ease with which it is perceived".[10] In this regard, however, the Respondent asserts that "*ad hoc* committees have held that a detailed analysis of the award does not prevent them from concluding that there is a manifest excess of powers".[11]

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[6] Reply, ¶3. See Memorial, Section II.C; Reply, Section IV.A.2, B.2 and C.2.

[7] Reply, ¶16.

[8] Memorial, ¶17, citing Exhibit RL-148, *Dolzer* and *Schreuer*, Principles of International Investment Law, Oxford University Press (2008) p. 281. See Reply, ¶ 17.

[9] Reply, ¶18.

[10] Reply, ¶19, quoting *Schreuer*, The ICSID Convention, p. 938, ¶135. See Memorial, ¶18.

[11] Reply, ¶22, citing Exhibit RL-156, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, 23 December 2010, ¶45; Exhibit RL-195, *Víctor Pey Casado and Foundation "President Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment, 18 December 2012, ¶70; Exhibit CL-137, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶¶93-115; Exhibit RL-169, *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment, 30 July 2010, ¶¶355-393; Exhibit CL-8, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶¶56-80.

33. According to the Respondent, it is undisputed that a tribunal's unauthorized assumption of *ex aequo et bono* powers constitutes a manifest excess of powers warranting annulment.[12] The Respondent points to Article 42(3) of the ICSID Convention, which provides that an ICSID tribunal only has "the power to decide a dispute *ex aequo et bono* if the parties so agree", and argues that *ad hoc* committees have consistently held that a violation of this provision can constitute a manifest excess of powers under Article 52(1)(b).[13]

34. The Respondent identifies *ex aequo et bono* powers as those allowing a tribunal to disregard the substantive rules of the governing law if they would lead to a decision that would contravene equity.[14] The main features are the power to depart from the applicable law, rules of evidence and contract terms, as well as greater freedom in the assessment of damages.[15] In determining whether a tribunal assumed unauthorized *ex aequo et bono* powers, "a careful review of a decision is particularly warranted".[16]

35. The Respondent argues that "an overall reading of the Decision on Jurisdiction and the Award shows that the Tribunal decided significant aspects of the case *ex aequo et bono*".[17] In particular, the Respondent asserts that:

> the Tribunal departed from the applicable law whenever the application of such law would have led it to dismiss Claimant's claims, ignored classic rules of evidence and the evidentiary record and, more generally, let its sense of what it thought was required by fairness prevail over any other consideration.[18]

36. According to the Respondent, the Tribunal thereby manifestly exceeded it powers, notably when it: (i) decided that it had jurisdiction on the basis of an "undefined and undocumented"

[12] Memorial, ¶¶35-45; Reply, ¶54.

[13] Memorial, ¶¶40-45; Reply, ¶54, citing, *inter alia*, Exhibit RL-153, *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, ¶59; Exhibit RL-154, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 14 December 1989, ¶5.03.

[14] Memorial, ¶21.

[15] Memorial, ¶¶21-32; Reply ¶¶38-53. According to the Respondent, the Claimant artificially limits the notion of *ex aequo et bono* decisions to those explicitly and solely based on equity. Reply, ¶37.

[16] Reply, ¶21.

[17] Reply, ¶56. See Tr. 7:10-15.

[18] Reply, ¶4.

investment; (ii) found that the Claimant owned "some kind of contractual interest" for liability purposes; and (iii) artificially quantified and awarded damages in the absence of any reliable documentary evidence.[19]

i. Jurisdiction

37. With respect to the Decision on Jurisdiction, the Respondent submits that the Tribunal exercised *ex aequo et bono* powers and manifestly exceeded its powers in two main ways: first, it departed from the applicable law prescribed by Article 42(1) of the ICSID Convention,[20] and second, it departed from basic rules of evidence.[21]

38. Regarding the applicable law, the Respondent argues that the Tribunal departed from the objective jurisdictional requirement of the ICSID Convention and the BIT that the dispute be shown to arise from an investment. The Tribunal failed to identify the Claimant's investment forming the basis of its jurisdiction. Rather, it upheld jurisdiction on the basis of "vague 'cumulative or alternative' conclusions that the Claimant may have owned either an investment in the form of movable property and/or some kind of contractual interest in the Poultry Business."[22]

39. However, according to the Respondent, the Tribunal never identified any form of "movable property", presumably equipment, that could have constituted an investment under Article 1(1)(a) of the BIT.[23] Further, there is nothing in the record to show that the Claimant ever owned any poultry equipment. The Respondent alleges that "the Tribunal merely deduces the existence of Dogan's contribution from the absence of evidence that the Gurbannazarovs financed such equipment",[24] citing the Tribunal's statement that:

[19] Memorial, ¶47; Reply, ¶60; Tr. 7:16-21.

[20] Article 42(1): "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

[21] Memorial, ¶¶50-98; Reply, ¶¶64-100.

[22] Reply, ¶66, quoting DOJ, ¶¶60-61. See Memorial, ¶49; Tr. 8:1-18.

[23] Reply, ¶66; Tr. 8:5-7.

[24] Memorial, ¶53; Reply, ¶66.

> There is no evidence that the Gurbannazarovs or anyone else provided such finance […]. The state-of-the-art facility did not fall from the heavens. Accordingly the Claimant at a minimum qualifies under Article 1(1)(a) of the BIT.[25]

40. The Respondent argues that in the Award the Tribunal appears to contradict its finding of an investment under Article 1(1)(a) of the BIT. There, it found that the Turkmen Companies, not the Claimant, owned the relevant equipment.[26]

41. The Respondent also points to the Tribunal's finding of a "further or alternative" form of investment under Article 1(1)(b) of the BIT as a departure from the Convention and the BIT.[27] The Tribunal found that the Claimant had established an investment through a contractual interest in the Turkmen companies "akin to what is commonly referred to as a 'carried interest'"; yet, it recognized that "the nature and extent of [the Claimant's] contribution cannot be determined fully at this stage".[28] Notably, Article 1 of the BIT does not include contractual interests among the forms of investment as some treaties do.[29]

42. The Respondent argues that in the Award the Tribunal identified another basis of jurisdiction under Article 1(1)(c) of the BIT ("claims to money which has been used to create economic value") without offering any reason for doing so.[30] To the Respondent, this "further confirmed the Tribunal's manifest inability to identify, at the jurisdictional stage, and even less at the merits stage, the investment which it found formed the basis of its jurisdiction".[31] Further, the Tribunal never demonstrates how the Claimant's alleged investment in the form of a contractual interest falls under *any* of the three subparagraphs of Article 1 of the BIT.[32] In this way, the Tribunal manifestly exceeded its powers by departing from the Convention and BIT.

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[25] DOJ, ¶60.

[26] Memorial, ¶53; Reply, ¶66, citing Award, ¶167.

[27] Memorial, ¶54; Reply, ¶66, quoting DOJ, ¶61.

[28] Reply, ¶66, quoting DOJ, ¶¶108, 125. See Tr. 32:21-34:12.

[29] Tr. 32:21-33:3.

[30] Memorial, ¶¶57-59; Reply, ¶66, citing Award, ¶109; Tr. 34:12-35:10.

[31] Reply, ¶66.

[32] Tr. 35:4-10.

43. The Respondent submits that the Claimant's only response in this regard is to rely on a diplomatic letter from the Deputy Chairman of the Cabinet of Ministers of Turkmenistan referring to Im-und Export Dogan GmbH's activities as a "direct private investment".[33] However, the existence of an investment cannot be established by the views of the Parties, and in any event, the letter does not identify what the "investment" is.[34]

44. In addition, the Respondent argues that the Tribunal disregarded applicable Turkmen law.[35] It notes that the BIT explicitly requires that an investment be made in accordance with the laws of the host State (Articles 2(1) and 9 of the BIT and Article 2(a) of the Protocol).[36] The Respondent recognizes that the Tribunal devoted an entire section of the Decision on Jurisdiction to the alleged investment's conformity with Turkmen law, but argues that the Tribunal did not in fact apply Turkmen law.[37] Instead, the Tribunal found Turkmen law to be irrelevant to determining whether the Claimant had a qualifying investment.[38] For example, in addressing the structure of the alleged investment, the Tribunal, without citing any legal authority, states that "local law becomes important in this respect only if its role is expressly reserved by the relevant international instruments".[39] In this way, according to the Respondent, the Tribunal disregarded numerous violations of Turkmen law, such as the Claimant's failure to: formalize any ownership interest, register any investment, declare any benefit or profit from his alleged activities to tax authorities and comply with the regulatory

[33] Reply, ¶67. See Exhibit C-26, Letter of the German Minister of Economics and Labor, Wolfgang Clement, to the President of Turkmenistan, Saparmurat Atajevich Niyazov, 22 March 2004.

[34] Reply, ¶67.

[35] Memorial, ¶¶60-68; Reply, ¶¶72-74; Tr. 36:3-39:1.

[36] Reply, ¶70. The Articles cited provide as follows: Article 2(1): "Each Contracting State shall in its territory promote as far as possible investments by nationals or companies of the other Contracting State and admit such investments in accordance with its respective laws."; Article 9: "This Treaty shall also apply to investments made by nationals or companies of either Contracting State in the territory of the other Contracting State, in accordance with the legislation of the latter, before the entry into force of this Treaty". Article 2(a) of the Protocol: "Investments made in accordance with the legislation of either Contracting State in its territory by nationals or companies of the other Contracting State shall enjoy the full protection of the Treaty".

[37] Reply, ¶71, citing DOJ, Section 7.3 ("Was the Investment in Conformity with Turkmen Law?"); Tr. 36:21-24.

[38] Memorial, ¶60; Reply, ¶71, citing DOJ, Section 7.2(C) ("Structural and Legal Complications").

[39] Memorial, ¶61; Reply, ¶71, quoting DOJ, ¶124; Tr. 37:6-17.

requirements applicable to exporter-importer (747) accounts.[40] In the Respondent's view, this constitutes a failure to apply the law.

45. The Respondent's second main argument under this heading relates to the Tribunal's treatment of the evidence. The Respondent acknowledges the power of a tribunal to assess and weigh the evidence in the record before it, but argues that this power is not unlimited.[41] In this case, according to the Respondent, the Tribunal manifestly exceeded its powers by departing from basic rules of evidence, following its "'equitable' approach to jurisdiction".[42] Specifically, the Respondent alleges that the Tribunal based its decision "on what it considered to be fair instead of … the applicable law and the evidentiary record".[43] To the Respondent, this is made obvious by, *inter alia*, the following points:

a) The Tribunal relied on the Participation Agreement as primary evidence for its finding of an investment, even though it is a one-page "fraudulent, forged document, which the Tribunal itself admitted was 'recreated,' … incoherent and contradicted by other admissions of Claimant in the record".[44]

b) The Tribunal ignored all documentary evidence showing that the Claimant "was exclusively a seller of poultry equipment to the Turkmen entities", including (i) equipment sales contracts between the Claimant (and his companies); (ii) the 747 account statement of Im-und Export Dogan GmbH; and (iii) the "Claimant's own testimony before the Turkmen courts stating that he was a seller of equipment".[45]

c) Although it is uncontested that the Claimant bore the burden of proving the existence of his investment, the Tribunal excused the Claimant from meeting this burden, emphasizing his alleged unsophistication as a foreign investor.[46] For example, the Tribunal excused the Claimant for: (i) presenting the recreated Participation Agreement

[40] Memorial, ¶80; Reply, ¶72.

[41] Reply, ¶75.

[42] Reply, ¶75.

[43] Reply, ¶100.

[44] Reply, ¶87, citing DOJ, ¶¶45-49, 88. See Memorial, ¶¶69-79; Tr. 39:2-20.

[45] Memorial, ¶¶80-86; Reply, ¶¶89-92; Tr. 43:4-11.

[46] Reply, ¶97; Tr. 43:12-25.

as an original document; (ii) not offering any evidence of making the "first capital contribution" of DM 500,000 required by the Participation Agreement; (iii) failing to produce any documentary evidence of his alleged interest in the Farm; (iv) not complying with Turkmen law; and (v) lying in the Turkmen courts.[47] On the other hand, the Tribunal made multiple unjustified inferences against the Respondent, blaming it for not having filled in the gaps in the Claimant's case, and in particular for the absence of testimony from the Gurbannazarovs.[48] This constitutes an unjustified reversal of the burden of proof.

ii. Liability

46. According to the Respondent, the Tribunal continued to take an *ex aequo et bono* approach in the merits phase and thereby manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.[49] As with the Decision on Jurisdiction, the Respondent raises two main arguments in this regard: first, that the Tribunal departed from the applicable law, and second, that it departed from basic rules of evidence.[50]

47. With respect to the first argument, the Respondent notes that, because expropriation concerns an interference with rights in property, tribunals must be careful about identifying claimants' rights at the time of the alleged interference.[51] Indeed, in the Decision on Jurisdiction, the Tribunal noted "the possible need for further clarification as to the precise nature and extent of the Claimant's investment, as relevant to issues arising at the merits stage".[52]

48. However, in the Respondent's view, "the Award blatantly fails to identify or describe the nature and extent of Claimant's purported interest that was allegedly subjected to expropriation and unfair treatment by Turkmenistan".[53] In particular, regarding the supposed

[47] Memorial, ¶¶87-92; Reply, ¶¶93-98.

[48] Memorial, ¶93; Reply, ¶99, citing DOJ, ¶51.

[49] Tr. 44:19-24.

[50] Memorial, ¶102; Reply, ¶135.

[51] Memorial, ¶104; Reply, ¶136; Tr. 45:7-13, citing Exhibit RL-57, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶6.2.

[52] Reply, ¶136, citing DOJ, ¶61.

[53] Reply, ¶136.

"contractual interest" in the revenue stream of the Farm, the Tribunal never identified the terms, parties, consideration or the Claimant's rights and obligations.[54] The Respondent points to the Tribunal's statement that:

> In essence, the Claimant's alleged entitlements cannot repose on formal entitlements in any legal entity, for example by way of a shareholding. Rather, their only conceivable existence is as a creature of contract. Yet even as a matter of contract, the record is fragmented and ambiguous.[55]

49. The Respondent submits that the Tribunal's inability to identify the contractual interest is underlined by its addition in the Award of a third basis of jurisdiction, under Article 1(1)(c) of the BIT ("claims to money which has been used to create an economic value").[56] According to the Respondent, the Tribunal gave no explanation for including this additional ground and never identified any funds that could have been used to create economic value.[57]

50. The Respondent rejects the Claimant's characterisation of this as a "confirmation" by the Tribunal that the Claimant's investment was covered under any of the first three subparagraphs of Article 1 of the BIT.[58] According to the Respondent, the Tribunal could not confirm something that it never found in the Decision on Jurisdiction. In sum, the Tribunal's failure to identify the Claimant's interest amounts to a failure to apply the Convention and the BIT.

51. The Respondent also argues that the Tribunal disregarded applicable Turkmen law in the merits stage. [59] In this respect, the Respondent asserts that "in its Decision on Jurisdiction, the Tribunal repeatedly noted that the issue of compliance with Turkmen law would find its relevance at the merits stage", quoting the Tribunal's statement that:

> Of course an investor who does not follow requirements of the applicable law (given the ICSID Convention's Article 42, this frequently points to the law of the host state) may not be able to prevail on the merits, but this is

[54] Reply, ¶133; Tr. 46:13-22.

[55] Award, ¶183.

[56] Memorial, ¶108; Reply, ¶136, citing Award, ¶109; Tr. 47:11-21.

[57] Memorial, ¶108; Reply, ¶136.

[58] Reply, ¶136, citing the Counter-Memorial, ¶94.

[59] Memorial, ¶¶111-118; Reply, ¶¶138-147; Tr. 47:15-48:13.

> different from the investment being disqualified ex ante and thus defeating arbitral jurisdiction.[60]

52. However, according to the Respondent, the Tribunal ignored Turkmen law in the Award. In particular, the Tribunal failed to address the consequences of the Claimant's non-compliance with applicable corporate, financial, accounting and tax regulations in carrying out his alleged investment activities.[61] For example, it found that the alleged interest in the Farm would consist of an oral agreement on a "joint entrepreneurial activity" but ignored Article 239 of the Turkmen Criminal Code which, according to the Respondent, makes such interest unenforceable under Turkmen law unless it is properly registered, which it was not.[62] In addition, the Tribunal never considered the enforceability of the Participation Agreement under Turkmen law.[63] Instead, it "merely presumed the Gurbannazarov's good faith in executing an oral, non-registered contractual interest, on the sole basis of a one page backdated document."[64] To the Respondent, by this alleged failure to apply Turkmen law, the Tribunal manifestly exceeded its powers.

53. As its second main argument under this heading, the Respondent submits that the Tribunal manifestly exceeded its powers by departing from basic standards of evidence in its finding on liability.[65] The Respondent points to the Decision on Jurisdiction, in which the Tribunal stated that the structure and documentation of the investment "might not be … a sufficiently solid basis to establish quantifiable rights to the value and/or earnings of the business".[66] According to the Respondent, the Tribunal contradicted this statement in the merits stage and did not require the Claimant to produce any additional evidence of his alleged interest in the investment.[67]

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[60] DOJ, ¶130.

[61] Memorial, ¶118; Reply, ¶¶145-147.

[62] Reply, ¶143, citing Exhibit KMA-19, Criminal Code of Turkmenistan, 12 June 1997, Article 239.

[63] Memorial, ¶114; Tr. 48:8-13.

[64] Reply, ¶146.

[65] Memorial, ¶¶119-134; Reply, ¶¶148-157; Tr. 48:14-49:11.

[66] Reply, ¶150, citing DOJ, ¶86.

[67] Memorial, ¶¶120-128; Reply, ¶152.

54. The Respondent asserts that in the Award the Tribunal relies only on the Participation Agreement and never points to evidence of a specific interest in the Farm.[68] Instead, the Tribunal acknowledged that:

a) the Claimant "demonstrated a limited concern to obtain well-prepared or relevant documentation, indeed on some occasions any documentation at all";[69]

b) the record concerning the Claimant's interest was "fragmented and ambiguous";[70] and

c) the Claimant had not produced "evidentiary material one might normally expect to be made available for an investment of this kind".[71]

55. The Respondent also asserts that the Tribunal relied on equitable considerations and excused the Claimant for failing to document his interest by stressing his alleged inexperience and unsophistication.[72] At the same time, according to the Respondent, the Tribunal applied unjustified inferences against Respondent, thereby reversing the burden of proof.[73]

56. Considering the above, the Respondent's position is that:

> It is manifest from the Tribunal's Award that had the Tribunal applied those rules instead of what it considered to be equitable considerations, and had it assessed the evidentiary record in light of [basic rules of evidence], the Tribunal would and should have dismissed Claimant's claim for lack of evidence of his alleged interest in the Poultry Business.[74]

iii. <u>Damages</u>

57. With regard to quantum, the Respondent submits that the Tribunal manifestly exceeded its powers by assuming *ex aequo et bono* powers and awarding "entirely artificial damages".[75] In particular, the Tribunal departed from the valuation standard agreed by the Parties and

[68] Memorial, ¶¶120-121; Reply, ¶152.
[69] Reply, ¶152, quoting Award, ¶8.
[70] Reply, ¶152, quoting Award, ¶¶8-9.
[71] Reply, ¶158, quoting Award, ¶¶8-9.
[72] Memorial, ¶¶129-134; Reply, ¶155.
[73] Memorial, ¶¶129-134; Reply, ¶156, citing Award, ¶181.
[74] Reply, ¶155.
[75] Memorial, ¶¶135-169; Reply, ¶¶170-180; Tr. 50:1-56:4.

then proceeded with an "artificial exercise of damage assessment" to award damages in the absence of any reliable historical data.[76]

58. In respect of the valuation standard, the Respondent submits that in the original arbitration, it was undisputed that the appropriate standard was fair market value ("FMV"),[77] defined as "the price that a willing buyer would pay to a willing seller in circumstances in which each had good information … and neither was under duress or threat".[78] At the Hearing, it also alleged that this standard of compensation was required by the BIT.[79]

59. In particular, the Respondent points to the Claimant's statements in his Memorial on the Merits in the original proceeding that FMV was "the most appropriate basis" to evaluate the investment, and that "Claimant is entitled to a sum which reflects the fair market value of the components of his investment. This is the only means of compensation which would 'wipe out all the consequences of the illegal act'".[80] The Respondent asserts that this position "was consistent with the established view that full reparation is usually assessed on the basis of fair market value".[81]

60. According to the Respondent, while the application of the FMV standard was undisputed, the Parties differed on the result of that application, with the Respondent arguing that the FMV of the investment was nil.[82] Indeed, the Respondent argues that the Tribunal recognized that it would be impossible to award any damages using the FMV standard, given the complete lack of documentary evidence of the Claimant's interest and profits. Notably, in the Award the Tribunal referred to the Respondent's argument that "no rational business managers would have been the least inclined to acquire Mr. Dogan's poorly documented

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[76] Memorial, ¶137.

[77] Memorial, ¶138.

[78] Memorial, ¶¶138-139, citing Exhibit R-121, Claimant's Memorial on the Merits (excerpt), ¶¶214-216 (adopting the definition of FMV in *Starrett Housing Corporation v. The Islamic Republic of Iran*, Award, 14 August 1987, 16 Iran-U.S. C.T.R. 112, ¶18); Exhibit R-110, Turkmenistan's Counter-Memorial on Merits and Quantum, ¶128 (also citing *Starrett Housing*).

[79] Tr. 22:7-8.

[80] Exhibit R-121, Claimant's Memorial on the Merits (excerpt), ¶¶215-216.

[81] Reply, ¶184.

[82] Reply, ¶185.

stake in the Farm" and acknowledged "[t]hat may well be true".[83] The Tribunal also stated that the value of the Claimant's rights "is evidently affected by the unlikelihood that an unrelated third party … would pay anything at all to obtain ownership of Mr. Dogan's entitlements".[84]

61. The Respondent argues that the Tribunal, guided by its sense of fairness, departed from the FMV standard to avoid the "ineluctable conclusion that no damages could be awarded".[85] Instead, "the Tribunal proceeded with an unprecedented, artificial exercise of damage assessment based on purely theoretical, optimal figures entirely disconnected from the reality of the Poultry Business' operations."[86]

62. In this regard, the Respondent asserts there was an "absolute lack of any reliable documentary historical data in support of the Claimant's damage claims".[87] The Claimant produced no evidence of his interest in the business, of the productivity and profitability of the business, or of the extent (if any) to which the business was denied import authorizations.[88]

63. According to the Respondent, the Tribunal acknowledged this absence of evidence, notably stating in the Award that:[89]

- "the details of the quantification of the loss are by no means a simple matter, having regard to the manifest insufficiency of the Claimant's documentary record and the limited evidence he has seemingly been able to cobble together after the event";[90] and

[83] Memorial, ¶144; Tr. 21:17-23, quoting Award, ¶190.
[84] Memorial, ¶146, quoting Award, ¶183.
[85] Memorial, ¶147. See Reply, ¶177.
[86] Memorial, ¶147. See Reply, ¶177.
[87] Memorial, ¶¶148-152.
[88] Memorial, ¶¶148-152.
[89] Memorial, ¶¶153-157.
[90] Award, ¶179. See also ¶182 ("the evidentiary record has not been well furnished"; "[the Tribunal] is left to reach [its] decision on the basis of evidence that is best described as patchy and scant").

- “there appears to be little to be gained by seeking to identify and confirm the existence of reliable financial records with regard to the transactions involving the Claimant and the Farm. In our view it is unlikely that they exist, or that they ever existed”.[91]

64. The Respondent argues that the Tribunal nevertheless excused the Claimant for failing to meet his burden of proof, apparently on the basis of his unsophistication and relative modesty of means.[92] The Respondent complains that:

a) The Tribunal assumed without any evidence that the Gurbannazarovs, in the absence of any legal obligation to share their company’s profits with the Claimant, would have done so in good faith;[93]

b) Having no documentary evidence of the business’ past productivity, the Tribunal calculated damages by “constructing an artificial scenario” based on “purely theoretical data”, relying on “optimal, idealistic production figures included in so-called ‘management guides’” produced by Western poultry equipment suppliers for marketing;[94] and

c) The Tribunal relied on the testimony of Mr. Geiselhart, who was in business relationships with the Claimant and visited the site only three times, while disregarding the testimony of the production manager of the Farm.[95]

65. The Respondent recognizes that tribunals have broad discretion when it comes to assessing and awarding damages but argues that this “departure from the most basic standard of damage assessment and calculation of entirely artificial damages” constitutes an

[91] Award, ¶188

[92] Memorial, ¶¶158-160.

[93] Memorial, ¶163, citing Award, ¶183 (“The Tribunal proceeds on the assumption that the Gurbannazarovs would in good faith acknowledge contractual obligations on the basis of what was understood rather than of what could be denied. Still, the scope of that entitlement would depend to a significant degree on the good will of the Gurbannazarovs”). See Tr. 53:8-20.

[94] Memorial, ¶¶164-166. See Tr. 53:21-54:19.

[95] Memorial, ¶¶ 167-168; Tr. 54:22-55:4.

unauthorized exercise of *ex aequo et bono* power and a manifest excess of the Tribunal's powers.[96]

66. The Respondent rejects the Claimant's defence of the damages calculation, in particular his argument that the Tribunal "sharply reduced [the Claimant's] recovery due to a lack of certainty with respect of particular aspects of his claim", as expressly stated in the Award.[97] The Respondent notes that annulment committees cannot rely solely on a tribunal's description of what it is doing but must also look to what a tribunal does. In any event, based on the record, the Tribunal should not have awarded any damages at all; its statement about reducing recovery only "underscores the Tribunal's discomfort as to the emptiness of the evidentiary record".[98]

2. *The Claimant's Position*

67. As an initial matter, the Claimant submits that the ICSID Convention provides for a very high threshold for annulment. He notes that the annulment procedure is not an appeal and is "only concerned with the legitimacy of the process of the decision and not with its substantive correctness".[99] Even if a committee finds a ground for annulment, it is within the committee's discretion whether to annul the award, and there is a presumption in favour of the validity of ICSID awards.[100]

68. With regard to Article 52(1)(b) of the ICSID Convention, the Claimant submits that a manifest excess of powers is present only if there is an excess of power that is both "textually obvious as well as substantively serious".[101] The Claimant points to certain issues that he considers cannot be grounds for annulment and are excluded from a committee's review, including: tribunals' discretion when assessing the interaction between international and

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[96] Memorial, ¶169.

[97] Reply, ¶176, quoting Counter-Memorial, ¶11.

[98] Reply, ¶176.

[99] Counter-Memorial, ¶15, citing Exhibit CL-40, *CDC Group plc v. Republic of the Seychelles*, Decision on the Application for Annulment, ICSID Case No. ARB/02/14, 29 June 2005, ¶34.

[100] Counter-Memorial, ¶17; Rejoinder, ¶346; Tr. 11:7-8.

[101] Counter-Memorial, ¶20. See Rejoinder, ¶¶29-33.

national law, an error of fact and an incorrect application or partial non-application of the applicable law.[102]

69. The Claimant notes that he "for the most part concurs" with the Respondent as to the requirements for an excess of powers to be "manifest".[103] In particular, the Parties agree that such an excess "can be discerned with little effort and without deeper analysis" and that an error of fact or law is not a ground for annulment.[104]

70. However, the Claimant rejects the Respondent's assertion that an "an egregious error of law can justify annulment, if it amounts to non application of the law".[105] To the Claimant, this would go to the substance of the Award, which is not reviewable.[106] The Claimant also disagrees with the Respondent's position that an unauthorized assumption of *ex aequo et bono* powers would *automatically* warrant annulment; rather, the burden is on the Respondent to prove that there was an exercise of *ex aequo et bono* powers, that such excess of powers is "manifest", and that it warrants annulment in the present case.[107]

71. As to identifying an exercise of *ex aequo et bono* powers, the Claimant submits that it involves going beyond positive law and choosing equity, not simply "filling gaps in the applicable law."[108] To the Claimant, it is important to differentiate between an actual decision *ex aequo et bono* and considerations of equity or fairness that are inherent in the law.[109] According to the Claimant, what the Respondent characterises as *ex aequo et bono* powers in fact form part of a tribunal's task in rendering a reasoned decision, in particular:

[102] Counter-Memorial, ¶¶28-42; Tr. 79:21-23.

[103] Counter-Memorial, ¶21. See Reply, ¶29.

[104] Counter-Memorial, ¶¶18-27, citing *Schreuer*, The ICSID Convention, Article 52, ¶135. See Rejoinder, ¶30; Tr. 78:6-13.

[105] Rejoinder, ¶35, citing Reply, ¶18.

[106] Rejoinder, ¶¶35-43.

[107] Rejoinder, ¶¶46-49; Tr. 77:24-75:2.

[108] Counter-Memorial, ¶60, citing *Schreuer*, Decisions *Ex Aequo et Bono* Under the ICSID Convention, 11 ICSID Review – Foreign Investment Law Journal 37, 41 (1997).

[109] Counter-Memorial, ¶¶62-67.

the evaluation of evidence,[110] the interpretation of agreements in accordance with the Parties' intention[111] and the assessment of damages.[112]

72. In any event, the Claimant submits that the Respondent has failed to identify a single passage in the Award in which the Tribunal stated that it was deciding *ex aequo et bono*; nor can the Respondent "point to any facts that would allow one to easily perceive that the Tribunal's decision was rendered solely on the basis of equity".[113] Instead, according to the Claimant, the Respondent's allegations regarding *ex aequo et bono* powers rest on false or misleading factual allegations, which have no place in annulment proceedings.[114]

i. Jurisdiction

73. The Claimant rejects the Respondent's position that the Tribunal manifestly exceeded its powers by departing from the applicable law and by departing from basic rules of evidence when it upheld jurisdiction.[115] According to the Claimant, the Respondent's argument is based on false factual allegations, and even if those allegations were true, they could not amount to a manifest excess of powers.[116]

74. With respect to the alleged departure from the ICSID Convention and the BIT, the Claimant argues that such "departure" is merely "what Turkmenistan perceives to be an incorrect application of the requirements for finding an 'investment'".[117] Yet, even if the Tribunal erred in its finding, this would not be a ground for annulment.[118] The Claimant asserts that the Respondent never alleges that the Tribunal *failed to apply* the ICSID Convention and the BIT, or the requirement of an "investment".[119] Nor does it attempt to show that the alleged

[110] Counter-Memorial, ¶¶68-72.
[111] Counter-Memorial, ¶¶73-77.
[112] Counter-Memorial, ¶¶78-81.
[113] Counter-Memorial, ¶40.
[114] Counter-Memorial, ¶84; Rejoinder, ¶¶6-8; Tr. 75:4-76:3.
[115] Rejoinder, ¶¶52-79. See Memorial, ¶¶147-155.
[116] Rejoinder, ¶¶55-72.
[117] Rejoinder, ¶58.
[118] Rejoinder, ¶58. See Counter-Memorial, ¶¶32-36.
[119] Rejoinder, ¶58.

"departure" is so egregious that it meets the Respondent's "purported sub-standard for an excess of power".[120]

75. In any event, according to the Claimant, the Respondent's allegation that the Tribunal failed to identify the nature and extent of the Claimant's investment is incorrect.[121] First, the Tribunal concluded in the Decision on Jurisdiction that "the Claimant at a minimum qualifies under Article 1(1)(a) of the BIT" ("movable property") based on its finding that "[t]he overwhelming evidence is to the effect that the Western equipment physically procured, transported, and installed at the Farm was financed in part or in whole by the Claimant".[122] Contrary to the Respondent's allegation that the Tribunal failed to identify this equipment, the Claimant asserts that it "was discussed in detail numerous times".[123]

76. In addition, the Claimant points to the Tribunal's conclusion that the Claimant had a contractual interest in 30% of the profits of one of the Turkmen Companies through a joint venture agreement with the Gurbannazarovs, and that such interest was a "kind of company interest" under Article 1(1)(b) of the BIT.[124]

77. According to the Claimant, the Respondent misrepresents the Decision on Jurisdiction by claiming that the Tribunal found the investment "might" consist of either movable property or a kind of company interest, or that the Claimant "may have" had an investment in one of these forms.[125] In fact, the Tribunal came to a "confident conclusion"[126] that the Claimant made an investment under the ICSID Convention and under *either* basis in the BIT.[127]

[120] Rejoinder, ¶59.

[121] Counter-Memorial, ¶¶147-155; Rejoinder, ¶¶136-143.

[122] Counter-Memorial, ¶96; Rejoinder, ¶138, quoting DOJ, ¶60.

[123] Counter-Memorial, ¶96, citing DOJ, ¶101 as an example ("Big Dutchman required the Claimant's personal guarantee before releasing equipment to a Turkmen sole proprietorship"). See Tr. 83:9-18.

[124] Rejoinder, ¶139, citing DOJ, ¶¶100-103, 108.

[125] Counter-Memorial, ¶94, citing Memorial, ¶¶9, 52, 55, 233; Rejoinder, ¶137, citing Reply, ¶66.

[126] DOJ, ¶60.

[127] Counter-Memorial, ¶94; Rejoinder ¶137. See Tr. 79:12-20.

78. The Claimant also rejects the Respondent's submissions concerning the Tribunal's alleged departure from Turkmen law in finding jurisdiction.[128] The Claimant submits that, even if the Respondent's allegations were true, they could not amount to a manifest excess of powers; only a complete failure to apply the law can warrant annulment, as opposed to a misapplication or partial non application of the law.[129] According to the Claimant, there was no such complete failure in this case. Indeed, as recognised by the Respondent, the Tribunal devoted an entire section of the Decision on Jurisdiction to the issue: "Was the Investment in Conformity with Turkmen Law?".[130]

79. In the Claimant's view, the Respondent is simply repeating its arguments from the underlying arbitration, which the Tribunal considered and rejected. In particular, the Respondent attempts to give the BIT a meaning it does not have by stating that an alleged investment must be "*carried out* in accordance with the laws of the host State in order to benefit from ICSID jurisdiction," when in fact the BIT refers only to the legality of an investment *at the time it was made*.[131] This point was confirmed by the Tribunal.[132] As a consequence, according to the Claimant, most of the Respondent's allegations are irrelevant to jurisdiction.

80. As for the Respondent's remaining allegations (that the Claimant failed to formalize his ownership interest and register the investment), the Claimant argues that the Tribunal dealt with them in detail.[133] For example, the Tribunal found that:

> the Respondent has been unable to point to any legal authority to the effect that Turkmen law requires the registration of any foreign investment. On cross-examination, Mr Akmamedov[, Turkmenistan's expert on Turkmen law,] was repeatedly asked to identify the legal source of such a requirement, but failed to provide a clear answer.[134]

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[128] Counter-Memorial, ¶¶156-170; Rejoinder, ¶¶61-72, 187-196.
[129] Rejoinder, ¶68.
[130] Counter-Memorial, ¶156; Reply, ¶69; Tr. 80:3-7 and 109:5-7, citing DOJ, Section 7.3.
[131] Rejoinder, ¶¶63-67 (emphasis in original).
[132] Rejoinder, ¶67, citing DOJ, ¶135.
[133] Rejoinder, ¶68.
[134] DOJ, ¶137.

81. Finally, even if there had been a violation of Turkmen law when the investment was made, the Tribunal would not have been automatically required to deny jurisdiction; ICSID tribunals have found that this determination is discretionary and is inappropriate when the violation of law is *de minimus*.[135]

82. Responding to the Respondent's second main argument, the Claimant submits that the Tribunal's alleged "departure" from basic standards of evidence in finding jurisdiction, even if true, would provide no ground for annulment.[136] According to the Claimant, the Respondent never refers to the legal standards for annulment when setting forth these allegations, as they "would not meet even Turkmenistan's own standards for a manifest excess of powers".[137] As stated by the *ad hoc* Committee in *Alapli v. Turkey*:

> pursuant to Arbitration Rule 34(1), the tribunal is the judge of the admissibility of any evidence adduced and of its probative value. It is certainly not the role of an annulment committee to verify whether a tribunal correctly established the facts of a case.[138]

83. In any event, in the Claimant's view, the Tribunal did not in fact depart from any basic evidentiary rules. In response to the Respondent's arguments, the Claimant asserts, *inter alia*, the following points:

a) With regard to the Participation Agreement, the Respondent "simply disagrees with the Tribunal's judgment on the admissibility and probative value of the evidence"; in both the jurisdictional and merits phase, the Tribunal found that there was no evidence of fraud or bad faith in relation to the Participation Agreement, yet the Respondent continues to argue that it is a one-page, fraudulent, forged document that should not have been accepted.[139]

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[135] Rejoinder, ¶71.

[136] Rejoinder, ¶¶73-79.

[137] Rejoinder, ¶75.

[138] Rejoinder, ¶76, quoting Exhibit CL-169, *Alapli Elektrik B.V. v. Republic of Turkey*, Decision on Annulment, ICSID Case No. ARB/08/13, 10 July 2014, ¶234.

[139] Rejoinder, ¶¶124-135, citing DOJ, ¶¶ 49, 90 and Award, ¶115.

b) Contrary to the Respondent's position, the Tribunal did not ignore the documentary evidence that the Respondent put forward in an attempt to show that the Claimant was merely a seller of poultry equipment, not an investor. Rather, the Tribunal: (i) cited and rejected the Respondent's arguments relating to the "equipment sales contracts"[140]; (ii) could not have considered the 747 account statement of Im-und Export Dogan GmbH because the Respondent did not submit it in the jurisdictional phase;[141] and (iii) dealt "in depth" with the issue of the Claimant's submission to the Turkmen courts.[142]

c) The Tribunal in no way excused the Claimant from meeting his burden of proving he had made an investment.[143] Rather, the Claimant met that burden by producing a wealth of documentary evidence (in addition to the Participation Agreement) and credible witness testimony showing the existence and nature of his investment.[144] Furthermore, he showed that the Respondent had expressly recognized the Claimant as an investor within the context of the BIT, and "the Tribunal held that Turkmenistan was accordingly estopped from denying Mr. Dogan's investor status".[145]

ii. <u>Liability</u>

84. The Claimant contends that the Respondent has also failed to prove that the Tribunal manifestly exceeded its power in finding that the Claimant had a contractual interest in the Farm for the purpose of liability. To the Claimant, the Respondent's submission that the Tribunal departed from the applicable law and basic rules of evidence in the merits phase is "essentially a repeat of its argument on the Tribunal's jurisdiction", and can be similarly dismissed.[146]

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[140] Rejoinder, ¶¶165-169, citing DOJ, ¶¶65, 102, 160, 132-133.

[141] Rejoinder, ¶¶171-176.

[142] Rejoinder, ¶¶177-179; DOJ, ¶¶ 88, 97, 98.

[143] Rejoinder, ¶¶197-200.

[144] Rejoinder, ¶¶193 *et seq.* (citing several exhibits from the underlying arbitration); ¶199; Tr. 89:22-93:12.

[145] Counter-Memorial, ¶¶90-93, citing DOJ, ¶¶155-161 and Exhibit C-26, Letter of the German Minister of Economics and Labor, Wolfgang Clement, to the President of Turkmenistan, Saparmurat Atajevich Niyazov, 22 March 2004. See Tr. 90:11-92:9.

[146] Rejoinder, ¶80.

85. With regard to the Tribunal's alleged departure from the ICSID Convention and the BIT, the Claimant argues that, as with jurisdiction, the Respondent has failed to show any such "departure", and even if it could, "this could at most qualify as a non-annullable misapplication of the law".[147]

86. The Claimant considers the only difference from the Respondent's arguments concerning jurisdiction to be the Respondent's criticism of the Tribunal for adding a third potential basis of jurisdiction in the Award ("claims to money which has been used to create economic value" under Article 1(1)(c) of the BIT). However, in the Claimant's view, the Respondent's position is "contradictory" and in any event offers no ground for annulment; even if the Tribunal had been incorrect, it could amount only to an error of law not subject to review by the Committee.[148]

87. Similarly, according to the Claimant, the Respondent's claims of a departure from Turkmen law "remain detached from any of the legal standards Turkmenistan claims are applicable" and could not warrant annulment even if correct.[149] In any case, according to the Respondent, these allegations are not correct. As discussed in the context of jurisdiction, and contrary to the Respondent's misleading paraphrasing of the BIT, the BIT does not require that an investment be "carried out" in accordance with Turkmen law.[150]

88. The Claimant also rejects the Respondent's further argument that the Tribunal failed to examine the enforceability of the Participation Agreement under Turkmen law.[151] In fact, the Tribunal expressly dealt with the issue in the Decision on Jurisdiction and concluded that there was no contradiction between Turkmen law and the ICSID Convention and BIT.[152] The Respondent's criticism of the Tribunal for having "merely presumed the Gurbannazarov's good faith" regarding the Participation Agreement is misplaced, given that

[147] Rejoinder, ¶83.
[148] Rejoinder, ¶¶84-85.
[149] Rejoinder, ¶86.
[150] Rejoinder, ¶86.
[151] Rejoinder, ¶89, citing DOJ, ¶107.
[152] Counter-Memorial, ¶¶171-190; Rejoinder, ¶¶88-89, citing DOJ, ¶107.

good faith is a principle recognized in Turkmen law.[153] Finally, the Claimant considers the Respondent's reference to Article 239 of the Criminal Code as "laughable"; it is irrelevant to the enforceability of the Participation Agreement and was mentioned by the Respondent in the underlying arbitration only in a footnote.[154]

89. In regard to the Respondent's contentions that the Tribunal departed from basic rules of evidence, the Claimant states that they are "fully addressed and rebutted by Claimant's observations made in connection with the Tribunal's finding on jurisdiction".[155] Evaluating evidence is the prerogative of tribunals, not subject to review in an annulment proceeding.[156]

90. Furthermore, the Respondent is incorrect that the Tribunal did not require the Claimant to present evidence of the nature and extent of his investment. Notably, the Tribunal indicated in the Decision on Jurisdiction that there was a "possible need for further clarification" in this regard, and then in the Award it denied the Claimant recovery for his interest in Samşyt and the Farm's broiler production business (which were not mentioned in the Participation Agreement).[157]

iii. Damages

91. According to the Claimant, the Respondent's contention that the Tribunal manifestly exceeded its powers in awarding damages fails for a number of reasons. Notably, the Respondent argues that the Tribunal "departed from the most basic standard of damage assessment" without identifying what that standard is or establishing its significance.[158] Moreover, the Respondent's allegations concerning how the Tribunal purportedly departed from this standard, if true, could amount to nothing more than a misapplication of damages standards, which is not a ground for annulment.[159]

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[153] Rejoinder, ¶¶90-92, citing Exhibit CL-194, Civil Code of Turkmenistan, Article 375.
[154] Rejoinder, ¶190.
[155] Rejoinder, ¶94.
[156] Rejoinder, ¶78.
[157] Rejoinder, ¶¶141-143
[158] Rejoinder, ¶97.
[159] Rejoinder, ¶¶98-99.

92. The Claimant contends that, given the degree of uncertainty inherent in damages calculations, it is accepted and indeed acknowledged by the Respondent that "tribunals have broad discretion when it comes to assessing and awarding damages".[160] The Respondent's incorrect characterisation of the Tribunal's use of this discretion as the assumption of *ex aequo et bono* powers must be rejected.[161]

93. In particular, regarding the Respondent's argument that the Tribunal departed from the Parties' agreed FMV standard on the basis of equitable considerations, the Claimant contends that Tribunal had no obligation to apply that standard.[162] The Claimant states that "the tribunal can base its damages assessment on the methodological approach it considers to be the most appropriate, which need not be identical with the parties' submissions".[163]

94. In any event, according to the Claimant, the Parties did not agree on the FMV standard.[164] The Claimant states that "the fundamental principle of full reparation is derived from the *Chorzów Factory* case relied upon by Claimant, which states that 'reparation must, as far as possible, wipe out all the consequences of the illegal act'".[165] The Tribunal considered the circumstances of the case, including "the brooding presence of an antagonistic Government", and concluded that the FMV standard would not result in full reparation. The Tribunal stated:

> the applicable standard is not what this beleaguered Farm might have been worth to a hypothetical third-party purchaser, but—as noted above—what it would have been worth to Mr. Dogan in the absence of any breach of the Treaty, including by reference to the stream of income that would have flowed from the sale of eggs.[166]

95. The Claimant asserts that the Tribunal then carried out a comprehensive analysis of the evidence provided (Witness Statements, Expert Reports and related documents) to calculate damages according to this standard. The Parties agreed on some variables and disagreed on

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160 Counter-Memorial, ¶204, quoting Memorial, ¶169; Rejoinder, ¶119.

161 Rejoinder, ¶121.

162 Counter-Memorial, ¶204.

163 Rejoinder, ¶119.

164 Tr. 97:18-98:10.

165 Counter-Memorial, ¶204, quoting Exhibit CL-178, *The Factory at Chorzów (Germany v. Poland)* (Claim on Indemnity, Merits), Publications of the PCIJ, Series A, No. 17, 13 September 1928, p. 47.

166 Counter-Memorial, ¶204, quoting Award, ¶191.

others, and the Tribunal decided those in dispute.[167] In fact, the Tribunal applied the Respondent's expert's formula for determining yearly egg production.[168] Thus, the Respondent's allegation that the Tribunal conducted an artificial exercise of damage assessment based on fabricated prices and theoretical, optimal production figures is "baseless".[169]

96. For example, according to the Claimant, the management guides relied on by the Tribunal are not advertisements as the Respondent alleges, but are a useful source of information for poultry farms worldwide.[170] Indeed, the experts of both Parties relied on the guides in their testimony, and the Respondent's own expert called them "a reputable source in the industry".[171] Furthermore, the figures in the management guide were confirmed by the Claimant's expert, who had actually visited the farm and whom the Tribunal found credible.[172]

97. Finally, the Claimant submits that the Respondent's allegation that the Tribunal decided quantum *ex aequo et bono* is further undermined by the fact that the Tribunal ruled according to the Respondent's request and sharply reduced the Claimant's recovery due to a lack of certainty as to particular aspects of his claim.[173]

3. *The Committee's Analysis*

98. A few preliminary comments are appropriate regarding the Respondent's contention that the Award should be annulled because the Tribunal exercised *ex aequo et bono* powers. A

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[167] Counter-Memorial, ¶205. The Claimant also asserts that the "Tribunal employed the exact method Turkmenistan employed with its series of variables in Turkmenistan's post-hearing brief on merits and quantum". Rejoinder, ¶120.

[168] Tr. 100:13-101.24.

[169] Rejoinder, ¶223.

[170] Rejoinder, ¶¶202-210.

[171] Rejoinder, ¶205, quoting Exhibit C-224, Expert Report of Joost Gerrits dated 14 November 2012 (excerpt), ¶36. See Tr. 94:22-95:18.

[172] Rejoinder, ¶210, citing Award, ¶218 ("In [accepting the Claimant's assumption regarding the number of hens] we rely primarily on the testimony of Mr. Geiselhart, which confirmed that the targets set in the management guide had been reached by the Farm"); Tr. 95:23-96:17. The Claimant points to the Tribunal's assessment of the credibility of the Respondent's expert, Mr. Soyunov: "Mr Soyunov appears to do little more than echo Respondent's legal arguments, a startling aspect of the testimony of a veterinarian employed as the Farm's production manager". Memorial, ¶145; Tr. 96:21-97:15.

[173] Counter-Memorial, ¶¶11, 208, citing Award, ¶¶8, 174-175, 194.

tribunal's power to decide a dispute *ex aequo et bono* is subject to the parties' agreement under Article 42(3) of the ICSID Convention. It is undisputed between the Parties that the Tribunal had not been granted such a power. A decision *ex aequo et bono* without the parties' authorization is a failure to apply the proper law amounting to an excess of powers. If manifest, it may found the ground of annulment under Article 52(1)(b) of the Convention.

99. A tribunal empowered to decide a dispute *ex aequo et bono* "may disregard the rules of law otherwise applicable under Art. 42(1) in favor of justice and fairness".[174] A decision *ex aequo et bono* may be distinguished from equitable considerations inherent in any legal system, be it international or national. As held by the International Court of Justice:

> Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision ex aequo et bono, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute.[175]

100. In the present case, in the original arbitration, the Tribunal made repeated references, both in the Decision on Jurisdiction and in the Award to the ICSID Convention, the BIT and Turkmen law to found its decision regarding jurisdiction and liability. Nowhere in the Decision on Jurisdiction or in the Award did the Tribunal indicate or even indirectly suggest that these were premised entirely on equitable considerations. Insofar as equitable considerations had any bearing at all on the Decision on Jurisdiction or the Award, these were inherent in the interpretation of the law applied by the Tribunal. This, however, does not absolve the Committee of its obligation to examine whether the Tribunal decided the questions before it by resorting to an unauthorized exercise of *ex aequo et bono* powers instead of applying the relevant law; and, if so, what would be its effect on the validity of the Decision on Jurisdiction or the Award. Based on the principles outlined above, this issue

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[174] *Schreuer*, The ICSID Convention, Article 42, ¶249.

[175] Exhibit CL-181, International Court of Justice, *North Sea Continental Shelf Cases,* Judgment of 20 February 1969, ICJ Reports, 1969, 3, ¶88. Article 38, ¶2 of the Court's Statute provides: "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto".

will be examined in some detail in the context of the Committee's analysis of the ground of manifest excess of powers. To the extent that it is relied upon by the Respondent, it will also be examined with regard to the other grounds of annulment.

101. The Parties appear to agree on the standard for annulment under Article 52(1)(b), including the condition that the excess of powers must be "manifest", meaning thereby that the excess "can be discerned with little effort and without deeper analysis".[176] This raises the question whether in the case before the Committee the excess of powers, if any, is "manifest".

102. The Respondent asserts that an "egregious error of law can justify annulment, if it amounts to non-application of the law",[177] which is disputed by the Claimant.[178] The latter asserts that in order to be "manifest", the excess of powers must not only be "textually obvious" but needs also to be "substantively serious".[179]

103. The Committee does not agree with the Parties' respective interpretations of the concept of "manifest". It notes that the scope of the term "manifest" must not expand the concept beyond "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" as provided in the Vienna Convention.[180] The dictionary meaning of "manifest" is "clearly apparent", "obvious".[181]

104. This meaning must be understood in the context of the object and purpose of the Convention which, as made clear by its drafting history, is to ensure the finality of awards by fixing a high threshold for annulment and providing a limited scope of review, while safeguarding against "the violation of the fundamental principles of law governing the Tribunal's proceedings".[182]

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[176] Memorial, ¶18; Counter-Memorial, ¶21.

[177] Reply, ¶18.

[178] Rejoinder, ¶¶35-43.

[179] Claimant's Opening Statement at the Hearing, slide 13.

[180] Vienna Convention on the Law of Treaties of 23 May 1969, Article 31(1).

[181] The American Heritage Dictionary of English Language, 5th ed. (2015) defines "manifest" as "clearly apparent to the sight or understanding; obvious" (available at https://www.ahdictionary.com/word/search.html?q=manifest). See also *Schreuer*, The ICSID Convention, Article 52, ¶135.

[182] ICSID Background Paper on Annulment, 10 August 2012, ¶72.

105. The Committee recognizes that, as held by other *ad hoc* committees, a simple error of law does not warrant annulment. At the same time, it has been held that an error of law may, however, be so egregious that it amounts to a failure to apply the proper law. Such an error would constitute a manifest excess of power and may result in annulment. The Committee further recognizes that when deciding issues relating to its jurisdiction, in particular, a gross misapplication of the applicable law by a Tribunal can amount to a manifest excess of powers.[183] This would be the case when such misapplication leads a tribunal to conclude that it has jurisdiction when jurisdiction is lacking or when a tribunal exceeds the scope of its jurisdiction. It would also be the case when the tribunal rejects jurisdiction where jurisdiction exists. An exercise of authority without jurisdiction or in excess of jurisdiction as well as a rejection of jurisdiction are all capable of being annulled under Article 52(1)(b).

106. *Ad hoc* committees have observed that a failure to apply the proper law would constitute a manifest excess of powers but its erroneous application would not. No clear line, however, separates a failure to apply the proper law from its erroneous application. As noted by the *Soufraki* Committee:

> ICSID *ad hoc* committees have commonly been quite clear in their statements – if not always in the effective implementation of these statements – that 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. As stated in Klöckner I, the distinction between "non-application" of the applicable law and mistaken application of that law is a "fine distinction." … If the general statement to the effect that a wrong application or interpretation of the law is not a ground for annulment is quite uncontroversial and endorsed by this *ad hoc* Committee, its practical application to concrete sets of facts may at times not be self-evident.[184]

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183 Exhibit RL-155, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment, 5 June 2007, ¶ 86, Exhibit CL-8, *Malaysian Historical Salvors SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶¶74, 80.

184 Exhibit RL-155, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment, 5 June 2007, ¶85. See also Exhibit CL-8, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009 ¶¶74, 80.

107. The Committee then suggested a possible way out of this difficulty by referring to the manner in which domestic courts in most common law jurisdictions decide applications for judicial review or writ petitions:

> Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law. Such gross and consequential misinterpretation or misapplication of the proper law which no reasonable person ("*bon père de famille*") could accept needs to be distinguished from simple error – even a serious error – in the interpretation of the law which in many national jurisdictions may be the subject of ordinary appeal as distinguished from, *e.g.*, an extraordinary writ of *certiorari*.[185]

108. This Committee acknowledges the difficulties inherent in such line drawing and has decided to follow with caution the course charted by earlier *ad hoc* committees' decisions. It has accordingly sought to distinguish carefully between the failure to apply the applicable law as a ground for annulment from a misinterpretation of the applicable law which it considers beyond its mandate. It will do that while continuing to remind itself that gross or egregious misapplication or misinterpretation of the law where it is tantamount to a failure to apply the proper law may lead to annulment.[186]

109. According to the Respondent, the Tribunal manifestly exceeded its powers in three situations: (i) when finding jurisdiction; (ii) when finding liability; and (iii) when awarding damages.[187] The Committee will consider all three contentions.

i. Jurisdiction

110. Regarding the finding of jurisdiction, it is the Respondent's contention that the Tribunal failed to identify the investment forming the basis of its jurisdiction under the ICSID Convention and the BIT, and that it disregarded applicable Turkmen law.[188] The Tribunal

[185] Exhibit RL-155, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment, 5 June 2007, ¶86.

[186] ICSID Background Paper on Annulment, 10 August 2012, ¶94 and fn. 171.

[187] Memorial, Section II.C; Reply, Section IV.A, B, C.

[188] Reply, ¶¶64 *et seq*.

allegedly failed to observe the jurisdictional requirement contained in the Convention and the BIT that the dispute must be shown to arise from an investment, since it based its decision on the "vague, '*cumulative or alternative*' conclusions that the Claimant may have owned either an investment in the form of movable property and/or some kind of contractual interest in the Poultry Business".[189]

111. The Committee notes that, according to the part of the Decision on Jurisdiction to which the Respondent makes reference, the Tribunal reached "the confident conclusion", based on "overwhelming evidence" that the Claimant, "at a minimum qualifies under Article 1(1)(a) of the BIT". In addition, the Tribunal held "[f]urther or alternatively" that it "is also of the view that the Claimant acquired a contractual interest that qualifies under Article 1(1)(b) of the BIT".[190]

112. The Respondent contends that the Tribunal failed to apply Article 25 of the ICSID Convention and Article 1(1) of the BIT when determining that the Claimant had an investment. The Committee notes initially that the Tribunal's conclusions regarding the Claimant's investment follow a reference it made to the text of Article 25 of the ICSID Convention[191] and to Article 1(1) of the BIT, which defines "investments".[192]

113. The Respondent did not argue that the Award be annulled on the basis that the Claimant's "investment" did not qualify under Article 25 of the Convention. Attention must, therefore, turn to Article 1(1) of the BIT, which, *inter alia*, provides:

> The term "investments" shall comprise all kinds of assets, in particular:
>
> a. Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;
> b. Shares of companies and other kinds of company interests;

[189] Reply, ¶66.
[190] DOJ, ¶61.
[191] DOJ, ¶52, transcribing part of Article 25 of the Convention.
[192] DOJ, ¶53, transcribing Article 1(1) of the BIT in full.

c. Claims to money which has been used to create an economic value, or claims to any performance having an economic value.[193]

114. Subparagraphs (a) and (b) were relied upon by the Tribunal in the Decision on Jurisdiction to hold that the Claimant had made an "investment" and that the Tribunal, therefore, had jurisdiction in the matter.[194] If the Committee finds either of these findings to be unobjectionable then, irrespective of its views with regard to the other, the Award must not be annulled on the ground that the Tribunal manifestly exceeded its powers in holding that there was an investment within the meaning of Article 1(1) of the BIT.

115. The Tribunal appears to have relied primarily on the Claimant's investment in the form of a contractual interest, holding that the financing of equipment was the Claimant's contribution to the business entitling him to an interest in the future income stream of Şöhrat-Anna.[195]

116. In the Decision on Jurisdiction, the Tribunal referred to the Claimant's assertion that his interest in the Turkmen Sole Proprietorship qualifies as "other kinds of company interests under Article 1(1)(b)".[196] The Tribunal then outlined in the following part of its decision[197] its findings and reasoning in relation to this assertion, and on that basis concluded that the Claimant had acquired a contractual interest that qualified as an investment under Article 1(1)(b) of the BIT.[198] In the Award, the Tribunal referred to the Claimant's contractual entitlement to a portion of the Farm's income stream "which was the counterpart of his contribution to the business", where the contribution includes the financing of the movable property.[199]

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[193] Article 1(1) of the BIT contains under (d) and (e) two additional kinds of "investments", which are of no interest for the present analysis since the former was rejected by the Tribunal (DOJ, ¶¶59, 62) and the latter was not relied on by the Claimant.

[194] All three sub-paragraphs were referred to in the Award in concluding that the claim qualified as an "investment". Award, ¶109.

[195] Award, ¶129.

[196] DOJ, ¶59.

[197] DOJ, ¶¶62 *et seq*.

[198] DOJ, ¶61.

[199] Award, ¶129.

117. The Committee has considered the fact that Article 1(1)(b) of the BIT does not include an express reference to "contractual interests". However, it is of the view that the reference in Article 1(1)(b) to "other kinds of company interests" is sufficiently broad to include the contractual interest in Şöhrat-Anna described by the Tribunal.[200]

118. The Committee is conscious of the fact that Article 1(1)(b) refers to "shares and other kinds of company interests". The words, "other kinds of company interests" are, however neither qualified by the word "shares" nor are these to be read *ejusdem generis*. The rule of *ejusdem generis* applies when general words follow special words. The general words are limited by the *genus* (class) indicated by the special words.[201] No general words in this case precede the words "other kinds of company interests". There is no genus or class established by an enumeration of specifics. At least two words are required to establish a class. The lone word "shares" does not constitute a class.

119. The words "other kinds of company interests" are of very wide import. They are wide enough to cover any interest in a company including a contractual interest in a future stream of income from a company. The Committee sees no reason to read these words narrowly or to place an artificial or strained construction on them.

120. The Committee is conscious of the fact that "companies" is a defined expression under the BIT. Under Article 1(1)(4) of the BIT in reference to Turkmenistan it means:

> Any juridical person or cooperative society or other company or association with legal personality which has been established in accordance with Turkmenistan's legislation and has its seat in the territory of Turkmenistan.

In view of this definition, a contractual right to a stream of income from an entity, which lacked legal personality, would not have amounted to "company interests". If either Şöhrat-Anna or Samşyt did not fall within the definition of "company" in the BIT, then any interest

[200] Award, ¶¶108-109.

[201] *Sir Anthony Aust*, Modern Treaty Law and Practice, 2nd ed., Cambridge University Press, Cambridge (2007), p. 249.

in them would not have qualified as "company interests". It would not have been an investment covered under Article 1(1)(b) of the BIT.

121. In view of this, the Committee examined the pleadings of the Parties and the transcript of the proceedings before the Tribunal. It appears that the Respondent did not argue that either Şöhrat-Anna or Samşyt, the proprietary entities in which the Claimant claimed to have an interest, were not juridical persons. The legal personality of Şöhrat-Ana and Samsyt was, therefore, never an issue in the arbitration proceedings. The Tribunal, therefore, rightly did not consider this argument and nothing would turn on the Committee proceeding to examine it in any further detail.

122. Instead, the Respondent focused its submissions before the Tribunal on whether the Claimant had shares or any other interest in the companies. The Respondent argued that the Claimant did not have such interests because such interests, if any, were never properly registered under Turkmen law and, further, that his alleged investments were not made in accordance with Turkmen law. According to the Respondent the companies, therefore, only had Turkmen investors, *i.e.* the individuals legally registered under the sole proprietorships. All of these arguments were carefully considered and rejected by the Tribunal. The findings of the Tribunal that the Claimant had made an investment within the meaning of Article 1(1)(b) of the BIT cannot, therefore, be interfered with by the Committee in exercise of its Article 52 Convention remit.

123. In light of this determination, the Committee need not further examine the Tribunal's finding whether the Claimant had also made an investment under subparagraph (1)(a) of Article 1. Nor is it necessary to delve into the Tribunal's additional reliance, in the Award, on subparagraph (c). As the Tribunal identified a valid basis for its jurisdiction under Article 1 of the BIT, these sub-questions would have no effect on the outcome of the Decision on Jurisdiction or the Award. Any discussion of these sub-questions would be academic. In this respect, the Committee adopts the reasoning of previous *ad hoc* committees which have stated that a manifest excess of power exists only where the action in question "is clearly

capable of making a difference to the result",[202] and similarly that "the excess of power should [be] substantively serious".[203]

124. The Committee, therefore, concludes that the Tribunal did not fail to apply the ICSID Convention and the BIT when finding jurisdiction. It identified the investment out of which the dispute had arisen in accordance with Article 25 of the Convention and Article 1 of the BIT.[204]

125. The Respondent also contends that the Tribunal found Turkmen law to be irrelevant to determine whether the Claimant had a qualifying investment. This contention appears to be based on the Tribunal's assertion that "local law becomes important in this respect only if its role is expressly reserved by the relevant international instruments".[205] However, the Committee does not need to review the validity of this statement since in any case the Tribunal did not fail to give due consideration to Turkmen law.

126. The Committee notes initially that an entire section of the Decision on Jurisdiction is devoted to the conformity of the investment with Turkmen law.[206] The Tribunal referred at the outset to the Respondent's contention that the Claimant does not qualify for access to ICSID by reason of Articles 2(1) and 9 of the BIT and Article 2(a) of the Protocol to the BIT.[207] These three articles are reproduced textually in the Decision on Jurisdiction.[208] The Tribunal then drew a distinction between investments that are disqualified *ex ante*, thus defeating arbitral jurisdiction, and those that do not follow the applicable law (frequently the host State law under Article 42 of the ICSID Convention) when carried out. In the latter case, the investor

[202] Exhibit CL-137, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶86; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *Ad Hoc* Committee, 1 March 2011, ¶229.

[203] Exhibit RL-155, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment, 5 June 2007, ¶40.

[204] See also *infra*, ¶142, regarding the finding of liability.

[205] *Supra*, ¶44 quoting DOJ, ¶124.

[206] DOJ, Section 7.3 ("*Was the Investment in Conformity with Turkmen Law?*").

[207] DOJ, ¶129.

[208] DOJ, ¶¶ 54-56; see *supra*, fn. 36.

may not be able to prevail on the merits, but the failure to comply with local law would not defeat jurisdiction.[209]

127. According to the Tribunal, the Respondent's objection would have found its most plausible justification in Article 9 of the BIT, which it reasoned "would clearly proscribe an investment in an area which is off-limits to foreign capital".[210] The Tribunal therefore did not consider the other two Articles to require that the Claimant's investment complied with Turkmen law at the time it was made. This interpretation does not appear to be erroneous, but even if it were, a mere erroneous interpretation would not be a ground for annulment.

128. Based on this interpretation, the Tribunal proceeded to examine compliance with Turkmen law at the time the investment was made, rather than during "the course of post-investment management of the venture",[211] in particular whether the investment needed to be registered in order to be valid under local law.[212] In the Tribunal's view, other failures to comply with Turkmen law alleged by the Respondent[213] related to the implementation of the investment. An entire subsection of Section 7.3 of the Decision on Jurisdiction is devoted to the analysis of the issue of registration in light, on the one hand, of the factual evidence showing repeated reference by authorities in both Germany and Turkmenistan to the Claimant's investment with no mention of a "supposedly required registration"[214] and, on the other hand, the Respondent's inability to identify any registration requirement under the BIT or Turkmen law.[215]

129. It is not within an *ad hoc* committee's remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence. A tribunal's discretion in such matters of appreciation and evaluation of evidence is recognized by the

[209] DOJ, ¶130.
[210] DOJ, ¶131.
[211] DOJ, ¶134.
[212] DOJ, ¶135.
[213] Memorial, ¶62; Reply, ¶72.
[214] DOJ, ¶136.
[215] DOJ, ¶¶138-142, referring to *Desert Line* Award requiring very explicit terms "for a formal registration requirement to be added to a bilateral treaty by a unilateral legislation or regulation".

ICSID system.[216] An *ad hoc* committee cannot sit in appeal on a tribunal's assessment of the evidence. If the Committee were to proceed to a re-examination of the facts of the present case and an assessment of how the Tribunal evaluated the evidence before it, it would act as an appellate body. That is not a function envisaged for it by the ICSID Convention.[217]

130. This view is supported by the decisions of a number of *ad hoc* committees. In *Wena Hotels v. Egypt*, the Committee stated that "it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party".[218] In *Rumeli v. Kazakhstan*, the Committee held that "[a]n ad hoc committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties".[219] As stated by the *ad hoc* Committee in *Alapli v. Turkey*, "[i]t is certainly not the role of an annulment committee to verify whether a tribunal correctly established the facts of a case".[220] And as held by the *ad hoc* Committee in *CDC v. Seychelles*, even if the Tribunal erred in the appreciation of the evidence the error would not in itself constitute a ground for annulment.[221]

131. In the Committee's view, the Tribunal's finding of the absence of a registration requirement under Turkmen law falls well within its discretion in the field of evidence. As explained in the Decision on Jurisdiction, this finding was based largely on the evidence of the Respondent's legal expert, Mr. Akmamedov, who after conceding that Article 971(1) of the Turkmen Civil Code allows agreements on "joint entrepreneurial activity" to be concluded

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[216] Arbitration Rules, Rule 34(1): "The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value".

[217] ICSID Convention, Article 53: "The Award… shall not be subject to any appeal".

[218] Exhibit CL-157, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 28 January 2002, ¶65.

[219] Exhibit CL-172, *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, 25 March 2010, ¶96.

[220] Exhibit CL-169, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, ¶234, referred to in the Rejoinder, ¶76.

[221] Exhibit CL-40, *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, ¶¶59-61, reported by *Schreuer*, The ICSID Convention, Article 52, ¶330. This holding was followed by other *ad hoc* committees, as in *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on the Application for Annulment, 5 June 2007, ¶87.

orally,[222] failed to provide an answer to the specific question whether Turkmen law required the registration of a foreign investment.[223]

132. The Tribunal also examined the issue of the conformity with Turkmen law of the Participation Agreement and of the Claimant's investment by way of a contractual interest, in light of the Respondent's reference to various laws of Turkmenistan. In particular, the Respondent argued that the Participation Agreement did not accord with the Law on Enterprises, which would have required an amendment to the foundation documents of Şöhrat-Anna or its reorganization from a sole proprietorship into a joint-stock company to permit an investment by a third party.[224] According to the Tribunal, even if the Law on Enterprises would not recognize the Participation Agreement, potentially depriving the Claimant of his status as a shareholder in that enterprise, that "would not, however, necessarily or automatically deprive the Claimant of a contractual right to the 30% portion of income" of Şöhrat-Anna.[225]

133. The Committee notes in this context that the Tribunal excluded the possibility that the Claimant's investment was in the form of the acquisition of a corporate equity or of a formal status within Şöhrat-Anna or Samşyt.[226] Regarding the Respondent's argument that "the exercise of the rights and the enjoyment of the benefits of an equity-holder in the absence of an appropriate corporate form constitutes a violation of Turkmen law", the Tribunal found that to relate "to possible unenforceability, not 'violation of Turkmen law'".[227]

134. Further, the Tribunal's finding regarding the absence of a registration requirement for foreign investments answers the Respondent's further allegation that the Tribunal "entirely

[222] DOJ, ¶106.

[223] DOJ, ¶137.

[224] DOJ, ¶143.

[225] DOJ, ¶144.

[226] DOJ, ¶¶110, 145; Award, ¶119. The reference to the two Turkmen companies owned by the Gurbannazarovs is explained by the fact that each of them had entered into a separate lease with the Government on which the Farm was located (DOJ, ¶6). When a single lease in the name of Şöhrat-Anna replaced the two leases on 1 January 2002 (DOJ, ¶8), the Claimant had no further involvement in Samsyt.

[227] DOJ, ¶146.

disregarded the Turkmen Law on Foreign Investment", which requires all investors to choose a corporate form or a form of business activity which would have to be registered.[228]

135. The same holds true regarding the Respondent's fleeting reference to Article 239 of the Criminal Code of Turkmenistan. According to this provision, "Engagement in an entrepreneurial activity without registration … shall result in a fine … or correctional work".[229] In the absence of a registration requirement for the Claimant's investment, this provision is of no effect as to the finding on jurisdiction. Even if registration had been required, which the Tribunal excluded, the only consequence under the Criminal Code would have been a sanction of a criminal nature, with no direct consequences on the Farm's business activity.

136. For the reasons above, the Committee concludes that the Tribunal duly considered and applied Turkmen law based on the available evidence. It is of the same view as Professor Schreuer that "[a]s long as the Tribunal identifies the applicable law correctly and strives to apply it, it is impossible to conclude that it has disregarded law for the sake of equity".[230] It holds that the Tribunal did not exercise *ex aequo et bono* powers for the purpose of finding jurisdiction.

137. The Respondent has further alleged that the Tribunal ignored the documentary evidence showing that the Claimant was exclusively a seller of poultry equipment to the Turkmen entities.[231] The Committee notes that by deciding that the Claimant had financed the procurement, transport and installation of said equipment, the Tribunal clearly excluded the possibility, based on the available evidence, that the Claimant had acted as a seller of that equipment. According to the Tribunal, "[t]he record leaves no room for doubt. All the

[228] Reply, ¶72, 2nd bullet point.

[229] Reply, ¶72, 3rd bullet point.

[230] Exhibit CL-179, *Schreuer*, Decisions *Ex Aequo et Bono* Under the ICSID Convention, 11 ICSID Review-Foreign Investment Law Journal (1997), 37, p. 61.

[231] *Supra*, ¶45(b).

evidence, such as it is, points to the Claimant as a true participant in contributing financially and by other means to the establishment and operation of the Farm".[232]

138. As previously mentioned, it is not within the Committee's remit to interfere with the appreciation and evaluation of evidence by the Tribunal. However, the Committee has the power and is indeed in duty bound to determine whether the Tribunal improperly reversed the burden of proof as to the nature of the Claimant's investments, as alleged by the Respondent.[233] What the Respondent in essence contends in this regard is that the Tribunal violated the fundamental rule of evidence "*actori probatio incumbit*", using *ex aequo et bono* powers that it did not have.[234] The Committee shall revert to this question when examining the second ground of annulment on which the Respondent relies.

ii. Liability

139. The Respondent contends that the Tribunal manifestly exceeded its powers when, in the Award, it: (i) found liability without identifying the nature and extent of the Claimant's alleged interest;[235] (ii) did not require the Claimant to meet his burden of proof;[236] (iii) departed from the applicable law;[237] and (iv) ignored the evidentiary record relying on *ex aequo et bono* powers.[238]

140. With respect to (i) above, the Respondent argues in particular that the Tribunal failed to identify "the terms of th[e] supposed contract, the parties to it, the consideration exchanged or even Dogan's rights or obligations under it and whether he met those obligations".[239]

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[232] DOJ, ¶125.
[233] Memorial, ¶¶87-98; Reply, ¶¶93-100.
[234] Reply, ¶¶106-107.
[235] Memorial, ¶107; Reply, ¶¶130, 133, 136; Respondent Oral Argument, slides 28-29.
[236] Memorial ¶120; Reply, ¶¶133, 151-152, 157; Respondent Oral Argument, slide 30.
[237] Memorial, ¶¶111-118; Reply, ¶¶138-147, 168; Respondent Oral Argument, slide 30.
[238] Memorial, ¶118; Reply, ¶¶134-135.
[239] Memorial, ¶103.

141. As stated by the Tribunal and recalled by the Respondent, "even as a matter of contract the record is fragmented and ambiguous".[240] However, this circumstance did not prevent the Tribunal from making a decision regarding liability based on the assessment of the facts and the available evidence, in particular the Participation Agreement. The Committee believes that, contrary to the Respondent's contention, the elements of the Claimant's contractual interest were identified as part of the Tribunal's analysis.

142. In the Decision on Jurisdiction, the Tribunal identified the form and content of the Claimant's interest when referring to the Participation Agreement as creating "a 30% contractual interest in Şöhrat-Anna"[241] and when qualifying the interest as "what is commonly referred to as a 'carried interest'".[242] The Tribunal also considered the qualification of this interest as an "investment" under the ICSID Convention and the BIT, as well as its conformity with Turkmen law. The Committee will not revisit this particular part of the Tribunal's decision, as it has already been examined with regard to the Tribunal's finding of jurisdiction. The Committee's conclusions above apply equally to the allegations made by the Respondent regarding the Tribunal's finding of liability.

143. With respect to the Respondent's allegation that the Tribunal did not identify the parties to the "supposed contract", the Committee notes that an English translation of the Participation Agreement is reproduced in full in the Decision on Jurisdiction, showing the parties thereto. The Agreement has the following title: "The company 'Im- und Export Dogan GmbH' is participating (dormant partner's interest) in the company 'Şöhrat-Anna' by means of project-related capital contributions".[243] The Agreement was signed by Adem Dogan in the name of his German company referred to in the title. The formal party to the Participation Agreement appears therefore to be Import & Export Dogan GmbH.

144. In light of this fact, the Tribunal expressly examined whether the Claimant could be considered a party to the Participation Agreement. According to the Tribunal, the Claimant,

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240 Award, ¶183; Reply, ¶136; Tr. 47: 3-4.
241 DOJ, ¶107.
242 DOJ, ¶108.
243 According to the certified translation from the original German text reproduced in DOJ, ¶87.

rather than any of his German companies, was the party that "directly and materially participated in carrying out the activities associated with the investment", being also "the source of all funds available to his two companies".[244] To the Tribunal, the words in the Participation Agreement: "[f]inally Mr Dogan agrees…" suggested that "it was understood that the Claimant himself was a party to the Participation Agreement through his wholly-owned company".[245] The Tribunal, citing a prior investment treaty case, determined that although the Claimant "held his participation in the joint venture investment" through a corporate vehicle that was the formal party to the Participation Agreement, the Claimant himself, a natural person, was "the qualifying investor" as the source of all funds available to his companies and the beneficiary of all revenues.[246]

145. In the Committee's view, the Tribunal clearly indicated that even if the Claimant's corporate vehicle was the formal party to the Participation Agreement, the Claimant himself was the party entitled to a 30% contractual interest in Şöhrat-Anna. The latter assumed the corresponding liability, as confirmed by the last sentence of the Participation Agreement: "The company 'Şöhrat-Anna' assumes full liability for the capital and for the correct disbursement of income".[247] The other party to the Participation Agreement is in effect Şöhrat-Anna, Mr. Gurbannazarov having signed the Agreement in the name of this Company.[248]

146. Based on the Tribunal's interpretation of the Participation Agreement,[249] the Claimant was entitled to 30% of Şöhrat-Anna's income stream in exchange for his contribution to the business. According to the Tribunal, "[t]he record leaves no room for doubt. All the evidence, such as it is, points to the Claimant as a true participant in contributing financially

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[244] DOJ, ¶113. The reference to "his two companies" is to the two German companies as defined in DOJ, ¶5.

[245] DOJ, ¶94, where "his wholly-owned company" is one of the German companies, namely Import & Export Dogan GmbH.

[246] DOJ, ¶113.

[247] Exhibit C-15.

[248] As shown by the text reproduced in DOJ, ¶87.

[249] DOJ, ¶¶92 *et seq*.

and by other means to the establishment and operation of the Farm, even if the nature and extent of that contribution cannot be determined fully at this stage".[250]

147. The Committee does not accept the Respondent's argument that the reservation in the final clause of that quote points to any failure by the Tribunal to identify the Claimant's contribution and contractual interest for the purpose of liability.[251] As explained in the Award, this reservation was intended to make clear that the Decision on Jurisdiction "did not prejudge any aspect of the merits of the case, in particular whether the structure and the documentation of Mr. Dogan's interest had a 'sufficiently solid basis' to be assigned a compensable value".[252] The Tribunal meant "to keep open the possibility … that matters might be clarified, one way or the other, during the merits phase".[253]

148. As the word "might" indicates, such clarifications were considered by the Tribunal only as a possibility, although a desirable one, to better establish the facts of the case. No such clarifications having been offered, the Tribunal was left with evidence that it described "as patchy and scant".[254]

149. At the risk of repeating itself, the Committee observes that it does not have the authority to sit in judgment on the Tribunal's appreciation and evaluation of the evidence and its conclusion, "not without hesitation but eventually by a balance of the evidence", that the Gurbannazarovs did likely agree that the Claimant "would have an entitlement to the Farm's profits", with the enforceability of such entitlement depending "to a significant degree on the good will of the Gurbannazarovs".[255]

150. The Respondent's allegation regarding the Tribunal's disregard of Turkmen law, including the alleged unenforceability of the Participation Agreement, have been examined by the Committee when dealing with the finding of jurisdiction. Even assuming that the Tribunal made an error in applying or omitting to apply individual provisions of Turkmen law, a mere

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[250] DOJ, ¶125.

[251] DOJ, ¶¶68-83.

[252] The Memorial refers to this reservation in ¶100.

[253] Award, ¶181.

[254] Award, ¶182.

[255] Award, ¶183; see also ¶129.

error or omission would not be a ground for annulment of the Award. In any event, this is merely an assumption. The record before the Committee does not support such an assumption.

151. Also regarding the Tribunal's finding on liability the Respondent alleges that the Tribunal reversed the Parties' burden of proof by blaming the Respondent for not providing evidence as to the nature of the Claimant's alleged investment.[256] According to the Respondent, the Tribunal drew unjustified adverse inferences against the Respondent.[257] These contentions are unwarranted, as will be discussed when examining the second ground of annulment.[258]

152. In sum, the Committee has concluded that the Tribunal properly identified the nature and extent of the Claimant's investment based on the evidence made available by the Parties. The Tribunal was therefore in a position to decide whether the Respondent had expropriated the investment as so identified, and whether it had breached the BIT in other respects regarding such investment. Clearly, the legal dispute had arisen out of the investment made by the Claimant and its treatment by the Respondent. The Committee concludes that no *ex aequo et bono* powers were exercised by the Tribunal for the purpose of finding liability.

iii. <u>Damages</u>

153. Regarding the finding of damages, the Respondent's main argument is that "the Tribunal did not assess damages based on the evidentiary record and accepted damage valuation standards", which in the Respondent's view is obvious from the Award.[259]

154. As detailed in the Respondent's oral argument at the Hearing:

a) The Tribunal itself recognized that Dogan failed to submit appropriate documentary evidence and historical data in support of his damage claim;[260]

[256] Memorial, ¶¶130-131.

[257] Memorial, ¶132.

[258] *Infra*, ¶¶204 *et seq*.

[259] Reply, ¶170.

[260] Turkmenistan's Oral Argument, slide 31.

b) The Tribunal chose to ignore the fair market value of Dogan's alleged interest, which is the standard for measuring damages set forth in the BIT and agreed upon by the Parties;[261] and

c) The Tribunal's manner of assessing damages manifestly demonstrates that it acted *ex aequo et bono*.[262]

155. As pointed out by the Respondent, the Tribunal repeatedly made reference to the limited record available regarding the Claimant's loss. According to the Tribunal, "the details of the quantification of the loss are by no means a simple matter, having regard to the manifest insufficiency of the Claimant's documentary record, and the limited evidence he has seemingly been able to cobble together after the event".[263] The Tribunal acknowledged that "the evidentiary record has not been well furnished … and we are left to reach our decision on the basis of evidence that is best described as patchy and scant".[264] As recalled by the Respondent, the Tribunal also stated that "there appears to be little to be gained by seeking to identify and confirm the existence of reliable financial records with regard to the transactions involving the Claimant and the Farm. In our view it is unlikely that they exist, or that they ever existed".[265]

156. There is, however, a significant difference between the sufficiency and absence of evidence. The passages from the Award referred to above demonstrate that here the former and not the latter was the case. The Tribunal relied primarily on the evidence provided by the Parties' respective experts who estimated prices and production based on various management guides for poultry farms. While the Respondent argues that the Tribunal's reliance on these management guides amounts to an "artificial exercise of damage assessment based on fabricated prices and purely theoretical, optimal production figures",[266] the Respondent's own expert, Mr. Gerrits, relied on the same management guides. In his first Expert Report,

[261] Turkmenistan's Oral Argument, slide 32.
[262] Turkmenistan's Oral Argument, slide 33; Reply, ¶170.
[263] Award, ¶179.
[264] Award, ¶182.
[265] Award, ¶188.
[266] Reply, ¶170.

Mr. Gerrits states that "[i]n my assumptions I used recommendations by Hy-Line as well as Big Dutchman".[267] Mr. Gerrits also called the Hy-Line International Online Management Guide "a reputable source in the industry".[268] The Respondent's contention is, therefore, contradicted by its own expert.

157. Nothing prevented the Respondent from producing documents proving actual prices and production figures for the Farm. The Respondent, however, failed to produce any such documents. As acknowledged by the Tribunal "[d]espite allegedly being in possession of records, he [Mr. Soyunov] produced none of them in this arbitration. The Respondent did not produce them either, although it appears to have access to the warehouse in Ashgabat where it is said that the original records (or a copy thereof) are kept".[269] Similarly, even though the Respondent disputed the eight invoices produced by the Claimant for sales of eggs from the Farm to the Government of Turkmenistan, it did not produce any other invoices to show a different picture. This was in spite of the fact that the Government regularly purchased eggs from the Farm and, therefore, such invoices could not have been absent from its possession.

158. In these circumstances, the Tribunal relied on the material produced before it. Simply because this material did not include the actual prices and production figures for the Farm did not require the Tribunal, in law, to ignore it or to reject it altogether as a basis for quantification of damages. There is no one size fits all formula for quantification of damages. It necessarily involves an appreciation of evidence and drawing of conclusions therefrom. It may, at times, also require a tribunal, in light of the facts and circumstances of a particular case, to make certain assumption from both the evidence produced by one party and by the failure of the other party to produce evidence. A tribunal is at liberty to reach conclusions from the evidence produced and to draw inferences from a failure to produce it. It was well within the domain of the Tribunal to rely on the best evidence before it and to draw conclusions therefrom. This evidence included not only the respective Expert Reports, but also Witness Statements and related documents submitted by the Parties. The Committee is,

[267] Expert Report of Joost Gerrits dated 14 November 2012, ¶5.
[268] Expert Report of Joost Gerrits dated 14 November 2012, ¶36.
[269] Award, ¶213.

therefore, of the view that there was sufficient evidence on record for the Tribunal to form a judgment as to the quantification of the Claimant's damages. That this evidence was limited was taken into account by the Tribunal and is clearly reflected in the Award where it "severely limit[ed] what might have been the full extent of his [Claimant's] possible entitlements, if his claim had been fully documented".[270] In the facts of this case, calculating damages in this manner was fully understandable.

159. The Committee also cannot accept the Respondent's argument that FMV was the standard provided by the BIT. "Fair market value" is set forth in various investment treaties as the only method to establish the amount of compensation due in case of expropriation of an investment. This is not the case in the BIT. Article 4.2 of BIT provides that in case of expropriation, nationalization or measures tantamount to expropriation the "compensation shall be equivalent to the value of the expropriated investment immediately before the date on which [any such measure] has become publicly known".

160. "Value" is a general term encompassing any valuation method to assess compensation due, including but not limited to "fair market value". By referring to "value", the BIT permitted the Tribunal to choose a standard other than FMV in light of the specific circumstances of the case.

161. The Committee is also of the view that there was no clear agreement between the Parties on the application of FMV as the only appropriate valuation method. The Respondent relies on the Claimant's Memorial on Merits and Quantum in the underlying arbitration to contend that the Claimant had requested compensation based on FMV as the only means of compensation, which would "wipe out all the consequences of the illegal act" (citing the *Chorzów Factory* Case).[271] However, based on the record before the Committee, it appears that the Claimant's position was more nuanced than the Respondent suggests.

162. In his Reply on the Merits and Quantum, the Claimant relied on the *Chorzów Factory* standard to request the Tribunal to award "a level of compensation which recognizes the

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[270] Award, ¶175.

[271] Exhibit R-121, Claimant's Memorial on Merits and Quantum dated 29 June 2012 (excerpts), ¶216, and fn. 298.

value that his investment would have had, were it not for Respondent's commission of deliberate, illegal acts".[272] Unlike in his Memorial on the Merits and Quantum (cited by the Respondent), the Claimant did not focus on the FMV standard as the only means of attaining full reparation as defined in *Chorzów Factory*. Nor did the Claimant agree with the Respondent's formulation of FMV.[273]

163. Addressing the contention that the FMV standard be employed, the Tribunal noted that it was "unlikely that many would buy into a venture in which the principal partners were languishing in prison, or where the brooding presence of an antagonistic Government could only be kept at bay with the energetic intervention of diplomats".[274] In these circumstances, the Tribunal chose as the applicable standard "not what this beleaguered Farm might have been worth to a hypothetical third party, but … what it would have been worth to Mr. Dogan in the absence of any breach of the Treaty, including by reference to the stream of income that would have flowed from the sale of eggs".[275] The Tribunal clearly considered the applicability of the FMV standard and came to the conclusion that it would not be appropriate in the given circumstances.

164. As is well known, the ICJ in *Chorzów Factory* observed that "reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish a situation which would, in all probability, have existed if that act had not been committed".[276] FMV is not the only valuation method that achieves this. As pointed out by the Claimant, "while fair market value is one recognized standard for valuation, other valuation methods such as, inter alia, book value, sunk investment costs, discounted cash flow or market comparables are also

[272] Exhibit C- 209, Claimant's Reply on the Merits and Quantum dated 28 February 2013, ¶168. At the Hearing, Mr. Fox for the Claimant asserted that there was no agreement on FMV, relying on the Claimant's Memorial on Merits and Quantum in which the Claimant had pointed to *Chorzów Factory* standard as the applicable standard for the assessment of damages. The record before the Committee does not contain the passage of the Claimant's Memorial to which Mr. Fox made reference. However, the Committee does have the Claimant's Reply on the Merits and Quantum, in which the Claimant also relies on *Chorzów*.

[273] Exhibit C- 209, Claimant's Reply on the Merits and Quantum dated 28 February 2013, ¶168

[274] Award, ¶191.

[275] Award, ¶ 191.

[276] *The Factory at Chorzów (Germany v. Poland)* (Claim on Indemnity, Merits), Publications of the PCIJ, Series A, No. 17, 13 September 1928, p. 47.

used in investment arbitration to provide for full reparation".[277] The Tribunal was entitled to choose the most appropriate method of valuation in the given facts and circumstances. In determining the financial benefit of which the Claimant had been deprived, the Tribunal found that such deprivation consisted of 30% of Şöhrat-Anna's share of the Farm's lost profits due to import restrictions and the dismantling of its assets. In turn, lost profits were assessed by the Tribunal as the difference between lost revenues and the cost of egg production (as these terms are defined in the Award) during the period 2006-2011.[278] In the Committee's view, the valuation method chosen by the Tribunal fairly reflects the *Chorzów Factory* standard to which the Claimant had made reference.

165. As discussed above, in quantifying damages the Tribunal relied primarily on the evidence of the Parties' experts. It also relied on the Parties' Witness Statements and related documents. A tribunal has broad discretion when evaluating the probative value of evidence. As stated by Professor Schreuer "ICSID arbitration is not governed by formal rules nor by national laws on evidence. ICSID tribunals have full discretion in assessing the probative value of any piece of evidence introduced before them".[279] To the same effect is a passage from Professor Waincymer, who refers to Article 34(1) of the ICSID Convention and states that:

> It is commonly accepted that broad discretions cover all the necessary evidentiary powers regardless of whether the rules expressly refer to particular matters such as documents, witnesses, experts or inspections. The International Court of Justice has considered that a tribunal generally has a broad discretion as to the way to approach the evaluation of evidence. It has stated that '(t)he appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not open to question.'[280]

166. The exercise of this discretion is different from the exercise of *ex aequo et bono* powers. The former, as expressed by Schreuer and Waincymer, is a power vested in every tribunal. The latter is the application of principles of equity and fairness in place of the applicable

[277] Reply, ¶119.
[278] Award, ¶279.
[279] *Schreuer*, The ICSID Convention, Art. 43, ¶104.
[280] *Jeff Waincymer*, Procedure and Evidence in International Arbitration, Kluwer Law International (2012), p. 750.

principles of law. In the present case, the Tribunal evaluated the evidence proffered by the Parties. It chose a particular valuation method that it considered appropriate in the circumstances of the case. It then applied this valuation method and quantified the damages. The entire process of damage valuation followed by the Tribunal, including the dismissal of some of the Claimant's claims for compensation,[281] based as it was on the Parties' evidence and the Tribunal's well considered appreciation of that evidence, was not based on the exercise of *ex aequo et bono* powers but on the exercise of discretion vested in it. In the view of the Committee, the Tribunal exercised its discretion in accordance with the applicable principles of law.

167. The Committee concludes that, contrary to the Respondent's contention,[282] the Tribunal has not exercised *ex aequo et bono* powers for the purpose of assessing damages. The Committee thus rejects the Respondent's request for annulment of the Award on the ground that the Tribunal manifestly exceeded its powers.

B. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

1. The Respondent's Position

168. The Respondent requests that the Committee annul the Award for violation of Article 52(1)(d) of the ICSID Convention, arguing that the Tribunal seriously departed from a fundamental rule of procedure by: (i) misallocating the burden of proof and improperly making adverse inferences against the Respondent;[283] (ii) depriving the Respondent of its right to be heard;[284] and (iii) failing to treat the Parties equally.[285]

169. Regarding the legal standard for annulment under Article 52(1)(d), the Respondent states that the relevant procedural rule must be "fundamental", and the departure "serious". According to the Respondent, the concept of a fundamental rule covers many principles,

[281] Such as damages for dismantled equipment or any confiscated harvest (Award, ¶177) or in respect of the project to produce chicken meat (broilers) (Award, ¶178).

[282] Turkmenistan's Oral Argument, slides 32 (at the end) and 33; Reply, ¶¶170-197.

[283] Memorial, ¶¶180 *et seq*. See Tr. 65:16-23.

[284] Memorial, ¶¶194 *et seq*.

[285] Memorial, ¶¶200 *et seq*.

including the principles of natural justice, "*actori probatio incumbit*", equal treatment of the parties and the right to be heard.[286] In particular, an inappropriate allocation of the burden of proof may fall within Article 52(1)(d). To the Respondent, the Claimant's assertion that only a reversal of the burden of proof, rather than a misallocation, would be covered "is incorrect and in clear contradiction with the straightforward rulings of *ad hoc* committees".[287]

170. In response to the Claimant's argument that tribunals are free to adopt their own reasoning according to the principle *iura novit curia*, the Respondent contends that a tribunal's reasoning must not go beyond the legal framework established by the parties.[288] In any event, such "freedom" may not excuse a violation of a fundamental right such as the right to be heard.

171. Regarding the requirement that the departure be "serious", the Respondent notes the Parties' agreement that the departure must have a material effect on the outcome or have "caused the Tribunal to reach a result substantially different from what it would have awarded had [the] rule been observed".[289]

172. The Respondent argues that the Tribunal made a number of serious departures from fundamental rules of procedure, all of which meet this standard for annulment, in its decisions on jurisdiction, liability and damages.

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[286] Memorial, ¶¶174, 176.

[287] Reply, ¶25, citing, *inter alia*, Exhibit RL-195, *Víctor Pey Casado and Foundation "President Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment, 18 December 2012, ¶73 (referring to "the proper allocation of the burden of proof" as one of the fundamental rules that may lead to annulment); Exhibit RL-196, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment, 24 January 2014, ¶165.

[288] Reply, ¶26, citing Exhibit RL-153, *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, ¶91; Exhibit RL-195, *Víctor Pey Casado and Foundation "President Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment, 18 December 2012, ¶267. See also Reply, ¶26, quoting Exhibit RL-203, *Christian P. Alberti*, "Iura Novit Curia in International Commercial Arbitration How Much Justice Do You Want?" in *Stefan Michael Kröll, Loukas A. Mistelis, et al* (eds.), *International Commercial Law: Synergy, Convergence and Evolution* (Kluwer), pp. 3-32 ("Tribunals should provide the parties with an opportunity to be heard if they intend to base their decision on legal reasoning that has not been advanced by the parties and that could otherwise lead to a reasonably unforeseen decision").

[289] Reply, ¶28, quoting Exhibit CL-157, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 28 January 2002, ¶58.

i. Jurisdiction

173. According to the Respondent the Tribunal assumed *ex aequo et bono* powers in the jurisdictional phase and thereby: (i) discharged the Claimant of his burden of proof; (ii) denied the Respondent the right to be heard; and (iii) failed to treat the Parties equally.[290]

174. With regard to the first of these allegations, the Respondent submits that the Tribunal failed to draw the consequences of the Claimant's "obvious failure" to prove he had a protected investment, violating the fundamental rule of evidence *actori probatio incumbit*.[291] In particular, the only document on which the Tribunal relied to find an investment is the one-page, backdated Participation Agreement. Moreover, that Agreement requires the Claimant's company to make a make a "first capital contribution" of DM 500,000, but the Tribunal never pointed to any evidence of such contribution. Similarly, the Tribunal found that the Claimant had contributed equipment to the Farm without ever identifying any such equipment.[292] The Tribunal nevertheless concluded that the Claimant was "a true participant in contributing financially and by other means to the establishment and operation of the Farm".[293]

175. The Respondent argues that the Tribunal's departure from the *actori probatio incumbit* principle is "serious" because the Tribunal could not have found jurisdiction if it had required the Claimant to meet his burden of proof, rather than taking on *ex aequo et bono* powers.[294] Furthermore, the Claimant cannot cure the Tribunal's actions with citations to purported evidence of his contribution from the underlying arbitration, some of which was not even referenced in the Decision on Jurisdiction.[295]

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[290] Reply, ¶101.

[291] Memorial, ¶¶181-186; Reply, ¶¶102-107.

[292] Reply, ¶104.

[293] Reply, ¶104, citing DOJ, ¶125.

[294] Reply, ¶107.

[295] Reply, ¶105, citing Counter-Memorial, ¶265. The Respondent also states that, in any case, the documents on which the Claimant relies do not show that he made any contribution.

176. The Respondent also submits that the Tribunal "deprived Turkmenistan of its right to be heard on the Tribunal's novel theory of a contractual interest".[296] According to the Respondent, the Claimant's submissions on jurisdiction never put forth the theory that he had a contractual right to the income stream of the Farm.[297] Rather, the Claimant's two arguments were that he had an equity interest in the Turkmen companies and a joint venture with the Turkmen partners, and the Respondent's defence therefore centred on these theories.[298]

177. However, according to the Respondent, the Tribunal realised that neither of these theories could support a finding of investment and proceeded to construct its novel theory of an investment in the form of a contractual interest in the income stream of the Turkmen Companies.[299] Indeed, the Tribunal first introduced the concept of a contractual interest at the hearing on jurisdiction.[300] As a result, the Tribunal denied the Respondent an opportunity to present its case on this purported form of investment and thereby seriously departed from a fundamental rule of procedure.

178. Finally, the Respondent submits that in the jurisdictional phase the Tribunal failed to treat the Parties equally in several ways.[301] In particular, the Tribunal:

a) expressly assumed that an expropriation had occurred, thereby prejudging the merits.[302] For example, it excused the Claimant for testifying that he was a seller of equipment

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[296] Memorial, ¶¶195-198; Reply, ¶¶108-112.

[297] Reply, ¶110, citing Exhibit R-107, Turkmenistan's Memorial on Objections to Jurisdiction dated 29 July 2010, pp. 39-54; Exhibit C-214, Claimant's Counter-Memorial on Jurisdiction dated 29 November 2010, ¶15.

[298] Reply, ¶110, citing, *inter alia*, Exhibit R-106, Request for Arbitration, ¶81; Exhibit C-209, Claimant's Reply on the Merits and Quantum dated 28 February 2013, ¶¶21-26, 28; Exhibit C-213, Claimant's Rejoinder on Jurisdiction dated 13 June 2011, ¶¶150-151.

[299] Reply, ¶112.

[300] Reply, ¶111, citing Exhibit C-221, Jurisdiction Hearing Tr., Day 1, Dogan, p. 42, II. 10-23 ("You have discussed how there couldn't be an investment, in your submission, in accordance with Turkmen law, but what about the proposition that it's purely contractual?").

[301] Reply, ¶¶113-118.

[302] Memorial, ¶209; Reply, ¶115.

before the Turkmen court based on the assumption that the Respondent was committed to expropriating the Farm;[303]

b) took a "backwards" approach when it "inferred from the existence of the Poultry Business that Dogan had an investment in it, and did not consider any other possible origin of the business";[304]

c) ignored documentary evidence showing that the Claimant was a salesman, and not an investor, and generally took a selective approach to the evidentiary record in favour of the Claimant;[305] and

d) made unjustified adverse inferences against Turkmenistan.[306]

179. In the Respondent's view, this unequal treatment of the Parties "undeniably had an impact on the Tribunal's decision as to its jurisdiction" and therefore warrants annulment of the Award.[307]

ii. Liability

180. The Respondent argues that the Tribunal, in reaching its decision on liability, again departed from the same three fundamental rules of procedure.

181. First, the Respondent asserts that the Tribunal ignored the *actori probatio incumbit* principle when it "obviously excused Claimant's failure to provide evidence for his alleged interest in the Farm".[308] The Tribunal appeared to recognize this failure when it stated that "Claimant has struggled to present evidence of a specific interest in the business of the Farm", but it nevertheless went on to find a contractual interest.[309] According to the Respondent, if the

303 Memorial, ¶209; Reply, ¶115, citing DOJ, ¶97 ("At a time when (to assume the accuracy of the Claimant's contentions on the merits) the Respondent appears to have been committed to the effective expropriation of the Farm, it would have made sense for the Claimant to save what he could").

304 Memorial, ¶208; Reply, ¶116.

305 Reply, ¶117.

306 Memorial, ¶¶87-98; Reply, ¶118.

307 Reply, ¶118.

308 Reply, ¶159. See Memorial, ¶¶187-190. In this regard, the Respondent also refers the Committee to its arguments relating to the Tribunal's alleged manifest excess of powers.

309 Memorial, ¶190, citing Award, ¶174.

Tribunal had applied the burden of proof, it would have dismissed the Claimant's claims for his failure to establish the existence and nature of his alleged interest in the Farm.[310]

182. Second, the Respondent argues that it was denied the opportunity to be heard regarding the forgery of the Participation Agreement.[311] The Tribunal refused to consider an Expert Report submitted by the Respondent "which proves beyond any doubt that this document is inauthentic."[312] Yet, the Tribunal relied primarily, if not exclusively, on the Participation Agreement as evidence of the Claimant's interest in the Farm.

183. Third, according to the Respondent, the Tribunal continued to treat the Parties unequally at the merits phase, in particular with respect to the assessment of evidence.[313] The Tribunal "selectively relied on evidence that purportedly showed that Dogan was an investor, while at the same time closing its eyes to the whole set of evidence showing that he was merely selling equipment to the Turkmen entities".[314] It also selectively applied the presumption of good faith and, more generally, showed compassion towards the Claimant and "inversely proportional severity" to the Respondent.[315]

iii. Damages

184. With respect to the Tribunal's damages calculation, the Respondent submits that it seriously departed from fundamental rules of procedure by: (i) departing from the undisputed FMV standard and (ii) discharging the Claimant of his burden of proof.[316]

185. According to the Respondent, the application of the FMV standard to determine the Claimant's damages was undisputed, as clearly shown by the Parties' written submissions.[317] However, the Tribunal departed from this standard and adopted a novel theory based on

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[310] Reply, ¶159.

[311] Memorial, ¶194; Reply, ¶160.

[312] Reply, ¶160, citing Exhibit R-111, Expert Report of Max-Peter Ratzel, pp. 7-8 and Exhibit R-44, Claimant's Letter to the Tribunal dated 16 September 2011

[313] Reply, ¶161.

[314] Reply, ¶161.

[315] Memorial, ¶211.

[316] Reply, ¶182.

[317] Memorial, ¶199; Reply, ¶¶182-190.

unfounded assumptions favouring the Claimant, which "went beyond the legal framework established by the Parties".[318] Notably, the Tribunal chose not to apply a discount rate, contrary to the submissions of both Parties and their experts, yet never raised the point at the hearing.[319]

186. In this way, the Tribunal deprived the Respondent of the right to be heard, as it never had a full opportunity to present its case on the Tribunal's valuation method.[320] The Claimant's attempt to rebut this by arguing that his position on damages was based on "full reparation" has no merit; the Claimant expressly stated that FMV was the "only means of compensation which would 'wipe out all the consequences of the illegal act'".[321]

187. The Respondent also argues that the Tribunal discharged the Claimant of his burden of establishing his damages.[322] The Claimant's failure to meet this burden is clear from a reading of the Award. For example, he provided no:[323]

- books or records of the Turkmen Companies showing the extent of his alleged interest;
- evidence of profit distributions;
- contemporaneous documents providing actual production data;
- evidence of technical results to assess productivity;
- historical data or business plans to support his price and cost estimates; or
- business plans or standard procedures.

188. According to the Respondent, it was therefore impossible for the Tribunal to estimate the Farm's production and profitability based on the record.[324] Indeed, the Tribunal characterized the evidence as "patchy and scant".[325] Yet it proceeded to calculate and award

[318] Reply, ¶191. See Memorial, ¶199.
[319] Memorial, ¶190, citing Award, ¶178.
[320] Memorial, ¶199.
[321] Reply, ¶183, citing Exhibit R-121, Claimant's Memorial on the Merits dated 29 June 2012, ¶216.
[322] Memorial, ¶¶191-193, 199; Reply, ¶¶192-197.
[323] Reply, ¶193.
[324] Reply, ¶197.
[325] Reply, ¶194, quoting Award, ¶¶172, 182.

damages by seriously departing from the fundamental principle *actori probatio incumbit*, warranting annulment of the Award.

2. The Claimant's Position

189. The Claimant rejects the Respondent's submissions relating to its request for annulment under Article 52(1)(d) of the ICSID Convention, arguing that the Respondent has "misconceived" the legal standard and failed to show any serious departure from a fundamental rule of procedure.[326]

190. Regarding the legal standard, the Claimant submits that the test for annulment under Article 52(1)(d) is a very high threshold with three elements: (i) the rule must be fundamental, (ii) there must be a departure from that rule, and (iii) the departure must be serious.[327] In the Claimant's view, the Respondent has attempted to improperly broaden the first requirement to include a "misallocation" of the burden of proof (as opposed to its improper reversal), yet the legal authorities which it cites offer no support for its position.[328] In reality, the Respondent's argument in this regard is just a complaint about the Tribunal's assessment of evidence.[329]

191. With respect to the principle of equal treatment, the Claimant asserts that this standard is very high, and that allegations of unequal treatment may be "negatived by, among other things, the fact that the Tribunal did exclude significant sums", as happened in the present case.[330] The Respondent's allegations do not meet this standard and, again, are essentially evidentiary complaints. The Respondent's reference to the Tribunal's purported *ex aequo et*

[326] Counter-Memorial, ¶¶210-292; Rejoinder, Section II; Tr. 103:21-106:1.

[327] Counter-Memorial, ¶210, citing Exhibit CL-189, *Daimler Financial Services AG v. Argentine Republic*, Decision on Annulment, ICSID Case No. ARB/05/1, 7 January 2015, ¶260; Rejoinder, ¶225; Tr. 103:23-104:5.

[328] Rejoinder, ¶¶227-228, discussing Exhibit CL-189, *Daimler Financial Services AG v. Argentine Republic*, Decision on Annulment, ICSID Case No. ARB/05/1, 7 January 2015, ¶189 and Exhibit RL-195, *Victor Pey Casado and Foundation "President Allende" v. Republic of Chile*, Decision on the Application for Annulment, ICSID Case No. ARB/98/2, 18 December 2012, ¶¶221 *et seq*. See Rejoinder, fn. 456.

[329] Counter-Memorial, ¶215.

[330] Counter-Memorial, ¶242, quoting Exhibit RL-152, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986, ¶192.

bono approach as unequal treatment is equally unfounded; even if the Tribunal had assumed such powers, that "would not *per se* constitute an unfair treatment of the Parties".[331]

192. The Claimant also argues that the Respondent has attempted to limit the seriousness requirement.[332] However, the test for a departure to be considered "serious" is twofold: first, it "deprives a party of the benefit or protection" of a fundamental rule, and second, it leads to "a result substantially different from what it would have awarded had said rule been observed".[333] The Respondent has failed to show that the Tribunal made any such serious departure with respect to its findings on jurisdiction, liability or damages.

i. Jurisdiction

193. The Claimant contends that none of the Respondent's arguments relating to the Decision on Jurisdiction is persuasive.[334] In fact: (i) the Tribunal applied the principle *actori probatio incumbit*; (ii) there was no violation of the Respondent's right to be heard; and (iii) the Respondent has failed to show any unequal treatment of the Parties.[335]

194. With regard to the Tribunal's alleged failure to apply the burden of proof, the Claimant submits that the Respondent's allegations concerning the Participation Agreement reveal that the Tribunal *did* apply the *actori probatio incumbit* principle.[336] The Tribunal evaluated this piece of evidence and relied on it in part for its finding of an investment, which falls well within tribunals' "considerable discretion" in judging the probative value of evidence.[337]

195. In addition, the Claimant considers the Respondent's allegation that the Tribunal excused his burden of proving a contribution to the Farm "obviously wrong".[338] In fact, the Tribunal

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331 Counter-Memorial, ¶245.

332 Counter-Memorial, ¶¶254-261; Rejoinder, ¶¶235-236.

333 Rejoinder, ¶235.

334 Rejoinder, ¶¶238-252.

335 Rejoinder, ¶238.

336 Rejoinder, ¶239.

337 Rejoinder, ¶240, quoting, *inter alia*, Exhibit CL-169, *Alapli Elektrik B.V. v. Republic of Turkey*, Decision on Annulment, ICSID Case No. ARB/08/13, 10 July 2014, ¶234.

338 Rejoinder, ¶266. See Counter-Memorial, ¶¶264-273; Rejoinder, ¶¶265-273.

referred to evidence of such contribution in the Decision on Jurisdiction, for example when it stated:

> The Claimant's son … submitted a witness statement giving details of the Claimant's cash outlays on the Turkmen venture supporting the Claimant's contention that he provided initial financing for the Farm in the amount of DM 1.8m, of which DM 1.3m were returned from the earnings of the Farm.[339]

196. Further, according to the Claimant, there is no basis for the Respondent's argument that it was not provided the right to be heard on "the Tribunal's novel theory of a contractual interest".[340] As shown by the Respondent's references to the hearing transcript, there was considerable discussion in the presence of the Parties about the potential qualification of the Claimant's investment as a contractual interest, and that was followed by post-hearing briefs, giving both Parties ample opportunity to present their cases on the issue.[341] In the Decision on Jurisdiction, the Tribunal even addressed—and rejected—the Respondent's assertion that the Claimant had not raised the issue of a contractual interest or interest based on a joint venture.[342] In any case, a violation of the right to be heard in this context would not warrant annulment, because it would not be material to the outcome; had the Tribunal not found a contractual interest, there still would be jurisdiction based on its finding of an alternative form of investment (moveable property).[343]

197. Finally, in the Claimant's view, the Respondent has failed to meet it burden of proof in relation to its allegations of unequal treatment in the jurisdictional phase for three reasons:[344]

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339 DOJ, ¶82. See *id*., ¶114.

340 Counter-Memorial, ¶234 and ¶¶284-292; Rejoinder, ¶¶242-246 and 274-281.

341 Rejoinder, ¶242.

342 Rejoinder, ¶278, quoting DOJ, ¶104 (referring to the Respondent's statement at the hearing: "I've never heard any allegation that he had an interest based upon a joint venture agreement and not through a legal entity" and the Claimant's response: "counsel … immediately referred to 115 of his Counter-Memorial, submitted some eight months earlier, which states that 'In essence, the farm was an informal international joint venture between two entrepreneurial friends and their families'"); Tr. 104:19-105:7.

343 Rejoinder, ¶¶245, 246, citing DOJ, ¶61.

344 Rejoinder, ¶¶247-252.

a) the Respondent has provided no support for its allegation that the Tribunal prejudged the merits, and any such prejudgment could in any event not have been material to the Tribunal's decision regarding jurisdiction;[345]

b) the Respondent's complaint of a "selective consideration of the evidentiary record" is not a basis for annulment;[346] and

c) the Respondent's reference to "unjustified inferences" is nothing more than an unsupported accusation;[347] it fails to show how the drawing of adverse inferences, which would form part of the Tribunal's unreviewable assessment of the evidence, constituted any unequal treatment of the Parties.[348]

ii. Liability

198. With respect to the Tribunal's finding of a contractual interest for the purpose of liability, the Claimant states that the Respondent "raises the same allegations it raised with regard to the Tribunal's finding of jurisdiction".[349] He therefore refers the Committee to his response under that heading, showing that the Tribunal neither violated the *actori probatio incumbit* principle nor treated the Parties unequally.[350]

199. Concerning the right to be heard, the Claimant specifically rejects the Respondent's argument that it was deprived of this right with respect to the alleged forgery of the Participation Agreement.[351] Although the Respondent submits that the Tribunal refused to consider an expert report on this issue, in fact, the Respondent "decided not to submit the full Ratzel report in the jurisdictional phase and was satisfied to only assert the report's

[345] Rejoinder, ¶248. The Claimant finds it unclear how the Tribunal's statement that "its determination of these issues for jurisdictional purposes does not prejudge any issues on the merits" is an admission of prejudgment, as the Respondent suggests. *Id.*, quoting DOJ, ¶86 and Reply, ¶115.

[346] Rejoinder, ¶¶250-251.

[347] Rejoinder, ¶252.

[348] Counter-Memorial, ¶251.

[349] Rejoinder, ¶253.

[350] Rejoinder, ¶254. See *supra* ¶¶185 and 187.

[351] Counter-Memorial, ¶100

conclusion, quoted from the report".[352] The Tribunal proceeded to consider the evidence presented, including the conclusion of the expert report, and decide the issue, dedicating an entire section of the Decision on Jurisdiction to the allegation of forgery.[353]

iii. Damages

200. The Claimant contends that both of the Respondent's main allegations regarding the Tribunal's calculation of damages are unfounded.[354] The Tribunal in no way seriously departed from a fundamental rule of procedure in applying what it considered the most appropriate standard; nor did it discharge the Claimant of his burden of proving damages.

201. As an initial matter, the Claimant states that tribunals have wide discretion in determining the standard by which to assess damages, and this is not subject to review in annulment proceedings. There are numerous methods of valuation to determine full reparation, and "a tribunal is permitted—and even obliged—to find the most appropriate method", even if it was not advocated by the parties.[355]

202. In any event, according to the Claimant, the application of FMV was not "undisputed" as the Respondent claims;[356] rather, the Tribunal's decision was well within the legal framework established by the Parties. The Claimant states his position as follows:

> Relying on the Chorzów Factory case, Claimant requested compensation that would wipe out all the consequences of Turkmenistan's illegal act. As explicitly acknowledged by Turkmenistan, this called for the determination of Claimant's actual losses. This is what the Tribunal did in line with the Chorzów Factory standard, which Claimant had advocated.[357]

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[352] Counter-Memorial, ¶112.

[353] Counter-Memorial, ¶107, citing DOJ, ¶¶44-51.

[354] Rejoinder, ¶¶255-263.

[355] Rejoinder, ¶260, citing Exhibit CL-205, *Khan Resources Inc., Khan Resources B.V. and CAUC Hotding Company Ltd. v. The Government of Mongolia and MonAtom LLC*, Award, PCA Case No. 2011-09, 2 March 2015, ¶390 (finding none of the three damages methodologies presented by the parties to be "wholly satisfactory" and opting for an alternative method).

[356] Counter-Memorial, ¶235.

[357] Rejoinder, ¶258, citing Exhibit CL-78, *The Factory at Chorzów (Germany v. Poland)* (Claim on Indemnity, Merits), Publications of the PCIJ, Series A, No. 17, 13 September 1928, p. 47 and Exhibit R-121, Claimant's Memorial on the Merits, ¶2l6.

203. Regarding the Respondent's argument that the Tribunal did not require the Claimant to prove his damages, the Claimant submits that this, "perhaps more than any other assertion … rests on inaccurate factual allegations".[358] In any case, according to the Claimant, it fails on the law. In particular, the Respondent repeatedly refers to a lack of *documentary* evidence, but tribunals are free to consider other types of evidence. In this case, the Claimant provided expert testimony as well as documentary evidence, and the Tribunal provides an extensive analysis of the available evidence in the Award.[359] Where the Tribunal found the evidence insufficient, it rejected the Claimant's requests for compensation.[360]

3. The Committee's Analysis

204. As summarised above, according to the Respondent, the Tribunal seriously departed from fundamental rules of procedure in three different respects, by:

a) Misallocating the burden of proof and improperly drawing adverse inferences against the Respondent;

b) Depriving the Respondent of its right to be heard on outcome-determinative issues; and

c) Failing to treat the Parties equally in its decision making process.[361]

205. The Respondent argues that this alleged serious departure from fundamental rules of procedure is consistent with the Tribunal's unauthorized *ex aequo et bono* approach to the dispute. It contends that the Tribunal ignored the fundamental rule of evidence "*actori probatio incumbit*" and deprived the Respondent of the right to be heard regarding the Tribunal's purported definition of the Claimant's investment as a "contractual interest" and its method of assessing damages.[362]

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358 Rejoinder, ¶262. The Claimant responds to these allegations at ¶¶201-223 of the Rejoinder.

359 Counter-Memorial, ¶¶274-283; Rejoinder, ¶263.

360 Tr. 102:4-103:14.

361 Memorial, ¶179.

362 Reply, ¶101. No reference to this ground for annulment is made in Turkmenistan's Oral Argument at the Hearing.

206. The Committee notes initially that the Claimant appears to agree that the rules of procedure to which the Respondent makes reference (the principle "*actori probatio incumbit*", "the right to be heard" and "the principle of equal treatment") may be considered "fundamental" within the meaning of Article 52(1)(d) of the ICSID Convention.[363] However, the Claimant disputes that this category includes the alleged "misallocation" of the burden of proof, as opposed to the improper reversal of the burden of proof.[364]

207. The Committee sees no reason to determine in the abstract whether a "misallocation" of the burden of proof may amount to a violation of a fundamental rule of procedure. The critical inquiry is the impact of the alleged violation on the tribunal's decision.[365]

208. Regarding the requirement that the departure be "serious", the Committee concurs with the *Wena* decision that "[i]n 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".[366] Each of the Respondent's allegations regarding this ground of annulment shall be examined in turn based on this standard for annulment under Article 52(1)(d) of the ICSID Convention.

i. <u>Jurisdiction</u>

209. The Respondent asserts that the Tribunal did not respect the fundamental rule "*actori probatio incumbit*" because it failed to require the Claimant to discharge the burden of proof regarding his alleged interest, and that such failure meets the "seriousness" requirement since it affected the outcome of the case.[367]

210. The Committee notes that the Respondent has claimed that the Participation Agreement was "[t]he only document on which the Tribunal relied in support of its definition of Claimant's

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[363] Reply, ¶158; Counter-Memorial, ¶221; Rejoinder, ¶238.

[364] Counter-Memorial, ¶¶212, 221.

[365] See Exhibit RL-153, *Klöckner v. Republic of Cameroon*, Decision on the Application for Annulment, 3 May 1985, ¶6.80, cited by Exhibit RL-197, *Caratube International Oil Company v. Republic of Kazakhstan,* Decision on Annulment, 21 February 2014, ¶97.

[366] Exhibit CL-157, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 28 January 2002, ¶58.

[367] Memorial, ¶186; Reply, ¶159.

alleged investment".[368] As made clear in the Decision on Jurisdiction, the Tribunal mainly relied on the Participation Agreement to found its definition of the Claimant's investment for purposes of jurisdiction.[369] As correctly observed by the Claimant, having based its decision on this piece of evidence, the Tribunal "effectively applied the *actori probatio incumbit* principle".[370] The Committee agrees that the Tribunal's reliance on the Participation Agreement shows that it did not release the Claimant from his burden of proof regarding jurisdiction.

211. Furthermore, the Participation Agreement was not the only evidence produced by the Claimant to establish jurisdiction. As indicated by the Decision on Jurisdiction, the Tribunal relied on a record that "leaves no room for doubt", including the uncontested testimonial evidence of Ambassador Mondorf, Mr. Geiselhart, the Claimant himself and the Claimant's son, Volkan Dogan. The Tribunal relied also on the Respondent's express recognition that the Claimant was an investor under the BIT, in essence accepting the Claimant's argument that the Respondent was accordingly estopped from denying Mr. Dogan's investor status.[371] The Tribunal also determined that the evidence pointed "to the Claimant as a true participant in contributing financially and by other means to the establishment and operation of the Farm".[372] It was in light of this evidence that the Tribunal, in the Award, confirmed jurisdiction regarding specifically the Claimant's acquisition of an interest in the business of the Farm.[373]

212. Both the Decision on Jurisdiction and the Award clearly indicate that the Tribunal's decision was founded on the evidence, even as it recognized the limitations of the record. Thus, in the Award, the Tribunal mentioned that the record had not benefited from contributions from

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[368] Reply, ¶104.
[369] DOJ, ¶107.
[370] Rejoinder, ¶239.
[371] DOJ, ¶¶155-161.
[372] DOJ, ¶125. See also Award, ¶181.
[373] Award, ¶181.

the Government, and stated: "we are compelled … to weigh such limited evidence as has been put before us".[374]

213. In the Committee's view, the Respondent's allegations that the Tribunal reversed the burden of proof and drew adverse inferences against it[375] are unsubstantiated. What the Respondent characterizes as a reversal of the burden of proof is only the expression of the Tribunal's regret, as shown by its use in the Award of the word "unfortunately", for not having received from the Respondent any explanations or other contributions, even by way of rebuttal evidence, to help it better establish the facts of the case.[376] Where the Tribunal mentions drawing certain inferences against the Respondent, they are made not in lieu of evidence before it but rather to corroborate the evidence on which it has relied.[377]

214. The Committee shall not review the probative value attributed by the Tribunal to the evidence on which it has relied to reach its Decision on Jurisdiction. This is a matter of appreciation and evaluation of evidence. It is repetitious to observe that it is beyond the mandate of this Committee to revisit the conclusions reached by the Tribunal in such matters, considering that it is not acting as an appellate body. This applies in particular to the Respondent's reference to the Participation Agreement being "unauthentic", "backdated" and "recreated",[378] and to its allegation that the Tribunal refused to consider the evidence regarding the forgery of the Participation Agreement.[379] It equally applies to the allegation that the Tribunal ignored evidence establishing that the Claimant was a seller of poultry equipment to Şöhrat-Anna and Samşyt, not an investor (including the Claimant's own testimony before the Turkmen courts stating that he was a seller of equipment).[380]

215. Without going into the details of the Tribunal's assessment of the evidence, the Committee is of the view that the Tribunal duly considered the above issues in the light of the available

[374] Award, ¶182.
[375] Memorial, ¶132; Reply, ¶157.
[376] DOJ, ¶¶50, 83, 126; Award, ¶¶181-182.
[377] DOJ, ¶84; Award, ¶¶81, 194.
[378] Reply, ¶160.
[379] Reply, ¶160.
[380] Reply, ¶89.

evidence. The Tribunal identified the evidence it considered relevant to reject the allegation of forgery of the Participation Agreement,[381] found that the Claimant had financed the equipment for the Farm and was not a seller of the same,[382] and examined the different position that the Claimant had taken before the Turkmen courts.[383]

216. The Respondent also argued that it was deprived of its right to be heard because the Tribunal failed to give the Respondent an opportunity to present its case with respect to the "novel" theory of the Claimant's investment as a contractual interest.[384] This argument has no basis in view of the fact that, as stated in the Decision on Jurisdiction, this issue was the subject of debate "as late as the hearing [on jurisdiction]"[385] and was also addressed in the Respondent's Post-Hearing Brief.[386] Therefore, the Respondent cannot complain that it was given no opportunity to address this issue or that its right to be heard in that regard was violated.

217. The Respondent's allegations of "unequal treatment" of the Parties and prejudgment of the merits are unsubstantiated. These again appear to be based on the Tribunal's appreciation and evaluation of the evidence. Likewise, the drawing of adverse inferences from the conduct of the Respondent and its failure to produce relevant evidence in its possession formed a part of the Tribunal's appreciation and evaluation of evidence and is outside the Committee's power of review.

ii. Liability

218. The Respondent's grievances regarding the finding of jurisdiction extend to the Tribunal's finding of liability at the merits stage. They appear to repeat arguments raised in connection with the Tribunal's finding of jurisdiction. Therefore, the Committee considers to have already expressed its position regarding the various issues raised by the Respondent.[387]

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[381] DOJ, ¶¶44-51; Award, ¶115.
[382] DOJ, ¶¶60, 76, 82-83.
[383] DOJ, ¶97.
[384] Memorial, ¶195.
[385] DOJ, ¶¶104-105.
[386] Counter-Memorial, ¶¶ 286- 289; *supra*, ¶196.
[387] See *supra*, Section IV.B.3.i.

Accordingly, the Committee finds that the Tribunal did not seriously depart from a fundamental rule of procedure in reaching its decision on liability.

iii. Damages

219. With regard to the finding of damages, the Respondent repeats arguments raised with regard to its contention that the Tribunal manifestly exceeded its powers in awarding damages. The Committee has already expressed its position in this regard.[388] In respect of the Respondent's contention that it was deprived of the right to be heard regarding the Tribunal's alleged departure from FMV and adoption of a "novel" valuation method, the Committee notes that, as may be gathered from the file of these proceedings, the Respondent was aware of the Claimant's position and had the opportunity to argue against it. In any case, the Tribunal was not bound, either by the terms of the BIT or any agreement between the Parties, to apply a specific method of valuation. The Tribunal was entitled to apply the most appropriate method of valuation in the given facts and circumstances. Regarding the Respondent's specific allegation that the Tribunal did not apply a discount rate contrary to the Parties' and their experts' submissions,[389] the Committee notes the clear reasoning in the Award regarding this issue: "there is no issue of determining an appropriate discount rate for purposes of establishing the present value of future profits; all profits that were lost are in the past".[390] A discount rate is usually applied to future streams of income. In this case, as the Tribunal rightly noted, all profits that were lost were in the past, *i.e.*, up to 2011. Not applying a discount rate in this case, therefore, made good sense. Further, even if this were not the case, the failure to apply a discount rate does not amount to serious departure from a fundamental rule of procedure.

220. In conclusion, the Respondent's request for annulment of the Award on the ground of a serious departure from a fundamental rule of procedure is rejected.

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[388] See *supra*, Section IV.A.3.iii.

[389] Reply, ¶190.

[390] Award, ¶178.

C. FAILURE TO STATE REASONS

1. The Respondent's Position

221. The Respondent seeks annulment of the Award in its entirety on the basis of Article 52(1)(e) of the ICSID Convention ("that the award has failed to state the reasons on which it is based"), arguing that the Tribunal's use of unauthorized *ex aequo et bono* powers resulted in the Tribunal manifestly failing to state reasons, or providing insufficient or contradictory reasons for a number of its findings on outcome-determinative issues.[391]

222. The Respondent states in the Reply that "the Parties appear to generally agree" on the legal standard under Article 52(1)(e) of the ICSID Convention.[392] In particular, both Parties have endorsed the statement of the *ad hoc* Committee in *MINE* v. *Guinea* that "the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion".[393] According to the Respondent, this obligation to state reasons flows from Article 48(3) of the ICSID Convention,[394] and an award will fall short if there is: an absence of reasons on an issue, insufficient or inadequate reasons on an issue, contradictory reasons, or a failure to deal with a question.[395]

223. The Respondent accepts the Claimant's view that tribunals are not bound to respond to each and every argument put forth by the parties, but they must address "issues that are material to the Tribunal's reasoning", and "a failure to deal with a question or an issue which affects the Tribunal's conclusions is a ground for annulment."[396] According to the Respondent, it has identified specific points material to the Tribunal's decisions on jurisdiction, liability and quantum, for which the Tribunal has failed to state reasons.

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391 Memorial, Section IV; Reply, Sections IV.A.3, B.3 and C.3; Tr. 56:9-65:6.

392 Reply, ¶120. See Tr. 56:11-17.

393 Reply, ¶120, quoting Exhibit RL-154, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 14 December 1989, ¶5.09.

394 Article 48(3) states: "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based".

395 Memorial, ¶¶214-222; Reply, ¶31; Tr. 56:18-21.

396 Reply, ¶¶33, 120.

i. <u>Jurisdiction</u>

224. With respect to the Decision on Jurisdiction, the Respondent submits that the Tribunal failed to state reasons, or provided contradictory reasons, on five main issues, and that the Claimant has not been able to point to any sentence in the Decision on Jurisdiction providing these missing reasons.[397]

225. First, the Tribunal failed to state reasons for its finding of an investment in the form of movable property, as it did not identify the movable property or how it was allegedly contributed.[398] While the Tribunal implies that it was poultry equipment, it never points to such equipment or references any specific piece of evidence, which makes it impossible for the reader to understand how the Tribunal reached the conclusion that the Claimant contributed movable property.[399] In addition, the Tribunal contradicted its finding on jurisdiction in the Award when it determined that the equipment was owned by the Turkmen companies, not the Claimant.[400]

226. Second, the Tribunal failed to explain how it was able to find an investment in the form of a "contractual interest in the Turkmen entities" without being able to identify the payment of any contribution from the Claimant to those companies.[401] In particular, the Tribunal expressly relied primarily on the Participation Agreement as a basis for its finding, but it never identified any evidence of the contribution of DM 500,000 that the Participation Agreement required the Claimant to make or explained how it found that the Claimant had made this contribution in the absence of such evidence.[402] The Claimant's arguments on this point are misplaced and in any event "would not cure *a posteriori* the Tribunal's failure to state reasons in its Decision on Jurisdiction".[403]

[397] Reply, ¶121.
[398] Memorial, ¶225; Reply, ¶123.
[399] Memorial, ¶225; Reply, ¶123.
[400] Reply, ¶163, citing Award, ¶¶109, 167.
[401] Memorial, ¶226; Reply, ¶124.
[402] Memorial, ¶226; Reply, ¶124.
[403] Reply, ¶124.

227. Third, the Tribunal stated no reasons for "entirely disregarding the sales agreements and the 747 account statement showing that Dogan was not an investor but a mere seller of equipment to the Turkmen entities".[404] This issue is material to the outcome of the Decision on Jurisdiction, as a sales transaction cannot be a basis of ICSID jurisdiction, yet the Decision contains no reference to any sales agreement in the record.[405]

228. Fourth, the Tribunal did not state reasons for its statement that "[i]t is not apparent that [the Participation Agreement] was designed to assist in a fraudulent manner in bolstering ICSID jurisdiction," and that "nothing … seems to turn on the date of the signature of the Participation Agreement."[406] Even if one can consider the Tribunal's "vague observations" in this regard as reasons, they contradict other findings by the Tribunal, such as its statement that the Participation Agreement "is important to the issue of jurisdiction, since the Claimant relies upon it as evidence of the reality, nature and extent of his investment".[407]

229. Finally, the Tribunal failed to state reasons for finding that it was irrelevant to determine whether the structure of the Claimant's alleged investment in the form of a "contractual interest" was in conformity with Turkmen law, in light of Articles 2 and 9 of the BIT, and 2(a) of the Protocol.[408]

ii. Liability

230. The Respondent argues that "the Tribunal's failure to state reasons for its finding of an investment at the jurisdictional stage manifestly extended to the merits".[409] According to the Respondent, the Tribunal's reasons for finding a "contractual interest" as the basis for liability are "simply impossible to follow".[410] Similar to its submissions regarding

[404] Memorial, ¶227; Reply, ¶125.

[405] Memorial, ¶227; Reply, ¶125.

[406] Memorial, ¶228; Reply, ¶16, quoting DOJ, ¶¶49-50.

[407] Reply, ¶126, quoting Award, ¶90. The Respondent also argues that the Tribunal contradicted itself by finding it "difficult to imagine" that the Claimant could have foreseen ICSID arbitration at the time the Participation Agreement was recreated while also finding, *inter alia*, that the Respondent was on notice that the Claimant was a foreign investor for the purposes of the BIT: Reply, ¶126.

[408] Memorial, ¶229; Reply, ¶127, citing DOJ, ¶118.

[409] Reply, ¶162.

[410] Memorial, ¶237.

jurisdiction, the Respondent points to five issues on which the Tribunal allegedly failed to state reasons in the Award.[411]

231. First, in the Award, the Tribunal failed to state reasons for apparently having abandoned the conclusion reached in the Decision on Jurisdiction that the Claimant made an investment in the form of "movable property".[412]

232. Second, the Tribunal provided no reasons for adding in the Award another alternative basis for the Claimant's investment under Article 1(c) of the BIT ("claims to money which has been used to create an economic value").[413] The Tribunal never addressed the issue or explained this broadening of potential bases of jurisdiction.

233. Third, the Award contains no reasons for the Tribunal's conclusion that the backdating and "recreation" from an "old notebook" of the main document submitted by the Claimant in support of his alleged interest in the Farm was "incidental" and "immaterial to [its] decision."[414] Further, as discussed above, the Tribunal provided contradictory reasons on this point.

234. Fourth, the Tribunal continued to ignore evidence showing that the Claimant was a seller of equipment.[415] Indeed, it is impossible to understand the Tribunal's handling of the evidence; "a startling feature of the Award [is that it] contains no citations to the record".[416]

235. Fifth, the Tribunal never addressed the conformity of the Claimant's alleged interest with Turkmen law, despite indicating in the Decision on Jurisdiction the relevance of this issue to liability.[417]

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[411] Memorial, ¶¶231-237; Reply, ¶¶162-169.
[412] Memorial, ¶232; Reply, ¶163.
[413] Memorial, ¶233; Reply, ¶164.
[414] Memorial, ¶234; Reply, ¶165, quoting Award, ¶9.
[415] Memorial, ¶235; Reply, ¶168.
[416] Memorial, ¶236.
[417] Memorial, ¶236, citing DOJ, ¶118.

236. More generally, the Respondent takes the position, set forth in particular at the Hearing, that the Tribunal's whole finding that the Claimant made a protected investment is impossible to follow from point A to point B, and that this deficiency is evident from reading paragraphs 105 to 129 of the Award.[418] There, the Tribunal concludes that "the Claimant's investment is covered under any of the first three broad definitions of the term 'investment'".[419] However, the Tribunal does not in fact apply any of those definitions. In particular, the Tribunal: (i) never attempts to show how the Claimant's "contractual interest" could fall under the first definition (moveable property); (ii) expressly recognizes that the Claimant has no "formal entitlements in any legal entity, such as shareholding", meaning that he could not have an investment under the second definition (shares of companies or other kinds of company interests); and (iii) never even discusses the application of the third definition (claims to money which has been used to create economic value).[420]

iii. Damages

237. The Respondent submits that the Tribunal's calculation of damages is opaque and contradictory, amounting to a failure to state reasons under Article 52(1)(e) of the ICSID Convention.[421] The Respondent advances a number of related criticisms in this regard.

238. First, the Respondent argues that the Tribunal contradicted itself by acknowledging "the manifest insufficiency of the Claimant's documentary record and the limited evidence he has seemingly been able to cobble together"[422] and then proceeding to award the Claimant damages for what the Farm "would have been worth [to him] in the absence of any breach of the Treaty".[423] The Tribunal also provided contradictory reasons by repeatedly stating that

[418] Tr. 57:6-62:1 and Tr. 119:19-121:6.
[419] Tr. 59:18-22.
[420] Tr. 58:16-59:22.
[421] Memorial, ¶¶238-244; Reply, ¶¶198-204; Tr. 62:2-64:23.
[422] Award, ¶179.
[423] Reply, ¶199, quoting Award, ¶181.

it was reducing the Claimant's recovery for a lack of evidence, but then calculating damages based on an artificial, idealistic scenario.[424]

239. According to the Respondent, the Tribunal constructs this scenario without explanation.[425] In particular, it did not explain how it could award damages while recognizing that the Claimant's "entitlement would depend to a significant degree on the good will of the Gurbannazarovs".[426]

240. In addition, the Respondent asserts that the Tribunal "fails to state adequate reasons for departing from the application of the fair market value standard", upon which the Parties and their respective damage experts had agreed.[427] Indeed, the Tribunal offered contradictory reasons when it rejected the FMV standard for lack of sufficient evidence to assign value to the Claimant's investment, and then applied its own artificial valuation method not supported by evidence.[428] In a similar situation, the *ad hoc* Committee in *MINE v. Guinea* found the tribunal's decision on quantum "inconsistent and in contradiction with its analysis of damages theories" and annulled the award.[429]

241. In the Respondent's view, the Tribunal also contradicted itself by criticising and disregarding the approach of the Claimant's expert for relying on production assumptions in management guides, while adopting at the same time exactly the same approach.[430]

242. Finally, the Respondent asserts that the Tribunal failed to state reasons for its improper allocation of the burden of proof of damages.[431]

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[424] Reply, ¶202.

[425] Memorial, ¶239; Reply, ¶200.

[426] Memorial, ¶239; Reply, ¶200, quoting Award, ¶183.

[427] Memorial, ¶240.

[428] Reply, ¶200.

[429] Reply, ¶200, quoting Exhibit RL-154, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 14 December 1989, ¶6.107 ("Having concluded that theories "Y" and "Z" were unusable because of their speculative character, the Tribunal could not, without contradicting itself, adopt a "damages theory" which disregarded the real situation and relied on hypotheses which the Tribunal itself had rejected as a basis for the calculation of damages").

[430] Memorial, ¶241; Reply, ¶201.

[431] Memorial, ¶242.

2. The Claimant's Position

243. The Claimant contends that the Respondent has failed to establish any basis for annulment of the Award pursuant to Article 52(1)(e) of the ICSID Convention.[432] The Tribunal understood and expressly acknowledged its obligation to state reasons, and it did in fact provide reasons for each decision that was essential to the outcome of the case.[433]

244. Regarding the legal standard, the Claimant submits that the threshold for finding a failure to state reasons is "very high", as confirmed by other *ad hoc* committees, and that such a failure must relate to a point essential to the outcome of the case.[434] Furthermore, an *ad hoc* committee should not annul an award if it "can 'explain' the Award by clarifying reasons that seemed absent because they were only implicit".[435] In the Rejoinder, the Claimant notes that that the Respondent did "not contest much of Claimant's assessment of the legal standard".[436]

245. However, according to the Claimant, the Respondent made certain additional, misleading submissions concerning the applicable standard. In particular, there is no support for the Respondent's assertion that insufficient or inadequate reasons can warrant annulment; it is widely accepted that *ad hoc* committees are barred from reviewing the sufficiency, adequacy, quality or persuasiveness of arbitral tribunals' reasoning.[437] In addition, contrary to the Respondent's submission, a tribunal is not required to deal with every "issue which

[432] Counter-Memorial, ¶¶293-358; Rejoinder, Section III; Tr. 106:2-111:1.

[433] Counter-Memorial, ¶296, citing Award, ¶9.

[434] Counter-Memorial, ¶¶293-300; Rejoinder, ¶289, quoting Exhibit CL-169, *Alapli Elektrik B.V. v. Republic of Turkey*, Decision on Annulment, ICSID Case No. ARB/08/13, July 10, 2014, ¶202.

[435] Rejoinder, ¶290, quoting Exhibit RL-155, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment, June 5, 2007, ¶24.

[436] Rejoinder, ¶289.

[437] Counter-Memorial, ¶¶323-334; Rejoinder, ¶292, citing Exhibit RL-154, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 14 December 1989, ¶5.08 ("The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision…).

affects the Tribunal's conclusions".[438] Rather, Article 52(1)(e) applies only to "crucial or decisive" issues.[439]

246. In any event, the Claimant contends that the Respondent has not established that the Tribunal's reasoning falls below the minimum standard of a failure to state reasons.[440] In its submissions, the Respondent ignores the Tribunal's evidentiary discretion and seeks to reopen the merits of the arbitration, which is entirely inappropriate for an annulment proceeding.[441] According to the Claimant, the Tribunal has incorrectly applied the standard for a failure to state reasons with regard to its submission on jurisdiction, liability and quantum.[442]

i. Jurisdiction

247. The Claimant rejects the Respondent's claim that the Tribunal failed to state reasons with respect to five issues in the Decision on Jurisdiction. According to the Claimant, the Respondent's criticisms actually underscore that the Tribunal dealt with all of the questions submitted—just not in the way the Respondent would have preferred.[443] In any case, the Respondent fails to show why any of the issues it raises would qualify as a "question" within the meaning of Article 48(3) of the ICSID Convention, let alone as a decisive argument altering the Tribunal's conclusions.[444] Thus, the Claimant asserts that each of the Respondent's arguments has no merit.

248. First, with regard to the finding of an investment in the form of movable property, the Respondent undermines its own allegation that the Tribunal failed to identify the moveable property by stating that "it is implied in the Decision on Jurisdiction that the 'moveable property' was poultry equipment."[445] The Respondent then impermissibly attempts to

[438] Rejoinder, ¶297, quoting Reply, ¶33.
[439] Rejoinder, ¶297.
[440] Counter-Memorial, ¶304.
[441] Counter-Memorial, ¶¶305-322.
[442] Rejoinder, ¶¶299-339.
[443] Rejoinder, ¶304; Tr. 106:16-22.
[444] Counter-Memorial, ¶¶301-303.
[445] Rejoinder, ¶304, quoting Reply, ¶123; Tr. 106:16-22.

replace the standard for a "failure to state reasons" with a failure to point to "any specific piece of evidence".[446] In fact, the Tribunal "virtually takes the reader by the hand", explaining that the existence of Western poultry equipment had been established and that the Claimant financed and procured this equipment for the Farm.[447] Thus, contrary to the Respondent's assertion, the Tribunal's statement in the Award that the equipment was owned by the Turkmen companies is a confirmation, not a contradiction, of this finding.[448]

249. Second, the Respondent's allegation that the Tribunal failed to identify any contribution from the Claimant to the business is unfounded because, in fact, "the Tribunal explained step by step how and from which facts it concluded that Claimant had contributed to the Farm and had thus made an investment".[449] Even if the Tribunal somehow erred in its reasoning, there would be no ground for annulment.

250. Third, regarding the evidence purportedly showing that the Claimant was a seller, the Respondent's argument is "misleading and irrelevant".[450] The Tribunal determined on the basis of the record that Claimant was an investor on various alternative bases, and the Respondent has not shown how a finding that the Claimant was a salesman would have changed that conclusion.[451] Notably, the Respondent did not submit the 747 account statements during the jurisdictional phase and thus cannot criticise the Tribunal for ignoring them.

251. Fourth, the Respondent's arguments concerning the Participation Agreement are contradicted by the clear wording of the Decision on Jurisdiction, in which the Tribunal set

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446 Rejoinder, ¶305, quoting Reply, ¶123.

447 Rejoinder, ¶307. See Tr. 107:6-24.

448 Rejoinder, ¶¶309-312, citing DOJ, ¶101. According to the Claimant, the Tribunal clearly determined that Şöhrat-Anna was the formal buyer and owner of the equipment which the Claimant supplied and financed.

449 Rejoinder, ¶315.

450 Rejoinder, ¶¶316-317. See Tr. 108:7-20.

451 Rejoinder, ¶317.

out "a number of reasons" for determining that it was not "designed to assist in a fraudulent manner in bolstering ICSID jurisdiction".[452]

252. Finally and similarly, the Tribunal did not fail to address Turkmen law in the Decision on Jurisdiction; indeed, it provided clear reasoning.[453]

ii. Liability

253. The Claimant contends that the Respondent has shown no failure by the Tribunal to state reasons for any of its findings on liability.[454] He considers the Respondent's arguments a "repetition" of those relating to jurisdiction and refers the Committee to his response under that heading.[455] With each issue, the Respondent's allegation of a failure to state reasons amounts to nothing more than a criticism of the Tribunal's evaluation of the evidence.

254. The Claimant specifically rejects the Respondent's assertion that the Tribunal failed to state reasons when it added a third basis of jurisdiction in the Award. According to the Claimant, this decision was "clearly based … on the extensive discussion [at the Hearing on Jurisdiction] of Claimant's investment and in particular on Claimant's investment as a possible 'claim to money'".[456] In any event, the Respondent has not demonstrated how the Tribunal's conclusion would have been different had it not included this third basis of jurisdiction.[457]

255. The Claimant further submits that in the Award the Tribunal offered a step-by-step assessment of the evidence in finding that the Claimant had a contractual interest in the

[452] Rejoinder, ¶¶318-321, quoting DOJ, ¶49; Tr. 108:21-109:4. The Claimant also argues that there is no contradiction between the Tribunal considering it "difficult to imagine" that the Claimant could have foreseen ICSID arbitration at the time the Participation Agreement was recreated and its findings on other matters. In the Award, the Tribunal explained that if the Claimant was trying to bolster ICSID jurisdiction "it would have been more plausible for [him] to have done so many years earlier; the Treaty was on the table and referred to explicitly by German officials from 2002 onwards". Rejoinder, ¶¶282-287, quoting Award, ¶116.

[453] Rejoinder, ¶322, citing DOJ, ¶118; Tr. 109:5-21.

[454] Rejoinder, ¶¶323-332.

[455] Rejoinder, ¶324.

[456] Rejoinder, ¶325, citing Exhibit C-221, Transcript of Hearing on Jurisdiction, 28 July 2011, 74:21-23.

[457] Rejoinder, ¶325.

income stream of the Farm, leaving no room to argue that the Tribunal failed to state reasons in this regard.[458]

iii. Damages

256. The Claimant contends that the Tribunal did not fail to state reasons for the damages awarded. The Respondent's arguments relate to its view of the sufficiency and adequacy of the reasoning, which is not subject to review in annulment proceedings.[459] Further, the Respondent repeatedly refers to "contradictory reasons" without indicating how the purported contradictions make it impossible to follow the Award's reasoning or how they would have altered the outcome, as required for annulment under Article 52(1)(e) of the Convention.[460] In any case, the Respondent "fails to distinguish between genuine contradictions in the Tribunal's reasoning and mere reflections on conflicting considerations".[461]

257. In particular, the Respondent's argument that the Tribunal's reference to "the manifest insufficiency of the Claimant's documentary record" is somehow contradictory to its decision is wrong. In fact, "the Tribunal proceeded to determine Claimant's damages in a well-reasoned manner, enabling the reader to follow its reasoning step by step".[462] In any case, this argument is irrelevant for the purpose of annulment, and reflects nothing more than the Respondent's dissatisfaction with the damages awarded.[463]

258. Similarly, the Claimant asserts that the Tribunal did not contradict itself when it decided not to base its valuation on what a third party would pay for the Claimant's interest. The Respondent's argument in this regard is based on the false premise that the Tribunal decided that there was insufficient evidence to determine FMV. In fact, the Tribunal found that FMV

[458] Rejoinder, ¶326, citing Award, ¶¶109 *et seq.*
[459] Rejoinder, ¶¶331-332. See Counter-Memorial, ¶¶323-334.
[460] Reply, ¶¶200-202.
[461] Counter-Memorial, ¶340.
[462] Rejoinder, ¶333.
[463] Rejoinder, ¶333.

was not the applicable standard and adopted one that was more appropriate for calculating the Claimant's actual losses.[464]

259. The Claimant submits that there is also no merit to the Respondent's assertion that the Tribunal contradicted itself by criticising an expert's reliance on the management guides and then adopting that same approach.[465] At most, this could be an example of conflicting considerations, as a "tribunal might well find objectionable details in a certain approach but nonetheless follow it, especially if it is left with no other or better approach".[466] In any case, the Tribunal did not in fact follow the exact same approach because it relied primarily on the testimony of the Claimant's expert Mr. Geiselhart regarding the production figures.[467]

260. According to the Claimant, the Respondent similarly attempts to "fabricate a contradiction that is simply non-existent" regarding the Tribunal's statements explaining that it was reducing the Claimant's recovery for lack of evidence.[468] The Respondent considers this contradictory to the Tribunal's own calculation based on "idealistic assumptions and optimal production figures", but this characterisation of the Tribunal's methodology has been shown to be false.[469] The Tribunal did in fact deny the Claimant's recovery where it considered the available evidence to be insufficient. It also clearly applied the *actori probatio incumbit* principle in determining damages, contrary to the Respondent's false allegations.[470]

3. *The Committee's Analysis*

261. The Parties are generally in agreement on the legal standard applicable to this ground for annulment contained in Article 52(1)(e) of the ICSID Convention. Both refer to the standard laid down by the *ad hoc* Committee in *MINE v. Guinea* pursuant to which "the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal

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464 Rejoinder, ¶334.
465 Counter-Memorial, ¶340; Rejoinder, ¶¶335-336; Tr. 109:25-110:12.
466 Counter-Memorial, ¶340.
467 Rejoinder, ¶335.
468 Rejoinder, ¶338.
469 Rejoinder, ¶337.
470 Rejoinder, ¶339.

proceeded from Point A. to Point B. and eventually to its conclusion".[471] The *Alapli* Committee referring to the criteria in *MINE* observed: "In other words, what a committee is authorized to verify under Article 52(1)(e) of the ICSID Convention is whether the sequence of arguments within an award evidences a logical chain of reasoning that is apt to lead to a conclusion that was reached by the tribunal".[472]

262. The Parties appear also to agree that a tribunal is not bound to give reasons for every single argument put forward by the parties. According to the Respondent, reasons are to be provided "for decisions on issues that are material to the Tribunal's reasoning, without which the reader would not be in a position to follow the tribunal's reasoning from A to B".[473] The Claimant relies on the decision of the *ad hoc* Committee in *Alapli v. Turkey*, which, after stating that the threshold for this ground of annulment is very high, held that "the Applicant bears the burden of proving that the Tribunal's reasoning on a point which is essential to the outcome of the case was either unintelligible or contradictory or frivolous or absent".[474]

263. The Committee concurs with the above description of the requirement to state reasons. It shares the view that the need to give reasons applies only to issues essential to the outcome of the case. It further considers that the "sufficiency and adequacy" of reasons is not what is required under Article 52(1)(e); as held by another *ad hoc* committee, the ground "is the failure to state reasons, not if these were inadequate or insufficient".[475] Finally, the Committee adopts the statement of the *ad hoc* Committee in *Wena* that "[t]he Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision".[476] This,

[471] Counter-Memorial, ¶294; Reply, ¶120, quoting Exhibit RL-154, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 14 December 1989, ¶5.09.

[472] Exhibit CL-169, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, ¶199.

[473] Reply, ¶120.

[474] Counter-Memorial, ¶295, quoting Exhibit CL-169, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, ¶202.

[475] Exhibit CL-171, *El Paso Energy International Company v. Argentine Republic,* Decision of the *Ad Hoc* Committee on the Application for Annulment, 22 September 2014, ¶235.

[476] Exhibit CL-157, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 28 January 2002, ¶81.

however, is subject to the caveat that "if non-stated reasons do not necessarily follow or flow from the award's reasoning, an *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal".[477]

264. As explained below, the Committee is of the view that the Respondent has not proven that the Tribunal failed to state reasons essential to the outcome of the case regarding its decisions on jurisdiction, liability or damages according to the requirements of this ground for annulment outlined above.

i. Jurisdiction

265. The Committee has already found that the Tribunal's reasoning related to its finding of an investment in the form of a contractual interest under Article 1(1)(b) was developed in light of both the available evidence and the applicable law, including Turkmen law. In particular, the Tribunal properly stated the reasons for each important step in its decision making process based on its interpretation of the Participation Agreement,[478] the testimonial evidence of Ambassador Mondorf and Mr. Geiselhart and, more generally, "[a]ll the evidence, such as it is, [that] points to the Claimant as true participant in contributing financially and by other means to the establishment and operation of the Farm".[479] It also offered extensive reasoning regarding the conformity of the investment with Turkmen law.[480]

266. The Tribunal stated reasons regarding the Claimant's financial contribution to the Farm, most notably by explaining that the Claimant and Mr. Gurbannazarov negotiated for the purchase of some DM 1.8 million worth of equipment from Big Dutchman in early 1999. Although he acted on behalf of Şöhrat-Anna as the buyer, the Claimant was paying the purchase price, as confirmed by a letter from Big Dutchman.[481]

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[477] Exhibit CL-172, *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, 25 March 2010, ¶83.

[478] DOJ, ¶¶ 92-94.

[479] DOJ, ¶125.

[480] DOJ, Section 7.3.

[481] DOJ, ¶101.

267. The Committee does not accept the Respondent's argument that the Tribunal failed to consider how the Claimant satisfied the condition in the Participation Agreement that he make a DM 500,000 contribution.[482] According to the Tribunal, the first capital contribution was to be in the amount of DM 500,000, giving a right of priority over the first DM 500,000 of income. The Tribunal found that this right was counterbalanced by a reduction to a 30% participation, which at an earlier stage had been envisaged as based on a 50:50 split.[483] In the underlying arbitration, the Respondent complained that the Claimant had not produced adequate documentary evidence of contributions to Şöhrat-Anna, and the Tribunal dealt with this contention directly, listing the evidence produced and finding that it was sufficient to found jurisdiction.[484]

268. The Tribunal confirmed in the Award that Şöhrat-Anna was the owner of the equipment.[485] Contrary to the Respondent's argument, there was no contradiction in the Tribunal's reasoning: that Şöhrat-Anna owned the equipment follows from the Tribunal's finding in the Decision on Jurisdiction that the Claimant was not a seller of the equipment, but procured and financed it for the Farm.[486]

269. As to the Respondent's arguments that the Tribunal failed to state reasons for finding an investment under Article 1(1)(a) and for adding the alternative basis for the Claimant's investment under Article 1(1)(c) of the BIT, the Committee is of the view that even if the Tribunal failed to state the reasons for the application of these subparagraphs, the outcome of the case would not be altered in light of the Tribunal's appropriate reliance also on Article 1(1)(b) to found jurisdiction in the Decision on Jurisdiction.[487] As noted above, the Committee has concluded that the finding of the Tribunal that the Claimant made an investment under Article 1(1)(b) cannot be annulled. A discussion on whether the Claimant

[482] Similarly, and for the same reasons, the Committee rejects the Respondent's arguments that the Tribunal manifestly exceeded its powers and departed from a fundamental rule of procedure by not requiring the Claimant to prove that he had made this DM 500,000 contribution.

[483] DOJ, ¶93. The Participation Agreement refers to DM 500,000 as "The Claimant's 'first' capital contribution".

[484] DOJ, ¶114.

[485] Award, ¶167.

[486] DOJ, ¶¶60, 76, 82, 125.

[487] *Supra*, ¶¶123, 265.

had also made an investment under Article 1(1)(c) and whether the finding of the Tribunal in that regard was based on reasons would, therefore, be superfluous. It would not affect the outcome of this decision. Therefore, applying the principle that the duty to give reasons applies only to issues essential to the outcome of the case,[488] the Committee must dismiss the Respondent's arguments.

ii. Liability

270. Regarding the Respondent's allegation that the Tribunal failed to state reasons for certain of its conclusions on liability, the Committee refers to its analysis concerning similar allegations made with regard to the Tribunal's finding of jurisdiction. As just explained, the Decision on Jurisdiction and the Award express the Tribunal's reasons for finding that the Claimant had a qualifying investment and was not a seller of equipment.[489] The Tribunal also set forth reasons for its decision that the Respondent breached the BIT's provisions regarding expropriation[490] and fair and equitable treatment[491] based on the testimony of Ambassador Mondorf and other witnesses, additional documentary evidence and the evaluation of the facts. On the essential points, the Tribunal's reasons were clearly developed on the basis of a critical review of the evidence and factual circumstances.

271. Based on the conclusion that the Claimant had a contractual entitlement to a portion of the profits of Şöhrat-Anna as counterpart of his contribution to the Farm's business, the Tribunal stated that this entitlement "was susceptible to diminution in value as direct result of the acts of the Government".[492] Having found liability, the Tribunal pointed to the existence of the causal link with the damage resulting from the diminution in value of the Claimant's investment. The Committee is of the view that no further explanation had to be given by the Tribunal for awarding damages for "an entitlement [that] would depend to a significant degree on the good will of the Gurbannozarovs", as contended by the Respondent,[493] once

[488] *Supra* ¶¶262-263.
[489] *Supra,* ¶¶265-268.
[490] Award, ¶¶130-136.
[491]Award, ¶¶137-161.
[492]Award, ¶129.
[493] *Supra*, ¶239.

both the entitlement and the economic prejudice due to the Respondent's breaches of the BIT had been found.

iii. Damages

272. There is no contradiction in the Tribunal's reasoning for the finding of damages. Having determined that the Claimant's investment was in the form of a contractual interest in the Farm's profits, the Tribunal proceeded to assess the compensation owed to the Claimant for the deprivation of that interest by expropriation and for the Respondent's violation of its obligation to accord fair and equitable treatment to the Claimant's investment.

273. The reasons leading the Tribunal to apply the *Chorzów Factory* standard for damage assessment were clearly explained by the Tribunal, as already analysed by the Committee regarding the ground of manifest excess of powers.[494] The process followed for such assessment is set forth in over 50 pages of the Award in a reasoned manner, based primarily on experts' testimony; testimony which is critically reviewed.[495] The reader is able to follow the path of the Tribunal's reasoning from Point A to Point B and eventually to its conclusion.

274. Similarly, the Committee has already analysed the Tribunal's evaluation of the evidence and found that there was sufficient evidence justifying the quantification of damages.[496] There is no contradiction in the Tribunal's evaluation of the evidence and its assessment of damages. The Tribunal has clearly stated its reasons in this regard. The Committee therefore rejects the Respondent's request for annulment for failure to state reasons.

V. COSTS

275. In light of the provisions of Article 61(2) of the Convention and Arbitration Rule 47(1), which are applicable to this proceeding pursuant to Article 52(4) of the Convention and Arbitration Rule 53, the Committee has discretion with regard to the allocation of costs.

494 *Supra*, ¶164.

495 *Supra*, ¶165.

496 *Supra*, ¶158.

276. Each Party filed its Statement of Costs on 21 September 2015 and its Observations on the other Party's Statement of Costs on 12 October 2015.

277. The Claimant seeks to recover his legal costs and expenses incurred in connection with this proceeding in the total amount of [redacted] all amounts in EUR being converted to USD at the currency exchange rate as of 20 September 2015.

278. The Respondent seeks to recover its legal costs and expenses in the total amount of [redacted] In accordance with Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations, the Respondent has been solely responsible for the advance payments to cover the fees and expenses of the Committee and ICSID's administrative fees and direct expenses. From the advanced payments, the following disbursements have been made (in USD):[497]

[redacted]

279. In deciding how to allocate the costs of this proceeding, the Committee has been guided by the principle that "costs follow the event", unless a different approach is called for. The Committee has found no such indication in this case. The Claimant has prevailed in totality and should not be burdened by having to pay for his defence in this annulment proceeding.

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[497] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account as soon as all invoices are received and the account is final. Any remaining balance will be reimbursed to the Respondent.

[498] The amount includes estimated charges (courier, printing and copying) relating to the dispatch of this Decision.

280. In its Observations of 12 October 2015 the Respondent contended that the Claimant's legal fees are unreasonable, being twice as high as the Respondent's legal fees, representing more than [redacted] of the total amount of the Award. It is accepted that a party's cost should be reasonable. However, reasonableness should not be assessed based on a comparison with the other party's cost and/or comparison to the amount of damages awarded, but rather by considering the amount of work required by the party to properly defend its case. On that basis, in view of the number of issues submitted and questions raised by the Respondent and the Claimant's articulated replies, the Committee does not find the Claimant's legal fees to be unreasonable.

281. The Committee therefore concludes that Respondent is to bear all ICSID costs, *i.e.* the fee to lodge the Application, the fees and expenses of the Members of the Committee, the administrative fees of the ICSID Secretariat and other direct expenses, amounting to [redacted], as well as the Claimant's legal costs and expenses amounting to [redacted].

VI. DECISION

282. For the foregoing reasons, the *ad hoc* Committee decides unanimously that:

(1) The Respondent's claims for annulment of the Award rendered on 12 August 2014 are dismissed;

(2) The Respondent shall bear the full costs and expenses incurred by ICSID in these annulment proceedings, including the fees and expenses of the Members of the Committee;

(3) The Respondent shall reimburse the Claimant for the legal costs and expenses he has incurred, amounting to [redacted], within sixty (60) days from the date of dispatch of this Decision, increased by interest until full payment at the rate provided in paragraph 316(iii) of the Award;

(4) All other claims by either Party are dismissed; and

(5) Pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3), the stay of enforcement of the Award is terminated.

Mr. Makhdoom Ali Khan
Member
Date: 1 January 2016

Dr. Jacomijn van Haersolte-van Hof
Member
Date: 5 January 2016

Professor Piero Bernardini
President
Date: 8 January 2016