

International Centre for Settlement of Investment Disputes

**BLUSUN S.A., JEAN-PIERRE LECORCIER AND MICHAEL STEIN**

Applicants

v.

**ITALIAN REPUBLIC**

Respondent

**(ICSID CASE NO. ARB/14/3)**

**ANNULMENT PROCEEDING**

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## **DECISION ON ANNULMENT**

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**Members of the *ad hoc* Committee**

Prof. Ricardo Ramírez Hernández, President of the *ad hoc* Committee

Mr. Makhdoom Ali Khan, Member of the *ad hoc* Committee

Prof. Hi-Taek Shin, Member of the *ad hoc* Committee

**Secretary of the *ad hoc* Committee:** Ms. Ella Rosenberg

*Date of Dispatch to the Parties:* April 13, 2020

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## ABBREVIATIONS/DEFINED TERMS

Application for Annulment	Blusun S.A., Jean-Pierre Lecorcier and Michael Stein’s application for annulment dated April 21, 2017
Arbitration Rules	ICSID rules of procedure for arbitration Proceedings
Award	Award rendered by the Arbitral Tribunal on December 27, 2016
Background Paper	Updated Background Paper on Annulment for the Administrative Council of ICSID dated May 5, 2016
BIT	Bilateral Investment Treaty
Brindisi DIAs	DIA Certificates of Conformity issued by the Municipality of Brindisi
Claimants	Blusun S.A., Jean-Pierre Lecorcier and Michael Stein
Committee	The <i>ad hoc</i> Committee composed of Professor Ricardo Ramírez Hernández (President), Mr. Makhdoom Ali Khan, and Professor Hi-Taek Shin
COREPER	<i>Comité des représentants permanents</i> (Permanent Representatives Committee)
Counter-Memorial on Annulment	The Respondent’s Counter-Memorial on Annulment dated March 16, 2018

Declaration	22 EU member states signed a declaration stating that which they draw from application of the European Law, <i>inter alia</i> , on the interpretation of the ECT as confirmed by the Court of Justice of the European Union in the Achmea decision.
DIA	Dichiarazioni di Inizio Attività (Declaration of Initiation of Activity)
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and Equitable Treatment
FIT	Feed-in Tariffs
Fourth Energy Account	Fourth energy account dated May 5, 2011 (Award, para. 107(b) (Tab A))
GSE	<i>Gestore dei Servizi Energetici</i> (Manager of Electricity Services)
Hearing	Hearing on Annulment held on April 11 and 12, 2019 at the World Bank, Paris Office, Paris
ICJ	International Court of Justice
ICSID	International Centre for Settlement of of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ILC	International Law Commission

Memorial on Annulment	The Claimants' Memorial on Annulment dated November 3, 2017
Mesagne DIAs	DIA Certificates of Conformity issued by the Municipality of Mesagne
Rejoinder on Annulment	The Respondent's Rejoinder on Annulment dated July 20, 2018
Reply on Annulment	The Claimants' Reply on Annulment dated May 18, 2018
Request	Italy's request for an award declaring immediate termination of the Annulment proceeding pursuant to EU Member States Declaration on the legal consequences of Achmea Judgement
Respondent/Italy	The Italian Republic
Romani Decree	Romani Decree of 3 March 2011 (CL-51)
Third Energy Account	The third energy account adopted by ministerial decree on August 6, 2010 (CL-55, Decreto Ministeriale 6 agosto 2010)
Tr. Day [#], [page: line]	English transcript of the Hearing before the Committee
Tribunal	Arbitral Tribunal composed of Prof. James Crawford AC (President), Dr. Stanimir Alexandrov and Professor Pierre-Marie Dupuy

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## I. PARTIES

1. The disputing parties are the Italian Republic (the “**Respondent**” or “**Italy**”) and the Claimants in the original arbitration proceeding: Blusun S.A. (“**Blusun**”), Jean-Pierre Lecorcier and Michael Stein (collectively, the “**Claimants**” or the “**Applicants**”).
2. The Respondent and the Claimants are hereinafter collectively referred to as the “**Parties.**”

## II. INTRODUCTION

3. This case concerns an application for annulment by the Claimants (“**Application for Annulment**”) for the alleged dismissal of claims on their merits pronounced by the Award dispatched to the Parties on December 27, 2016 (the “**Award**”).
4. The Award related to a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**”) on the basis of the 1994 Energy Charter Treaty (the “**ECT**”), as well as the Convention on the Settlement of Investment Disputes between States and nationals of other States (the “**ICSID Convention**”).
5. The Claimants argued that the Tribunal which rendered the Award (the “**Tribunal**”), decided that it had jurisdiction over the claims brought by the Claimants against the Italian Republic, dismissed those claims on merits, and in doing so, the Tribunal inexplicably failed to consider the measure at the heart of one of those claims and on which the other claims relied in important respects.
6. Central to each claim advanced by the Claimants lies certain investments made concerning a solar energy project in the Puglia region of Italy: a 120-megawatt project, where plants were to be connected with each other by a medium-voltage grid, with electricity substations constructed to connect that grid to the high-voltage grid. The project consisted of uniting approximately 120 individual solar plants of one megawatt each. 114 of the 120 plants were to be built in the municipality of Brindisi and the remaining six in the municipality of Mesagne. The project also required the construction of a network of underground cables spread over 370 kilometers. These cables formed two rings connecting the solar plants to each other, and to two substations. The Claimants acquired the shares of 12 local development companies which hold all of the relevant rights and

permits for the plants via Eskosol S.R.L (“**Eskosol**”), an Italian company owned and controlled by Blusun (the “**Project**” or “**Puglia project**”).

7. The dispute in the underlying arbitration related to certain regulatory and judicial measures adopted by the Italian Government, which in the Claimants’ view frustrated their investments in the Puglia project.
8. The Claimants advanced three distinct legal claims in the original arbitration proceedings: (a) the first claim was for an alleged breach of Article 10(1), first sentence, of the ECT: such claim was advanced on the basis that in the Claimants’ view, the Italian Government failed to encourage and create stable, equitable, favorable, and transparent conditions for the Claimants’ Investments in the Puglia project (the “**Legal Instability Claim**”); (b) the second claim was for an alleged breach of Article 10(1), second sentence, of the ECT: this claim was advanced on the basis that in the Claimants’ view, Italy failed to accord fair and equitable treatment to their investments, namely regarding certain legitimate expectations (the “**Legitimate Expectations Claim**”); and (c) the third claim was advanced on the basis that in the Claimants’ view the regulatory measures and judicial decisions adopted by the Italian Constitutional Court, the Italian Government and the Commune had an effect equivalent to nationalization or expropriation within the meaning of Article 13(1) of the ECT (the “**Expropriation Claim**”).
9. The Claimants seek annulment of the entirety of the Award’s alleged dismissal of the Claims on their Merits, on the basis of Article 52(1) (b), (d) and (e) of the ICSID Convention. Such grounds of Article 52(1) of the ICSID Convention respectively state as follows: (i) the Tribunal manifestly exceeded its powers; (ii) the Tribunal seriously departed from a fundamental rule of procedure; and (iii) that the Award has failed to state the reasons on which it is based.
10. The Application for Annulment submitted by the Claimants mainly rests on the foregoing legal grounds. Each one of the legal grounds of Article 52(1) of the ICSID Convention, in the present Annulment proceedings, has the exact same factual basis.<sup>1</sup> These are the alleged dismissal of the Tribunal by not considering and addressing the DIA Certificates of Conformity issued by the Municipality of Brindisi, while adjudicating the Legitimate

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<sup>1</sup> Memorial on Annulment, para. 100.

Expectation claim. This is precisely the omission addressed by the Claimants in their Application for Annulment and it is central to the second claim brought by the Claimants in the original arbitration proceedings, their Legitimate Expectations Claim.<sup>2</sup> This, according to Claimants, breaches Article 52(1) (b) (d) and (e) of the ICSID Convention. The Committee will, therefore, examine these grounds.

### **III. PROCEDURAL HISTORY**

11. On February 4, 2014, ICSID received a request for arbitration from Blusun against Italy (the “RfA”).
12. On February 21, 2014, the Secretary-General of ICSID registered the RfA in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
13. On June 12, 2014, a Tribunal composed of Prof. James Crawford, a national of Australia, President, appointed by agreement of the Parties; Mr. Stanimir Alexandrov, a national of Bulgaria, appointed by the Claimant; and Prof. Pierre-Marie Dupuy, a national of France, appointed by the Respondent, was constituted.
14. On July 28, 2014, the Tribunal held its first session by telephone conference.
15. On July 30, 2014, the Tribunal issued Procedural Order No. 1. The Parties subsequently filed the following submissions:
  - The Claimants’ Memorial on the Merits on July 31, 2014;
  - The Respondent’s Counter-Memorial on the Merits on December 19, 2014;
  - The Claimants’ Reply on the Merits on May 8, 2015; and
  - The Respondent’s Rejoinder on the Merits on October 16, 2015.

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<sup>2</sup> Application for Annulment, para. 5.

16. On October 23, 2015, the European Commission (the “Commission”) filed an application to file a written submission pursuant to ICSID Arbitration Rule 37(2).
17. On October 28, 2015, both Parties filed observations on the Commission’s application. In its observations, the Respondent requested that the Tribunal bifurcate the proceedings and address jurisdiction as a preliminary matter.
18. On October 30, 2015, the Tribunal granted the Commission permission to supplement its application, which it duly did on November 12, 2015.
19. On November 13, 2015, the President held a pre-hearing conference with the Parties.
20. On November 18, 2015, the Tribunal issued Procedural Order No. 2 in which it decided, *inter alia*, to suspend the hearing then schedule for November 30 through December 4, 2015 in order to address the Commission’s application.
21. On January 22, 2016 and February 26, 2016, the Respondent and the Claimants, respectively, filed further observations on the Commission’s application. In its submission, the Respondent reiterated its request for the bifurcation of the proceedings.
22. On March 19, 2016, the Tribunal issued Procedural Order No. 3 admitting the Commission’s submission of November 12, 2015 into the record.
23. On March 19, 2016, the Tribunal also issued Procedural Order No. 4 in which it rejected the Respondent’s request to bifurcate the proceedings.
24. From April 25 through April 28, 2016, the Tribunal held a hearing on jurisdiction and the merits in Paris.
25. On June 21, 2016, Eskosol S.p.A. in liquidazione (“Eskosol”), an Italian subsidiary of Blusun, filed an application to intervene as a non-disputing party pursuant to ICSID Arbitration Rule 37(2).
26. On June 21 and 22, 2016, the Tribunal held a further hearing on jurisdiction and the merits in Paris. During the final day of the hearing, the Tribunal invited the Parties to provide their comments on Eskosol’s application.
27. On June 30, 2016 (the Respondent) and July 1, 2016 (the Claimants), both Parties asked that the Tribunal deny Eskosol’s application to intervene.

28. On July 8, 2016, the Tribunal issued Procedural Order No. 5, rejecting Eskosol's application to intervene as a non-disputing party.
29. On August 1, 2016, the Claimants filed a submission for costs.
30. On November 22, 2016, the Tribunal declared the proceedings closed in accordance with ICSID Arbitration Rule 38(1).
31. On December 27, 2016, the Tribunal rendered its award.
32. On April 21, 2017, ICSID received an Application for Annulment (the "Application") from Blusun. The Application for Annulment was made within the time-period provided in Article 52(2) of the ICSID Convention. Blusun sought annulment of the Award based on the following three grounds:
  - The Tribunal *manifestly exceeded its powers* because it was part of the Tribunal's mandate and jurisdiction *ratione materiae* to consider, when adjudicating Claimants' legitimate expectations claim, the DIA certificates of conformity relevant to that claim, i.e. those from the municipality of Brindisi, and it manifestly failed to do so.
  - The Tribunal *departed from the fundamental rules of procedure* because it appeared from paragraph 379 of the Award that the Tribunal considered only the first page of Exhibit C-24, and that it failed to consider the translation of a template of a translation of 48 certificates of conformity from the Municipality of Brindisi. Yet these certificates were part of the same exhibit and included the mention that "[t]his activity is in accordance with general urban planning instruments." These certificates were at the center of the Claimants' claim on legitimate expectations, and no reasonable review of the record could possibly overlook this.
  - The Tribunal *failed to state reasons* because it did not address the DIA certificates in its analysis of the Claimants' legitimate expectations claim.
33. On May 2, 2017, the Acting Secretary-General registered the Application.
34. By letter of June 7, 2017, ICSID informed the Parties that it intended to recommend to the Chairman of the Administrative Council the appointment of Prof. Donald McRae, a

national of Canada and New Zealand, as President of the *ad hoc* Committee (the “Committee”), with Mr. Makhdoom Ali Khan, a national of Pakistan, and Prof. Hi-Taek Shin, a national of the Republic of Korea, serving as co-members. The Centre invited the Parties to provide any comments on the proposed appointments by June 14, 2017.

35. By letter of June 15, 2017, the Secretary-General of ICSID noted that no objections to the proposed Committee members had been received and stated that the Chairman would therefore proceed to the appointment the candidates.
36. By letter of June 16, 2017, the Centre confirmed that the Chairman had appointed the proposed Committee members.
37. On June 20, 2017, the Acting Secretary-General informed the Parties that the Committee was constituted in accordance with Article 52(3) of the ICSID Convention. Its members were: Prof. Donald McRae (Canadian, New Zealand), President; Mr. Makhdoom Ali Khan (Pakistani); and Prof. Hi-Taek Shin (Korean).
38. By letter of June 23, 2017, the Committee invited the Parties to provide their availability for a first session.
39. By letter of June 28, 2017, the Claimants provided their availability for the first session. By email of the same date, the Respondent stated that it was unavailable during any of the proposed times and asked the Committee to postpone the first session until September 2017.
40. By email of July 5, 2017, the Claimants informed the Committee that the Parties had agreed, subject to the Committee’s approval, to forego a first session and reach an agreement on the text of Procedural Order No. 1 between themselves. By email of the same date, the Respondent confirmed its agreement with the Claimants’ email. The Respondent reiterated its agreement by email of July 10, 2017.
41. By letter of July 10, 2017, the Committee transmitted a draft Procedural Order No. 1 to the Parties and invited them to provide their comments and any points of disagreement by July 26, 2017.

42. By email of July 26, 2017, the Claimants requested, on behalf of both Parties, an extension until August 4, 2017 to provide comments on Procedural Order No. 1. By email of July 27, 2017, the Committee granted the requested extension.
43. On August 3, 2017, the Parties provided an agreed-upon version of Procedural Order No. 1.
44. By letter of August 25, 2017, the Committee asked the Parties to officially confirm that they had no need of a first session. By email of August 26, 2017, the Claimants provided their confirmation. By email of August 28, 2017, the Respondent provided its confirmation.
45. On August 28, 2017, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Paris, France. Procedural Order No. 1 also set out the agreed schedule for the proceedings, which was later modified by agreement of the Parties.
46. On November 3, 2017, the Claimants filed their Memorial on Annulment (the “Memorial”) with supporting documentation.
47. On March 16, 2018, the Respondent files its Counter-Memorial on Annulment (the “Counter-Memorial”) with supporting documentation.
48. By letter of March 23, 2018, the Centre informed the Parties that Prof. Donald McRae had submitted his resignation from the Committee and that, pursuant to ICSID Arbitration Rule 10(2), the proceedings would be suspended until a replacement appointment had been made.
49. By letter of May 4, 2018, the Secretary-General informed the Parties that she intended to ask the Chairman of the Administrative Council to appoint Professor Ricardo Ramírez Hernández as President of the Committee and invited the Parties to provide any comments by May 11, 2018.

50. By email of May 5, 2018, the Claimants asked for confirmation that Prof. Ramírez Hernández was available to attend the hearing scheduled for October 2018. By email of May 9, 2018, Prof. Ramírez Hernández confirmed his availability.
51. By letter of May 14, 2018, the Secretary-General confirmed that she would proceed to ask the Chairman of the Administrative Council to appoint Prof. Ramírez Hernández.
52. By email of May 18, 2018, the Claimants asked for confirmation of Prof. Ramírez Hernández's appointment to allow for the official resumption of the proceedings so the Claimants could submit their Reply on Annulment.
53. By letter of May 18, 2018, ICSID informed the Parties that Prof. Ramírez Hernández had accepted his appointment and the Committee had been reconstituted with the proceedings resuming as of that date.
54. On May 18, 2018, the Claimants submitted their Reply on Annulment (the "Reply") with accompanying documentation.
55. By letter of June 28, 2018, Prof. Shin provided a disclosure regarding his involvement in *JGC Corporation v. Kingdom of Spain* (ICSID Case No. ARB/15/27) and confirmed that it would not affect his independence and impartiality in these proceedings.
56. On July 20, 2018, the Respondent submitted its Rejoinder on Annulment (the "Rejoinder") with accompanying documentation.
57. By letter of August 23, 2018, the Committee provided a draft agenda for the organization of the hearing and invited the Parties to agree to its contents by email; should they be unable to do so, the Committee provided a proposed date and time for a telephone conference to discuss outstanding issues.
58. By email of August 31, 2018, the Claimants submitted the Parties' joint agenda and stated that there would be no need for a pre-hearing conference. By email of the same date, the Respondent confirmed its agreement.
59. By letter of September 12, 2018, the Claimants stated that they would be unable to pay the second advance, requested on August 22, 2018, before the end of the year. In light of this, they asked that the hearing be rescheduled for the first quarter of 2019.

60. By letter of September 17, 2018, the Committee took note of the Claimants' letter of September 12, 2018 and proposed April 11 and 12, 2019 as new dates for the hearing. By emails of September 21, 2018, the Parties confirmed their availability for the proposed dates.
61. On February 4, 2019, the Respondent submitted its "Request for an award declaring immediate termination – EU Members States Declaration on the legal consequences of *Achmea*" (the "Request for Termination") along with a declaration on the consequences of the *Achmea* award issued by Member States of the European Union (the "*Achmea* Declaration").
62. By letter of February 5, 2019, the Claimants provided their comments on the Request for Termination.
63. By letter of February 12, 2019, the Committee took note of the Parties' submissions on the Request for Termination and stated that it would hear further arguments on the matter at the upcoming hearing.
64. On March 12, 2019, the Centre provided the Parties with a draft hearing agenda based on the agreed-upon version for the originally scheduled hearing and asked them to provide any comments by March 21, 2019. By email of March 13, 2019, the Claimants confirmed that they had no comments. By email of March 18, 2019, the Respondent confirmed that it had no comments.
65. By email of April 9, 2019, the Claimants stated their assumption that the agenda circulated on March 12, 2019 should be considered final in absence of comments from the Parties and asked the Committee to correct them if this was not the case.
66. On April 11 and 12, 2019, a Hearing on Annulment was held in Paris (the "Hearing"). The following persons were present at the Hearing:

*Ad hoc Committee:*

Prof. Ricardo Ramírez Hernández	President
Mr. Makhdoom Ali Khan	Member
Prof. Hi-Taek Shin	Member

*ICSID Secretariat:*

Ms. Ella Rosenberg

Secretary of the *ad hoc* Committee

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***Parties***

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Avv. Sergio Fiorentino

Avvocatura dello Stato

Prof. Maria Chiara Malaguti

Ministry for Foreign Affairs and  
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consultant)

*Court Reporters:*

Mr. Ian Roberts

Ms. Lisa Barrett

67. By email of April 16, 2019, the Committee invited the Parties to provide their corrections to the transcripts by April 23, 2019 and their statements of costs by June 7, 2019.
68. On June 7, 2019, the Claimants filed a submission on costs.
69. On June 19, 2019, the Respondent filed a submission on costs. On July 3, 2019, the Respondent filed its revised statement on costs.

70. On April 3, 2020 the proceeding was closed.

#### **IV. THE AWARD OF THE TRIBUNAL**

##### **A. The Tribunal's reasoning concerning the three claims advanced by the Claimants in the original proceedings as set forth in the Award**

71. On December 27, 2016, the Tribunal rendered its Award. The Tribunal's reasoning with respect to the three claims made by the Claimants is described below.

##### **(i) Legal Instability Claim: Breach of Article 10(1), first sentence of the ECT**

72. The Claimants contended that they did not claim that Italy's legislation had to remain immutable, unchanged, or written in stone and that their case was not about regulatory change, but about regulatory turbulence. Rather, they contended that the legal framework for a solar energy project in the Puglia region of Italy constantly fluctuated between the legally permissible and impossible, for two years, leaving no period of stability in which the requisite capital investment for a project of this size could be realized.<sup>3</sup>

73. The Claimants contended that a series of measures adopted by the Italian Government in relation to the Puglia project amounted to a breach of the legal stability standard set out in the first sentence of Article 10(1) of the ECT.<sup>4</sup> Such measures, as stated by the Claimants, are the following: (a) the Constitutional Court decision and its aftermath; (b) the Romani Decree and the Fourth Energy Account; (c) the uncertainties associated with the publication of multiple lists of eligible plants by GSE; and (d) the Brindisi stop-work order and related events.<sup>5</sup>

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<sup>3</sup> Award, para. 320.

<sup>4</sup> Article 10(1): Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

<sup>5</sup> Ibid., 321.

74. The Tribunal observed, in this regard, that the Claimants did not suggest that these events were directly linked or that the sequence was the result of any design on the part of the Italian State. This, according to the Tribunal, was no conspiracy but a series of disconnected acts of alleged disregard for the Claimants' rights.<sup>6</sup>

**(ii) Legitimate Expectations Claim: Breach of Article 10(1), second sentence of the ECT**

75. In accordance with the Award “[t]he Claimants present an alternative formulation of an Article 10(1) claim based essentially on legitimate expectations. In effect, it is argued that persons in the Claimants' position had a legitimate expectation that the Third Energy Account would be maintained for the term envisaged:

the Claimants had legitimate expectations that the Third Energy Account would remain in place for its entire duration according to its terms; that is, until the end of 2013. However, the Romani Decree frustrated the Claimants' legitimate expectations in this respect.<sup>7</sup>

76. The Tribunal noted that this argument had the effect of treating the law not as a general command but as an individual commitment, at least where the law is enacted for the benefit of a determinate class of persons.<sup>8</sup>

77. The Tribunal observed that so far, tribunals have declined to sanctify laws as promises,<sup>9</sup> and that “there is still a clear distinction between a law, i.e. a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment.”<sup>10</sup>

78. The Tribunal also observed that “in the absence of a specific commitment, the state has no obligation to grant subsidies such as feed in tariffs, or to maintain them unchanged, once granted.”<sup>11</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> Award, para. 365, citing Reply, paras. 217, 298-319; Arbitration Tr. Day 5, 71:12-17 (Dufetre).

<sup>8</sup> Award, para. 365.

<sup>9</sup> Ibid., 367, citing *Charanne B.V., Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Final Award, January 21, 2016, para. 510, Legal Authority CL-208; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, para. 372, Legal Authority CL-109 (“*El Paso Award*”).

<sup>10</sup> Award, para. 371.

<sup>11</sup> Ibid., para. 372.

79. The Tribunal concluded by stating, “the Respondent made no special commitment to the Claimants with respect to the extension and operation of FITs, nor did it specifically undertake that relevant Italian laws would remain unchanged. For these reasons the Claimants have not established a breach of Article 10(1), second sentence, of the ECT.”<sup>12</sup>

**(iii) The Expropriation Claim: Breach of Article 13(1) of the ECT**

80. In the alternative, the Tribunal addressed Claimants’ indirect expropriation claim under Article 13 of the ECT<sup>13</sup> “the Italian measures resulted in the indirect expropriation of the investment, given its total loss of value, contrary to Article 13 of the ECT.”<sup>14</sup>

81. The Tribunal recalled previous case law on the subject:

As regards indirect expropriation, the Tribunal considers that the wording of Article 13(1) ECT requires Electrabel to establish that the effect of the PPA’s termination by Hungary was materially the same as if its investment in Dunamenti had been nationalised or directly expropriated by Hungary. In other words, Electrabel must prove, on

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<sup>12</sup> Ibid., para. 374.

<sup>13</sup> “Article 13: Expropriation

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having equivalent to nationalisation or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.”

<sup>14</sup> Ibid., para. 396.

the facts of this case, that its investment lost all significant economic value with the PPA's early termination."<sup>15</sup>

82. The Tribunal decided that, "in the present case, the Respondent, by non-discriminatory laws, ostensibly passed in the public interest, significantly changed the terms laid down in the Third Energy Account for investment in the green energy sector. These changes, combined with operational decisions made by the investors, and the lack of prearranged Project financing, meant that the Project remained radically incomplete, never qualified for feed-in tariffs, and inevitably went into liquidation. As a general matter the situation was not analogous, still less tantamount, to expropriation of the Project by Italy."<sup>16</sup>

## **V. THE PARTIES' INTERPRETATION OF THE AWARD REGARDING THE DIA CERTIFICATES OF CONFORMITY**

### **A. DIA Certificates of Conformity within the Legitimate Expectations Claim**

#### **(i) The Claimants' Position**

83. The Claimants begin by explaining that the Tribunal decided that it had jurisdiction over the claims brought by the Claimants against Italy, without restriction, but dismissed those claims on merits.<sup>17</sup>
84. The Claimants contend that the Tribunal correctly understood the Claimants' three distinct claims, as such.<sup>18</sup> They submit that "[t]he Tribunal also correctly understood one of the Claimants' two bases of its Legitimate Expectations Claim, i.e. the expectations that legitimately arose from the DIA Certificates of Conformity and were later dashed by measures adopted by the municipality of Brindisi."<sup>19</sup>

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<sup>15</sup> Ibid., para. 398 citing *Metalclad Corporation v. United Mexican States*, ICISD Case No. ARB(AF)/97/1, Award, August 30, 2000, para. 103, Legal Authority CL-32.

<sup>16</sup> Award, para. 401, at footnote 652, "In closing, counsel for the Claimants also cited *Biloune v Ghana* as bearing 'some similarities' to the present case: [Arbitration] Tr. Day 6, 34:8-19 (Barrier), citing *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL Award on Jurisdiction and Liability, October 22, 1989. Although Biloune involved a municipal stop order, what was crucial was the combination of actions taken by various Ghanaian entities – partial demolition of the works, refusal to allow resumption, deportation and refusal of return. The temporary judicial stay here is in obvious contrast."

<sup>17</sup> Memorial on Annulment, para. 51.

<sup>18</sup> Memorial on Annulment, para. 53.

<sup>19</sup> Ibid., para. 54.

85. The Claimants contend that the Tribunal also correctly recalled, at paragraph 165 of the Award, the multiple representations made by the Italian Government. According to these representations, as per the Claimants, the construction of specific plants was in accordance with the procedures set out in Regional Law n. 31/2008 and was within the scope of general urban planning instruments.<sup>20</sup>
86. The Claimants contend that the Tribunal also recalled the assertion made by them in the original proceedings that “for at least two years after having granted the DIA authorisations, the municipality ‘took no step to suggest that it had any doubt about the validity of the authorisations granted.’”<sup>21</sup> “This, in the Claimants’ view, amounted to an implicit representation that gave rise to legitimate expectations,”<sup>22</sup> and that in recognition of such situation, the Tribunal cited in footnote the Claimants’ Memorial at paragraph 446, and referenced in that footnote the Claimants’ factual exhibit upon which they based their assertion, **Exhibit C-24**.<sup>23</sup>
87. The Claimants contend that in paragraph 167 of the Award, the Tribunal recalled the Claimants’ assertion that the stop-work order “‘was contrary to the very regional law with which [the municipality of Brindisi] had previously certified [the construction of the solar plant’s] compliance,’” and, thus, emphasized the importance for the Claimants of the representations made in the DIA Certificates of Conformity reproduced as **Exhibit C-24**.<sup>24</sup>
88. The Claimants submit that the Tribunal reviewed each of the Claimants’ three separate claims one by one.<sup>25</sup> The Legitimate Expectations Claim is dealt with in paragraphs 365 to 374 of the Award, in a section entitled “B. Breach of the Fair and Equitable Treatment Standard: ECT Article 10(1), second sentence (legitimate expectations).”<sup>26</sup> The Claimants contend that the Tribunal recalled the Claimants’ position that the DIA Certificates of Conformity had created legitimate expectations, protected under Article 10(1), second

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<sup>20</sup> Ibid., para. 57.

<sup>21</sup> Ibid., para. 60.

<sup>22</sup> Ibid., para. 61.

<sup>23</sup> Ibid., para. 58. See also footnote 257, Award.

<sup>24</sup> Ibid., para. 62. Footnote omitted.

<sup>25</sup> Ibid., para. 63.

<sup>26</sup> Ibid., para. 64.

sentence, of the ECT; it was thus expected that the Tribunal would adjudicate this claim in paragraphs 365 to 374 of the Award.<sup>27</sup> However, in the Claimants' view, a reading of the Award discloses that the Tribunal did not discuss the DIA Certificates of Conformity at all in this section, nor did it mention the 48 certificates from the municipality of Brindisi or the five certificates from the municipality of Mesagne.<sup>28</sup>

89. The Claimants submit that the only question the Tribunal discussed in this section is whether the Claimants had a legitimate expectation that the "Third Energy Account would be maintained for the term envisaged [...]"<sup>29</sup> The Claimants assert that the Third Energy Account was also relied upon by the Claimants as a separate prong of their Legitimate Expectations Claim, but it was unrelated to the DIA Certificates of Conformity. They contend that the DIA Certificates of Conformity concerned the authorizations to build the solar plants, while the Third Energy Account related to the price at which electricity would be sold.<sup>30</sup>
90. The Claimants refer to the prior discussion concerning whether they had a legitimate expectation that the Third Energy Account would be maintained for the term envisaged within section B. Breach of the Fair and Equitable Treatment Standard: ECT Article 10(1), second sentence (legitimate expectations), instead of the discussion of legitimate expectations concerning the DIA Certificates of Conformity, as it should have been. The Claimants assert that the Tribunal could not have been confused and mixed the two together as they had addressed the DIA Certificates of Conformity first at page 6 of their opening presentation at the hearing, while the Third Energy Account was addressed subsequently at slide 35 of the presentation and thereafter. As the Tribunal could not have confused the two categories of measures, it obviously failed to consider the DIA Certificates of Conformity in adjudicating the Legitimate Expectations Claim.<sup>31</sup>
91. The Claimants submit that it is not until the reader reaches the next section, "C," i.e., issue of Causation in relation to ECT Article 10(1), that they can, for the first time, see a

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<sup>27</sup> Ibid., para. 65.

<sup>28</sup> Ibid., para. 66.

<sup>29</sup> Ibid., para. 67. Footnote omitted.

<sup>30</sup> Ibid., para. 68.

<sup>31</sup> Ibid., para. 69. Footnote omitted.

mention of the DIA Certificates of Conformity in the Tribunal's analysis. Section C is a separate section from prior Section B. The Claimants also argue that Section C does not deal with the Legitimate Expectations Claim but with causation in relation to the first two sentences of Article 10(1) ECT, which, according to them, is a conceptually distinct question.<sup>32</sup>

92. Within Section C regarding the subject of causation, in the Annulment Proceeding, the Claimants rely heavily on paragraph 379 of the Award within this section. It states as follows:

The Claimants relied on the DIAs as amounting to a definitive authorization for the individual plants. They refer by way of example to a Notice of the Municipality of Mesagne with the notation 'The local development companies obtain the 53d DIA Certificate of Conformity, stating that the construction of the given solar plants was in accordance with the relevant regulations.' In fact the Notice states in its operative clause that the DIA procedure 'is to be regarded as complete', which is not at all the same thing.<sup>33</sup>

93. Based on paragraph 379 of the Award, the Claimants contend that the Tribunal quoted only from the first page of the PDF of **Exhibit C-24**. According to Claimants, the Tribunal correctly characterized it as a certificate from the municipality of Mesagne (which had issued five Certificates of Conformity only). The Claimants submit that the Tribunal, however, completely failed to consider the 48 certificates issued by the municipality of Brindisi and which were translated in template form on the third page of the PDF of **Exhibit C-24**. According to the Claimants, only the DIA Certificates of Conformity issued by the Municipality of Brindisi were relevant to the Legitimate Expectations Claim. The municipality of Mesagne never instituted self-redress proceedings or stop-work orders, or otherwise questioned the legality of the DIAs it represented to be complete. It was the measures adopted by the municipality of Brindisi that were alleged, in the Legitimate Expectations Claim, to have violated the ECT by directly contradicting representations specifically made with respect to the construction of the very plants at issue. Yet, inexplicably, according to the Claimants, nowhere in the

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<sup>32</sup> Ibid., para. 70. Footnote omitted.

<sup>33</sup> Award, para. 379.

Award did the Tribunal address the DIA Certificates of Conformity issued by the Municipality of Brindisi, in spite of the fact that these were relevant to the claims before it.<sup>34</sup>

**(ii) The Respondent's Position**

94. The Respondent begins by asserting that the Claimants have made an unwarranted inference from an isolated reading of one paragraph of the Award, i.e. paragraph 379. The Respondent submits that the Claimants are reading what is, in fact, a reproach made in passing (directed at an inaccuracy in their own Memorial and Reply) as evidence of the Tribunal's negligence. The Respondent disputes that there was an oversight or that that the alleged oversight had wide-reaching repercussions which undermined the viability of the Award.<sup>35</sup>
95. The Respondent submitted that "the Claimants asserted that the Tribunal ha[d] not given adequate consideration to the fraction of their Legitimate Expectations Claim that relied on certain documents of certification issued by the municipality of Brindisi (the '*Dichiarazioni di Inizio Attività*,' or DIAs, which authorised the construction of solar plants)." It contended that "this assertion is groundless, but the gateway question is rather whether it would even matter in annulment proceedings, even if it were true." According to the Respondent, it would not, but the Claimants nevertheless seek, on this basis, the annulment of "*the entirety* of the Award's dismissal of the claims on their merits."<sup>36</sup>
96. According to the Respondent, the Claimants' case rests on two arguments:<sup>37</sup>
- (a) First, the Tribunal allegedly "failed to address the DIA Certificates of Conformity ... when adjudicating the Legitimate Expectations Claim."<sup>38</sup>

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<sup>34</sup> Memorial on Annulment, para. 72.

<sup>35</sup> Counter-Memorial on Annulment, para. 4.

<sup>36</sup> Ibid., para. 5.

<sup>37</sup> Ibid., para. 12.

<sup>38</sup> Ibid., para. 13.

- (b) Second, the Tribunal allegedly addressed only the DIA Certificates issued by the municipality of Mesagne (the “Mesagne DIAs”), failing to consider the DIA Certificates issued by the municipality of Brindisi (the “Brindisi DIAs”).<sup>39</sup>

97. The Respondent contends that these arguments are ill-founded in fact and in law.<sup>40</sup> It also contends that the factual premises for the submission of the Claimants is mistaken for the following reasons:

- (a) First, the Tribunal did address the DIA Certificates. In the Award, an entire section of the part on causation is dedicated to “[t]he status of the DIAs and the Project as a unified scheme.” This part of the Award, highlighting the absence of legitimate expectations and the lack of causation between Italy’s acts and the Applicant’s business misfortunes, is an integral part of the reasons why the Legitimate Expectations Claim did fail....
- (b) Second, the Tribunal did not “refer ... only” to the DIA Certificates issued by the municipality of Mesagne. To the contrary, it did mention them “by way of example.” The obvious implication is that the Tribunal considered all DIA Certificates, and singled out some of them to point out an inaccuracy in the Claimants’ Reply....<sup>41</sup>

98. The Respondent contends that the Claimants’ argument that the Tribunal did not address the DIA Certificates of Conformity is plainly incorrect.<sup>42</sup> According to the Respondent, the Tribunal “located,” “read” and by all appearances “consider[ed]” the Brindisi DIAs. Paragraph 165 of the Award, as the Claimants readily conceded, discusses precisely those documents and includes a footnote pointing to the correct Exhibit (C-24). Besides, the Tribunal also dutifully noted the Claimants’ argument that these documents “gave rise to legitimate expectations.”<sup>43</sup>

99. The Respondent contends that the Tribunal addressed the merits of the Claimants’ claim in part X of the Award.<sup>44</sup> Specifically, the Tribunal addressed the two claims based on

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<sup>39</sup> Ibid., para. 14.

<sup>40</sup> Ibid., para. 17.

<sup>41</sup> Ibid., para. 17. Footnotes omitted.

<sup>42</sup> Ibid., para. 23.

<sup>43</sup> Ibid., para. 24.

<sup>44</sup> Ibid., para. 25.

Article 10(1) of the ECT (namely, the “Legal Instability Claim” in Section A and the “Legitimate Expectations Claim” in Section B), as well as the Expropriation Claim (in Section D).<sup>45</sup>

100. Italy submits that the two claims based on Article 10(1) of the ECT ((i) Legal Instability Claim; and (ii) Legitimate Expectations Claim) were also discussed jointly with respect to one aspect that they had in common: the issue of causation.<sup>46</sup> It also submits that in order “[t]o entertain the claim under Article 10(1) ECT the Tribunal needed to be satisfied that Italy’s acts caused the failure of the Project. The Award dedicated a specific section to this determination (Section C of Part X), which applied to both Article 10(1) ECT claims – the Legal Instability and Legitimate Expectations claims – but treated these jointly to avoid repetition.”<sup>47</sup>
101. The Respondent submits that the Tribunal addressed the Legitimate Expectations Claim in Part X, in Sections B and C, the latter addressing a specific aspect – the causal link – that was critical to this specific claim’s chances of success.
102. The Respondent recalls that when addressing the causation element, the Tribunal discussed the Claimants’ reliance on the DIAs (which had been introduced earlier, in para. 165) along with the other documents and acts that allegedly generated their legitimate expectations. According to the Respondent, the Tribunal noted that the DIAs did not represent a firm assurance that the plants would receive FITs at any fixed rate.<sup>48</sup>
379. The Claimants relied on the DIAs as amounting to a definitive authorization for the individual plants ...
380. At no stage did the Claimants obtain unconditional assurances from the central Government as to their plants’ entitlement to FITs, or to the level of such FITs.<sup>49</sup>
103. Regarding the prior cited paragraphs, the Respondent submits that paragraph 380 shifts the focus from the DIAs to the critical aspect of the Claimants’ lack of entitlements in

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<sup>45</sup> Ibid., para. 26. See also footnotes 15, 16 and 17, Counter-Memorial on Annulment.

<sup>46</sup> Ibid., para. 27.

<sup>47</sup> Ibid. See also footnote 18, Counter-Memorial on Annulment.

<sup>48</sup> Ibid., para. 31. See also paras. 379 and 380 of the Award.

<sup>49</sup> See footnote 22, Counter-Memorial on Annulment.

the FITs.<sup>50</sup> Italy also contends that even accepting, for the sake of argument, that the Tribunal failed to countenance the reassuring function of the Brindisi DIAs, this would be a matter of merits and should not engage the review of an annulment committee. Further, the point would remain that the Claimants never received any specific assurances that they would receive any FIT, at any specific rate.<sup>51</sup>

104. The Respondent contends that the Claimants' submissions with regard to the Tribunal's failure to consider the Brindisi DIA Certificates of Conformity are based both on a misreading of paragraph 379 itself and on reading it in isolation. According to the Respondent, the Tribunal not only addressed the DIAs while discussing the Legitimate Expectations Claim, but it also did so when analyzing one specific aspect thereof: causation.<sup>52</sup> The Respondent also contends that "it is also very clear that the Tribunal did not consider the DIAs to be particularly meaningful, as they did not generate any legitimate expectation with respect to a specific rate of FITs."<sup>53</sup>

## **B. The Tribunal addressed only the DIAs issued by the Municipality of Mesagne**

### **(i) The Claimants' Position**

105. The Claimants base their assertion on the Tribunal's alleged failure to consider a series of documents central to the Claimants' claim on Legitimate Expectations, second prong. They specifically refer to the DIA Certificates of Conformity issued by the Municipality of Brindisi. They draw attention to paragraph 379 of the Award. The Claimants submit that this document was cited no less than 30 times by the Claimants in the original arbitration. They also argue that this was repeatedly referred to before the Tribunal at the hearing. The Tribunal implicitly observed, in paragraph 165 of the Award, that it would address this document. It, however, failed to do so.<sup>54</sup>
106. The Claimants contend that the Tribunal only considered the template of the five Certificates issued by the municipality of Mesagne, but completely failed to consider the

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<sup>50</sup> Counter-Memorial on Annulment, para. 32.

<sup>51</sup> *Ibid.*, para. 33.

<sup>52</sup> *Ibid.*, para. 35.

<sup>53</sup> *Ibid.*, para. 36.

<sup>54</sup> Reply on Annulment, para. 2.

48 certificates issued by the municipality of Brindisi and translated in template form on the third page of the PDF of **Exhibit C-24**. The Claimants submit that in a separate and different part of the Award, other than the one discussing the Legitimate Expectations Claim,<sup>55</sup> specifically Section C regarding causation, at paragraph 379, the Tribunal discussed the five DIA Certificates of Conformity issued by the municipality of Mesagne. According to the Claimants, the Tribunal, however, inexplicably failed to address the 48 DIA Certificates of Conformity issued by the municipality of Brindisi. This, the Claimants submit, was in spite of the fact that the Tribunal had announced, in paragraph 165 of the Award, that it would do so.<sup>56</sup>

107. According to the Claimants, the document which the Tribunal completely failed to consider is a template form, on the third page of **Exhibit C-24**, which was a translation of the 48 Brindisi DIA Certificates of Conformity. “Each of those certificates sets out a positive representation that the construction of the solar plant, at issue, conformed with local law. Each representation was specific in that it was made to the special-purpose investment company owning the plant and concerned only the plant that constituted the investment. The municipality of Brindisi reneged on that representation, at a crucial time in the chronology, resulting in the loss of the Claimants’ investments.”<sup>57</sup>
108. The Claimants argue against Italy’s contention that Section C, Part X of the Award, deals with the Legal Instability Claim and the Legitimate Expectations Claim regarding causation, saying that, “[a]s is clear from its text, paragraph 379 addresses certain DIA Certificates of Conformity issued by the municipality of Mesagne. Those certificates,” according to the Claimants, “were not part of any claim of breach or causation pleaded by” them. The Claimants submit that Italy incorrectly “asserts that the discussion of these certificates in this paragraph must be read to imply that the Tribunal considered all DIA Certificates of Conformity, including the Brindisi DIA Certificates of Conformity that served as the basis for the Legitimate Expectations Claim.” According to the Claimants, they suffered injury from this breach.<sup>58</sup>

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<sup>55</sup> Award, Part X, B. Breach of the Fair and Equitable Treatment Standard: ECT Article 10(1), second sentence (legitimate expectations).

<sup>56</sup> Reply on Annulment, para. 37. Footnote omitted.

<sup>57</sup> Reply on Annulment, para. 3.

<sup>58</sup> *Ibid.*, para. 50.

109. The Claimants further contend, in this regard, that paragraph 379 refers to a “Notice of the Municipality of Mesagne” and quotes the language from the first page of the PDF of Exhibit C-24, that is, from the five DIA Certificates of Conformity issued by the municipality of Mesagne. However, it is plain that this paragraph does not quote or discusses the language from the 48 DIA Certificates of Conformity, issued by the municipality of Brindisi, on the third page of that exhibit.<sup>59</sup>
110. The Claimants draw attention to the difference between the DIA Certificates of Conformity issued by the municipality of Brindisi and those issued by the municipality of Mesagne by quoting the language used by both.<sup>60</sup> Given the emphasis put on this point by the Claimants and its importance for both parties, the Committee quotes verbatim from both certificates:
- (i) This activity [construction of the solar plant] is in accordance with the procedures set out in Regional Law n. 31/2008 and with general urban planning instruments.<sup>61</sup> (This is the language used by all 48 DIA Certificates of Conformity issued by the Municipality of Brindisi.)
    - (i) Simplified Authorization File Number ... is to be regarded as complete [...]. Hence, the aforementioned Simplified Authorization shall become applicable for all intents and purposes [...] <sup>62</sup> (Language used by the Mesagne DIAs.)
111. The Claimants contest Italy’s argument that the DIA Certificates of Conformity from Mesagne were discussed, by way of example, on paragraph 379 of the Award. They submit that the expression “by way of example” has nothing to do with the Tribunal’s reasoning. They contend that it is also plain from paragraph 379 that the “example” was presented by the Tribunal as being offered by the Claimants, not by the Tribunal.<sup>63</sup>
112. They also argue that the expression “they” in the text of the second sentence of paragraph 379 does not refer to the DIAs as contended by the Respondent, but to the Claimants themselves as mentioned in the first sentence, i.e., “The Claimants relied on the DIAs as

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<sup>59</sup> Ibid., para. 52.

<sup>60</sup> Ibid., paras. 53-54.

<sup>61</sup> Reply on Annulment, para. 53, citing Exhibit C-24, DIA Certificates of Conformity, p. 3 of PDF (March 5, 2009-May 21, 2010).

<sup>62</sup> Reply on Annulment, para. 54, citing Exhibit C-24, DIA Certificates of Conformity, p. 1 of PDF.

<sup>63</sup> Reply on Annulment, para. 55. Parenthesis added.

amounting to a definitive authorization for the individual plants. They refer by way of example to a Notice of the Municipality of Mesagne” (the Mesagne DIA Certificates of Conformity). The language of paragraph 379 of the Award, therefore, does not support Italy’s inference that the Tribunal considered not only the Mesagne DIA Certificates of Conformity but must also have reviewed the Brindisi ones.<sup>64</sup> They also contend that it would not be rational to cite them, as an example, when the 48 DIA Certificates of Conformity issued by the municipality of Brindisi were the only ones on which a claim of breach and causation was founded.<sup>65</sup>

113. The Claimants allege that “the wording of paragraph 379 does not support Italy’s suggestion that ‘the tribunal simply wished to stress how the Claimants had conveniently mischaracterized some of the DIAs in their briefing.’”<sup>66</sup> They argue that paragraph 379 refers not to an assertion in the text of any submission by the Claimants but to a chronology of key events provided as an annex, to the Reply, for the convenience of the Tribunal. The entry, in paragraph 379, referred to **Exhibit C-24**, which aggregated five DIA Certificates of Conformity issued by the Mesagne municipality (and the template translation on the first page of the Exhibit) and 48 such certificates issued by the Brindisi municipality (and the template translation on the third page of the Exhibit).<sup>67</sup>
114. The Claimants argue that “[i]t was the Tribunal that in paragraph 379 referred to the template translation of the Mesagne Certificates of Conformity in the exhibit as part of a discussion of causation. ... But it had nothing to do with causation or breach, because the municipality of Mesagne took no action inconsistent with the representations in its DIA Certificates of Conformity and the Claimants never presented a claim based on those representations.”<sup>68</sup>
115. In addition, the Claimants contend that the “Tribunal’s dismissal of that Claim was founded entirely on the Tribunal’s inability to identify in the record a positive representation attributable to the State with respect to the specific investments at issue.”<sup>69</sup>

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<sup>64</sup> Ibid., para. 56.

<sup>65</sup> Ibid., para. 57.

<sup>66</sup> Ibid., para. 58, citing Counter-Memorial on Annulment, para. 44.

<sup>67</sup> Reply on Annulment, para. 59.

<sup>68</sup> Ibid., para. 60.

<sup>69</sup> Ibid., para. 64.

In that regard, the Claimants argue that the second prong of their Legitimate Expectations Claim was based on the indisputably specific representations made concerning the specific investments present in the 48 Brindisi DIA Certificates of Conformity.<sup>70</sup> Thus, the Claimants allege that “[t]he inapposite discussion of the Mesagne DIA Certificates of Conformity in paragraph 379 can be understood only as confirming that the Tribunal missed the template translation of the 48 Brindisi DIA Certificates of Conformity a page later in that exhibit.”<sup>71</sup>

116. The Claimants also contest Italy’s contention that the mention of the Mesagne Certificates, at paragraph 379 of the Award, was an *obiter dictum*. The Claimants submit that *obiter dictum* implies that elsewhere the decision states reasons for the holding around which that *dictum* can orbit. There is no such reasoning as concerns the Legitimate Expectations Claim founded on the 48 Brindisi DIA Certificates of Conformity.<sup>72</sup>
117. Another element on which the Claimants base their argument against the alleged failure of the Tribunal to consider the DIA Certificates of Conformity, issued by the Municipality of Brindisi, is the distinction between an internationally wrongful act and causation. The Claimants argue that an international wrongful act and causation are two different things. These are separate and independent conditions for reparation which cannot be confused with each other.<sup>73</sup> The Claimants submit that considering the expertise of the arbitrators, on this particular subject, it is not possible that they confused the prior notions.<sup>74</sup> That is why, in the Claimants’ view, the only possible explanation for the lack of analysis in the Award of the 48 DIA Certificates of Conformity issued by the Brindisi municipality is that the Tribunal missed them in the record.<sup>75</sup>
118. The Claimants further contend that several consequences flow from the Tribunal’s alleged failure to consider the Brindisi DIA Certificates of Conformity.<sup>76</sup>

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<sup>70</sup> Ibid., para. 65.

<sup>71</sup> Ibid., para. 67.

<sup>72</sup> Ibid., para. 68.

<sup>73</sup> Ibid., para. 70.

<sup>74</sup> Ibid., para. 71.

<sup>75</sup> Ibid., para. 72.

<sup>76</sup> Ibid., para. 4.

119. The Claimants submit that the first conclusion which can be drawn from it is that the Award lacks any analysis of the document.<sup>77</sup> Also, the Claimants recall that Italy noted that in paragraph 379 of the Award, the Tribunal discussed the translation of five different DIA Certificates of Conformity, issued by another municipality, Mesagne. This discussion of different documents appeared in the Award's treatment of causation, not the breach of Article 10(1), second sentence, of the ECT. No claim of breach or causation, however, was ever based on the Mesagne DIA Certificates of Conformity.<sup>78</sup>
120. The second consequence drawn from the Tribunal's alleged failure to consider the Brindisi DIA Certificates of Conformity, according to the Claimants, is that the failure impacted the Tribunal's reasoning regarding the Legitimate Expectations Claim.
121. The Claimants further contend that neither paragraph 379 nor paragraph 165 of the Award considered the DIA Certificates of Conformity issued by the Municipality of Brindisi when adjudicating the Legitimate Expectations Claim. Contrary to what Italy contends regarding the discussion by the Tribunal of the Brindisi DIA Certificates, when rejecting the Legitimate Expectations Claim, the Tribunal merely summarized the Claimants' position in this regard. This is made clear by paragraph 165 of the Award. It reads as follows:

The Claimants allege that the Italian Government made multiple representations 'that the construction of specific plants was "in accordance with the procedures set out in Regional Law n. 31/2008 and with general urban planning instruments."' They also argue that for at least two years after having granted the DIA authorizations, the municipality 'took no step to suggest that it had any doubt about the validity of the authorizations it had granted.' This, in the Claimants' view, amounted to an implicit representation that gave rise to legitimate expectations. The Claimants further contend that Italy represented, in the Second Energy Account, that it would gradually change the level of feed-in tariffs every two years.<sup>79</sup>

122. The Claimants contend that paragraph 165 of the Award does not deal with adjudicating the Legitimate Expectations Claim based on the Brindisi Certificates, for several reasons.

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<sup>77</sup> Ibid., para. 5.

<sup>78</sup> Ibid., para. 6.

<sup>79</sup> Award, para. 165. Footnote omitted.

First, because paragraph 165 is part of Section VI, titled “Positions of the Parties on Liability,” under Heading A titled “the Claimants’ position” and sub-heading (b) titled “Italy’s alleged breach of the fair and equitable treatment standard.”<sup>80</sup> Second, this paragraph includes no review or analysis on the part of the Tribunal itself, but a mere recital of the Claimants’ argument based on **Exhibit C-24**, and in particular on the third page thereof, i.e., the translation of the 48 Brindisi DIA Certificates of Conformity.<sup>81</sup>

123. The Claimants dispute Italy’s contention that Part X of the Award deals with all of the Claimants’ claims on merits, including the Legitimate Expectations Claim in Section B. They submit that Part X, Section B of the Award goes from paragraph 365 to 374, where the Tribunal focused on the Claimants’ position that persons in their position had a Legitimate Expectation that the Third Energy Account would be maintained, for the term envisaged.<sup>82</sup> They contend that the Tribunal only addressed the first prong of the Legitimate Expectations Claim, i.e., the argument that the Claimants had legitimate expectations that the regulatory regime for solar projects would remain stable, in part based on representations made to all potential investors in the Second Energy Account.
124. In view of the foregoing, the Claimants submit that nowhere in Section B of Part X of the Award, did the Tribunal address the second prong of the Claimants’ Legitimate Expectations Claim concerning the representations made by the municipality of Brindisi in the 48 DIA Certificates of Conformity. According to the Claimants, these representations were later violated by the Brindisi stop-work order.<sup>83</sup>

#### **(ii) The Respondent’s Position**

125. The Respondent contends that the first sentence of paragraph 379 is sufficient to reject the Claimants’ alleged reading of the Award. The Tribunal dutifully noted the Claimants’ reliance on the DIAs without limiting its remarks to any subset thereof.<sup>84</sup>

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<sup>80</sup> Reply on Annulment, para. 40. Footnote omitted.

<sup>81</sup> *Ibid.*, para. 41.

<sup>82</sup> *Ibid.*, para. 43.

<sup>83</sup> *Ibid.*, para. 45.

<sup>84</sup> *Ibid.*, para. 39.

126. The Respondent contends that the first sentence of paragraph 379 referred to the DIAs, and in the absence of any indication to the contrary, it is clear that it referred to all of them, including those issued by the municipality of Brindisi.<sup>85</sup>
127. According to the Respondent, after that first sentence, paragraph 379 refers to a Notice of the Municipality of Mesagne, and contains the reasoning, of the Tribunal, “by way of example.” In this vein, the Respondent submits that by definition, such wording cannot be taken as a benchmark of the completeness of the Tribunal’s reasoning.<sup>86</sup>
128. The Respondent contends that the mention of the DIAs issued by the Municipality of Mesagne, by way of example, is only because the Tribunal wished to stress how the Claimants had conveniently mischaracterized some of the DIAs in their briefings.<sup>87</sup>
129. The Respondent contends that the drafting of paragraph 379 of the Award and mainly the mention of DIAs issued by the Municipality of Mesagne by way of example, is nothing more than an *obiter dictum*.<sup>88</sup> It also submits that reference to the Mesagne DIAs did not undermine the Award’s reasoning, much less compromise it.<sup>89</sup>
130. Italy submits that the Claimants, when submitting their reply in the original proceedings, accompanied it with a chronology of key events, indicating, for each listed event, the relevant Exhibit.<sup>90</sup>
131. Italy refers to an entry dated May 21, 2010, where the Claimants referred to the event “The local development companies obtain the 53d [sic] DIA Certificate of Conformity, stating that the construction of the given solar plants was in accordance with the relevant regulations,” and it indicated that the document with all DIAs was a supporting document.<sup>91</sup> Italy asserts that the Claimants clearly referred to all DIAs, issued both by Mesagne and Brindisi, together, as is evidenced by the reference to the total combined number (53) and the Exhibit that contains both.<sup>92</sup> “Yet, according to this entry, these 53

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<sup>85</sup> Ibid., para. 40.

<sup>86</sup> Ibid., para. 41.

<sup>87</sup> Ibid., para. 44.

<sup>88</sup> Ibid., para. 50.

<sup>89</sup> Ibid., para. 51.

<sup>90</sup> Ibid., para. 52.

<sup>91</sup> Ibid., para. 53. Footnote omitted.

<sup>92</sup> Ibid., para. 55.

DIA s stated that the plants were constructed ‘in accordance with the relevant regulations.’”<sup>93</sup>

132. According to the Respondent, the description is wrong as it mischaracterizes the five DIAs issued by the Municipality of Mesagne – which are plainly included in the sample but do not fit the description.<sup>94</sup>
133. Italy contends that the Claimants’ description of Exhibit C-24 glosses over this distinction and that the Claimants conveniently but inaccurately attached all 53 DIAs under the marginally more positive light of the Brindisi DIAs.<sup>95</sup>
134. The Respondent submits that the mistake is also made, for example, in paragraph 446 of the Memorial and paragraph 308 of the Reply, which again referred to the whole set of DIAs as pertaining to the Brindisi municipality and all containing the “in accordance” language, allegedly amounting to an “explicit representation.”<sup>96</sup>
135. Italy contends that the Award’s reference to the DIAs issued by Mesagne highlighted a mistake in the Claimants’ Memorial and Reply and did not suggest nor imply, *a contrario*, that the Tribunal had failed to “consider” or even “read” the DIAs issued by the municipality of Brindisi.<sup>97</sup>
136. The Respondent submits that in its view, “[a]ll DIAs on which the Applicant [sic] allegedly relied were considered by the Tribunal, which found them to be of marginal value – as they did not provide any reassurance as to the Claimants’ plan to receive FITs at a specific rate.”<sup>98</sup>
137. The Respondent notes that in the Claimants’ Reply on Annulment, they took issue with the Respondent’s view that the Tribunal had selected the “example” and maintained that the Tribunal, instead, referred to the “example” selected by the Claimants in their pleadings.<sup>99</sup> The Respondent submits that it “has no trouble accepting this as a possible

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<sup>93</sup> Ibid., para. 56.

<sup>94</sup> Ibid., para. 57.

<sup>95</sup> Ibid., para. 60.

<sup>96</sup> Ibid., para. 61.

<sup>97</sup> Ibid., para. 65.

<sup>98</sup> Ibid., para. 66.

<sup>99</sup> Rejoinder on Annulment, para. 25.

alternative construction: the text of the Award is ambiguous and accommodates both readings. Yet, nothing changes for the purpose of the Claimants' case. According to both constructions, the Tribunal expressly acknowledged that the Mesagne Certificates are a sample selected 'by way of example' from a wider set of documents – most obviously, the entire set collected in document C-24."<sup>100</sup>

138. In addition to the foregoing, the Respondent states that the Tribunal did not miss part of C-24 by referring to the Mesagne documents, as an example. The Tribunal expressly alluded to a wider class to which the Mesagne documents belonged, i.e., the entire class of C-24 documents. It included the Brindisi certificates. "Crucially, since the Brindisi Certificates are the only other documents collected in C-24, the mere mentioning of the Mesagne Certificates by way of example implies – inescapably – awareness of the Brindisi" Certificates.<sup>101</sup> As a consequence of the foregoing, the Respondent contends that "the para-deduction of Claimants (that the Tribunal mentioned the Mesagne Certificates because it had not found the Brindisi ones) is logically untenable, irrespective of whether the Tribunal meant that the "example" had been selected by the Tribunal itself or by the Claimants."<sup>102</sup>
139. The Respondent submits that the Claimants glossed over the Respondent's explanation of why the Tribunal mentioned the Mesagne DIA Certificates at paragraph 379 of the Award. The Tribunal, quite simply, took the opportunity to highlight an inaccuracy in the Claimants' Memorial, when it dismissed the relevance of all certificates in establishing any legitimate expectations. The Respondent submits that the Claimants' pleadings are punctuated with inaccuracies. It quotes from their Reply:

The Municipality of Brindisi explicitly represented on no less than 53 occasions that the construction of specific plants was "in accordance with the procedures set out in the Regional Law n. 31/2008 and with general urban planning instruments.[""]<sup>103</sup>

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<sup>100</sup> Ibid., para. 26.

<sup>101</sup> Ibid., para. 27.

<sup>102</sup> Ibid., para. 28.

<sup>103</sup> Ibid., para. 32 citing Reply, para. 308. The text is almost identical to paragraph 446 of the Memorial: "The Municipality of Brindisi, notably, represented on no less than 53 occasions that the construction of specific plants was 'in accordance with the procedures set out in Regional Law n. 31/2008 and with general urban planning instruments.' See also paragraph 152 of the Memorial and paragraph 101 of the Reply, which mistakenly reported that all 53 DIA Certificates confirmed that the permits were in "accordance with Regional Law n. 31/2008."

140. The Respondent takes issue with this pleading. It submits that this is wrong. Only 48 Brindisi Certificates were submitted with C-24, not 53 or more. Further, not all the 53 Certificates in C-24 are of the “in accordance” kind. Only 48 are. They submit that confusion is caused by the Claimants through C-24. It is not caused by either the Respondent or the Tribunal. Moreover, these statements are misleading. These are designed to favor the Claimants. According to the Respondent they inflate the number of the “in accordance” certificates from 48 to 53. These mistakes, the Respondent submits, call for public rectification.<sup>104</sup>
141. Derived from the foregoing, according to the Respondent, is the fact that the Tribunal picked up on the Claimants’ misstatements. This is in and of itself sufficient evidence that the Tribunal was familiar with the contents of C-24, otherwise, it would have taken the erroneous 53-Brindisi-Certificates and the 53-compliance-certificates stories at face value.<sup>105</sup>
142. The Respondent argues that the Tribunal was aware that the Legitimate Expectations Claim relating to the stop-work order concerned only the Brindisi Certificates. This, according to the Respondent, “emerges from the Tribunal-made interpolation in a quote from the Claimants’ own pleadings.”
- Claimants assert that the stop-work order “was contrary to the very regional law with which [the municipality of Brindisi] had previously certified [the construction of the solar plant’s] compliance.”<sup>106</sup>
143. Italy contends that “the wording chosen by the Tribunal to synthesise the position of the Claimants, and in particular the intervention between square brackets, demonstrate [sic] that the Tribunal was aware of the relevance of the Brindisi Certificates and that the stop-work episode related to them, rather than to the Mesagne Certificates.”<sup>107</sup>
144. Ultimately, Italy argues that “the appearance of the Mesagne Certificates in paragraph 379 of the Award is not an indication of the Tribunal’s negligence, but of the Claimants’ mistakes.”<sup>108</sup>

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<sup>104</sup> Ibid., para. 33.

<sup>105</sup> Ibid., para. 34.

<sup>106</sup> Ibid., para. 35, citing Award, para. 167.

<sup>107</sup> Ibid., para. 36.

<sup>108</sup> Ibid., para. 45.

## VI. OVERVIEW OF THE MATTERS BEFORE THE *AD HOC* COMMITTEE

145. In this annulment proceeding, this Committee must decide upon the Claimants' request for annulment and the Respondent's request to terminate the proceeding. The first task assigned to this Committee was the Application for Annulment. The Committee will, therefore, treat each of these requests in turn.

## VII. GROUNDS FOR ANNULMENT UNDER ARTICLE 52(1) OF THE ICSID CONVENTION

146. The Committee observes that the Claimants raise three grounds for annulment due to the same alleged omission, each ground is different and independent; hence the Committee will analyze each of these three grounds.

### A. Scope of the Annulment

147. This Committee will begin by examining the scope of annulment set out in Article 52 of the ICSID Convention before analyzing the merits of the Application for Annulment.

148. The common elements identified by previous *ad hoc* committees are, *inter alia*, the following:

- The annulment is not an appeal

It bears reiterating that an *ad hoc* committee is not a court of appeal.<sup>109</sup>

It is important to note, at this juncture, that within the ICSID system of Arbitration there is no appeal or any other remedy against an award except those provided for in the CONVENTION.<sup>110</sup>

- The *ad hoc* committee has discretion

An *Ad Hoc* Committee retains a measure of discretion in its ruling on applications for annulment. This is clearly implied in the CONVENTION through the use of terms, such as “manifest,” “serious” and “fundamental”. This discretion is not unlimited and should

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<sup>109</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, para. 64, Legal Authority CL-259 (“*Vivendi P*”). Emphasis added.

<sup>110</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, December 17, 1992, para. 1.14, Legal Authority ARL-29 (“*Amco*”). Emphasis added.

not be exercised to the point of defeating the object and purpose of the remedy of annulment. The Ad Hoc Committee may refuse to exercise its authority to annul an Award if and when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards.<sup>111</sup>

- The task of an *ad hoc* committee is limited

An Ad Hoc Committee, in annulment proceedings, is not entitled to decide which one of several possible interpretations of an annulment decision, among which the Tribunal could choose, was preferable. It has simply to ascertain whether the Tribunal whose award is challenged acted in manifest breach of its competence.<sup>112</sup>

- The *ad hoc* committees have the task to “protect the integrity of the system”

The role of an *ad hoc* committee is to ensure the stability of the ICSID arbitration system, not to overthrow awards because of its disagreement with the arbitral tribunal. Otherwise, the annulment mechanism of Article 52 would slide into an appeal.<sup>113</sup>

149. The exceptional character of annulment proceedings is confirmed by the decision of the *ad hoc* committees. As the Respondent pointed out in “[o]nly 8 times out of the 50 attempts until 2016”<sup>114</sup> was the applicant successful.

## **B. The core element in this Application for Annulment**

150. The fundamental issue raised by the Claimants is that the Tribunal erred by not considering and addressing the 48 DIA Certificates of Conformity issued by the Municipality of Brindisi, contained in Exhibit C-24,<sup>115</sup> when considering the Claimants’

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<sup>111</sup> *Amco*, para. 1.20, Legal Authority ARL-29. Emphasis added.

<sup>112</sup> *Amco*, para. 8.08, Legal Authority ARL-29.

<sup>113</sup> *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee, March 1, 2011, para. 165, Legal Authority CL-267 (“*Duke*”). See also *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, para. 23, Legal Authority CL-261 (“*Soufraki*”).

<sup>114</sup> Counter-Memorial on Annulment, footnote 40.

<sup>115</sup> Exhibit C-24, contains 57 pages. The first is an English non-official translation of a template of the certificates of conformity (DIA) of the municipality of Mesagne. The second page is blank. The third page contains an English non-official translation of a template of the certificates of conformity (DIA) of the municipality of Brindisi. Following, these are 53 numbered pages in Italian. Pages 1 through 47, 49 and 51 through 53 are copies of Italian certificates issued by the Municipality of Brindisi. Pages 48 and 50 are copies of Italian certificates issued by the Municipality of Mesagne.

Legitimate Expectation Claim. Such omission, according to the Claimants, had a direct impact on such claim.<sup>116</sup>

151. In the words of the Claimants, “the question presented is one of the Tribunal failing to consider a key element of a party’s case.”<sup>117</sup> The grounds for Annulment are based precisely on that issue. Accordingly, the first task of this Committee is to determine whether the Award did or did not address the Brindisi DIAs.

152. The second issue argued by Claimants “concerns the impact of the Tribunal’s error on the outcome of the case.”<sup>118</sup> The second issue will arise for consideration only if this Committee concludes that the Brindisi DIAs were not discussed in the Award.

**a. Analysis of the core element**

153. The Claimants acknowledge that the Award described the DIA Certificates of Conformity and their functioning:

- “The DIA procedure is correctly described in Section IV.C.1. of the Award”;<sup>119</sup>
- “the Tribunal correctly understood that the DIA Certificates of Conformity were at the heart of the Claimants’ Legitimate Expectations Claim”;<sup>120</sup>

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<sup>116</sup> “[T]he Tribunal inexplicably failed to consider measures at the heart of one of the claims and on which the other claims relied in important part” (Memorial on Annulment, para. 2); “[t]he omission ... concerns measures central to ... the Legitimate Expectations Claim” (Memorial on Annulment, para. 5); “the Tribunal disregarded the DIA Certificates of Conformity in its analysis of the Legitimate Expectations Claim” (Memorial on Annulment, para. 32); “Yet, surprisingly, the Tribunal did not discuss the DIA Certificates of Conformity *at all* in this section [Section B. Breach of the Fair and Equitable Treatment]. None of the 48 certificates from the municipality of Brindisi or the five certificates from the municipality of Mesagne is mentioned” (Memorial on Annulment, para. 66); “the Award’s shortcomings – fundamentally, its complete failure to deal with the DIA Certificates of Conformity in the section of the Award addressing the Legitimate Expectations Claim” (Memorial on Annulment, para. 100); “It is based on a fundamental procedural mistake made by the Tribunal, i.e. failing to read one-page document central to the second prong of the Claimants’ Legitimate Expectations Claim” (Reply on Annulment, para. 2) “The first and most obvious consequence is that the Award lacks any analysis of the document” (Reply on Annulment, para. 5); “the issue is the Tribunal’s failure to consider a key part of the Claimants’ evidence and, therefore, address a claim based on that evidence” (Reply on Annulment, para. 149); “This case concerns a single failure of an award to address an important claim” (Tr. Day 2, 6:15-16).

<sup>117</sup> Memorial on Annulment, para. 8.

<sup>118</sup> Reply on Annulment, para. 77.

<sup>119</sup> Memorial on Annulment, para. 17, citing the following paragraphs of the Award: 66, 67, 68, and 71.

<sup>120</sup> Memorial on Annulment, para. 30.

- “The Tribunal also correctly understood one of the Claimants’ two bases of its Legitimate Expectations Claim, i.e. the expectations that legitimately arose from the DIA Certificates of Conformity and which were later dashed by measures adopted by the municipality of Brindisi”;<sup>121</sup>
- “The Tribunal therefore correctly recalled, at paragraph 165 of the Award, that:
  - ...the Italian Government made multiple representations ‘that the construction of specific plans was “in accordance with the procedures set out in Regional Law n. 31/2018 and with the general urban planning instruments”’;<sup>122</sup>
- “The Tribunal also correctly referenced in that footnote the Claimants’ factual exhibit upon which they based their assertion, Exhibit C-24”;<sup>123</sup>
- “... the Tribunal again correctly recalled the Claimants’ argument that:
  - [F]or at least two years after having granted the DIA authorisations, the municipality ‘took no step to suggest that it had any doubt about the validity of the authorizations it had granted’;<sup>124</sup>
- “The Tribunal also correctly recalled ... the Claimants’ argument that ‘[t]his, in the Claimants’ view, amounted to an implicit representation that gave rise to legitimate expectations.’”<sup>125</sup>

154. In this Committee’s view, the Tribunal referred to the DIA Certificates issued by the Municipality of Mesagne only as an example of the contents and scope of these Certificates and the promises, if any, incorporated in them. This example does not establish that the Tribunal was either unaware of or failed to consider the Brindisi DIA Certificates. This Committee is of the view that the Tribunal considered the entire class of C-24 documents. It was not required to and did not commit an error by not discussing each DIA Certificate individually. It was not required to divide them so or to discuss them

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<sup>121</sup> Memorial on Annulment, para. 54. The footnote 63 to paragraph 54 references, *inter alia*, to paragraph 165 of the Award which reads as follows: “the Italian Government made multiple representations ‘that the construction of specific plans was “in accordance with the procedures set out in Regional Law n. 31/2018 and with the general urban planning instruments.””

<sup>122</sup> Memorial on Annulment, para. 57.

<sup>123</sup> Memorial on Annulment, para. 58.

<sup>124</sup> Memorial on Annulment, para. 60.

<sup>125</sup> Memorial on Annulment, para. 61.

separately, as suggested by the Claimants. It performed its function adequately by looking at the entire set of documents together and concluding that these could not provide the basis for an award in favor of the Claimants.

155. In light of the above, this Committee is of the view that the DIA Certificates of Conformity and their functioning were addressed in the Award.

156. The above conclusion is also supported by fact that Claimants themselves recognized that “the Tribunal reviewed each of the Claimants’ three separate claims, one by one.”<sup>126</sup>

**b. Structure and functioning of the Award**

157. At the outset, this Committee recognizes that an award is the result of a lengthy process which amalgamates and summarizes many elements. Each piece of the Award is intertwined. For this reason, the Award should be read carefully and holistically. Nothing prevents a tribunal from crafting an award in the manner that such tribunal considers the best way to shed light on the claims and arguments.

**i. Claims under ECT Article 10(1)**

158. Article 10(1) of the ECT states:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

159. Regarding the merits on ECT Article 10(1), the Tribunal, in its Award, stated that the Claimants’ second claim relating to “legitimate expectations argument is thus *a frank*

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<sup>126</sup> Memorial on Annulment, para. 63.

*alternative* to its more nuanced argument based on degree of legislative change,”<sup>127</sup> and that “Claimants present an *alternative* formulation of an Article 10(1) claim based essentially on legitimate expectations.”<sup>128</sup> In this vein, the Award addressed the main issues regarding Article 10 in Section X.A, which is more elaborate than Section X.B. It covered the measures in a broader way, although not in a disconnected fashion, and finally discussed the causation part in Section X.C.

160. The Tribunal saw the second claim as a “more nuanced argument based on degree of legislative claim,”<sup>129</sup> and, based on such reading, considered that it was not necessary to revisit the issue in Section X.B. This understanding of the Tribunal’s reasoning indicates a close relationship between claims under ECT Article 10(1).

161. In Section X.A, The Legal Instability Claim: ECT Article 10(1), subsection 1, The interpretation of Article 10(1), the Tribunal referred to the second sentence of such article:

In effect, as various tribunals have pointed out, the obligation to create stable conditions is conceived as part of the FET standard which is generally applicable to investments by virtue of the second sentence. The Respondent in effect agrees:

the obligation of FET ... already contains the requirements of stability and transparency of the treatment. The FET standard represents the mandatory specification of the general provision contained in the first sentence. On the other hand, it is not clear which state conduct could be considered lawful on the basis of the FET standard and unlawful on the basis of Art. 10.1 first sentence.

162. On the basis that Article 10(1), first and second sentences, of the ECT apply to a ‘legal instability’ claim said to arise in the course of an existing investment, the next question is the scope of the host state’s obligation in that regard.<sup>130</sup>

163. The Tribunal noted that the disputing parties saw such close relationship:

“the Respondent further argues that ‘[i]f it is true that the second sentence [of Article 10(1)] is strictly related to the first, this does not prevent the second sentence from having a different normative force,

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<sup>127</sup> Award, para. 366. Emphasis added.

<sup>128</sup> Award, para. 365. Emphasis added.

<sup>129</sup> Award, para. 366. Emphasis added.

<sup>130</sup> Award, paras. 315-316. Footnotes omitted. Emphasis added.

that is being specifically binding and directly enforceable by the investor.”<sup>131</sup>

164. In Section X.A of the Award, the Tribunal not only addressed the first sentence of Article 10(1), but also addressed other sentences, in particular the second sentence:

(1) The five sentences of Article 10(1) embody commitments towards investments, in accordance with their terms ...

...

(3) But the core commitment is that in the second sentence, expressly included in the first, ‘to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment’ ...<sup>132</sup>

...

In applying to the Romani Decree and the Fourth Energy Account the standard of legal stability incorporated in Article 10(1), first and second sentence, of the ECT (paragraph 319 above).<sup>133</sup>

the fair and equitable treatment standard which, by virtue of the second sentence, is at the core of the obligation of stability under the first sentence has a relatively high threshold.<sup>134</sup>

165. Turning to the core of the Application for Annulment, this Committee observes that the Tribunal analyzed the measures described in a broader manner in the Award (paras. 321 *et seq.*). These are interrelated to broader and more comprehensive measures, i.e. the Constitutional Court Decision, the Romani Decree and the Fourth Energy Account, and the Brindisi stop-work. All these are intertwined and related and/or have an impact on the DIA Certificates of Conformity issued by the Brindisi Municipality.

166. The Claimants argued that the claim regarding the second sentence referred to the construction of the plants and not to the FITs. At paragraph 351 (*et seq.*) of the Award’s Section X.A, the Tribunal refers precisely to the construction:

The Claimants argue that the stop-work order was the final blow to the Project, preventing the construction even of the two projected plants

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<sup>131</sup> Award, footnote 276.

<sup>132</sup> Award, para. 319. Emphasis added.

<sup>133</sup> Award, para. 342. Emphasis added.

<sup>134</sup> Award, para. 363. Emphasis added.

by the deadline laid down in the Fourth Energy Account and thereby ensuring the bankruptcy of the project companies.<sup>135</sup>

167. The Tribunal also analyzed the failure of the Project due to the stop-work episode.<sup>136</sup>

168. The Award addressed the issue of legitimate expectations arising from the DIA:

The Claimants emphasise the due diligence done on the Project, in particular through the Preliminary Due Diligence Report. They go on to assert that '[t]he report identified no particular issue with respect either to the construction and connection authorizations held by the companies ...' But this is not the case: the Preliminary Report focuses perhaps more on this potential problem than any other. Moreover, a due diligence exercise (and this one was avowedly incomplete) is or should be carried out for the client prior to the investment; it does not shift any risk to the state. Nor could it form the basis for a legitimate expectation vis-à-vis the state that the DIA 'authorizations' were secure against challenge.<sup>137</sup>

169. In the opinion of this Committee, these findings relate to the legitimate expectations claim and cover the DIA authorizations issued by the Brindisi as well as the Mesagne municipalities.

170. The Committee is of the view that, as explained above, the Award made a general determination on the claims under Article 10(1). The following quote illustrates the point:

In the Tribunal's view, the Claimants have not discharged the onus of proof of establishing that the Italian state's measures were the operative cause of the Puglia Project's failure. Of far greater weight was the continued dependence on project financing, and the failure to obtain it was due both to the size of the Project and to justified concerns about the scope of DIA authorisation, on which the legality of the Project depended. That being so, the claim under Article 10(1) for loss of the Project would fail in any event.<sup>138</sup>

171. It is noteworthy that the general conclusion covers (1) the claim under Article 10(1), even if this is just a "claim," and not "claims," as suggested. It could be explained in light of

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<sup>135</sup> Award, para. 351. Emphasis added. The subsequent paragraphs of the Award refer to the construction of the plants.

<sup>136</sup> See Award, paras. 358-360.

<sup>137</sup> Award, para. 383. Emphasis added.

<sup>138</sup> Award, para. 394. Emphasis added.

the Tribunal's view, that the second sentence was a "legitimate expectations argument is thus *a frank alternative* to its more nuanced argument based on degree of legislative change";<sup>139</sup> and (2) the DIA authorization scheme either under the Brindisi or Mesagne municipalities.

172. With regard to ECT Article 10(1), the Tribunal developed its analysis in Section C with the Issue of Causation in Part X, *The Merits: The Tribunal's Appreciation*. The first paragraph of this section reads:

Central to the Claimants' case as pleaded under Article 10(1) is a claim of fact - viz., that the real reason for the complete failure of the Project was the legal instability in Italy arising from a series of events ... But even if all (or some of them) constituted breaches of the ECT, if they did not cause the failure of the Project, the Claimants cannot recover.<sup>627</sup>

<sup>627</sup> For the requirement of causation as a condition for a claim of breach of an obligation, see ILC Articles on State Responsibility, 2001, Exhibit CL-4, Art. 31 and commentary.<sup>140</sup>

173. After such introduction, the Tribunal extensively analyzed the DIA Certificates of Conformity in Section X.C.

### c. Conclusion

174. The Committee in *TECO* correctly recognized that "a tribunal cannot be required to address within its award each and every piece of evidence,"<sup>141</sup> and the Committee in *Suez* found that "it is not for an *ad hoc* committee ... to determine whether the Tribunal assessed each and every piece of evidence that the Parties considered relevant to their case."<sup>142</sup> Finally, in the context of the subparagraph (e) of Article 51 the Committee in *Enron* observed that:

... the tribunal is required only to give reasons for its decision in respect of each of the *questions*. This requires the tribunal to state its pertinent

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<sup>139</sup> Award, para. 366. Emphasis added.

<sup>140</sup> Award, para. 375.

<sup>141</sup> *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016, para. 131, Legal Authority CL-272 ("*TECO*").

<sup>142</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment, May 5, 2017, para. 299, Legal Authority CL-284 ("*Suez*"). Emphasis added.

findings of fact, its pertinent findings as to the applicable legal principles, and its conclusions in respect of the application of the law to the facts. If the tribunal has done this, the award will not be annulled on the basis that the tribunal could have given more detailed reasons and analysis for its findings of fact or law, or that the tribunal did not expressly state its evaluation in respect to each individual item of evidence or each individual legal authority or legal provision relied upon by the parties, or

did not expressly state a view on every single legal and factual issue raised by the parties in the course of the proceedings. The tribunal is required to state reasons for its *decision*, but not necessarily reasons for its *reasons*.<sup>143</sup>

175. The Tribunal, in this case, addressed Exhibit C-24 as mentioned *supra*. The Claimants' complaint is not that the Award did not address it but that the Award did not address it in the section the Claimants consider more appropriate.
176. This Committee finds that the Award analyzed the claims and the evidence – including Exhibit C-24 – in a coherent and not in a segmented manner. The Tribunal did not omit consideration of any issue or any material evidence although the measures alleged to be contrary to the ECT Article 10(1) were interrelated, contained different pieces and some of them operated in an integrated manner. The complete analysis is developed in Part X of the Award through its three different Sections.
177. In the view of the Committee, the Claimants' complaint is in essence not about an omission to consider pivotal evidence but about the weight the Tribunal gave to such evidence, i.e., Exhibit C-24.<sup>144</sup>
178. In view of the above discussion, the answer to the question – whether the Tribunal has considered a key element of a party's case, i.e., 48 DIA Certificates of Conformity – is in the affirmative'. This Committee will, therefore, now turn to address each of the grounds of annulment.

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<sup>143</sup> *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010, para. 222, Legal Authority CL-265 (“*Enron*”). Emphasis added.

<sup>144</sup> See for example Counter-Memorial on Annulment, para. 163 (“What transpires from the Award, if anything, is the Tribunal's lack of conviction regarding the alleged value of the DIAs issued from the municipality of Brindisi”); para. 193 (“Claimants, in their submissions, invoke instead a (very much alleged) error *in iudicando*. They asserted that the Tribunal has mistakenly given insufficient weight to the Brindisi DIAs.”)

### C. Article 52(1)(e): The Tribunal Failed to State Reasons on Which the Award is Based

#### (i) The Claimants' Position

179. The Claimants begin by addressing the legal standards applicable to Annulment under Article 52(1)(e) of the ICSID Convention. According to them Article 48(3) of the ICSID Convention provides that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.” They submit that a violation of this duty is a ground for annulment of the award.<sup>145</sup>
180. The Claimants argue that this ground for annulment is designed to protect “*the integrity of the award*— meaning that the reasoning presented in the award should be coherent and not contradictory, so as to be understandable by the Parties and must reasonably support the solution adopted by the tribunal (Article 52(1)(e)).”<sup>146</sup>
181. In support of the legal standard applicable to Annulment under Article 52(1)(e) of the ICSID Convention, the Claimants cite the *TECO ad hoc* Committee, as follows:
- [T]he requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law.<sup>147</sup>
182. The Claimants also cite *CMS*, where the *ad hoc* committee annulled part of the award in light of the “significant lacuna” in the award on a specific point, i.e., how the claimant was entitled to bring a claim under a contract to which it was not a party by virtue of an

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<sup>145</sup> Memorial on Annulment, para. 76.

<sup>146</sup> *Ibid.*, para. 77, citing *Soufraki*, para. 23, Legal Authority CL-261.

<sup>147</sup> *Ibid.*, para. 78, citing *Maritime Int'l Nominees Establishment (MINE) v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, December 14, 1989, para. 5.09, Legal Authority CL-257 (“*MINE*”). See also *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000 in the Above Matter, February 5, 2002, para. 81, Legal Authority CL-258 (“*Wena Hotels*”) (“Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal’s reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal’s reasoning.”); *TECO*, para. 87, Legal Authority CL-272 (“[A]nnulment of an award for failure to state reasons can only occur when a tribunal has failed to set out the considerations which underpinned its decision in a manner that can be understood and followed by a reader.”).

umbrella clause. The award made it “impossible for the reader to follow the reasoning on this point.”<sup>148</sup>

183. They also cite part of the reasoning of *Wena Hotels ad hoc* Committee, in this regard. The *ad hoc* committee, in that case, decided that annulment will be justified if “the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case.”<sup>149</sup>

184. The Claimants also cite another part of the reasoning of the *TECO ad hoc* Committee, where that Committee partially annulled the award on the ground of Article 52(1)(e) of the ICSID Convention. The *TECO* Committee took “issue with the complete absence of any discussion of the Parties’ expert reports within the Tribunal’s analysis of the loss of value claim.” In the *TECO* Committee’s words:

While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory.<sup>150</sup>

185. The Claimants contend that as a consequence of the foregoing “[a] tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case[.]”<sup>151</sup>

186. After setting out the legal standards applicable to annulment under Article 52(1)(e) of the ICSID Conventions, the Claimants apply those legal standards to the Award in this case.<sup>152</sup>

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<sup>148</sup> Memorial on Annulment, para. 79, citing *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007, para. 97, Legal Authority CL-263 (“*CMS*”). See also *Soufraki*, para. 122, Legal Authority CL-261 (“[E]ven short of a total failure [to state reasons], some defects in the statement of reasons could give rise to annulment.”). See also *Enron*, para. 384, Legal Authority CL-265.

<sup>149</sup> *Ibid.*, para. 80, citing *TECO*, para. 135, Legal Authority CL-272. Emphasis added.

<sup>150</sup> Memorial on Annulment, para. 81, citing *ibid.*, para. 137 (“The Committee is therefore left guessing as to the Tribunal’s actual line of reasoning, which cannot be ascertained from the rest of the Tribunal’s analysis either.”); *Ibid.*, para. 131. See also *ibid.*, para. 130 (“[T]he Tribunal did not discuss *at all* the Parties’ respective expert reports ...”). Emphasis in original.

<sup>151</sup> Memorial on Annulment, para. 82. Footnote omitted.

<sup>152</sup> *Ibid.*, para. 98.

187. The Claimants allege that nowhere did the Tribunal address the DIA Certificates issued by the Municipality of Brindisi in its analysis of the Claimants' Legitimate Expectations Claim. As such, the Tribunal failed to state reasons on which the Award is based. The following arguments are advanced by the Claimants to support this contention.
1. The Tribunal Nowhere Addressed the Certificates of Conformity in Its Analysis of the Claimants' Legitimate Expectations Claim and, as Such, Failed to State Any Reasons for Dismissing This Claim<sup>153</sup>
188. They argue that in Section X.B of the Award, entitled "Breach of the Fair and Equitable Treatment Standard: ECT Article 10(1), second sentence (legitimate expectations)," the Tribunal didn't address the DIA Certificates of Conformity that appeared at Exhibit C-24 either.<sup>154</sup> The only question the Tribunal addressed in Section X.B of the Award is whether the Claimants had a legitimate expectation that the Third Energy Account "would be maintained for the term envisaged."<sup>155</sup>
189. The Claimants recalled that their Legitimate Expectations Claim was divided into two prongs. The first prong related to legitimate expectations based on the Third Energy Account, while the second prong related to legitimate expectations based on the DIA Certificates of Conformity issued by Brindisi. They also recalled that the Tribunal correctly understood the difference between the two prongs of the Claimants' Legitimate Expectations Claim and had no confusion about them.<sup>156</sup>
190. The Claimants contend that "focusing on the Third Energy Account to the exclusion of the DIA Certificates of Conformity led the Tribunal to make findings regarding the lack of 'specificity' vis-à-vis any given investor of a decree of general application such as the Third Energy Account. The Tribunal contrasted it with the specificity required, in its view, for a finding of breach of representations made to investors, creating legitimate expectations, in the context of Article 10(1), second sentence, of the ECT."<sup>157</sup>

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<sup>153</sup> Ibid., para. 101, citing See e.g., Award, para.165 & n. 257 (citing among others Exhibit C-24) (Tab A).

<sup>154</sup> Ibid., para. 102, citing Award paras. 365-74 (Tab A).

<sup>155</sup> Memorial on Annulment, para. 103, citing Ibid., para. 365 (Tab A).

<sup>156</sup> Memorial on Annulment, para. 104. Footnote omitted.

<sup>157</sup> Memorial on Annulment, para. 105, citing See Award, paras. 365-74 (Tab A).

191. As a consequence of the findings of the Tribunal regarding the lack of specificity, the Claimants contend that “[h]ad the Tribunal analyzed the 48 DIA Certificates of Conformity from the municipality of Brindisi as part of its adjudication of the Legitimate Expectations Claim – which it had implicitly announced it would do, because it had correctly recalled the Claimants’ argument in respect of this claim – the Tribunal would necessarily have observed that these DIA Certificates of Conformity could hardly be more specific to the Claimants’ investments, because the only topic each DIA Certificate of Conformity addressed was the construction of a particular solar plant (which the Claimants were to finance) on a specific parcel of land (which the Claimants acquired).”<sup>158</sup>
192. They argue that they had anticipated this situation, so they addressed it as part of their closing submissions at the hearing, highlighting the fact that Italy made “specific” commitments.<sup>159</sup> However, the Claimants argue that the analysis of the specific representation in the DIA Certificates of Conformity, which would logically follow from the Tribunal’s approach to “specificity,” is completely absent in the Award, and without any reason.
193. The Claimants contend that as a consequence of the foregoing, the Tribunal omitted to review and, thus, to adjudicate the Claimants’ Legitimate Expectations Claim, to the extent, that this claim related to the DIA Certificates of Conformity.<sup>160</sup> They contend that “such omission had a direct bearing on the outcome of the case, given that those certificates contained specific representations by the municipality of Brindisi, on which the Claimants relied in making the bulk of their investment, and which the municipality subsequently reneged on (when initiating the self-redress proceedings and adopting the stop-work order).”<sup>161</sup>
194. The Claimants contest Italy’s argument that the Tribunal addressed the DIA Certificates of Conformity from Brindisi when rejecting the Legitimate Expectations Claim.

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<sup>158</sup> Memorial on Annulment, para. 106.

<sup>159</sup> Ibid., para. 107, citing Claimants’ Closing Statement, which can be found at Tab M of the procedural documents from the arbitration.

<sup>160</sup> Memorial on Annulment, para. 110.

<sup>161</sup> Ibid., para. 111.

195. The Claimants allege that the Tribunal solely focused on the first page of the PDF of **Exhibit C-24**, which is a template translation of the five Certificates of Conformity, issued by the municipality of Mesagne. According to them, “the Tribunal completely failed to consider the 48 Certificates of Conformity issued by the municipality of Brindisi, and their template translation displayed on the third page of the PDF of **Exhibit C-24**.”<sup>162</sup>
196. The Claimants contend that “three aspects of the record place this omission into context. First, the vast majority of the plants in the Claimants’ project, were located in Brindisi, and **Exhibit C-24** primarily consisted of the 48 certificates from the municipality of Brindisi reproduced in that exhibit.”<sup>163</sup> “Second, only the municipality of Brindisi adopted measures culminating in the stop-work order that violated the expectations that had legitimately arisen from the Certificates of Conformity issued by that municipality. The municipality of Mesagne at no point questioned the validity of the construction permits it had granted, and the Legitimate Expectations Claim addressed only measures by the municipality of Brindisi, not Mesagne.”<sup>164</sup> “Third, the texts of the Certificates of Conformity issued by the respective municipalities were different,”<sup>165</sup> as noted before.<sup>166</sup> “The Tribunal correctly observed that the Mesagne municipality’s certificates did not contain the key text found in the Brindisi municipality’s certificates that the Claimants relied on in making their investment and repeatedly quoted in their submissions. However, that observation is of no consequence because only the municipality of Brindisi was alleged to have contradicted explicit representations by adopting measures diametrically opposed to the specific representations made in the certificates it had issued.”<sup>167</sup>
197. The Claimants further contend that “[t]he Tribunal not only did not address the 48 DIA Certificates of Conformity issued by the Municipality of Brindisi prominently featuring in **Exhibit C-24** but it also failed to state any reasons for disregarding them. It appears that the Tribunal only read the first page of a 53-page long exhibit, as if the exhibit had

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<sup>162</sup> Ibid., para. 114.

<sup>163</sup> Ibid., para. 115.

<sup>164</sup> Ibid., para. 116.

<sup>165</sup> Ibid., para. 117.

<sup>166</sup> See *supra* para. 119.

<sup>167</sup> Memorial on Annulment, para. 117.

included only one template translation of the DIA Certificates of Conformity issued by the municipality of Mesagne on page 1 of the PDF and not a second page consisting in the template translation of the municipality of Brindisi on page 3 of the PDF.”<sup>168</sup>

198. The Claimants contend that they “have discharged their burden of proof based on Article 52(1)(d), because it is plain that the Tribunal implicitly announced at paragraph 165 of the Award that the question of the 48 DIA Certificates of Conformity issued by the Brindisi municipality was important for the Claimants and for the Tribunal itself. Yet, the Tribunal nowhere analyzes, in the Award, the 48 DIA Certificates of Conformity issued by the Brindisi municipality and on which the second prong of the Legitimate Expectations Claim was based.”<sup>169</sup>
199. The Claimants also submit that because of the evidence overlooked by the Tribunal, it is impossible to follow the Tribunal’s reasoning “from Point A to Point B” to recall the standard of the *MINE ad hoc* committee.<sup>170</sup>
200. The Claimants argue that “Italy misses the mark with its separate assertion that [a] tribunal’s failure to address a specific question does not render the resulting award annulable as such.”<sup>171</sup> Furthermore, the Claimants contend that by doing so, Italy relies on the history of the ICSID Convention and the fact that “the ICSID Convention provides another remedy where a Tribunal fails to address a question: the dissatisfied party may request that the same Tribunal issue a supplementary decision [under Article 49(2) of the ICSID Convention] concerning the question not addressed.”<sup>172</sup>
201. Regarding the remedy of supplementary decision, the Claimants submit that “ICSID jurisprudence has rejected the notion that Article 49(2)’s provision for a supplemental decision provides the exclusive remedy, or a remedy that must be exhausted, when an award fails to address a question. Summarizing this jurisprudence, Schreuer, Malintoppi, Reinisch and Sinclair state in their treatise on ICSID practice as follows:

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<sup>168</sup> Ibid., para. 118.

<sup>169</sup> Reply on Annulment, para. 153.

<sup>170</sup> Ibid., para. 154, citing *MINE*, para. 5.09, Legal Authority CL-257; Memorial on Annulment, paras. 78, 101-121.

<sup>171</sup> Reply on Annulment, para. 155, citing Counter-Memorial on Annulment, para. 88. Footnote omitted.

<sup>172</sup> Reply on Annulment, para. 156, citing ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016, para. 103, Legal Authority ARL-19. Footnote omitted.

This case law on Art. 49(2) confirms the limited relevance of the remedy of supplementation. It is useful for unintentional omissions of a technical nature ... It is not a sufficient remedy for a failure to address major facts and arguments which go to the core of the tribunal's decision. In the latter case, a party must seek annulment if it can demonstrate one of the grounds listed in Art. 52(1). The *Wena Hotels* Committee observed that 'the ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award.' In that case a prior exhaustion of the lesser remedy of supplementation under Art. 49(2) is not necessary."<sup>173</sup>

202. The Claimants argue that the problem in this case is different. It is that the Tribunal failed to review the 48 DIA Certificates of Conformity issued by the Brindisi municipality. This was in spite of the fact, according to the Claimants, that the Tribunal had itself implicitly announced, in paragraph 165, that it would review these to properly adjudicate the second prong of the Claimants' Legitimate Expectations Claim.<sup>174</sup> As a consequence, they claim, that the problem in the present case is not simply that the Tribunal failed to address "a question," which was one among many other questions.<sup>175</sup> According to the Claimants, the question that the Tribunal failed to address, that of the 48 Brindisi DIA Certificates of Conformity, was the only question that was at the heart of the second prong of the Claimants' Legitimate Expectations Claim.<sup>176</sup> They also submit that the Tribunal also did not fail to address that question because it deemed it unimportant or irrelevant. It is clear from paragraph 165 of the Award, among others, that the Tribunal realized that this question was important. It simply failed to address it in the Award because it failed to locate in the record, the template translation of the 48 DIA Certificates of Conformity issued by the municipality of Brindisi at the third page of the PDF in Exhibit C-24.<sup>177</sup>
203. The Claimants note that the ICSID Background Paper on Annulment (the "**Background Paper**") cites the *TECO* annulment decision's finding that "the failure to address certain evidence relevant to the determination of damages amounted to a failure to state the

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<sup>173</sup> Reply on Annulment, para. 157, citing Christoph H. Schreuer et al., *The ICSID Convention—A Commentary*, p. 864, Legal Authority CL-279 (quoting *Wena Hotels*, para. 101, Legal Authority CL-258). Footnote omitted.

<sup>174</sup> Reply on Annulment, para. 159.

<sup>175</sup> *Ibid.*, para. 160.

<sup>176</sup> *Ibid.*, para. 161.

<sup>177</sup> *Ibid.*, para. 162.

reasons.” They submit that “Italy itself draws the Committee’s attention to this decision, noting that the award in that case was partially annulled because ‘the tribunal had not explained why it had bypassed and substantially ignored the evidence provided by the parties about [a specific] claim.’”<sup>178</sup>

204. The Claimants argue that “the Tribunal failed to explain why it ‘bypassed’ and ‘substantially ignored the evidence’ provided at the third page of Exhibit C-24 (i.e., the 48 Brindisi DIA Certificates of Conformity).”<sup>179</sup>

205. The Claimants allege that because of all of these arguments, the Tribunal’s omissions rendered its reasoning on the Legitimate Expectations Claim impossible to understand. That “[i]n sum, the absence of any analysis of the DIA Certificates of Conformity in the section of the Award addressing the Legitimate Expectations Claim, and the failure to deal with the relevant DIA Certificates of Conformity (those of Brindisi) reproduced in **Exhibit C-24** in the Award’s section on causation, is a failure to state reasons. It follows that the Award should be annulled pursuant to Article 52(1)(e) of the ICSID Convention.”<sup>180</sup>

## (ii) The Respondent’s Position

206. The Respondent begins by addressing the Legal Standards. It cites *MINE*:

the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e) [Article 52], because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal’s decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention.<sup>181</sup>

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<sup>178</sup> Ibid., para. 164, citing *TECO*, paras. 123-139, Legal Authority CL-272; see Counter-Memorial on Annulment, paras. 90-92.

<sup>179</sup> Reply on Annulment, para. 165.

<sup>180</sup> Memorial on Annulment, para. 120.

<sup>181</sup> Counter-Memorial on Annulment, para. 78.

207. The Respondent argues that an award warrants annulment if it does not enable the reader to follow and understand its reasoning.<sup>182</sup>
208. The Respondent contends that “the Applicant [sic] 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.”<sup>183</sup> A “tribunal’s failure to address a specific question does not render the resulting award annulable as such.”<sup>184</sup>
209. The Respondent notes that “certain committees have considered an award annulable if the question overlooked was critical to the outcome of the case.”<sup>185</sup> “In one case, the *ad hoc* committee commented on the award’s failure to discuss several pieces of evidence submitted by the parties in the calculation of damages.”<sup>186</sup> “The committee, in the *TECO v. Guatemala* case, noted that the tribunal’s claims that the evidence was either insufficient or missing altogether were factually wrong, since the parties had made several submissions that the tribunal failed to mention.”<sup>187</sup> “Ultimately, it annulled the tribunal’s determination of a claim regarding the loss of value of the investment, as the tribunal had not explained why it had bypassed and substantially ignored the evidence provided by the parties about that claim.”<sup>188</sup>
210. The Respondent contends also “that the absence of reasons must be critical, that is, it must affect the outcome of the case:

even where an absence of reasons is found, in order for a failure to state reasons to justify an annulment, the error must relate to an issue that was outcome-determinative.”<sup>189</sup>

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<sup>182</sup> Ibid., para. 82, citing *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, February 1, 2016, para. 264, Legal Authority ARL-03; *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Decision on Request for Annulment, February 2, 2018, para. 282, Legal Authority ARL-02.

<sup>183</sup> Counter-Memorial on Annulment, para. 87, citing *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014, para. 202, Legal Authority ARL-16 (“*Alapli*”).

<sup>184</sup> Counter-Memorial on Annulment, para. 88.

<sup>185</sup> Ibid., para. 89.

<sup>186</sup> Ibid., para. 90, citing *TECO*, paras. 123-139, Legal Authority CL-272.

<sup>187</sup> Counter-Memorial on Annulment, para. 91, citing *TECO*, see in particular paras. 130-134, Legal Authority CL-272.

<sup>188</sup> Ibid., para. 92, citing *TECO*, para. 139, Legal Authority CL-272.

<sup>189</sup> Ibid., para. 93, citing *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Poštová banka’s Application for the Partial Annulment of the Award, September 29, 2016, para. 143, Legal Authority ARL-18 (“*Poštová banka*”). See also *Alapli*, para. 202, Legal Authority ARL-16; *Vivendi I*, para. 65, Legal Authority CL-259; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15,

211. Furthermore, the Respondent contends that “an annulable award must have a *non sequitur* that affects its operative part. Conversely, a logical gap or flaw that affects an *obiter dictum* cannot by definition give rise to annulment.”<sup>190</sup>
212. The Respondent notes that “the Claimants’ entire challenge hinges on the alleged failure by the Tribunal to give weight to the Brindisi DIAs, while rejecting the Legitimate Expectations Claim.”<sup>191</sup> The Award, however, tells a different story, one which, according to the Respondent, is quite simple to understand.<sup>192</sup>
213. The Respondent submits that Article 52(1)(e) of the ICSID Convention requires that the conclusion of the Tribunal on a specific question is impossible to square with its supporting reasons.<sup>193</sup> It submits that, “therefore, it is worth starting from the Tribunal’s conclusions on the Article 10(1) ECT claims, including the Legitimate Expectations Claim.”<sup>194</sup> One is provided at paragraph 380 of the Award: the “Absence of Legitimate Expectations” conclusion. The other is provided at paragraph 394: the “Absence of Causation” conclusion.<sup>195</sup>
214. The Respondent submits that the Tribunal explained why the Legitimate Expectations Claim did not stand in light of the fact that the Claimants never received any reassurance that they would benefit from the FITs at any specific rate. The DIAs clearly could not fulfil that function.<sup>196</sup>
215. In addition, Italy contends that “immediately after referring to the Claimants’ alleged reliance on the DIAs, the Tribunal cut to the bone of the Legitimate Expectations Claim:

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Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 22, 2014, para. 169, Legal Authority ARL-06 (“*El Paso* Decision on Annulment”); *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, para. 81, Legal Authority ARL-17; *Wena Hotels*, para. 58, Legal Authority CL-258.

<sup>190</sup> Counter-Memorial on Annulment, para. 94.

<sup>191</sup> *Ibid.*, para. 95.

<sup>192</sup> *Ibid.*, para. 98.

<sup>193</sup> *Ibid.*, para. 99.

<sup>194</sup> *Ibid.*, para. 100.

<sup>195</sup> *Ibid.*, para. 101.

<sup>196</sup> *Ibid.*, para. 102, citing Award, para. 380.

[a]t no stage did the Claimants obtain unconditional assurances from the central Government as to their plants' entitlement to FITs, or to the level of such FITs.<sup>197</sup>

216. The Respondent, in support of this contention, argues that “the Claimants had only suffered from a very circumscribed incident with respect to the exercise of that right: the stop-work order that, in January 2012, blocked the construction works for two days with respect to two plants.” These were two plants out of 120 that were never even commenced.<sup>198</sup> According to the Respondent, thus, “the Claimants’ assertion advanced in the Memorial that Italy’s actions relating to the two plants in Brindisi ‘frustrated the project in its entirety’ is ostensibly an exaggeration.”<sup>199</sup>
217. The Respondent recalls that “the Tribunal attributed the failure of the Claimants’ project to its inherent financial and regulatory risks. The dubious legality of the DIAs was one of them: the risk was ultimately overcome, but could not be discounted or minimised. The Claimants could not harbor a legitimate expectation that there would be no glitch in that regard.”<sup>200</sup> Italy further contends that these regulatory risks, when they surfaced, were effectively overcome by the efficient system of judicial review administered by the Italian courts. The Claimants, according to the Respondent, suffered what was perhaps a minor setback in the construction schedule. The Respondent submits that the Claimants’ expectation that construction would steer clear of any minor bump in the road was not legitimate. The more plausible expectation of having the right to build the plants was indeed met by Italy’s actions.<sup>201</sup>
218. The Respondent recalls that the Claimants criticized the Tribunal’s reading of the due diligence report, which they said would have been more approving had the arbitrators considered the Brindisi DIA Certificates, as the Claimants’ consultants had when they prepared it.<sup>202</sup>
219. The Respondent contends that “the zoom-in on the due diligence report deliberately neglected to mention that both the Brindisi Certificates and the due diligence report had

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<sup>197</sup> Ibid., para. 103; and Award paras. 379-380.

<sup>198</sup> Ibid., para. 105.

<sup>199</sup> Ibid., para. 106, citing Memorial, para. 452.

<sup>200</sup> Rejoinder on Annulment, para. 54.

<sup>201</sup> Ibid., para. 55.

<sup>202</sup> Ibid., para. 60, citing Reply on Annulment, para. 83.

been submitted to several potential funders, partners and lenders, all of which gave the Claimants a cold shoulder. In other words,” Italy submits, “if really the combination of the Brindisi Certificates and the subsequent due diligence report should have dispelled all regulatory risks – something that the Claimants asserted – it becomes inexplicable why the construction project attracted no interest.” According to Italy, “the Claimants found themselves trying to build a tiny portion of the project without external funding, in a last ditch-effort to avoid the application of Romani Decree to their plans. This scenario does not speak highly of the project’s popularity and the Tribunal’s alleged failure to read the Brindisi Certificates, therefore, had nothing to do with it.”<sup>203</sup>

220. Now, regarding the stop-work order, which in the Claimants’ views was the final blow to the project,<sup>204</sup> the Respondent cites a part of the reasoning of the Tribunal in this regard, which is as follows:

In the Tribunal’s view, the stop-work episode did not involve any breach of the ECT. Nor (for that matter) was it a function of ‘legal instability.’ ...<sup>205</sup>

221. In addition, the Respondent submits that “[e]vidently, the Tribunal recognised that the stop-work order’s illegality under Italian law was remedied quickly and effectively and could not give rise to any ECT breach. The Claimants’ entire fantasy about the ‘smoking gun’ effect of the Brindisi Certificates cannot be entertained [for] it boils down to a simple refusal to accept that the Tribunal attributed to them a much lower evidentiary weight than the Claimants would now want them to have.”<sup>206</sup>
222. Italy notes that another of the Claimants’ arguments, in favor of the importance of the DIA Certificates of Conformity from Brindisi for their Legitimate Expectations Claim, is related to land use regulations. On this particular subject, the Respondent alleges that after the Tribunal rejected the Legitimate Expectations Claim stating that the Claimants had no legitimate expectations in the FITs that phased out prematurely,<sup>207</sup> the Claimants attempted to divert attention away from this bleak but plain conclusion by asserting that

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<sup>203</sup> Rejoinder on Annulment, para. 62.

<sup>204</sup> Ibid., para. 64.

<sup>205</sup> Ibid., para. 64, citing Award para. 357. Footnotes omitted.

<sup>206</sup> Ibid., para. 66.

<sup>207</sup> Ibid., para. 68. Footnote omitted.

the object of their expectations was not the access to a specific rate of FITs, but the more liberal regime of use of agricultural land that prevailed before the limitations imposed by Romani Decree entered into effect.<sup>208</sup>

223. In support of its contention, Italy cites the following excerpt from the Claimants' Reply on merits:

the Municipality's stop-work orders frustrated the Claimants' legitimate expectations. ... The temporary suspension of the stop-work orders by the President of the Administrative Court did not change this state of affairs. ...*Such decision came too late for the project to be completed on time to qualify for feed-in tariffs. ...*<sup>209</sup>

224. The Respondent cites another excerpt from the Claimants' Memorial in support of their contention, which states as follows:

the Claimants made substantial investments only after they had prepared a business plan on the basis of the Third Energy Account's feed-in tariffs and established that the project was attractive based on those tariffs.<sup>210</sup>

225. In addition, the Respondent argues that stressing the link between the reassuring function of Brindisi Certificates and the goal to accede Conto Energia III, the Claimants synthesized their Legitimate Expectations Claim as follows:

The Claimants committed the bulk of their funds only after Watson Farley had conducted a due diligence review of the authorizations for the plants [which included the Brindisi Certificates]. That due diligence was based in substantial part on the representations made by the Municipality that the construction of the plants was authorized in accordance with regional law, and the absence of any objection by the Municipality or anyone else to the plants' construction. Similarly, the Claimants made substantial investments only after they had prepared a business plan on the basis of the Third Energy Account's feed-in tariffs and established that the project was attractive based on those tariffs.<sup>211</sup>

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<sup>208</sup> Ibid., para. 69.

<sup>209</sup> Ibid., para. 70, citing Reply on Annulment, para. 318. Emphasis added. The entire paragraph does not mention the land requirements.

<sup>210</sup> Rejoinder on Annulment, para. 72, citing Memorial, paras. 438 to 454, labelled "Italy Frustrated Legitimate Expectations and Failed to Accord Fair and Equitable Treatment."

<sup>211</sup> Rejoinder on Annulment, para. 73, citing Memorial, para. 449.

226. The Respondent submits that zoning restrictions, established under Romani Decree, were discussed in another section of the claim, under Article 10(1) ECT, i.e., the one relating to Italy's alleged failure to provide stable conditions for investors. That, according to the Respondent, is an altogether different claim from the Legitimate Expectations claim. The Tribunal also dismissed this claim. That dismissal, according to the Respondent, is not before this Committee.<sup>212</sup>
227. The Respondent also submits that the fate of the two plants in Brindisi amounts to a tiny fraction of the Claimants' project, the only one that they could attempt to carry out after coming to terms with the inability to secure external funding.<sup>213</sup>
228. The Respondent contends that "even if the DIAs from Brindisi had been neglected, and even if they were capable of creating certain specific legitimate expectations, these expectations would concern only and exclusively the right to build plants."<sup>214</sup> "The Claimants' Legitimate Expectations claim concerned instead the access to a specific generation of FITs." According to Italy, "[i]t was therefore natural for the Tribunal to briefly dispose of the DIAs argument as it bore little relevance to the core of the claim."<sup>215</sup>
229. The Respondent recalls that the Claimants "remarked without ambiguity that the uncertainty over the right to build the plants, caused by the stop-work order, was only challenged insofar as it disrupted their rushed attempt to meet the deadline for a specific generation of FITs:

The Regional Administrative Tribunal annulled the stop-work order as an illegal excess of authority. But the damage to the Claimants' investments was already done. No part of the project could be completed before the deadline imposed by the Romani Decree of 29 March 2012.<sup>216</sup>

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<sup>212</sup> Ibid., para. 74.

<sup>213</sup> Counter-Memorial on Annulment, para. 107.

<sup>214</sup> Ibid., para. 108.

<sup>215</sup> Ibid., para. 109.

<sup>216</sup> Ibid., para. 111, citing Memorial, para. 452. Footnotes omitted. Emphasis added.

230. The Respondent contends that when the Tribunal discarded the assertion that the Claimants had any expectations, relating to FITs, that was worth protecting, the stop-work order episode and the relevance of the DIAs was ultimately considered irrelevant.<sup>217</sup>
231. Italy also submits that in the Award, the Tribunal also explained a second reason why the Legitimate Expectations Claim could not succeed.<sup>218</sup> It recalls that the Tribunal noted that the Legitimate Expectations Claim would fail “in any event.”<sup>219</sup> “The Tribunal explained that, even if – hypothetically – Italy had generated some legitimate expectations in the Claimants, and even if it had frustrated them by its subsequent actions, there was no causal link between such frustration and the Claimants’ business’ demise.”<sup>220</sup>
232. In support of the foregoing, Italy cites part of the Tribunal’s reasoning regarding causation, as follows:

In the Tribunal’s view, the Claimants did not discharge the onus of proof of establishing that the Italian state’s measures were the operative cause of the Puglia Project’s failure. Of far greater weight was the continued dependence on project financing, and the failure to obtain it was due both to the size of the Project and to justified concerns about the scope of DIA authorisation, on which the legality of the Project depended. That being so, the claim under Article 10(1) for loss of the Project would fail in any event.<sup>221</sup>

233. The Respondent also recalls that, thus, the Tribunal considered that a claim could not be upheld without causation, irrespective of any *prima facie* conduct contradicting an international obligation:

... even if all (or some of [Italy’s actions]) constituted breaches of the ECT, if they did not cause the failure of the Project, the Claimants cannot recover.<sup>222</sup>

234. The Respondent contends that the reasons why DIAs did not matter in the end are explained in paragraphs 379 and 380 of the Award. These, simply put, are that the

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<sup>217</sup> Counter-Memorial on Annulment, para. 115.

<sup>218</sup> Ibid., para. 116.

<sup>219</sup> Ibid., para. 117.

<sup>220</sup> Ibid., para. 119.

<sup>221</sup> Ibid., para. 120, citing Award, para. 394.

<sup>222</sup> Counter-Memorial on Annulment, para. 128, citing Award, para. 375.

Claimants had no legitimate expectations of the kind that could found a successful claim under Article 10(1) ECT.<sup>223</sup>

235. The Respondent further contends that “in any event,” if the Tribunal had really failed to consider the Brindisi DIAs either deliberately or by mistake, and such mistake led to the failure to disregard some effective expectations worth protecting, the Award itself contains the alternative reasons why the conclusion would remain exactly the same.<sup>224</sup>
236. As argued by the Respondent, the claim could not succeed because there was no factual link between Italy’s action and Claimants’ business’ failure.<sup>225</sup>
237. Italy argues that “the specific weight that the Tribunal gave (or should have given) to the DIAs was (or would have been) incapable of affecting the outcome of the Legitimate Expectations Claim.”<sup>226</sup>
238. The Respondent also argues that the Claimants’ allegations that the relevance of Brindisi DIAs was overlooked is difficult to understand.<sup>227</sup> This in essence, according to the Respondent, is a plea that the Tribunal should have decided differently on the existence of legitimate expectations.<sup>228</sup>
239. In conclusion, Italy argues, any informed reader could understand and follow the A→B logical sequence of the Award’s reasons.<sup>229</sup>

### **(iii) The Committee’s Analysis**

240. The Claimants’ basic argument is that by failing to review the 48 DIA Certificates of Conformity contained in Exhibit C-24, the Tribunal failed to address the second prong of their legitimate expectations claim based on the second sentence of Article 10(1). For

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<sup>223</sup> Counter-Memorial on Annulment, para. 131.

<sup>224</sup> Ibid., para. 132.

<sup>225</sup> Counter-Memorial on Annulment, para. 133.

<sup>226</sup> Ibid., para. 137.

<sup>227</sup> Ibid., para. 140.

<sup>228</sup> Ibid., para. 141, stating that this is the specific point that the Claimants make in Memorial on Annulment, para. 124, when they stress that the Tribunal should have decided “whether the 48 DIA Certificates of Conformity issued by the municipality of Brindisi ... had created legitimate expectations on the Claimants’ part that were dashed by the Brindisi measures.”

<sup>229</sup> Counter-Memorial on Annulment, para. 148.

that reason, Claimants contend that it is “impossible to follow the Tribunal’s reasoning ‘from Point A to Point B.’”<sup>230</sup>

241. Subparagraph (e) of Article 52 (1) sets out, as a ground for annulment, “that the award has failed to state the reasons on which it is based.” In the view of this Committee, the Award stated the reasons on which it is based.
242. With respect to the Exhibit C-24, the Claimants acknowledged that the Award described the DIA Certificates of Conformity and their functioning.<sup>231</sup> Moreover, this Committee recalls its previous conclusion that the Tribunal analyzed the DIA Certificates of Conformity of Brindisi – including Exhibit C-24 – in a coherent manner.<sup>232</sup> The Tribunal addressed them and was conscious that those certificates were important for the Claimants’ case.<sup>233</sup>
243. With respect to the legitimate expectations claim, the Committee concluded that the Tribunal saw the second claim as a “frank alternative to its more nuanced argument based on degree of legislative claim,”<sup>234</sup> Moreover, the Tribunal specifically referred to the second sentence of Article 10(1).<sup>235</sup> Finally, the Tribunal extensively analyzed and made a finding on the claims under Article 10(1).<sup>236</sup>
244. The cases cited by the Claimants refer to certain situations that are qualified as “significant lacuna,”<sup>237</sup> “impossible for the reader to follow,”<sup>238</sup> “complete absence of any discussion.”<sup>239</sup> For the reasons stated, this Committee is of the view that the Award is far from being tainted with any of such defects. The Award complies with the *TECO* committee’s requirement, quoted by the Claimants, “... to state reasons is satisfied as long

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<sup>230</sup> Reply on Annulment, para. 153.

<sup>231</sup> See paragraphs 150-156.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Award, para. 366.

<sup>235</sup> See paragraph 157-178.

<sup>236</sup> Ibid.

<sup>237</sup> Memorial on Annulment, para. 79 citing *CMS*, Legal Authority CL-263.

<sup>238</sup> Memorial on Annulment, para. 79 citing *CMS*, Legal Authority CL-263.

<sup>239</sup> Memorial on Annulment, para. 81, citing *TECO*, Legal Authority CL-272.

as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law.”<sup>240</sup>

245. The committee in *Enron* observed:

the tribunal is required only to give reasons for its decision in respect of each of the questions. ... the award will not be annulled on the basis that the tribunal could have given more detailed reasons and analysis for its findings of fact or law, or that the tribunal did not expressly state its evaluation in respect to each individual item of evidence or each individual legal authority or legal provision relied upon by the parties, or

did not expressly state a view on every single legal and factual issue raised by the parties in the course of the proceedings. The tribunal is required to state reasons for its *decision*, but not necessarily reasons for its *reasons*.<sup>241</sup>

246. Consistent with this criterion, the Tribunal evaluated the specific evidence, i.e. Exhibit C-24 and adjudicated the claim which stemmed from it. Thus, this *ad hoc* Committee is of the view that the Tribunal did not fail in its duty to state the reasons for the Award. For the abovementioned reasons, this Committee dismisses the Annulment Request under ICSID Convention Article 52(1)(e).

#### **D. Article 52(1)(b): The Tribunal Manifestly Exceeded Its Powers**

##### **(i) The Claimants' Position**

247. The Claimants begin by arguing that the excess of power includes failure to exercise jurisdiction *ratione materiae* and to fully discharge its mandate.<sup>242</sup>

248. The Claimants note and argue that as recalled by Professor Schreuer, “[a]n arbitral tribunal derives its power from the parties’ agreement [to arbitrate].” He further notes that “[t]he most important form of excess of powers occurs when a tribunal exceeds the limits of its

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<sup>240</sup> *TECO*, para. 78, Legal Authority CL-272. The Committee further observes that, according to the *TECO* standard, by its use of the adverb “eventually” this criterion allows certain leeway to tribunals. The language also suggests that in the view of the *TECO* committee a mere “error of fact or of law” alone cannot be equated with a failure to state the reasons on which an award is based. Given that the this Committee considers that it did not identify any error of fact or law, this Committee does not find it necessary to test the boundaries of this standard.

<sup>241</sup> *Enron*, para. 222, Legal Authority CL-265. Emphasis added.

<sup>242</sup> Memorial on Annulment, para. 84.

jurisdiction” but that “[a] tribunal may also exceed its power by failing to exercise a jurisdiction it does have.” This is in line with the case law of ICSID *ad hoc* committees, which often refer to the work of Professor Schreuer.<sup>243</sup>

249. The Claimants argue that the manifest excess of powers ground for annulment also envisages a “Manifest’ failure to exercise jurisdiction and to fully discharge mandate. Article 52(1)(b) of the ICSID Convention requires not only there to be an excess of powers, but also that such excess be manifest. As explained by Professor Schreuer, the

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<sup>243</sup> Ibid., para. 84, citing Christoph H. Schreuer et al., *The ICSID Convention—A Commentary* (2<sup>nd</sup> ed., 2009), p. 938, paras. 132-133, Legal Authority CL-256; See, e.g., *Vivendi I*, para. 86, Legal Authority CL-259 (“[A]n ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.”); *CDC Group PLC v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, para. 40, Legal Authority CL-260 (“CDC”) (“Common examples of such ‘excesses’ are a Tribunal deciding questions not submitted to it or refusing to decide questions properly before it.”); *Soufraki*, para. 43, Legal Authority CL-261 (“The manifest and consequential non-exercise of one’s full powers conferred or recognized in a tribunal’s constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as the overstepping of the limits of that power.”); *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007, para. 99, Legal Authority CL-262 (“Where a tribunal assumes jurisdiction in a matter for which it lacks competence under the relevant BIT, it exceeds its powers. The same is true in the inverse case where a tribunal refuses or fails to exercise jurisdiction in a matter for which it is competent under the BIT.”); *Malaysian Historical Salvors Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, April 16, 2009, para. 80, Legal Authority CL-264 (The *ad hoc* committee found that “the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it ‘manifestly’ did so ....”); *Duke*, para. 97, Legal Authority CL-267 (“[A] failure to decide a question entrusted to the tribunal and requiring its decision may also constitute an excess of powers, since the tribunal has also in that event failed to fulfil the mandate entrusted to it by virtue of the parties’ agreement.... .”); *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012, para. 17, Legal Authority CL-268 (“[T]he ordinary meaning of a manifest excess of power is either an obvious transgression of a tribunal’s mandate or its obvious non-execution.”); *Malicorp Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited, July 3, 2013, para. 47, Legal Authority CL-270 (“*Malicorp*”) (“The most significant excess of powers ... occurs when the Tribunal exceeds the limits of its jurisdiction. This may be the case where a tribunal ‘exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.’” (quoting *Vivendi I*, para. 86) (footnotes omitted)); *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, para. 75, Legal Authority CL-271 (“[An] excess of power can be committed both by over reach and by defect. Awards can be annulled if tribunals assume powers to which they are not entitled, and also if arbitrators do not use the powers that have been vested upon them by the parties.”); *TECO*, para. 77, Legal Authority CL-272 (“[T]he Committee finds that a tribunal commits an excess of powers: (i) if it goes beyond the parties’ consent by either exercising jurisdiction it does not have or by failing to exercise a jurisdiction which it possesses; or (ii) if it fails to apply the law agreed by the parties.”)

ordinary meaning of the term ‘manifest’ is “‘plain”, “clear”, “obvious”, “evident” and easily understood or recognized by the mind.”<sup>244</sup> This is not disputed by Italy.<sup>245</sup>

250. The Claimants contend that if a tribunal has jurisdiction to answer a question, has announced that it would do so and ultimately fails to do so, as shown above, such a failure is “plain,” “clear,” “obvious,” “evident” and “easily understood or recognized by the mind” and thus, manifest.<sup>246</sup> They also contend that Italy does not dispute this.<sup>247</sup>
251. The Claimants note that the Parties agree that this ground for annulment includes a tribunal’s failure to exercise jurisdiction *ratione materiae* and to fully discharge its mandate.<sup>248</sup>
252. The Claimants quote part of the reasoning of the *Vivendi I ad hoc* Committee in support of their contention in this regard:

It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Conventions, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.<sup>249</sup>

One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power.<sup>250</sup>

[I]t is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power.<sup>251</sup>

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<sup>244</sup> Memorial on Annulment, 85, citing ICSID Convention, art.52(1)(b); Christoph H. Schreuer et al., *The ICSID Convention—A Commentary*, p. 938, paras. 134-135, Legal Authority CL-256.

<sup>245</sup> Reply on Annulment, para. 113.

<sup>246</sup> Memorial on Annulment, para. 86.

<sup>247</sup> Reply on Annulment, para. 114.

<sup>248</sup> Reply on Annulment, para. 112, citing Memorial on Annulment, para. 84; and Counter-Memorial on Annulment, para. 153.

<sup>249</sup> Claimants’ Opening Statement, slide 41, citing *Vivendi I*, para. 86, Legal Authority CL-259.

<sup>250</sup> Memorial on Annulment, para. 87, citing *Vivendi I*, para. 86, Legal Authority CL-259.

<sup>251</sup> Reply on Annulment, para. 139, citing *Vivendi I*, para. 86, Legal Authority CL-259.

253. The Claimants also advance the argument that “[i]t is not within the tribunal’s powers to refuse to decide a dispute or part of a dispute that meets all jurisdictional requirements of Art. 25.”<sup>252</sup>
254. In addition, they quote that “a manifest excess of power would consist ... in answering only a part of a question in fact raised by the parties.”<sup>253</sup>
255. The Claimants further manifest that “ICSID Arbitration Rule 34(1) leads to the same result. If an *ad hoc* committee finds that a failure to exercise jurisdiction is capable of leading to a different outcome, it should annul the award and leave it to the resubmission tribunal to decide the case on its merits.”<sup>254</sup>
256. They also contest the Respondent’s contention regarding the similarity between the present case and *Soufraki*, saying that the present case “differs from *Soufraki*, where the tribunal, after having considered specific documents, rejected claimant’s contention that they established the claimant’s nationality. Here, as the Award reveals, the Tribunal did not analyze the relevant documents at all; nor did it at all review the second prong of the Legitimate Expectations Claim in rejecting that claim as a whole. Italy’s allegation that the Tribunal ‘discharged its arbitral duty by taking into account the arguments of the parties and the evidence submitted, including the DIAs’ is simply unsupported.”<sup>255</sup>
257. The Claimants once again recall the distinction between their Legitimate Expectations Claim which is in two prongs.<sup>256</sup> They contend that as observed by the Tribunal, “this second prong was based on explicit and specific representations made by the Italian authorities in the DIA Certificates of Conformity that were later repudiated by Brindisi’s illegal self-redress proceedings and stop-work order.”<sup>257</sup>

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<sup>252</sup> Claimants’ Opening Statement, slide 42, citing *Malicorp*, para. 47, Legal Authority CL-270.

<sup>253</sup> Claimants’ Opening Statement, slide 43, citing *Soufraki*, para. 44, Legal Authority CL-261.

<sup>254</sup> Reply on Annulment, para. 140.

<sup>255</sup> Reply on Annulment, para. 173, citing Counter-Memorial on Annulment paras. 165-168 (discussing *Soufraki*, para. 75, Legal Authority CL-261); and Counter-Memorial on Annulment, para. 169. Italy fails to show where in the Award the Tribunal “did not consider the DIAs from Brindisi ‘as conclusive’ in ascertaining the existence of legitimate expectations[.]” *Ibid.*, para. 170.

<sup>256</sup> See *supra*, 189.

<sup>257</sup> Memorial on Annulment, para. 123, citing Award, paras. 163-68 (Tab A).

258. The Claimants allege that “it was a part of the Tribunal’s mandate and undisputed jurisdiction *ratione materiae* to decide whether the 48 DIA Certificates of Conformity issued by the municipality of Brindisi, and produced at **Exhibit C-24**, had created legitimate expectations on the Claimants’ part that were dashed by the Brindisi measures.”<sup>258</sup>
259. They contend that the Tribunal, however, “only addressed the second prong of the Legitimate Expectations Claim in paragraphs 365 to 374 of the Award, i.e. the Third Energy Account, but failed to adjudicate the first prong based on DIA Certificates of Conformity.”<sup>259</sup>
260. The Claimants argue that “in doing so, the Tribunal refused to decide a question properly put before it and more so a question which it had expressly and properly recalled at paragraph 165 of the Award. In short,” according to them, “the Tribunal declined to use the powers vested in it by the Parties and to fully discharge the mandate which it had itself acknowledged. Such a defect is an excess of powers.” The Claimants submit that the defect is manifest for two reasons. First, because it is textually obvious from the evident lacuna in the Tribunal’s analysis. Second, because it is substantively serious as it went to the heart of one of the Claimants’ claims. As a result, they submit the Award be annulled under Article 52(1)(b) of the ICSID Convention.<sup>260</sup>

## **(ii) The Respondent’s Position**

261. The Respondent begins by arguing that in order for an award to be annulled, the tribunal must have acted in excess of its conferred powers, and must have done so in a manner which is manifest.<sup>261</sup>
262. The Respondent further contends that an excess of power can occur “when the tribunal disregards the applicable law or grounds its decision in the award on a law other than the law applicable under Article 42 of the ICSID Convention.”<sup>262</sup>

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<sup>258</sup> Memorial on Annulment, para. 124.

<sup>259</sup> Ibid., para. 125.

<sup>260</sup> Ibid., para. 126.

<sup>261</sup> Counter-Memorial on Annulment, para. 151.

<sup>262</sup> Ibid., para. 154, citing *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Decision on Annulment, October 3, 2017, para. 163, Legal Authority ARL-20.

263. The Respondent notes that “[w]hereas certain committees have remarked on the effect on the award’s outcome that such excess of power would inevitably entail, that is more a consequence of this ground rather than an essential element.”<sup>263</sup>
264. It also notes that “[t]o ascertain whether an excess of power is ‘manifest,’ tribunals have routinely referred to a test of self-evidence: the excess of power must be obvious and cannot depend on an elaborate or searching analysis of the award.”<sup>264</sup>
265. The Respondent alleges that if the excess of power does not leap to the eye of the award’s reader, it may be there, but it would not be manifest and, therefore, the award would not be annulable.<sup>265</sup>
266. The Respondent contends that contrary to what the Claimants claim regarding the alleged failure of the Tribunal to exercise jurisdiction, the Tribunal duly answered the Legitimate Expectations Claim.<sup>266</sup> Besides that, the Respondent submits, what transpires from the Award is that the Tribunal was not persuaded about the alleged value of the DIAs issued by the municipality of Brindisi.<sup>267</sup> They argue that, in any event the foregoing does not transgress the boundary of the arbitral mandate.<sup>268</sup>

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<sup>263</sup> Counter-Memorial on Annulment, para. 156.

<sup>264</sup> *Ibid.*, para. 157, citing ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, paras. 82-83, Legal Authority AR-19, and cases cited therein. In particular, see *Wena Hotels*, para. 25, Legal Authority CL-258: “The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other”; *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, November 1, 2006, para. 20, Legal Authority ARL-21 (the excess is manifest if found “with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award”); *Enron*, para. 69, Legal Authority CL-265 (quoting *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, para. 47, Legal Authority ARL-22: “not arguable”); *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment, January 8, 2007, para. 36, Legal Authority ARL-23 (“*Repsol*”) (quoting Christoph H. Schreuer et al, *The ICSID Convention: A Commentary*, p. 933, Legal Authority CL-256: “[manifest means] discerned with little effort and without deeper analysis”); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009, paras. 48, 68, Legal Authority ARL-24; *CDC*, para. 41, Legal Authority CL-260: “Any excess apparent in a Tribunal’s conduct, if susceptible ‘one way or the other’, is not manifest”; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, June 29, 2010, para. 213, Legal Authority ARL-25: “quite evident without the need to engage in an elaborate analysis”; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, October 19, 2009, para. 49, Legal Authority ARL-26 (“*M.C.I.*”): “the manifest excess requirement in Article 52(1)(b) suggests a somewhat higher degree of proof than a searching analysis of the findings of the Tribunal”; *El Paso* Decision on Annulment, para. 142, Legal Authority ARL-06 (“obvious, evident, clear, self-evident and extremely serious”).

<sup>265</sup> Counter-Memorial on Annulment, para. 158.

<sup>266</sup> *Ibid.*, para. 162.

<sup>267</sup> *Ibid.*, para. 163.

<sup>268</sup> *Ibid.*, para. 164.

267. The Respondent submits that there is no such failure and, in any event, such failure would have been immaterial to the conclusion reached. As noted in the *Vivendi I* case:

No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with.<sup>269</sup>

268. The Respondent cites, in support of their contention regarding the present ground for annulment, the *Soufraki* case. In that case, the claimant argued in annulment proceedings that the tribunal should have inferred from a set of documents, i.e., the certificates of nationality, a legal consequence, the proof of nationality, which was necessary to establish jurisdiction.<sup>270</sup> The *ad hoc* committee considered that the tribunal, in doing otherwise, far from exceeding its jurisdiction, discharged its jurisdictional mandate dutifully, irrespective of the correctness of its conclusions on the point:

The *ad hoc* Committee believes that in not considering the national documentation on nationality as conclusive and in ascertaining on its own the nationality of the Claimant, the Tribunal did not manifestly exceed its powers, but on the contrary asserted a power which it was bound to exercise in order to verify its competence under the ICSID Convention and the [applicable] BIT.<sup>271</sup>

269. Thus, the Respondent contends that “[t]he same reasoning applies here. Called to discharge its jurisdiction, on the merits of the case, the Tribunal needed to assess whether the Legitimate Expectations Claim had any merits.”<sup>272</sup> “It discharged its arbitral duty taking into account the arguments of the parties and the evidence submitted, including the DIAs.”<sup>273</sup>

270. On the foregoing basis, the Respondent contends that “when the Tribunal did not consider the DIAs from Brindisi ‘as conclusive’ in ascertaining the existence of legitimate expectations, it ‘did not manifestly exceed its powers, but on the contrary asserted a power

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<sup>269</sup> Rejoinder on Annulment, para. 113.

<sup>270</sup> Respondent’s Opening Statements on Grounds for Annulment, slide 62.

<sup>271</sup> *Ibid.*

<sup>272</sup> Counter-Memorial on Annulment, para. 168.

<sup>273</sup> *Ibid.*, para. 169.

which it was bound to exercise in order to verify' whether the Claimants had any expectations to begin with."<sup>274</sup>

271. Furthermore, the Respondent contends that, "[i]n any event, the Claimants' attempt to create a discrete Legitimate Expectations sub-claim that only regarded Brindisi's DIAs and the stop-work order is not viable."<sup>275</sup> First, the stop-work order related to the construction of two plants, out of the around 120 initially planned.<sup>276</sup> Second, the stop-work order remained in effect for only two days and was definitively annulled less than two months after it was issued.<sup>277</sup>
272. Italy further contends that if the Claimants' point about the legitimate expectation to build a couple of plants, was genuine it would be sufficient to note how that expectation encountered no more than a mere glitch. But for this insignificant bump on the road the actions of the Respondent did not interfere with the legitimate expectation of the Claimants which was preserved.<sup>278</sup> The Respondent further contends that in this respect, the Tribunal in its award sufficiently address the matter. According to the Respondent it cannot, therefore, be reasonably contended that the Tribunal fell short in exercising its jurisdiction.<sup>279</sup>

The stop-work order – the only measure taken specifically in relation to the Project – was granted and revoked in a timely manner and in accordance with rule of law standards.<sup>280</sup>

273. In addition, the Respondent contends that the stop-work order is exploited to create a storyline to serve the Claimants' case regarding the FITs. According to the Respondent, in this regard, the Claimants' own words could not be clearer:

[the annulment of the stop-work order] came down on 7 March 2012 and confirmed the validity of the authorizations at issue. Unfortunately, there was not enough time to build the project's plants between the decision of the Administrative Court on 7 March 2012 and the

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<sup>274</sup> Ibid., para. 170.

<sup>275</sup> Ibid., para. 172.

<sup>276</sup> Ibid., para. 173.

<sup>277</sup> Ibid., para. 174, citing Award, para. 119.

<sup>278</sup> Counter-Memorial on Annulment, para. 175.

<sup>279</sup> Ibid., para. 176.

<sup>280</sup> Ibid., para. 177.

expiration of the 29 March 2012 deadline imposed by the Romani Decree.<sup>281</sup>

274. The Respondent submits that the foregoing establish that the Award was very clear about the lack of merit of the Legitimate Expectations Claim relating to FITs. It is final in that respect. Therefore, the instrumental argument of the delay caused by the stop-work order is immaterial to the Award's conclusion even without mentioning the all-encompassing causation finding.<sup>282</sup>
275. Regarding the specific issue of outcome-determinativeness, the Respondent submits that the controlling test is the "manifest" nature of a tribunal's excess of authority, as stipulated by Article 52 of ICSID Convention. The impact of this circumstance on the award is just an obvious consequence and a heuristic rather than a legal benchmark.<sup>283</sup>
276. Italy further contends that it is unclear why the *Vivendi I* decision, according to which an excess of power is manifest when it is "clearly capable of making a difference," should assist the Claimants.<sup>284</sup> Italy advances three main reasons why this *dictum*, according to it, does not support the Claimants.
277. First, the emphasis of this *dictum* is obviously on the word "clearly" which qualifies it. An excess of power that is not "clearly" capable of making a difference does not warrant annulment. This has to be read together with the word "manifestly" in Article 52(1)(b) of the ICSID Convention, which sets the threshold requirement by qualifying the words "exceeded its powers." This stipulates that instances of excess of powers that are not *prima facie* decisive in the tribunal's ultimate finding will not render the award annulable.<sup>285</sup>
278. "Second, the *ad hoc* committee in *Vivendi I* produced two versions of the decision, one in Spanish and one in English, 'both versions being equally authoritative.' A quick glance at the Spanish text reveals that 'clearly capable of making a difference' must not be construed to include a mere possibility. The Spanish text reads '*claramente importa una diferencia significativa para el resultado*' and does not feature the nuance of potentiality that the

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<sup>281</sup> Ibid., para. 178.

<sup>282</sup> Ibid., para. 179.

<sup>283</sup> Rejoinder on Annulment, para. 114, citing Counter-Memorial on Annulment, para. 156.

<sup>284</sup> Rejoinder on Annulment, para. 114, citing Reply on Annulment, para. 139; *Vivendi I*, para. 86, Legal Authority CL-259. Emphasis added by Claimants.

<sup>285</sup> Rejoinder on Annulment, para. 116.

Claimants ... read in the word ‘capable.’ To the extent that the English version retained some ambiguity in the use of the word ‘capable,’ its meaning is clearly established by comparison with the other official text, which expressly mentions only an excess of power that ‘clearly makes a meaningful difference.’ Because of the ‘clearly’ qualifier, there is actually no difference between the two versions: what matters is not just the ‘if’ but the ‘how much’ of outcome-determinativeness.”<sup>286</sup>

279. “Third, two lines below this formula the committee rephrased the same notion, and the suggestion of potentiality is lost, in both languages. The English text refers to ‘circumstances where the outcome of the inquiry [of the Tribunal] is affected as a result [of the excess of power].’ The Spanish version reads: ‘*circunstancias donde se veía afectado el resultado de su examen.*’”<sup>287</sup>
280. Furthermore, the Respondent argues that “a review of the outcome-determinativeness of the alleged excess of power must reveal that it has produced a material impact on the conclusion reached by the tribunal. To warrant annulment, the impact must be such that it can be reasonably argued that the result would have likely been different but for [such] excess. Without such material impact, it becomes virtually impossible to meet the ‘manifest’ requirement of Article 52 of the ICSID Convention.”<sup>288</sup>
281. The Respondent alleges that “there is nothing in the Award that evinces or suggests that the Tribunal committed an excess of power, let alone manifest, let alone outcome-determinative, let alone materially so.”<sup>289</sup>

### **(iii) The Committee’s Analysis**

282. The Claimants’ principal contention is that it was within the mandate of the Tribunal to address the 48 DIA Certificates of Conformity as well as the corresponding legitimate expectations claim.<sup>290</sup> By failing to do so, the Tribunal exceeded its power. Moreover, the

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<sup>286</sup> Ibid., para. 117, citing *Vivendi I*, para. 86, Legal Authority CL-259.

<sup>287</sup> Ibid., para. 118.

<sup>288</sup> Rejoinder on Annulment, para. 119.

<sup>289</sup> Ibid., para. 120.

<sup>290</sup> Memorial on Annulment, para. 124-125.

Claimants contend that this was “manifest” because it was a “lacuna” in the Tribunal’s analysis and the omission goes “to the heart” of one of the Claimants’ claims.<sup>291</sup>

283. Subparagraph (b) of Article 52(1) provides a ground for annulment where “the Tribunal has manifestly exceeded its powers.” The adverb “manifestly” means “in a way that everyone can easily understand.” In the particular case of subparagraph (b), it is not sufficient to find that the tribunal exceeded its powers, it has to be “manifestly” so.
284. With respect to the failure to address Exhibit C-24 the Claimants acknowledged that the Award described the DIA Certificates of Conformity and their functioning.<sup>292</sup> Moreover, this Committee recalls its previous conclusion that the Tribunal analyzed the DIA Certificates of Conformity of Brindisi – including Exhibit C-24 – in a coherent manner.<sup>293</sup> The Tribunal addressed them and was conscious that those certificates were important for the Claimants’ case.<sup>294</sup>
285. With respect to the legitimate expectations claim, the Committee concluded that the Tribunal saw the second claim as a “frank alternative to its more nuanced argument based on degree of legislative claim,”<sup>295</sup> Moreover, the Tribunal specifically referred to the second sentence of Article 10(1).<sup>296</sup> Finally, the Tribunal extensively analyzed and made a finding on the claims under Article 10(1).<sup>297</sup>
286. Based on the above, the Committee finds no excess of powers by the Tribunal. Consequently, it does not need to analyze whether it was manifestly so. The Tribunal clearly exercised its jurisdiction and ruled on the question raised by the disputing parties. Accordingly, this Committee finds that the Tribunal has not exceeded its powers. For the abovementioned reasons, the Committee rejects the Annulment Request under ICSID Convention Article 52(1)(b).

#### **E. Article 52(1) (d): The Tribunal Seriously Departed from a Fundamental Rule of Procedure**

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<sup>291</sup> Ibid., para. 126.

<sup>292</sup> See paragraphs 150-156.

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Award, para. 366.

<sup>296</sup> See paragraph 157-178.

<sup>297</sup> Ibid.

**(i) The Claimants' Position**

287. The Claimants argue that “the obligation for any ICSID tribunal to properly review the record, and particularly those parts of the record principally relied upon by each party in support of their respective cases, is a necessary corollary of the parties’ right to be heard. It is a fundamental rule of procedure. This right would be an empty shell if an ICSID tribunal could disregard its obligation to properly review the key evidence on record, which is at stake here.”<sup>298</sup>
288. The Claimants allege that, in the present case, the above obligation was breached by the Tribunal. They further contend that it is plain from the Award that the Tribunal failed to locate in **Exhibit C-24** the 48 DIA Certificates of Conformity issued by the municipality of Brindisi and, therefore, to draw any consequence from them in its analysis of the case.<sup>299</sup>
289. The Claimants manifest that the Parties agree on a series of criteria regarding the legal standard applicable to this particular ground for annulment.
290. First, the Claimants argue that they agree that the departure must be substantial, which means that the departure must potentially have led the tribunal to issue an award substantially different from what it would have been, had the fundamental rule of procedure been observed.<sup>300</sup>
291. Second, the Claimants submit that according to the *Fraport ad hoc* committee, “a ‘fundamental rule of procedure’ is intended to denote procedural rules which may properly be said to constitute ‘general principles of law’[.] The Parties also agree that the treatment of evidence is one of these principles.”<sup>301</sup>

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<sup>298</sup> Memorial on Annulment, paras. 94, 127.

<sup>299</sup> Memorial on Annulment, para. 128.

<sup>300</sup> Reply on Annulment, para. 118, citing Memorial on Annulment, para. 96; Counter-Memorial on Annulment, para. 185. The Claimants also quote in the same direction in paragraph 142 of the Reply on Annulment that the CDC endorsed the *Wena Hotels* statements in the same terms.

<sup>301</sup> Reply on Annulment, para. 119, citing Counter-Memorial on Annulment, para. 183 (quoting *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, December 23, 2010, para. 187, Legal Authority CL-266 (“*Fraport*”)); Memorial on Annulment, para. 94; Counter-Memorial on Annulment, para. 184(iv). Footnote omitted.

292. They note, however, that the Respondent disagrees on the issue of whether the departure from such rule “caused the arbitration and the resulting award to lose its judicial character.’ [Italy] complains that ‘Claimants were unable to point to a single authority supporting their case.’”<sup>302</sup>

293. The Claimants recall in this regard, part of the reasoning of the *TECO ad hoc* Committee:

The Committee takes issue with the complete absence of any discussion of the Parties’ expert reports within the Tribunal’s analysis of the loss of value claim. While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a Tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory.<sup>303</sup>

294. As a consequence of the foregoing, the Claimants argue that “an ICSID tribunal cannot ‘simply gloss over evidence upon which the parties have placed significant emphasis,’ ... because it must have reviewed such evidence in the first place. This is part and parcel of the ‘judicial character’ that the award must have and that Italy rightly emphasizes.”<sup>304</sup>

295. In addition, the Claimants cite in support of their present contention the fact that the *Suez ad hoc* committee confirmed that a tribunal is duty-bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case. That committee clarified that “highly relevant” evidence is the kind that “must have the potential to have an impact on the outcome of the Award.”<sup>305</sup>

296. The Claimants further cite in a different but relevant context, by analogy, the European Court of Human Rights. They submit that that Court has “repeatedly stated that the right to a fair trial includes the parties’ right to submit the requests and observations they deem relevant to their case. That right cannot be seen as effective unless the requests and

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<sup>302</sup> Reply on Annulment, para. 121, citing Counter-Memorial on Annulment, paras. 188-189.

<sup>303</sup> Reply on Annulment, para. 122, citing Memorial on Annulment, paras. 91-92; *TECO*, para. 131, Legal Authority CL-272.

<sup>304</sup> Reply on Annulment, para. 123.

<sup>305</sup> *Ibid.*, para. 124; *Suez*, para. 303, Legal Authority CL-284.

observations of the parties are truly ‘heard,’ that is to say properly examined by the tribunal.”<sup>306</sup>

297. Thus, the Claimants claim that “a tribunal’s failure to properly examine a party’s evidence ... undoubtedly violates the right to be heard and the right to a fair trial. In that sense, a tribunal’s failure to consider the essential evidence submitted by a party would ‘cause the arbitration and the resulting award to lose its judicial character’ to use the language quoted by Italy in its Counter-Memorial.”<sup>307</sup>

298. They further quote part of the reasoning of the *Pey Casado ad hoc* Committee:

The Committee subscribes to the Respondent’s view. *The applicant is not required to show that the result would have been different*, that it would have won the case, if the rule had been respected. The Committee notes in fact that, in *Wena*, the committee stated that the applicant must demonstrate “the impact that the issue *may have had* on the award.” The Committee agrees that this is precisely how the seriousness of the departure must be analyzed.

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<sup>306</sup> Reply on Annulment, para. 125, citing *Dulaurans v. France*, ECtHR (3rd Section) Case No. 34553/97, Judgment, March 21, 2000, para. 33, Legal Authority CL-276 (unofficial English translation: “The Court reiterates that the right to a fair trial, guaranteed by Article 6 para. 1 of the Convention, encompasses, *inter alia*, the right of the parties to the trial to submit the observations that they deem relevant to their case.... this right can be considered effective only if these observations are really ‘heard’, i.e. duly examined by the tribunal seized.”) (the French original reads: “La Cour rappelle que le droit à un procès équitable, garanti par l’article 6 § 1 de la Convention, englobe, entre autres, le droit des parties au procès à présenter les observations qu’elles estiment pertinentes pour leur affaire.... ce droit ne peut passer pour effectif que si ces observations sont vraiment ‘entendues’, c’est-à-dire dûment examinées par le tribunal saisi.”); *Carmel Saliba v. Malta*, ECtHR (4th Section) Case No. 24221/13, Judgment, November 29, 2016, para. 65, Legal Authority CL-283 (“[T]he right to a fair trial cannot be seen as effective unless the requests and observations of the parties are truly ‘heard’, that is to say properly examined by the tribunal.”); *Ilgar Mammadov v. Azerbaijan* (No. 2), ECtHR (5th Section) Case No. 919/15, Judgment, November 16, 2017, para. 206, Legal Authority CL-285 (enouncing same principle). See also *Marc Fouquet v. France*, ECm HR (2nd Chamber) Case No. 20398/92, Commission Report, October 12, 1994, para. 36, Legal Authority CL-275 (unofficial English translation: “[It is] incumbent on the ‘tribunal’ to conduct an effective assessment of the submissions, arguments and evidence submitted by the parties...”) (the French original reads: “[Est] à la charge du ‘tribunal’, l’obligation de se livrer à un examen effectif des moyens, arguments et offres de preuve des parties... .”); *ibid.*, para. 38 (unofficial English translation: “The Commission is of the opinion that a litigant is not effectively heard if an essential defence is overlooked.”) (the French original reads: “La Commission est d’avis qu’un plaideur n’est pas effectivement entendu lorsqu’un moyen de défense essentiel est méconnu.”). As the Committee is aware, the European Commission of Human Rights set up in 1954 was replaced by the European Court of Human rights when Protocol No. 11 to the European Convention on Human Rights came into force on November 1, 1998. Protocol No. 11 abolished the Commission and allowed individuals to apply directly to the Court, which was given compulsory jurisdiction.

<sup>307</sup> Reply on Annulment, para. 127, citing Counter-Memorial on Annulment, para. 182.

*In the Committee's view, it has no discretion not to annul an award if a serious departure from a fundamental rule is established. The Committee exercises its discretion when it determines whether or not the departure was serious. Examining the seriousness of the departure implies a review of seriousness of the act concerned, i.e., the deprivation of the legal right protected by the rule and a review of the seriousness of the consequence or impact of the departure. The discretion of the Committee lies in the evaluation of the impact. The impact will most likely be material and require an annulment if the departure affects the legal right of the parties with respect to an outcome-determinative issue. In other words, a finding that if the rule had been observed the tribunal *could have reached a different conclusion*. As indicated earlier, the Committee does not consider, however, that an applicant is required to prove that the tribunal would necessarily have changed its conclusion if the rule had been observed. *This requires a committee to enter into the realm of speculation which it should not do ...*<sup>308</sup>*

299. The Claimants submit that in line with the foregoing, the *TECO ad hoc* committee opined:

Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. *An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which is not within its powers to do.* What a committee can determine however is whether the tribunal's compliance with a rule of procedure could *potentially* have affected the award.<sup>309</sup>

300. The Claimants contend that presenting one's case has two different components.<sup>310</sup> One has to do with the right of the parties to introduce factual and legal evidence of their choice. The other – which is the one at stake in this case – has to do with the obligation of the tribunal to look at the evidence thus introduced. There is no point in giving a party the right to introduce evidence if, as a necessary corollary, there is not an obligation for the tribunal to look at the evidence. Looking at the evidence is one of the key obligations of any tribunal. If no such obligation were to exist, the equality between the parties would be breached – with one party having its evidence looked at and the other not, wholly or

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<sup>308</sup> Reply on Annulment, para. 143, citing *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, December 18, 2012, paras. 78, 80, Legal Authority CL-269 (“*Pey Casado*”). Footnote omitted, emphasis added.

<sup>309</sup> Reply on Annulment, para. 144, citing *TECO*, para. 85, Legal Authority CL-272. Emphasis added.

<sup>310</sup> Reply on Annulment, para. 128.

partly. The Claimants submit that Italy does not appear to disagree with this principle either.<sup>311</sup>

301. The Claimants contest the Respondent's contention that the Claimants allege not an *error in procedendo* but an *error in iudicando*, by saying that an *error in iudicando* is an error made by the Tribunal in the adjudication of the claims,<sup>312</sup> and that they do not dispute what the Tribunal decided. They, however, submit that the Tribunal could not have decided what it did when it failed to review a critical document brought to its attention no less than 30 times. And this too after the Tribunal had itself implicitly announced that it would review this document. The Tribunal had to announce this because it was the sole foundation of the second ground of the Claimants' Legitimate Expectations Claim.<sup>313</sup> Yet, this is precisely what the Tribunal failed to do.
302. The Claimants recall their previous assertion concerning the fact that they referred, in the course of the arbitration, to Exhibit C-24 or the content of the Brindisi's DIA Certificates of Conformity more than 30 times.<sup>314</sup> However, the Claimants contend that "the Tribunal looked at page 1 of Exhibit C-24 (the template translation of the five certificates of the municipality of Mesagne) and discussed it at paragraph 379 of the Award, noting that these certificates were 'not at all the same thing' as what was alleged by the Claimants. It failed, however, to look at page 3 of the PDF document, which precisely evidenced the specific representations relied upon by the Claimant." They argue that even "[i]f the Tribunal did not wish to look at all the 53 DIA Certificates of Conformity in Exhibit C-24, in their Italian version, it should have at least looked at the two pages of template translations in English included in that exhibit, as it had itself authorized at paragraph 11.3 of Procedural Order No. 1. This," they submit, "is the bare minimum that the Parties and ICSID as an institution could ask for."<sup>315</sup>
303. In view of the foregoing, the Claimants allege that "if an *ad hoc* committee finds a serious departure from a fundamental rule of procedure, it must also annul the award and leave

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<sup>311</sup> Ibid., para. 129, citing Memorial on Annulment, para. 94; "One would even wonder whether one could speak of a proper 'tribunal' or 'jurisdiction' in such a case."

<sup>312</sup> Tr. Day 2, 34:13 – 15.

<sup>313</sup> Tr. Day 2, 34:21-25 – 35:1 – 3.

<sup>314</sup> See *supra*, 105, Memorial on Annulment, para. 129, and Claimants, citing Memorial on Annulment, para. 56.

<sup>315</sup> Memorial on Annulment, para. 130.

it to the resubmission tribunal to decide the outcome of the case.”<sup>316</sup> As a consequence, they also contend, that in such circumstances, first, the Tribunal’s complete disregard of Exhibit C-24 in adjudicating the Legitimate Expectations Claim, second its partial reliance on selective parts of that exhibit, i.e., the five Certificates of Conformity issued by the municipality of Mesagne, and, third, its failure to consider the 48 certificates issued by the municipality of Brindisi, in other parts of its analysis, individually, as well as, and particularly cumulatively, constitutes a serious departure from a fundamental rule of procedure. On these bases they request that the Award be annulled under Article 52(1)(d).<sup>317</sup>

## (ii) The Respondent’s Position

304. The Respondent begins its submissions by reviewing the applicable standard of Article 52(1)(d) of the ICSID Convention. It submits that it replicates, without significant amendments, Article 35(c) of the Model Rules on Arbitral Procedure prepared by the International Law Commission (ILC).<sup>318</sup> The Respondent argues that, therefore, “the commentary prepared by the ILC about this provision illustrates its function, and applies without difficulty to the equivalent clause of the ICSID Convention:

the principle that the tribunal must function in the manner of a judicial body and with respect for the fundamental rules governing the proceedings of any judicial body. The paragraph is concerned with error *in procedendo*, not with error *in iudicando*. It is, further, concerned with serious departures from fundamental procedural rules rather than minor departures.”<sup>319</sup>

305. The Respondent notes that as discussed by the *Fraport ad hoc* committee, the ILC remarked on the rationale of this clause endorsing the test formulated by Carlston in the literature:

Does the departure constitute a deprivation of a fundamental right so as to cause the arbitration and the resulting award to lose its judicial

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<sup>316</sup> Reply on Annulment, para. 146.

<sup>317</sup> Memorial on Annulment, para. 131.

<sup>318</sup> Counter-Memorial on Annulment, para. 180, citing United Nations, *Yearbook of the International Law Commission*, 1958, Vol. II, p. 86, Legal Authority ARL-27.

<sup>319</sup> Counter-Memorial on Annulment, para. 181.

character? Unless its effect is to prejudice materially the interests of a party, the charge of nullity should not be open to a party.<sup>320</sup>

306. The Respondent recalls that committees have identified certain principles a departure from which could fall under this ground:

- (i) the equal treatment of the parties;
- (ii) the right to be heard;
- (iii) an independent and impartial Tribunal;
- (iv) the treatment of evidence and burden of proof; and
- (v) deliberations among members of the Tribunal.<sup>321</sup>

307. Italy submits that even a “departure from one of these principles is insufficient to warrant annulment, if it is not serious. Whilst the ‘seriousness’ requirement is case-specific, several committees have stated that it is met when the disregard of the rule of procedure determine[s] the outcome of the award.”<sup>322</sup>

308. The Respondent quotes part of the reasoning of the *TECO ad hoc* Committee in support of their contention regarding the applicable standard to the present ground for annulment, as follows:

The *TECO* Committee acknowledged that absolute certainty of the hypothetical outcome could not be obtained, let alone required as proved, let alone rubber-stamped by the committee. What an *ad hoc*

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<sup>320</sup> Ibid., para. 182, citing *Fraport*, para. 184, Legal Authority CL-266; Kenneth S. Carlston, *The Process of International Arbitration* (Columbia University Press, 1946) pp. 38-39, cited in ILC Commentary, Legal Authority ARL-28.

<sup>321</sup> Counter-Memorial on Annulment, para. 184, citing ICISD, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, para. 99, Legal Authority ARL-19.

<sup>322</sup> Ibid., 185, citing ICISD, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, para. 100, Legal Authority ARL-19, referring to the decisions in *Wena Hotels*, para. 58, Legal Authority CL-258; *Repsol*, para. 81, Legal Authority ARL-23; *CDC*, para. 49, Legal Authority CL-260; *Fraport*, para. 246, Legal Authority CL-266; *Impregilo S.p.A. v. The Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, January 24, 2014, para. 164, Legal Authority ARL-04; *El Paso* Decision on Annulment, para. 269, Legal Authority ARL-06; *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment, January 13, 2015, para. 104, Legal Authority ARL-08; *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, January 15, 2016, para. 208, Legal Authority ARL-13; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016, para. 134, Legal Authority ARL-14; *TECO*, para. 82-85, Legal Authority CL-272. See also the analysis of the Annulment Committee in *Kılıç İnşaat İthalat İbracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Legal Authority ARL-07.

committee is tasked to do, ultimately, is determining “whether the tribunal’s compliance with a rule of procedure could potentially have affected the award.”<sup>323</sup> The wording of this statement is very clear and should not occasion confusion: to consider any potential outcome-determinativeness is indeed the *task of the committee*, but it is not the applicable *standard of annulment*. This sentence describes the powers of the committee, not the threshold of seriousness required for this ground for annulment to operate. Of course, it is within the jurisdiction of the committee to assess whether there is outcome-determinativeness, of any magnitude – even none.<sup>324</sup>

309. The Respondent submits that the Claimants’ argument regarding this ground for annulment duplicates its submissions about the alleged lack of reasons for the Award.<sup>325</sup>
310. Paraphrasing *Carlston’s* test, Respondent submits that “the question before the Committee is whether the tribunal has actually disregarded the procedural guarantees in such a way as to ‘cause the arbitration and the resulting award to lose its judicial character.’” And it suggests that the answer is “no.”<sup>326</sup>
311. Italy contends that the Claimants were unable to point to a single authority supporting their case.<sup>327</sup> It submits that the few cases in which a breach of Article 52(1)(d) caused a full or partial annulment of the award have nothing in common with this case.<sup>328</sup>
312. The Respondent alleges that even admitting, on its face, the Claimants’ erroneous assumption that the Tribunal has neglected to examine the DIAs issued by the municipality of Brindisi, cannot be equated with:
- a) the tribunal’s failure to allow both parties to present their case on newly submitted evidence, or
  - b) the tribunal’s failure to afford the respondent to present its arguments on the standard applicable to the calculation of damages for a breach of FET, or

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<sup>323</sup> Rejoinder on Annulment, para. 123; *TECO*, para. 85, Legal Authority CL-272.

<sup>324</sup> Rejoinder on Annulment, para. 123.

<sup>325</sup> Counter-Memorial on Annulment, para. 186.

<sup>326</sup> *Ibid.*, para. 188.

<sup>327</sup> *Ibid.*, para. 189.

<sup>328</sup> *Ibid.*, para. 190.

- c) the tribunal's failure to fix a time-limit for a party's submissions in the event of a request for rectification of the award made by the other party.<sup>329</sup>

313. Italy further contends, in this regard, that “[i]n all these cases the ground for annulment was upheld with respect to errors *in procedendo* that affected directly the parties’ equality of arms.”<sup>330</sup> Italy claims that the Claimants, in their submissions, invoke instead an alleged error *in iudicando*, as according to the Claimants the Tribunal has mistakenly given insufficient weight to the Brindisi DIAs.<sup>331</sup>
314. The Respondent submits that since the Claimants clung onto the *TECO* decision with obvious pertinacity or rather to a few sentences of that decision, artfully arranged but without much context, it might help to distinguish between the present proceedings and those underlying the *TECO* annulment decision. The Respondent submits that its views in the Counter-Memorial on Annulment had no discernible effect on the Claimants’ arguments. It would, therefore, now rely on the words of the *ad hoc* committee in *Suez* (2017), instead. That case, according to Italy, illustrates how, to put it very simply, *TECO* is the wrong basket for the Claimants to put all its legal eggs in.

Contrary to the *TECO* case, the Tribunal in the present case did not consider that there was “no sufficient evidence” for a certain issue, without specifying why the expert reports submitted by the parties did not qualify as such evidence. It can rather be reasonably inferred from the Tribunal’s reasoning that it did consider the evidence before it and reached its conclusions on that evidentiary basis, albeit without discussing in detail any particular item filed by either Party.<sup>332</sup>

315. In addition to the foregoing, the Respondent contends that the case here is the same. “Contrary to the *TECO* case,” the Tribunal did not profess that the evidence relating to the Legitimate Expectations Claim was insufficient. Even without providing a detailed discussion of all the documents collected in Exhibit C-24, the Tribunal reached a conclusion on the basis of the available evidence and the parties’ arguments. Anyone reading the Award can have no problem understanding why the Tribunal rejected the

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<sup>329</sup> Ibid., para. 191, citing *Fraport*, para. 230, Legal Authority CL-266; *Pey Casado*, para. 269, Legal Authority CL-269; *Amco*, paras. 9.07-9.10, Legal Authority ARL-29.

<sup>330</sup> Ibid., para. 192.

<sup>331</sup> Ibid., para. 193.

<sup>332</sup> Rejoinder on Annulment, para. 126, citing Reply on Annulment, paras. 166-167; *Suez*, para. 300, Legal Authority CL-284. Footnote omitted, emphasis added.

Claimants' Legitimate Expectations Claim, regardless of whether he or she shares the underlying reason.

**(iii) The Committee's Analysis**

316. Like with their previous claims, the Claimants allege that the complete disregard of Exhibit C-24 in the respective legitimate expectations claim, to only consider the Certificates of Conformity issued by the Municipality of Mesagne and, finally, failure to consider the Certificates of Conformity issued by the Municipality of Brindisi, collectively and individually, amount to a serious departure from a fundamental rule of procedure.
317. Subparagraph (d) of Article 52(1) refers to the ground of annulment consisting of a “serious departure from a fundamental rule of procedure.” The adjective “serious” means “significant or worrying because of possible danger or risk; not slight or negligible.”
318. As a general proposition, the disregard of evidence constitutes an infringement of a fundamental rule of procedure.<sup>333</sup> Thus, before addressing whether the departure was fundamental, the first question is whether such issue arises in this case.
319. Exhibit C-24 is at the heart of Claimants' claim. However, this Committee is not satisfied that there has been any omission or failure to consider relevant evidence. The Claimants acknowledged that the Award described the DIA Certificates of Conformity and their functioning.<sup>334</sup> Moreover, this Committee recalls its previous conclusion that the Tribunal analyzed the DIA Certificates of Conformity of Brindisi – including Exhibit C-24 – in a coherent manner.<sup>335</sup> The Tribunal addressed them and was conscious that those certificates were important for the Claimants' case.<sup>336</sup>
320. With respect to the legitimate expectations claim, the Committee concluded that the Tribunal saw the second claim as a “frank alternative to its more nuanced argument based on degree of legislative claim,”<sup>337</sup> Moreover, the Tribunal specifically referred to the

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<sup>333</sup> Reply on Annulment, para. 119. Memorial on Annulment, para. 94; Counter-Memorial on Annulment, para. 184(iv).

<sup>334</sup> See paragraphs 150-156.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Award, para. 366.

second sentence of Article 10(1).<sup>338</sup> Finally, the Tribunal extensively analyzed and made a finding on the claims under Article 10(1).<sup>339</sup>

321. Thus, Exhibit C-24 was in fact addressed by the Tribunal within the Award, accordingly the Claimants have not been able to persuade this Committee that there was a “departure” from a fundamental rule of procedure. That being the case the condition of the departure being “serious” cannot possibly be met.

322. For the abovementioned reasons, this Committee concludes that the Annulment Request under ICSID Convention Article 52(1)(d) is not well founded. It is accordingly rejected.

## **VIII. THE RESPONDENT’S REQUEST FOR IMMEDIATE TERMINATION OF THE ANNULMENT PROCEEDINGS**

323. On February 4, 2019, the Respondent filed a request for a decision declaring immediate termination of the Annulment Proceeding pursuant to EU Member States’ Declaration on the legal consequences of the Achmea Judgement.

324. Both parties filed detailed pleadings and made oral submissions on the issue.<sup>340</sup>

325. This *ad hoc* Committee has dismissed the Request for Annulment of the Award. The Award therefore stands and this particular issue is moot.<sup>341</sup> It is, therefore, unnecessary for it to either record or analyze the submissions of the parties or state its opinion on the subject. The matter is best left to be determined in proceedings where it squarely arises. This Committee, therefore, records no finding on it.

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<sup>338</sup> See paragraphs 157-178.

<sup>339</sup> *Ibid.*

<sup>340</sup> Respondent’s Request for an award declaring immediate termination dated February 4, 2019; Claimants’ letter of February 5, 2019 responding thereto; Transcript D1:P78:L14-P80:L15 and D2:P46:L9-P51:L20 (Claimants) Transcript D1:P81:L93-P98:L16 (Respondent).

<sup>341</sup> At the hearing, Respondent submitted to the Committee the Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on the Investment Protection in the European Union of 15 January 2019. In this regard, Respondent recognized that this was a new fact affecting the Committee’s jurisdiction but made clear that it was leaving it open to the Committee’s discretion what to do with such declaration. See D1:P155:L13-22 and D2:P94:L23-P97:L24.

## IX. COSTS

### A. The Parties' Positions on Costs

326. The Claimants submitted their statement of cost on June 7, 2019.
327. The Respondent submitted its statement on costs on June 19, 2019.
328. By letter dated June 20, 2019 the Claimants argued that the ICSID Rules require that “each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it *in the proceeding* ...,”<sup>342</sup> and that the Respondent’s submission does not permit an assessment of whether the costs claimed are reasonable or whether they were incurred in these proceedings. By way of example, the Claimants submit that Italy claims disbursements of EUR 60,000 described as “costs (translation, expertize [sic], other expenses).” The Claimants state, however, that all of the legal authorities submitted by Italy in these annulment proceedings, except four, were originally in English. There were no translations submitted. No expert report was submitted, either. It is not apparent how such disbursements could qualify as costs borne in these proceedings.
329. The Claimants also submits that “[t]he same observations hold for other categories of costs claimed by Italy, which include (i) ‘attendances (personal attendances, telephone, letters out/e-mail)’ of EUR 250,000, (ii) ‘legal fees’ of EUR 300,000 and (iii) ‘attendance at hearing’ of EUR 30,000, for a grand total of EUR 640,000. [All of these] are well in excess of those incurred by the Claimants. These are round numbers, with no indication as to the basis on which they were calculated or whether the costs claimed have ever been paid.”<sup>343</sup>
330. As a consequence of the foregoing, the Respondent submitted its revised statement on costs on July 3, 2019.
331. The Claimants seek to recover the entirety of the costs of these proceedings, including the fees and expenses of the *ad hoc* Committee and the Centre, and all reasonable fees and

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<sup>342</sup> Claimants’ Letter to Committee, June 20, 2019, citing ICSID Arbitration Rule 28(2). Emphasis added. Under Article 52(4) of the ICSID Convention and Arbitration Rule 53, this rule applies *mutatis mutandis* to annulment proceedings.

<sup>343</sup> Claimants’ Letter to Committee, June 20, 2019, pp. 1-2.

expenses incurred by the Claimants in relation to these annulment proceedings, including the Claimants' legal fees and disbursements (USD 375,000.00 for fees and costs paid to ICSID and €479,616.60 for legal fees and disbursements).

332. The Respondent seeks to recover their legal fees and costs incurred in these proceedings, totaling USD 618,065.62 (USD 616,000.00 as legal fees and USD 2,065.62 incurred for attendance at the Hearing).

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

Committee's fees and expenses	
Prof. Ricardo Ramírez Hernández	88,703.86
Mr. Makhdoom Ali Khan	53,604.72
Prof. Hi-Taek Shin	58,313.70
ICSID's administrative fees	116,000.00
Direct expenses	20,214.57
<b>Total</b>	<b><u>336,836.85</u></b>

334. The above costs have been paid out of the advances made by the Claimants.

#### **B. The Committee's Decision on Costs**

335. The Committee has discretion as for the allocation of cost under Article 61(2) of the ICSID Convention, applicable to these proceedings in accordance with Article 52(4) of the ICSID Convention. Additionally, Regulation 14(3)(e) of the Administrative and Financial Regulations applies. It accordingly decides as follows.

336. Article 61(2) of the ICSID Convention, as well as Regulation 14(3)(e), grants the Committee discretion to allocate costs, fees and expenses incurred by (i) the disputing parties, (ii) ICSID, and (iii) members of this *ad hoc* Committee. Both disputing parties, by

requesting the recovery of costs, fees and expenses seem to endorse the rule known as “cost follow the event.”

337. It has been recognized that “there is no uniform practice in treaty arbitration with regard to the allocation of the costs of the arbitration.”<sup>344</sup> In the context of annulment proceedings it was stated that “[i]n most of the decisions of annulment committees, the committees have decided that each party should bear its own litigation costs and that the costs of the proceeding should be borne equally by the parties.”<sup>345</sup> However, in a more recent decision it was observed that annulment committees have decided that the applicant should pay the costs when the annulment is refused.<sup>346</sup>
338. In these proceedings, the Committee has rejected the Application for Annulment, accordingly, it decides that the Claimants shall bear the costs, fees and expenses of these proceedings incurred by (i) the disputing parties, (ii) ICSID, and (iii) members of this *ad hoc* Committee.

## X. DECISION

339. For the reasons stated *supra*, the *ad hoc* Committee decides as follows:
- (i) Blusun S.A, Jean Pierre Lecorcier and Michael Stein’s Request for Annulment is denied.
  - (ii) It is not necessary to rule on the request of Italy for immediate termination of the proceedings considering the decision of this Committee in subparagraph (i) abovementioned.
  - (iii) The Claimants shall bear the costs, fees and expenses of these proceedings, i.e. those incurred by the Respondent, ICSID and members of this *ad hoc* Committee.

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<sup>344</sup> *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, para. 694, Legal Authority CL-288.

<sup>345</sup> *Pey Casado v. Chile*, para. 352, Legal Authority CL-269. Footnote omitted.

<sup>346</sup> Cfr. *Poštová banka*, para. 170, Legal Authority ARL-18. (“The Committee has rejected the Application for Partial Annulment. A number of *ad hoc* committees have in such circumstances allocated the Costs of the Proceeding to the Applicant. For example, in *M.C.I.*, the Committee stated that a consequence of Regulation 14(3)(e) ‘which imposes on the party who applies for annulment the financial burden of advancing the costs, should normally be that the Applicant, when annulment is refused, remains responsible for these costs.’ The Committee therefore decides that the Applicant shall bear the Costs of the Proceeding.”) Emphasis added.

[Signed]

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Makhdoom Ali Khan  
*Ad hoc* Committee Member

Date: April 11, 2020

[Signed]

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Hi-Taek Shin  
*Ad hoc* Committee Member

Date: April 11, 2020

[Signed]

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Ricardo Ramírez Hernández  
President of the *ad hoc* Committee

Date: April 12, 2020