INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

CEAC HOLDINGS LIMITED

Applicant

and

MONTENEGRO

Respondent

ICSID CASE NO. ARB/14/08

ANNULMENT PROCEEDING

DECISION ON ANNULMENT

Members of the ad hoc Committee

Sir Christopher Greenwood, President of the *ad hoc* Committee

Professor Joongi Kim, Member of the *ad hoc* Committee

Ms Tinuade Oyekunle, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Mr Alex Kaplan

Date of dispatch to the Parties: 1 May 2018

REPRESENTATION OF THE PARTIES

Representing CEAC Holdings Limited

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Representing Montenegro:

Mr Slaven Moravčević
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TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

Application	CEAC Holdings Limited Application for Annulment
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	Award of the Tribunal dated 26 July 2016 in *CEAC Holdings Ltd* v. *Montenegro* (ICSID case No. ARB/14/8)
BIT or Treaty	Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments, which entered into force on 23 December 2005
C-[#]	Applicant's Exhibit
CEAC Memorial	Applicant's Memorial on Annulment dated 12 May 2017
CEAC Reply	Applicant's Reply on Annulment dated 25 August 2017
CEAC Slides	Applicant's Slides accompanying Oral Presentation at Hearing on Annulment held on 29-30 November 2017
CL-[#]	Applicant's Legal Authority
Committee	*Ad hoc* Committee composed of Sir Christopher Greenwood (president), Professor Joongi Kim and Ms Tinuade Oyekunle
Dissent	Dissenting Opinion of Professor William W. Park, appended to the Award

EUR	Euro
Hearing	Hearing on Annulment held on 29-30 November 2017
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Montenegro Counter-Memorial	Respondent's Counter-Memorial on Annulment dated 7 July 2017
Montenegro Rejoinder	Respondent's Rejoinder on Annulment dated 13 October 2017
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Tr. Day [#], [page:line]	Transcript of the Hearing before the Committee
Tribunal	Arbitral tribunal composed of Professor Bernard Hanotiau (President), Professor William W. Park, and Professor Brigitte Stern
USD	United States Dollars

I. INTRODUCTION AND PARTIES

1. This case concerns an application for annulment (the "Application") of the award rendered on 26 July 2016 in ICSID Case No. ARB/14/08 (the "Award") in the arbitration proceeding between CEAC Holdings Limited ("CEAC" or the "Applicant") and Montenegro ("Montenegro" or the "Respondent") rendered by a Tribunal composed of Professor Bernard Hanotiau (President), Professor Brigitte Stern and Professor William W. Park.

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

3. The Award decided on a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of investments, which entered into force on 23 December 2005 (the "BIT" or the "Treaty"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

4. The dispute in the original proceeding related to CEAC's alleged ownership and management of an aluminium plant located near Podgorica, Montenegro. CEAC alleged that Montenegro failed to provide fair and equitable treatment, full protection and security, and most-favoured nation treatment to CEAC's investment as required by the Treaty and that Montenegro expropriated CEAC's investment.

5. In the Award, the Tribunal, by a majority (Professor Park dissenting), reached the conclusion that it lacked jurisdiction over the dispute because CEAC did not have a "seat" in Cyprus and thus did not qualify as an investor under the BIT. The Tribunal ordered CEAC to pay the full costs and expenses incurred by ICSID and the Tribunal by reimbursing Montenegro USD 223,062.66. It also ordered CEAC to reimburse Montenegro EUR 707,105.71 for legal costs and expenses.[1]

[1] Award, paras. 220-225.

6. CEAC applied for the annulment of the Award on the basis of Article 52(1) of the ICSID Convention, identifying three grounds for annulment: (i) manifest excess of powers (Article 52(1)(b)); (ii) serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) failure to state the reasons on which the Award was based (Article 52(1)(e)).[2]

II. PROCEDURAL HISTORY

7. On 22 November 2016, CEAC filed the Application with the Secretary-General of ICSID. CEAC's Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Arbitration Rules for a stay of enforcement of the Award (pertaining to the order for costs) until CEAC's Application was decided ("CEAC's Request" or the "Request").

8. On 30 November 2016, pursuant to Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules"), ICSID registered the Application. On the same date, in accordance with Arbitration Rule 54(2), ICSID informed the Parties that the enforcement of the Award had been provisionally stayed.

9. By letter dated 29 December 2016, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Sir Christopher Greenwood, a national of the United Kingdom and designated as President of the Committee, Professor Joongi Kim, a national of the Republic of Korea, and Ms Tinuade Oyekunle, a national of Nigeria, (the "Committee") had been constituted. On the same date, the Parties were notified that Mr Alex Kaplan, Legal Counsel, ICSID, would serve as Secretary of the Committee.

10. By letter of 3 January 2017, the Committee invited the Parties to submit their positions on CEAC's Request by 9 January 2017. On 9 January 2017, and in accordance with the Committee's instructions, CEAC requested that the Committee continue the stay of

[2] Application, para. 2.

enforcement of the Award pending the Committee's decision on the Request. By letter of the same date, Montenegro informed the Committee that it opposed CEAC's Request.

11. On 10 January 2017, the Committee invited the Parties to submit by 17 January 2017 a joint proposal advising the Committee of any agreements reached and those points on which the Parties were unable to reach agreement concerning the schedule for written and oral submissions on CEAC's Request and the procedural matters to be discussed at the First Session.

12. On 12 January 2017, the Parties were provided with copies of the declarations pursuant to Rules 53 and 6(2) of the ICSID Arbitration Rules signed by each member of the Committee.

13. By letters of 17 January and 18 January 2017, the Applicant and the Respondent respectively informed the Committee on the status of their efforts to reach agreement on a joint proposal for the timing of written and oral submissions on CEAC's Request and procedural matters to be discussed at the First Session. Both Parties agreed that there should be one round of simultaneous written submissions on 17 February 2017, and that the Parties should have the liberty to make oral submissions on CEAC's Request at the First Session. However, the Parties did not agree on a date for the First Session or on whether there should be oral submissions on CEAC's Request.

14. By letter of 3 February 2017, the Committee instructed the Parties to file their submissions on CEAC's Request by the Parties' agreed date of 17 February 2017. In the same letter, the Committee requested that the Parties confirm their availability to hold the First Session together with oral submissions on CEAC's Request in Paris or in The Hague on 20 April or 2 May 2017, should they be unable to reach agreement on the Request. The Committee also asked the Parties to confirm their availability on those same dates for a First Session to be held by teleconference, should CEAC's Request be resolved among the Parties before the First Session. By separate communications of 6 February 2017, the Parties confirmed their availability for a First Session to be held on 20 April 2017 by teleconference should the Parties reach agreement on the Request, or in Paris should they fail to agree.

15. By separate communications on 14 February 2017, the Parties informed the Tribunal that they were still engaged in negotiations regarding the Applicant's Request, and requested that the Committee grant a four-week extension until 17 March 2017 to file simultaneous submissions thereon. By letter of 15 February 2017, the Committee granted the Parties' request for an extension and further notified the Parties that the First Session and hearing on the Applicant's Request would take place on 20 April 2017 at the World Bank Paris Office, should the Parties fail to reach agreement on the Request.

16. On 6 March 2017, the Committee transmitted a draft Procedural Order No. 1 to the Parties, and on 13 March 2017, the Parties provided the Committee with their comments on the draft.

17. By separate communications of the same date, the Parties confirmed that they had reached agreement on CEAC's Request and that, accordingly, the Applicant would not pursue its Request before the Committee. The Parties further confirmed their agreement that the First Session take place by telephone conference on 20 April 2017.

18. By letter of 20 March 2017, the Respondent informed the Committee of changes to its legal representatives and requested the opportunity to propose further revisions to the Draft Procedural Order No. 1, either in writing before the First Session or orally during the First Session. On 24 March 2017, the Committee requested that the Parties confer and submit a revised joint proposed draft of Procedural Order No. 1 by 5 April 2017.

19. By letter of 5 April 2017, the Respondent informed the Committee that the Parties had been unable to resolve disagreements regarding proposed modifications to the Draft Procedural Order No. 1. The Applicant confirmed this disagreement by letter of the same date and requested that the Committee "decide the issues of disagreement between the Parties either prior to or at the First Session."

20. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the Parties on 20 April 2017 by teleconference. In addition to the Committee and its Secretary, participating in the conference were:

For the Applicant:

Mr Egishe Dzhazoyan	Partner, King & Spalding International LLP
Mr Thomas Sprange QC	Partner, King & Spalding International LLP
Mr Grigori Lazarev	Senior Associate, King & Spalding International LLP
Ms Lisa Wong	Qualified Paralegal, King & Spalding International LLP

For the Respondent:

Mr David Pawlak	David A. Pawlak LLC
Mr Slaven Moravčević	Partner, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Jelena Bezarević Pajić	Partner, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Tanja Šumar	Attorney at law, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Vanja Tica	Associate, Moravčević Vojnović and Partners in cooperation with Schönherr

21. Pursuant to the Committee's instructions during the First Session, by separate communication on 21 April 2017 the Parties each confirmed their availability to a hold a hearing on annulment on 29 and 30 November 2017.

22. On 24 April 2017, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the Committee's decisions on those procedural matters where the Parties did not agree. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Paris, French Republic.

23. In accordance with Procedural Order No. 1, on 12 May 2017, the Applicant submitted its Memorial on Annulment, together with Exhibits C-1 to C-4, and Legal Authorities CL-1 to CL-12 (the "Memorial"). Subsequently, on 16 May 2017, the Applicant submitted a revised version of Exhibit C-3.

24. On 7 July 2017, the Respondent submitted its Counter-Memorial on Annulment (the "Counter-Memorial"), together with Exhibits R-1 to R-20, and Legal Authorities RL-1 to RL-20.

25. On 26 July 2017, Professor Joongi Kim informed the Parties that he had been asked to serve as chair of a tribunal in an unrelated commercial dispute by two co-arbitrators, one of which was Mr Jan Schaeffer, the head of the German dispute resolution practice of the law firm representing the Applicant. Mr Schaeffer was not involved in the present proceedings. Professor Kim notified the Parties that the appointment would not impact his independence or impartiality in the proceedings, and invited the Parties to submit any questions they might have regarding this development. Neither Party raised any question or objection regarding Professor Kim's continued participation as a Member of the Committee if he accepted the appointment in the other case.

26. On 25 August 2017, the Applicant submitted its Reply on Annulment (the "Reply"), together with Exhibits C-5 to C-90, and Legal Authorities CL-13 to CL-30.

27. On 13 October 2017, the Respondent submitted its Rejoinder on Annulment (the "Rejoinder"), together with Exhibits R-21 and R-22, and Legal Authorities RL-21 to RL-49.

28. On 27 October 2017, the Committee sent the Parties a draft of Procedural Order No. 2 containing a proposed hearing protocol and invited them to submit joint comments thereon, by 30 October 2017. On the same date, the Respondent requested an extension to submit its comments on draft Procedural Order No. 2 until 1 November 2017, a request granted by the Committee later that day.

29. Previously, by separate communication on 29 October 2017, both Parties confirmed their availability for a pre-hearing organization meeting by telephone conference on 2 November 2017.

30. On 1 November 2017, the Parties provided their comments on Procedural Order No. 2, and on 2 November 2017, the President and the Parties held a pre-hearing organizational meeting by telephone conference. During the telephone conference, the Parties agreed on all outstanding matters regarding the hearing, and subsequently on the same date, the Committee issued Procedural Order No. 2 concerning the organization of the hearing.

31. In addition to President Greenwood, acting on behalf of the Committee, and Ms Lindsay Gastrell, acting on behalf of the Secretary, participating in the prehearing organization meeting were:

For the Applicant:

Mr Egishe Dzhazoyan	Partner, King & Spalding International LLP
Mr Thomas Sprange QC	Partner, King & Spalding International LLP
Ms Lisa Wong	Qualified Paralegal, King & Spalding

For the Respondent:

Mr David Pawlak	David A. Pawlak LLC
Mr Slaven Moravčević	Partner, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Jelena Bezarević Pajić	Partner, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Tanja Šumar	Attorney at law, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Vanja Tica	Associate, Moravčević Vojnović and Partners in cooperation with Schönherr

32. A hearing on Annulment was held at the World Bank Paris Office from 29 to 30 November 2017 (the "Hearing"). The following persons were present at the Hearing:

Committee:

Sir Christopher Greenwood QC	President
Professor Joongi Kim	Committee Member
Ms Tinuade Oyekunle	Committee Member

ICSID Secretariat:

Mr Alex Kaplan	Secretary

For the Applicant:

Mr Thomas Sprange QC	Partner, King & Spalding International LLP
Mr Egishe Dzhazoyan	Partner, King & Spalding International LLP
Mr Grigori Lazarev	King & Spalding International LLP
Ms Lisa Wong	King & Spalding International LLP
Ms Elysia Stellakis	King & Spalding International LLP

For the Respondent:

Mr David Pawlak	David A. Pawlak LLC
Mr Slaven Moravčević	Partner, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Jelena Bezarević Pajić	Partner, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Tanja Šumar	Attorney at law, Moravčević Vojnović and Partners in cooperation with Schönherr
Ms Vanja Tica	Associate, Moravčević Vojnović and Partners in cooperation with Schönherr

Court Reporter(s):

Ms Yvonne Vanvi	Independent Court Reporter

33. The Parties filed their submissions on costs on 12 January 2018.

34. The proceeding was closed on 26 March 2018.

III. THE AWARD AND SEPARATE OPINION

A. THE CLAIM

35. The factual background was briefly summarized in paras. 29-38 of the Award. The Tribunal made clear, however, that it was not making any findings with regard to factual disputes.[3] The dispute originated in CEAC's ownership and management of Kombinat Aluminijuma Podgorica, AD, an aluminium plant located in Montenegro. According to the Request for Arbitration, CEAC had begun experiencing problems regarding the plant in 2006. On 11 March 2014 CEAC filed a Request for Arbitration with ICSID. It relied upon the Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments, which had entered into force on 23 December 2005 (the "BIT").

[3] Award, para. 28.

36. CEAC maintained that it was entitled to rely upon the BIT on the ground that it was a company incorporated under the laws of Cyprus. Article 1 of the BIT provides, in relevant part, that:

> *3. The term "investor" shall mean: […]*
>
> *(b) a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party and making investments in the territory of the other Contracting Party.*

37. CEAC maintained that Montenegro had breached its obligations under the BIT:

(a) to provide fair and equitable treatment;

(b) to provide full protection and security;

(c) to provide national and most-favoured-nation treatment, including with respect to the "management, maintenance, use, enjoyment, expansion or disposal" of investments;

(d) not to expropriate, except in cases in which such measures are taken in the public interest, observe due process of law, are not discriminatory, and are accompanied by adequate compensation effected without delay;

(e) to guarantee the free transfer of payments; and

(f) to "encourage and create stable, equitable, favourable and transparent conditions for [foreign investors] to make investments in its territory".[4]

[4] Award, para. 39.

B. THE PROCEDURE BEFORE THE TRIBUNAL

38. The Tribunal was duly constituted on 14 July 2014. Montenegro submitted Preliminary Objections pursuant to Arbitration Rule 41(5) within the thirty-day time limit. In its Objections, Montenegro contended, *inter alia*, that CEAC did not qualify as an "investor" under Article 1(3)(b) of the BIT on the ground that it did not have a "seat" in Cyprus. CEAC filed a response to the Objections, together with a witness statement from Mr Nicos Chrysanthou.[5] Hearings were held on those objections on 11 December 2014 and the Tribunal issued its Decision on the Preliminary Objections on 27 January 2015. In that Decision, the Tribunal rejected the Objections on the ground that Montenegro had failed to meet the high standard, laid down in Rule 41(5), of demonstrating that CEAC's claim was "manifestly without legal merit".[6] In particular, the Tribunal observed that:

> *(i) the issue of the "seat", as the term is used in Article 1(3) of the BIT, is a complex legal issue which has been left undefined by the Contracting Parties to the BIT; (ii) both Parties made arguments on this issue, which, whilst incomplete, were nonetheless plausible; and (iii) the Tribunal does not have before it all the relevant materials that would allow it to ascertain the meaning of the term "seat".*[7]

In light of this decision, the Tribunal decided to have a phase of proceedings dedicated to determining whether CEAC had a "seat" in Cyprus for the purposes of Article 1(3)(b) of the BIT.

39. In accordance with the Tribunal's decision, the Parties set out their submissions regarding the question of "seat" in two rounds of written argument and at the hearing in March 2016. CEAC's Memorial[8] and Reply[9] were accompanied by two expert opinions from Mr Alecos Markides (hereinafter the "First Markides Opinion"[10] and the "Second Markides Opinion"[11]), a former Attorney-General of Cyprus, and two expert opinions from Dr

[5] Exhibit R-6.

[6] Exhibit C-1, para. 100.

[7] Exhibit C-1, para. 105.

[8] Exhibit R-9.

[9] Exhibit R-13.

[10] Exhibit R-15.

[11] Exhibit C-88.

Monique Sasson.[12] In addition, it submitted with its Reply a witness statement from Mr Georgios Iacovou.[13] Montenegro submitted a Counter-Memorial[14] and a Rejoinder,[15] together with an expert opinion from Professor Vuk Radovic and two expert opinions from Mr Kypros Ioannides,[16] as well as witness statements from Mr Marcos Georgios Dracos and Mr Michalis Georgiou.

C. CEAC'S POSITION BEFORE THE TRIBUNAL

40. CEAC's position before the Tribunal is set out in some detail at paras. 50-96 of the Award and the Committee does not consider it necessary to repeat that position in the same detail here. In brief, CEAC maintained that neither the BIT nor international law more generally offered any guidance as to the meaning of the term "seat" in Article 1(3)(b) of the BIT. The BIT itself contained no definition of the term or anything which might indicate its meaning. As for international law as a whole, there was no consistent State practice regarding the concept of corporate "seat": whereas some States (such as France and Germany) regarded a corporation as having its "real seat" in the State from which it was managed and controlled, irrespective of where it was incorporated, others (including England, from whose law the companies law of Cyprus was derived) had no notion of the "seat" of a corporation and considered nationality to flow from the fact of incorporation under the law of a particular State.

41. Accordingly, CEAC argued that the meaning of "seat" in the BIT had to be determined by a *renvoi* to the law of the relevant Contracting Party, in the case of CEAC, to the law of Cyprus. Under Cypriot law, CEAC maintained, a corporation was Cypriot if it had its registered office in Cyprus. That CEAC had its registered office in Cyprus was conclusively demonstrated, according to CEAC, by the certificates of registration granted by the Registrar of Companies and produced in evidence.[17] Those certificates stated that

[12] Exhibits R-12 and C-89.
[13] Exhibit C-87.
[14] Exhibit C-84.
[15] Exhibit R-17.
[16] Exhibits C-85 and R-14.
[17] CEAC produced certificates for 2005, 2006, 2007, 2008, 2010, 2011, 2012 and 2013; Award, para. 89.

the registered office of CEAC was located at Dimosthenous 4, 1101, Nicosia. CEAC adduced evidence to the effect that it received documents – including a number of documents from the Respondent – at Dimosthenous 4. Its argument that under Cypriot law a company had its "seat" where it had its registered office was supported by the expert evidence of Mr Markides.

42. CEAC also advanced two alternative arguments. First, it maintained that, if the term "seat" was to be interpreted as requiring a "genuine link" or "real connection" with Cyprus, or that CEAC had to be managed and controlled from Cyprus, those requirements were satisfied. CEAC was a holding company and its activities and functions were typical of such a company. According to its governing instruments, its sole director was a Cypriot service company. In addition, CEAC carried out transactions in Cyprus including the purchase of shares and instructing auditors and other consultants.

43. Secondly, CEAC argued that it was a tax resident of Cyprus, as established by its tax residency certificates for 2005, 2014 and 2015, and its income tax return for 2007. In the event that the Tribunal did not accept that the fact that CEAC had its registered office in Cyprus meant that it had its "seat" there, CEAC maintained that its tax residency in Cyprus was sufficient to establish that it had its "seat" there.

D. MONTENEGRO'S POSITION BEFORE THE TRIBUNAL

44. Montenegro's position before the Tribunal is described in similar detail in paras. 97-142 of the Award; again, the Committee will not repeat that detail but briefly summarize Montenegro's arguments.

45. Montenegro maintained that CEAC bore the burden of establishing the meaning of the term "seat" under the BIT and proving that it had a "seat", within that meaning, in Cyprus. According to Montenegro, CEAC had failed to discharge that burden. Montenegro's principal argument was that the term "seat" in the BIT had to be given an autonomous meaning derived from international law. For Montenegro, that meaning had to be equated to the concept of "real seat". Otherwise the requirement in Article 1(3)(b) of the BIT that a legal entity must have its "seat" in the territory of the contracting party, as well as being

incorporated under the laws of that party, would be rendered superfluous. Montenegro further argued that the principle of reciprocity required that the "seat" test needed to fulfil its function in an even manner with respect to both Contracting Parties, which meant that the test had to be based upon identical criteria; the essential reciprocity of the BIT would be frustrated if a Cypriot holding company was treated as an investor but a Montenegrin one was not.[18]

46. In the alternative, Montenegro argued that, even under Cypriot law, the term "seat" could not be equated to "registered office". It also argued that CEAC did not, in fact, have a registered office in Cyprus. Montenegro rejected the argument that the certificates issued by the Registrar of Companies were conclusive evidence that CEAC had a registered office at Dimosthenous 4. It maintained that the reference to Dimosthenous 4 as the registered office of CEAC in the certificates of registration was by no means conclusive, because the Registrar of Companies issued such certificates on the basis of the filings by companies and made no attempt at independent verification of the existence of a registered office.

47. Montenegro maintained that, under Cypriot law, a registered office had to perform certain functions. In particular, Montenegro argued that Cypriot law required that the registered office consist of physical premises and not a mere vacant plot of land, that the company have some right in respect of those premises, that the premises be accessible to the public for at least two hours a day for inspection of various official documents pertaining to the company, that service of documents on the company could be effected at the premises and that the company's name be clearly displayed outside the premises. Montenegro adduced evidence which it maintained demonstrated that the building at Dimosthenous 4 met none of those requirements, that it appeared to be an empty building with no indication of any connection with CEAC and that attempts to deliver documents there had been unsuccessful.

E. THE AWARD

48. The Tribunal began by noting that it was for the Tribunal to determine whether the requirements for jurisdiction were satisfied, that this analysis had to be conducted under

[18] Award, paras. 98-114.

international law[19] and that the conditions necessary for the establishment of jurisdiction "must be fulfilled at the moment when the Parties' consent to arbitration is perfected, i.e., at the moment when the Request for Arbitration is filed (11 March 2014)".[20]

49. The Tribunal went on to summarize its findings in a passage which has been the subject of so much debate between the Parties in the annulment proceedings that it is worth quoting in full. The Tribunal stated:

> *For the purposes of the present analysis, the Tribunal does not consider it necessary to determine the precise meaning of the term "seat" as employed in Article 1(3)(b) of the BIT. That is because the evidence in the record does not support a finding that CEAC had a registered office in Cyprus at the relevant time, nor a conclusion that it was managed and controlled from Cyprus. Equally, the Tribunal finds that the term "seat" cannot be equated to tax residency. As these are the only competing interpretations of the term "seat" put forward by the Parties, the Tribunal has come to the conclusion that CEAC did not have a "seat" in Cyprus at the time the Request for Arbitration was filed. Consequently, CEAC is not an "investor" within the meaning of the Treaty, and the Tribunal lacks jurisdiction to hear this case.*[21]

The Tribunal elaborated on this summary finding in the following three sections of the Award.

50. First, in paras. 150-201, it considered whether CEAC had a registered office in Cyprus on 11 March 2014. It noted CEAC's argument, supported by the First Markides Opinion, that a certificate of registered office was conclusive proof, as a matter of Cypriot law, that a company had a registered office in Cyprus. The Tribunal had "no difficulty in accepting that, as a general matter, a certificate of registered office will indicate that a company indeed has a registered office at the address specified therein".[22] However, it rejected CEAC's argument that the certificate was conclusive proof. Referring to the award of the

[19] Award, para. 145.

[20] Award, para. 146.

[21] Award, para. 148 (cross-references omitted).

[22] Award, para. 152.

tribunal in *Flutie*[23] and the decision of the *ad hoc* Committee in *Soufraki*,[24] the Tribunal held that, as a matter of international law it was not bound by a certificate issued by a domestic authority but was entitled, in certain circumstances, to go behind that certificate and investigate the facts for itself.

51. The Tribunal also held that, "even under Cypriot law, certificates of registered offices are not conclusive evidence that a registered office exists".[25] It noted that the Registrar who issued the certificate "does not carry out any official and independent verification as to whether the declaration made by the company concerning the registered office corresponds with reality".[26] On that point, it preferred the expert evidence of Mr Ioannides to that of Mr Markides.[27]

52. The Tribunal noted that Mr Ioannides had explained that the law of Cyprus imposed certain requirements that a registered office should fulfil, specifically:

(1) it had to consist of physical premises; a vacant plot would not do;

(2) the company had to have some right to use the property;

(3) the premises had to be accessible to the public (for at least two hours on each business day) for inspection of the various books and registers and for service of documents and notices upon the company;

(4) the books and registers that a company was required by law to maintain in its registered office had actually to be held there; and

(5) the company's name had to be painted or affixed on the outside of the office in a conspicuous position in letters easily legible.[28]

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[23] Award, para. 156, citing *Flutie* case,1904 IX R.I.A.A. 151-152.

[24] Award, paras. 157-158, citing *Hussein Nuaman Soufraki* v. *United Arab Emirates* (ICSID Case No. ARB/02/07), Decision on Annulment, 5 June 2007 ("*Soufraki*"), paras. 76 and 78.

[25] Award, para. 160.

[26] Award, para. 166.

[27] Award, para. 168.

[28] Award, para. 171.

53. The Tribunal accepted that these requirements were applicable under the law of Cyprus and that, as Mr Ioannides put it, if an address did not comply with them, it did not qualify as a registered office.[29] The Tribunal examined the evidence regarding the premises at Dimosthenous 4 and concluded that:

> *… Claimant has not proven, with evidence, that the building at Dimosthenous 4, Nicosia, Cyprus is accessible to the public for purposes of inspecting the company's registers, that CEAC is amenable to service at that address, that the company's records are kept there or that the address bears a plate with CEAC's name.*[30]

It continued:

> *Based on these considerations, the Tribunal can only conclude that, for purposes of its jurisdictional analysis, CEAC does not have a registered office at Dimosthenous 4, Nicosia, Cyprus. Considering that Claimant has not presented arguments or evidence indicating that a different address in Cyprus could ostensibly serve this purpose, the Tribunal concludes that CEAC did not have a registered office in Cyprus at the time the Request for Arbitration was filed.*[31]

54. Secondly, in paras. 202-208, the Tribunal considered, "out of an abundance of caution", whether the evidence in the record supported a conclusion that CEAC was managed and controlled from Cyprus at the relevant time.[32] Noting that CEAC's status as a holding company was contested, the Tribunal found that, even if it were accepted to be such, the evidence attesting to its management and control was "very poor".[33] In particular, the Tribunal observed that "there are no documents in the record attesting to CEAC's management and control at the relevant time: 11 March 2014".[34]

55. Finally, in paras. 209-211, the Tribunal considered CEAC's alternative argument that CEAC had a seat in Cyprus on account of its tax residency in Cyprus. The Tribunal rejected

[29] Award, paras. 171 and 176.

[30] Award, para. 199.

[31] Award, para. 200.

[32] Award, para. 202.

[33] Award, para. 204.

[34] Award, para. 207.

this argument on the ground that CEAC had put forward no convincing evidence that tax residency could be equated to "seat" as a matter of Cypriot law and that, on the contrary, the evidence of its own expert, Mr Markides, was that it could not be used to determine the meaning of "seat" under BIT.[35]

56. The Tribunal therefore concluded that CEAC was not an investor under the BIT and that the Tribunal accordingly lacked jurisdiction.[36]

57. That decision was taken by a majority. Professor Park wrote a vigorous dissent, criticising the approach taken by the majority. According to Professor Park:

> *Apart from tax residency, the Parties advanced three test of "seat" for consideration. One looks to a relatively deep level of economic penetration implicating management and control in Cyprus. The second imposes multiple criteria in determining registered office, and presupposes that an office ceases to be registered in the event of defective compliance with corporate formalities. The final test rests on the registered office in the plain meaning of that terms [sic]: an office that is registered.*[37]

58. Professor Park considered that there was no international law definition of "seat" and thus rejected the first of the three tests which he identified.[38] The second he considered to be unsupported in either domestic or international law and commented that "adoption of that standard would require arbitrators to assume a policy-making mission in excess of their authority.[39] Only the third test had any merit in his eyes.[40]

59. Professor Park was also critical of the majority for having purported to apply CEAC's test of "seat" and finding it was not satisfied when he considered that, in reality, the majority had applied a test advanced by the Respondent.[41]

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[35] Award, para. 210, quoting the Second Markides Opinion.

[36] Award, para. 212.

[37] Dissent, para. 19.

[38] Dissent, para. 20.

[39] Dissent, para. 21.

[40] Dissent, para. 22.

[41] Dissent, paras. 1-2 and 10-11.

IV. GROUNDS FOR ANNULMENT

60. As noted in para. 6, above, CEAC argues that the award should be annulled on the grounds that the decision that the Tribunal lacked jurisdiction was a manifest excess of power (ICSID Convention, Article 52(1)(b)), that the Tribunal was guilty of a serious departure from a fundamental rule of procedure (ICSID Convention, Article 52(1)(d)) and that the Award failed to state the reasons on which it was based (ICSID Convention, Article 52(1)(e)). However, CEAC made a total of eleven separate criticisms of the Tribunal and the Award, in respect of several of which it maintained that more than one of the three grounds for annulment was implicated.

A. CEAC'S POSITION

61. In the hearings before the Committee, CEAC set out its challenge to the Award under the following headings.[42]

(1) The Tribunal failed to determine the meaning of the term "seat" in Article 1(3)(b) of the BIT

62. By failing to determine the precise – or, according to CEAC, any – meaning of the term "seat in Article 1(3)(b) of the BIT, the Tribunal failed to answer the central question it had posed and to which the relevant stage of the proceedings had been dedicated. Consequently, the Award was not based on international law, and the Tribunal had failed to identify and apply the proper law. The result was a manifest excess of power.[43] There was also a failure to state the reasons on which the Award was based, since the Tribunal failed to deal with all the questions put to it.

(2) The Tribunal considered the facts before the legal tests, thereby prejudging the outcome of its legal analysis

63. CEAC maintains that, instead of following the proper course of determining the legal tests to be applied and then considering whether the facts did or did not show those tests to have been met, the Tribunal started by considering the facts and thereby prejudged the outcome,

[42] CEAC Slides, 14-19.

[43] Application, paras. 44-46; CEAC Memorial, para. 17.1; CEAC Reply, paras. 87-99.

thus committing a manifest excess of power and producing an Award which failed adequately to state the reasons on which it was based.[44]

(3) The Tribunal failed to consider the definition of "registered office" advanced by CEAC

64. According to CEAC, the Tribunal, having decided to proceed not by setting out what it considered the legal test of "seat" under the proper law but by enquiring whether CEAC satisfied any of the tests put forward by the Parties, misapplied the test on which CEAC principally relied. CEAC maintains that its test was that the BIT required a *renvoi* to Cypriot law and that, according to that law, a company had its seat in Cyprus if it had been incorporated there, had given the Registrar of Companies the necessary notification of a registered office address and received from the Registrar a certificate of registration. In CEAC's view, the Tribunal fell into error by substituting its own test of what constituted a registered office based upon the expert evidence of Mr Ioannides. In doing so, the Tribunal confused the question "what is a registered office?" with the question "what is a registered office required to do?". As a result, it committed a manifest excess of power, was guilty of a serious departure from a fundamental rule of procedure and failed to state the reasons on which the Award was based.[45]

(4) The "minimum requirements" for a registered office proposed by Mr Ioannides were not pleaded by Montenegro as a test for "seat" and did not form part of the legal framework in the case

65. CEAC contends that it was taken by surprise by the way in which the Tribunal employed the expert evidence of Mr Ioannides to arrive at a definition of what constituted a registered office under Cypriot law. According to CEAC, Montenegro had not pleaded the requirements identified by Mr Ioannides as part of its own test for "seat" under the BIT and CEAC had not cross-examined Mr Ioannides on this part of his report because it had no reason to believe that it might be taken as a definitive part of the test for "seat". As a result, the Tribunal committed a manifest excess of power, was guilty of a serious departure

[44] Application, paras. 46 and 75-76; CEAC Reply, paras. 145 and 159.

[45] Application, paras. 49, 54 and 76; CEAC Memorial, paras. 30-32 and 39; CEAC Reply, paras. 146, 161, 164-168 and 178-179.

from a fundamental rule of procedure and failed to state the reasons on which the Award was based.[46]

(5) The Tribunal failed to give any, or any proper, weight to the evidence of Mr Markides

66. According to CEAC, the Tribunal, in contrast to its reliance on the evidence of Mr Ioannides, failed to give any, or any proper, weight to the evidence of CEAC's expert on the law of Cyprus, Mr Markides, notwithstanding that he was a former Attorney-General of Cyprus. As a result, the Tribunal committed a manifest excess of power, was guilty of a serious departure from a fundamental rule of procedure and failed to state the reasons on which the Award was based.[47]

(6) By adopting the "minimum requirements" identified by Mr Ioannides as a legal test which found no basis in international or domestic law, the Tribunal assumed a policy-making mission beyond its jurisdiction

67. CEAC maintains that the test adopted by the Tribunal – namely that only an office which complied with the "minimum requirements" identified by Mr Ioannides was a "registered office" within the meaning of Cypriot law – had no legal basis and was a serious misapplication of the law. The Tribunal adopted a policy-making mission, seeking to lay down what it thought the requirements for a "seat" *ought* to be, rather than considering what those requirements were under the proper law. It therefore manifestly exceeded its powers.[48]

(7) The Tribunal ignored CEAC's evidence regarding management and control

68. In considering the evidence of whether CEAC satisfied the test of being subject to management and control from Cyprus, the Tribunal, according to CEAC, ignored the evidence which CEAC had submitted on this point. In particular, CEAC complains that the Tribunal disregarded the evidence of Mr Chrysanthou, whose witness statement had been submitted in the Article 41(5) stage and who testified that the office of his law firm in

[46] Application, paras. 50-51, 62-63 and 81; CEAC Memorial, para. 23; CEAC Reply, paras. 102-121, 127-132, 147 and 180-183.

[47] Application, para. 69; CEAC Reply, paras. 31-36, 97, 137, 165-166 and 178.

[48] Application, paras. 40.2 and 52-54; CEAC Memorial, para. 17.2; CEAC Reply, para. 36.

Cyprus was the operating centre of the company and that documents were regularly served on CEAC through the premises at Dimosthenous 4, from which correspondence was collected daily. As a result, the Tribunal committed a manifest excess of power, was guilty of a serious departure from a fundamental rule of procedure and failed to state the reasons on which the Award was based.[49]

(8) The Tribunal failed properly to consider and give content to Montenegro's "autonomous definition" of "seat" under international law

69. CEAC also complains that the Tribunal failed to give content to Montenegro's definition of "seat" under the BIT. Montenegro had argued that "seat" had to be given an autonomous definition under international law. The result is that the Award failed to state the reasons on which it was based.[50]

(9) The Tribunal's treatment of "tax residency" was incompatible with its approach to the "autonomous definition"

70. CEAC maintains that the Tribunal's treatment of its alternative test based upon CEAC's "tax residency" in Cyprus was incompatible with its approach to Montenegro's "autonomous definition", with the result that the Award failed to state the reasons on which it was based.[51]

(10) The Tribunal entirely failed to consider Montenegro's "real seat" theory

71. This ground of challenge, which clearly overlaps with ground (8) above, is said to involve a manifest excess of power and a failure to state the reasons on which the Award was based.[52]

[49] Application, paras. 65-68, 74 and 83-84; CEAC Memorial, paras. 26 and 38; CEAC Reply, paras. 51, 133-136, 138, 148, 157-160, 169-175 and 184-185.

[50] CEAC Reply, paras. 23.2, 39-46, 90.3, 148 and 162.

[51] CEAC Reply, paras. 23.3., 47-49 and 149-150.

[52] CEAC Reply, paras. 23.5, 54-60, 90.2, 96, 141, 153 and 163.

(11) The evaluation of CEAC's evidence was unnecessarily arbitrary and frivolous

72. CEAC criticises the Tribunal's approach to CEAC's evidence in light of the failure to consider and give effect to the "autonomous definition" and "real seat" theory advanced by Montenegro, with the result that the Award failed to state the reasons on which it was based.[53]

B. MONTENEGRO'S POSITION

73. Montenegro raised a procedural objection that CEAC had not properly deployed its case either in its Application (which was 21 pages long) or its Memorial (which occupied only nine pages) but had waited to develop its case until it filed its Reply (67 pages) and had then further refined that case at the hearings.[54] According to Montenegro, this approach placed Montenegro at a disadvantage and meant that the pleading schedule was not properly respected.

74. On substance, Montenegro denied that the Tribunal had committed any of the errors suggested by CEAC and maintained that, even if the Tribunal had erred, it had not committed an annullable error.[55]

75. Montenegro maintained that there had been no manifest excess of power.[56] The Tribunal had been entitled to avoid the question of the precise meaning of "seat" in Article 1(3)(b) of the BIT and adopt an approach based on "judicial economy".[57] CEAC had argued that the question whether CEAC had its seat in Cyprus had to be decided under Cypriot law and that was what the Tribunal had done, since the Tribunal had applied Cypriot law, having carefully compared the expert evidence of Mr Markides and Mr Ioannides and preferred the latter. According to Montenegro, the Tribunal had been correct in its

[53] CEAC Reply, paras. 23.4, 46, 50-53, 90.4, 174 and 188.

[54] See Montenegro Rejoinder, paras. 2-16.

[55] Montenegro Counter-Memorial, paras. 1-13.

[56] Montenegro Counter-Memorial, paras. 39-81.

[57] Montenegro Rejoinder, paras. 36-38; Tr. Day 1, 207:18-208:6.

conclusion but, even if it had not been, it would have misapplied the proper law, rather than failed to apply it at all and had not therefore committed an annullable error.[58]

76. According to Montenegro, the Parties had both been aware that the Tribunal intended to examine the evidence concerning whether CEAC had its seat in Cyprus at the hearings.[59] The burden of proof had been on CEAC and if it had failed to bring forward evidence regarding its links with Cyprus as of the date of filing its Request for Arbitration, then it had only itself to blame.[60] There had been no serious departure from a fundamental rule of procedure and the Award set out in full its reasoning; the fact that CEAC found that reasoning unconvincing was not a ground for annulment.[61]

V. THE COMMITTEE'S DECISION

77. The Committee is grateful to both Parties and their representatives for their very full argument on all of the points in contention.

A. THE LEGAL STANDARD TO BE APPLIED ON AN APPLICATION FOR ANNULMENT

78. Before analysing the grounds on which annulment is sought in the present case, the Committee will briefly consider the legal standards which it is required to apply.

(1) Nature of Annulment and the Powers of an *Ad Hoc* Committee

79. The text of Article 52(1) of the ICSID Convention and the decisions of past *ad hoc* Committees establish that there are four general principles regarding the nature of annulment proceedings and the power of an *ad hoc* Committee which are pertinent to the present case.

80. First, as the *ad hoc* Committee in *MTD Equity and MTD Chile* v. *Republic of Chile* put it:

> *Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review*

[58] Montenegro Counter-Memorial, section IV; Montenegro Rejoinder, paras. 113-116.

[59] Montenegro Rejoinder, paras. 73-75; see also Tr. Day 1, 152:1-4 (quoting Professor Brigitte Stern).

[60] Montenegro Counter-Memorial, para. 123; Montenegro Rejoinder, para. 41.

[61] Montenegro Counter-Memorial, section V; Montenegro Rejoinder, paras. 195-200.

> *on specified and limited grounds which take as their premise the record before the Tribunal.*[62]

81. The *ad hoc* Committee in *Soufraki* was similarly insistent on this point, commenting that:

> *… annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award. In other words, … "an ad hoc committee does not have the jurisdiction to review the merits of the original award in any way. The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings."*[63]

The *Soufraki* Committee went on to analyse this role of an *ad hoc* Committee as the safeguard of the integrity of the proceedings in greater detail:

> *In the view of the ad hoc Committee, the object and purpose of an ICSID annulment proceeding may be described as the control of the fundamental integrity of the ICSID arbitral process in all its facets. An ad hoc committee is empowered to verify (i) the integrity of the tribunal – its proper constitution (Article 52(1)(a)) and the absence of corruption on the part of any member thereof (Article 52(1)(c)); (ii) the integrity of the procedure – which means firstly that the tribunal must respect the boundaries fixed by the ICSID Convention and the Parties' consent, and not manifestly exceed the powers granted to it as far as its jurisdiction, the applicable law and the questions raised are concerned (Article 52(1)(b)), and secondly, that it should not commit a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) 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)). Integrity of the dispute settlement mechanism, integrity of the process of dispute settlement and integrity of solution of the dispute are the basic interrelated goals projected in the ICSID annulment mechanism.*[64]

82. Secondly, as the *Soufraki* Committee also explained:

> *Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor*

[62] *MTD Equity and MTD Chile* v. *Republic of Chile* (ICSID Case No. ARB/01/07), Decision on Annulment, 21 March 2007 ("*MTD*"), para. 31.

[63] *Soufraki*, para. 20.

[64] *Soufraki*, para. 23.

> *extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty.*[65]
>
> The reference to principles of treaty interpretation is to the principles laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, 1969. Although the Vienna Convention is not, as such applicable to the ICSID Convention, which predates it, the provisions of the Vienna Convention on treaty interpretation are generally regarded as declaratory of customary international law.

83. Thirdly, it is clear from the text of Article 52 that an award may be annulled only on one or more of the five grounds set out in Article 52. An *ad hoc* Committee is not entitled to range beyond those five grounds. Its function is not to consider whether it agrees with the reasoning or the conclusions of the tribunal but only to determine whether one or more of the five grounds has been made out.

84. Lastly, the language of Article 52(3) of the ICSID Convention, which states that an *ad hoc* Committee "shall have *the authority to annul* the award or any part thereof on any of the grounds set forth in paragraph (1)" indicates that, even where an *ad hoc* Committee determines that one of the grounds for annulment is made out, the Committee has a discretion whether to annul the award.[66] That discretion is by no means unlimited and must take account of all relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether they had – or could have had – a material effect upon the outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both Parties.

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[65] *Soufraki*, para. 21.

[66] See *Amco v. Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, 3 December 1992 ("*AMCO II*"), para. 1.20; *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, 22 December 1989 ("*MINE*"), paras. 4.09-4.10; *Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 ("*Vivendi I*"), para. 66. See also Schreuer and Others, *The ICSID Convention: A Commentary*, (Cambridge, 2nd ed., 2009) ("Schreuer"), Article 52, paras. 466-485.

85. These principles have been repeated by numerous other *ad hoc* Committees [67] and can be regarded as well established.

(2) ICSID Convention, Article 52(1)(b): Manifest Excess of Power

86. Article 52(1)(b) provides that an *ad* hoc Committee may annul an award on the ground that "the Tribunal has manifestly exceeded its powers". The paragraph lays down two requirements, both of which must be met if an Award is to be annulled on this ground. First, the tribunal must have exceeded its powers and, secondly, that excess of power must be "manifest". The most obvious instance of an excess of power by a tribunal is the decision of an issue which falls outside the jurisdiction of the tribunal under the ICSID Convention or the relevant BIT (or other instrument conferring jurisdiction). However, decisions of *ad hoc* Committees in other cases have made clear that it is also an excess of power for a tribunal to fail to apply the law applicable to the case or to the particular issue in the case.

87. The requirement that the excess of powers be "manifest" refers to how readily apparent the excess is, rather than to its gravity. In the words of one leading commentary on the ICSID Convention:

> *In accordance with its dictionary meaning, "manifest" may mean "plain", "clear", "obvious", "evident" and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived. … An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.* [68]

This view has been endorsed in several decisions of *ad hoc* Committees. Thus, in *Wena Hotels Ltd*. v. *Egypt*, the Committee stated that:

> *The excess of power must be self-evident rather than the product of elaborate interpretation one way or the other. When the latter happens, the excess of power is no longer manifest.* [69]

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[67] See, e.g., *EDF International SA* v. *Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment, 5 February 2016 ("*EDF*"), paras. 61-73; *Teco Guatemala Holdings* v. *Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016 ("*Teco*"), para. 73.

[68] Schreuer, Article 52, para. 135.

[69] *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, 5 February 2002 ("*Wena*"), para. 25.

Similarly, the Committee in *CDC Group v. Seychelles* stated:

> *As interpreted by various ad hoc committees, the term "manifest" means clear or "self-evident". Thus, even if a tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a tribunal's conduct, if susceptible of argument "one way or the other" is not manifest. As one commentator has put it, "if the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive."*[70]

88. The Committee notes, however, the observation of the *EDF* Committee that:

> *While … an excess of powers will be manifest only if it can readily be discerned, … this does not mean that the excess must, as it were, leap out of the page on a first reading of the Award. The reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided. In such a case, the need for such inquiry and analysis will not prevent an excess of powers from being "manifest".*[71]

89. Nevertheless, it is important to understand the limits of the Committee's role in relation to an application for annulment for manifest excess of powers. As the *Teco* Committee explained:

> *… in determining whether a tribunal has committed a manifest excess of powers, an annulment committee is not empowered to verify whether a tribunal's jurisdictional analysis or a tribunal's application of the law was correct, but only whether it was tenable as a matter of law. Even if a committee might have a different view on a debatable issue, it is simply not within its powers to correct a tribunal's interpretation of the law or assessment of the facts."*[72]

[70] *CDC Group* v. *Republic of the Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, 29 June 2005 ("*CDC*"), para. 41.

[71] *EDF*, para. 193.

[72] *Teco*, para. 78; see also *Lucchetti* v. *Peru* (ICSID Case No. ARB/03/25), Decision on Annulment, 23 December 2010, para. 112, and *Rumeli* v. *Kazakhstan* (ICSID Case No. ARB/05/16), Decision on Annulment, 25 March 2010, para. 96.

(3) ICSID Convention, Article 52(1)(d): Serious Departure from a Fundamental Rule of Procedure

90. Article 52(1)(d) of the ICSID Convention provides that an *ad hoc* Committee may annul an award on the ground that "there has been a serious departure from a fundamental rule of procedure". It is clear from this language that not every procedural default can provide grounds for annulment. A party seeking to annul an award under this provision must show (a) that the rule of procedure from which the tribunal departed was of fundamental importance;[73] and (b) that the departure was serious.

91. With regard to the first requirement, the Committee does not consider it necessary or appropriate to set out a list of those procedural rules which fall into the category of "fundamental" rules of procedure but it has no doubt that the rules of natural justice, including the rule that a tribunal must afford both Parties an equal opportunity to be heard, fall into that category.

92. On the second requirement, the Committee agrees with the observation of the *MINE* Committee that:

> *In order to constitute a ground for annulment the departure from a "fundamental rule of procedure" must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and must be such as to deprive a party of the benefit or protection which the rule was intended to provide.*[74]

93. It also shares the view of the Committee in *Pey Casado* that:

> *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*

[73] *EDF*, para. 199, discussing, *inter alia*, a difference between the Spanish text of the Convention and the English and French texts and concluding that, in accordance with the principle stated in Article 33 of the Vienna Convention on the Law of Treaties, 1969, the meaning which best reconciles the three authentic texts of the ICSID Convention is that only a serious departure from a fundamental rule of procedure affords grounds for annulment. See also *MINE*, paras. 5.05 to 5.06.

[74] *MINE*, para. 5.05.

> *may have had on the award". The Committee agrees that this is precisely how the seriousness of the departure must be analysed.*[75]

The Committee is, therefore, not persuaded by the suggestion, in *Wena* that "the violation … must have caused the Tribunal to reach a result substantially different from what it would have awarded had [the relevant procedural] rule been observed".[76] It shares the view of the *Teco* Committee that:

> *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 it 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.*[77]

(4) ICSID Convention, Article 52(1)(e): Failure to State Reasons

94. The provision of Article 52(1)(e) that an award may be annulled if it "fails to state the reasons on which it is based" is closely tied to the provision of Article 48(3), which requires that "the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based".

95. The requirement to state reasons is an important one but it is equally important that an *ad hoc* Committee is not drawn into using Article 52(1)(e) as a means for conducting an appeal. The point was very clearly made by the *Vivendi I* Committee in the following passage:

> *A greater source of concern is perhaps the ground of "failure to state reasons", which is not qualified by any such phrase as "manifestly" or "serious".*
>
> *However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect*

[75] *Victor Pey Casado* v. *Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012, para. 78, citing *Wena*, para. 61.

[76] *Wena*, para. 58.

[77] *Teco*, para. 85.

> *to all or part of an award, not the failure to state correct or convincing reasons. It bears repeating that an ad hoc committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.*
>
> *In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.*[78]

96. The *Wena* Committee took a similar view:

> *The ground for annulment of Article 52(1)(e) does not allow any review of the challenged award which would lead the ad hoc committee to reconsider whether the reasons underlying the tribunal's decisions were appropriate or not, convincing or not. As stated by the ad hoc committee in MINE, this ground for annulment refers to a "minimum requirement" only. This requirement is based on the tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the tribunal to its decision. If such a sequence of reasons has been given by the tribunal, there is no room left for a request for annulment under Article 52(1)(e). […]*
>
> *Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the parties will be able to understand the tribunal's reasoning. This goal does not require that each reason be stated expressly. The tribunal's reasons may be implicit in the consideration and conclusions contained in the award, provided*

[78] *Vivendi I*, paras. 64-65.

> *they can be reasonably inferred from the terms used in the decision.*[79]

97. The Committee therefore agrees with the observation of the *EDF* Committee that "Article 52(1)(e) empowers a Committee to annul an award if there has been a *failure* to state the reasons on which the award is based; it does not entitle a Committee to annul an award because it finds the reasoning unconvincing".[80]

98. One final consideration, of particular relevance in the present case, is that, in order to give a fully reasoned award, a tribunal is required to answer every "question" put to it. It is not, however, required to deal explicitly with every detail of every argument advanced by the Parties or to refer to every authority which they invoke. The Committee agrees with the analysis of the *Enron* Committee:

> *… a tribunal has a duty to deal with each of the questions ("pretensions") submitted to it, but it is not required to comment on all arguments of the parties in relation to each of those questions. Similarly, the Committee considers 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 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 of each individual item of evidence or each individual legal authority or legal provision relied on 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.*[81]

[79] *Wena*, paras. 79 and 81.

[80] *EDF*, para. 195; see also *Teco*, para. 90.

[81] *Enron Creditors Recovery Corp. and Ponderosa Assets LP v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Annulment, 30 July 2010 ("*Enron*"), para. 222.

B. GROUNDS FOR ANNULMENT IN THE PRESENT CASE TAKEN AS A WHOLE

99. The Committee will now turn to the application of the standards set out in the preceding section to the case presented by CEAC. Each of the grounds for annulment advanced by CEAC is, of course, in principle freestanding in the sense that CEAC does not have to succeed in respect of one ground in order to succeed on another. Nevertheless, it is apparent that there is a very close relationship between the different grounds summarized in paras. 60-72, above and that, indeed, there is a considerable overlap. The Committee considers, therefore, that it is appropriate to begin by looking at CEAC's criticisms of the Award as a whole.

100. Those criticisms centre around the Tribunal's decision not to determine the "precise" meaning of "seat" in the BIT but to decide the case on the basis that, on any of the tests put forward by the Parties, CEAC did not have a "seat" in Cyprus and thus did not qualify as an investor within the meaning of Article 1(3)(b) of the BIT. CEAC sees a sequence of errors – substantive and procedural – in this approach:

(a) the Tribunal failed to answer the principal question that was before it and, in doing so, failed to apply international law, which it had already stated was the applicable law for determining its jurisdiction;

(b) instead, the Tribunal purported to decide the issue by reference to the law of Cyprus but got that law wrong because it confused questions of evidence with questions of law and failed to appreciate that whether CEAC had a registered office was entirely different from whether its office performed the functions which Cypriot law required of a registered office;

(c) the Tribunal based its decision on a part of the expert report of Mr Ioannides which did not correctly represent the law of Cyprus and had not been put forward by Montenegro (whose witness Mr Ioannides was) for the purpose for which the Tribunal used it;

(d) the Tribunal failed to give equal treatment to the evidence of Mr Markides (CEAC's expert); and

(e) the Tribunal ignored, or grossly underestimated, evidence which contradicted its findings.

101. The Committee is not persuaded by this line of argument.

102. First, the issue before the Tribunal was not – as CEAC tried to represent it before the Committee – what was the meaning of "seat" in the BIT, but whether, at the relevant date, CEAC had a "seat" in Cyprus. That was the only question which the Tribunal had to answer in the proceedings on what it had identified as a preliminary issue. In answering it, the Tribunal was perfectly entitled to adopt the "judicial economy" approach of concluding that, if CEAC failed to show that it possessed a seat in Cyprus under any of the tests advanced by the Parties, then the answer to that question was in the negative and no further inquiry was necessary; the Tribunal did not have to begin by determining the meaning of "seat" in the BIT and then deciding whether CEAC had such a seat.

103. There is no force in CEAC's argument that, by adopting this approach, the Tribunal failed to apply international law as the applicable law. The Tribunal was faced with three possible tests of "seat" put forward by the Parties:

(a) CEAC's principal argument, that neither the BIT nor international law contained any definition of "seat" and therefore a *renvoi* to Cypriot law was required;

(b) Montenegro's argument that, as a matter of international law, "seat" meant "real seat", in the sense of the place from which the company was managed and controlled; and

(c) CEAC's alternative argument that "seat" should be equated to tax residency.

104. None of these arguments was advanced as an end in itself but as a means by which the Tribunal should conclude that CEAC did or did not have a seat in Cyprus. All three tests were based on international law, either (as in the case of the second argument) on the ground that this was the test directly imposed by international law, or (as is explicit in the case of the first test and implicit in the third) on the ground that international law referred

the matter to national law. The Tribunal's approach of deciding that CEAC had failed to establish it had a seat in Cyprus under any of these three tests cannot therefore correctly be characterized as a failure to apply international law. Nor does it involve a failure to state the reasons for the Award; the chain of reasoning is expressly stated and easily discernible on the face of the Award.

105. At the hearings before the Committee, CEAC's counsel argued that, if the Tribunal were to employ the approach of judicial economy to avoid deciding what the term "seat" in the BIT meant, then it had to apply the tests put forward by each Party exactly as that Party had done. He maintained that the Tribunal had failed to do this, because it had not applied CEAC's test of "seat" under Cypriot law. CEAC's argument had been that, under Cypriot law, a company had its "seat" in Cyprus if it had its registered office there and it had a registered office there if it held a certificate to that effect from the Registrar of Companies.[82] Instead of applying that test, the Tribunal had taken the requirements identified by Mr Ioannides and wrongly treated them as conditions which had to be satisfied if the office shown on the certificate of registration were to qualify as a registered office.

106. That criticism misunderstands the nature both of the issue before the Tribunal and the approach of the Tribunal to that issue. CEAC had argued that the Tribunal should apply the law of Cyprus to determine whether CEAC had its seat there and that, as a matter of Cypriot law, a company had its seat in Cyprus if it had its registered office in Cyprus. That was the test that the Tribunal applied. It was not obliged to adopt CEAC's evidence as to what constituted a registered office under the law of Cyprus. Its finding that CEAC's premises at Dimosthenous 4 did not meet the requirements of Cypriot law and therefore did not constitute a registered office was neither a failure to apply the proper law nor any other form of manifest excess of power.

107. Secondly, the Committee sees no confusion, let alone contradiction or annullable error, in the Tribunal's treatment of what constituted a registered office under the law of Cyprus.

[82] Counsel did accept that the Tribunal would have been entitled to inquire whether there were actual premises at the address shown on the certificate but maintained that, in other respects, the certificate was conclusive.

The Tribunal held that "even under Cypriot law, certificates of registered office are not conclusive evidence that a registered office exists".[83] Counsel for CEAC told the Committee that CEAC was "not asking you, as a Committee, to disturb the finding they make in paragraph 160".[84] His complaint was that the Tribunal erred in the way it then treated the evidence of Mr Ioannides as the basis for finding that an office which did not meet certain requirements was not a registered office.

108. Counsel for CEAC nevertheless maintained that these minimum requirements had been put forward only as evidence, not as criteria for determining what constituted a registered office.[85] He accepted that this was "a subtle distinction"[86] but contended that it was an "egregious mistake"[87] on the part of the Tribunal to elevate the minimum requirements into a legal test.

109. The Committee disagrees. After setting out the different requirements which he considered a registered office had to fulfil (see para. 52, above), Mr Ioannides testified that "if an 'address' does not comply with the above minimum requirements, I do not see how such address can qualify as the registered office of any company".[88] There can be no doubt that his evidence was that, as a matter of Cypriot law, an office which did not meet the minimum requirements was not a registered office. That was the Tribunal's conclusion.[89] CEAC may contend that the Tribunal was wrong to reach that conclusion but the Committee does not see anything which could constitute an annullable error. The conclusion was supported by evidence of Cypriot law from an expert whose qualifications have not been challenged and whom CEAC was able to cross-examine. The way in which the Tribunal arrived at its conclusion is clear from the Award. The fact that Montenegro may not have attributed to the evidence of Mr Ioannides the significance which the Tribunal gave it is not important; Montenegro was relying upon one approach to the concept of "seat" but the Tribunal was

[83] Award, para. 160.
[84] Tr. Day 1, 72:14-16.
[85] Tr. Day 1, 74:18-25.
[86] Tr. Day 1, 93:11-12.
[87] Tr. Day 1, 87:4-5.
[88] Exhibit R-14, para. 3.9.
[89] Award, para. 171 et seq.

entitled to take that evidence into account when considering a different test of "seat". The evidence of Mr Ioannides was clear and CEAC had the chance to challenge it and to examine its own expert, Mr Markides, on the issues which Mr Ioannides raised.

110. Thirdly, the Committee does not accept that the Tribunal can be faulted – let alone that there was a serious departure from a fundamental rule of procedure – in its handling of the evidence of Mr Markides. It is, of course, a rule of the utmost importance that each party must be given an equal opportunity to put evidence before a tribunal and that the tribunal must treat all witnesses equally in the sense of affording them the same opportunity to be heard. That does not mean that it is required to accord each witness's evidence the same weight. Indeed, where two expert witnesses markedly disagree, it is difficult to see how a tribunal can avoid deciding between them and, in doing so, preferring the evidence of one to that of the other.

111. In the present case, the Tribunal commented on the evidence given by Mr Markides and Mr Ioannides that "these two opinions could not be more irreconcilable" and continued that "in deciding which of the two is preferable, the Tribunal has considered the bases invoked by the two experts for their positions".[90] It then set out the evidence of both experts and concluded that "Mr Ioannides' more nuanced testimony better reflects the effects of Cypriot law".[91] Whether the Tribunal was right to prefer Mr Ioannides' evidence to that of Mr Markides and to reach the conclusion that it did, the Committee considers that nothing in the Award, or in the record before the Tribunal, could support a conclusion that its approach to the competing expert evidence amounted to an annullable error.

112. Lastly, the Committee is not persuaded by CEAC's argument that the Tribunal committed an annullable error in its treatment of the evidence regarding CEAC's factual links with Cyprus. There are two limbs to this argument, both of which concern the Tribunal's treatment of the evidence of Mr Chrysanthou.[92]

[90] Award, para. 162.

[91] Award, para. 168.

[92] Exhibit R-6.

113. Under the first limb, CEAC contends that the Tribunal ignored Mr Chrysanthou's evidence regarding the premises at Dimosthenous 4. According to CEAC, that evidence showed that correspondence was collected daily from Dimosthenous 4 and taken to the law office of Mr Chrysanthou at Palais d'Ivoire House, 2nd Floor, 12 Them. Dervis Avenue, PO Box 21762, Nicosia, which Mr Chrysanthou describes as the "operating address" of CEAC,[93] that, contrary to Montenegro's evidence, courier companies knew how to deliver to CEAC at Dimosthenous 4,[94] and that correspondence from Montenegro and its lawyers was received there.[95] In CEAC's view, that evidence should have led the Tribunal to reach a different conclusion regarding the status of the premises at Dimosthenous 4 as the registered office of the company.

114. Under the second limb, CEAC maintains that the Tribunal's comment that CEAC had not presented arguments or evidence indicating that a different address in Cyprus could possibly serve the purpose of a registered office for CEAC[96] flew in the face of Mr Chrysanthou's evidence that the premises of his law firm were the operating address of the company. In particular, CEAC points to the fact that Mr Chrysanthou had testified that:

> *All board meetings are held in Cyprus at the Operating Address … of the Company and all minute books, registers and accounting records are maintained on behalf of the company in Cyprus by the Cypriot Secretary of the Company. Procedurally, the directors of the Company function independently in their fiduciary duties such as passing resolutions on different issues, executing documents and so forth. CEAC also maintains a bank account in Cyprus which is locally administered. The above further demonstrates that CEAC is effectively managed and controlled from within Cyprus.*[97]

Moreover, CEAC maintains that this evidence pointed to the conclusion that CEAC was managed and controlled from Cyprus and should not have been ignored by the Tribunal when the Tribunal considered that question.[98]

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[93] Exhibit R-6, para. 24.

[94] Exhibit R-6, para. 19.

[95] Exhibit R-6, para. 17.

[96] Award, para. 200.

[97] Exhibit R-6, para. 14.

[98] Award, paras. 203-208.

115. With regard to the first limb of the argument, the Award makes extensive reference to the evidence of Mr Chrysanthou regarding the premises at Dimosthenous 4.[99] The Tribunal, however, attached more weight to other evidence before it, in particular to the evidence of Mr Dracos and the evidence that neither FedEx nor DHL had been able to deliver to that address and the fact that the "Claimant has not provided a reason why, on nine different occasions during the last two years, the building was inaccessible for courier deliveries or for the purpose of inspecting CEAC's registers".[100] CEAC's complaint is, in reality, that the Tribunal should have accorded greater weight to Mr Chrysanthou's evidence. Even if that were so, it is not an annullable error. How much weight is accorded to each item of evidence is very much a matter for the tribunal to determine; it is not within the powers of an *ad hoc* Committee to substitute its assessment of the evidence.

116. So far as the second limb of the argument is concerned, the Committee accepts that the Tribunal made almost nothing of Mr Chrysanthou's witness statement, although it did quote the passage in which he referred to the operating address of CEAC,[101] and did not consider that evidence either with regard to a possible alternative address for the registered office or, when the Tribunal came to consider whether CEAC met the test of "seat" formulated by Montenegro, in relation to the question whether CEAC was managed and controlled from Cyprus.[102] That may reflect the fact that Mr Chrysanthou's witness statement was filed at the Article 41(5) phase and CEAC made nothing of it in relation to either of these points in its written or oral pleadings before the Tribunal.

117. In any event, CEAC's argument confuses two different issues: whether the operating address could constitute the relevant office and whether the evidence regarding the operating address established that CEAC was managed and controlled from Cyprus. With regard to the first issue, CEAC never contended that its registered office was anywhere other than Dimosthenous 4, nor did Mr Chrysanthou suggest that. The Tribunal cannot, therefore, be faulted for its comment that CEAC had adduced neither argument nor

[99] Award, paras. 192-195.

[100] Award, para. 191.

[101] Award, para. 192.

[102] Award, paras. 203-208.

evidence to suggest that an address other than Dimosthenous 4 could serve the purpose of its registered office. On the second issue, notwithstanding Mr Chrysanthou's comment that all Board meetings were held in Cyprus, the only documentary evidence produced by CEAC was from 2006-2007; there was nothing at all from the critical date of 11 March 2014 when the arbitration was commenced and counsel for CEAC admitted to the Committee that there were no Board minutes from that period.[103] Given that Mr Chrysanthou attended the hearings before the Tribunal as a representative of CEAC and that CEAC's counsel had told the Tribunal at the Article 41(5) hearings that CEAC would be able to produce "hundreds of documents" at the next stage of the proceedings, the absence of any documents which might have evidenced management and control from Cyprus at the time the Request for Arbitration was filed was telling.

118. In these circumstances, the Committee cannot see in the Tribunal's treatment of Mr Chrysanthou's evidence anything which could amount to a manifest excess of power or a serious departure from a fundamental rule of procedure. Nor does the failure to cite that evidence on the second issue mean that the Award has failed to state the reasons on which it was based; a tribunal is not required to refer to each and every item of evidence before it.

119. In short, CEAC's main line of argument fails to disclose any ground on which the Award could be annulled. CEAC undoubtedly considers that the Tribunal made a number of mistakes of law and fact but, even if one accepts that the Tribunal had done so, those mistakes are not enough to warrant annulment.

C. MANIFEST EXCESS OF POWERS

120. Notwithstanding its analysis in the preceding section of the main line of CEAC's challenge to the Award, the number of different criticisms which CEAC has made of the Award makes it necessary also to examine in turn the allegations relating to each of the three paragraphs of Article 52(1) of the ICSID Convention on which CEAC relies.

[103] Tr. Day 2, 285:9-12.

121. Nine of the eleven criticisms of the Award advanced by CEAC involve the allegation that there was a manifest excess of power:

(1) The failure to determine the meaning of the term "seat" in Article 1(3)(b) of the BIT

122. CEAC's argument is that, by failing to address the question what "seat" meant in the BIT, the Tribunal failed to apply the proper law. For the reasons already given in paras. 101 to 106, above, the Committee rejects this ground of challenge. The Tribunal did not fail to apply the proper law; it was entitled to determine the real question before it – whether CEAC had a seat in Cyprus – by considering whether CEAC satisfied any of the possible tests, namely whether it had a registered office in Cyprus, whether it was managed and controlled from Cyprus and whether its tax residency in Cyprus amounted to having its seat there. The Committee sees no manifest excess of power in the adoption of this approach or in the way in which it was applied.

(2) Considering the facts before the legal tests, thereby prejudging the outcome of the legal analysis

123. This challenge is essentially a slight recasting of the first challenge and is equally without merit. The Tribunal did not consider the facts before it considered the legal tests. Rather, it approached each of the three legal tests advanced by the Parties and inquired whether they were satisfied. In the case of the first test advanced by CEAC – i.e., whether the company had its seat in Cyprus as a matter of Cypriot law, which treats registered office as synonymous with seat – the Tribunal first examined the law of Cyprus to determine what constituted a registered office, holding that such an office had to fulfil certain functions in order to be considered a registered office (Award, paras. 150-169), and then held that the evidence did not support a conclusion that CEAC met that test (Award, paras. 170-200). The Committee can discern no prejudgment and no manifest excess of power.

(3) The failure to consider CEAC's definition of "registered office"

124. CEAC argues that the Tribunal failed to consider its definition of "registered office" as an office certified as the registered office by the Registrar of Companies. That is not the case. The Tribunal carefully inquired into what were the requirements of Cypriot law regarding

a "registered office" and rejected CEAC's definition and the evidence of Mr Markides in favour of the definition advanced by Mr Ioannides (Award, paras. 154-169). Even if, as CEAC maintains, the Tribunal should have preferred the evidence of Mr Markides (and the Committee expresses no opinion on whether that is so), the error would not have been one for which the Award could be annulled. As the *Teco* Committee put it, "even if a committee might have a different view on a debatable issue, it is simply not within its powers to correct a tribunal's interpretation of the law or assessment of the facts".[104]

125. Contrary to CEAC's submission to the Committee, the Tribunal, in applying the test of registered office under Cypriot law, was entitled – indeed required – to determine what Cypriot law required for a company to have a registered office. It was not obliged to accept CEAC's view of the requirements of Cypriot law.

(4) Mr Ioannides' "minimum requirements" were not pleaded by Montenegro as a test for "seat" and did not form part of the legal framework of the case

126. The fact that Montenegro did not rely upon the evidence of Mr Ioannides regarding the minimum requirements of Cypriot law for a registered office does not make the Tribunal's adoption of those requirements a manifest excess of power. It was not in the context of Montenegro's test that the Tribunal considered those requirements but in the context of CEAC's test. As the Committee has already explained, CEAC had argued that, as a matter of the law of Cyprus, a company had its seat in Cyprus if it had its registered office there. The Tribunal was entitled to consider all the evidence before it to determine what Cypriot law required if a company was to be held to have its registered office in Cyprus.

(5) The failure to give any, or any proper, weight to the evidence of Mr Markides

127. The Committee has already dealt with this ground of challenge in paragraphs 110 to 111 above.

[104] *Teco*, para. 78.

(6) By adopting the "minimum requirements" identified by Mr Ioannides as a legal test which found no basis in international law or domestic law, the Tribunal assumed a policy-making mission beyond its jurisdiction

128. This ground of challenge, which is clearly based upon a comment in the dissenting opinion,[105] simply restates the earlier ones. The Tribunal did not find that the minimum requirements constituted part of an autonomous international law definition of "seat". It considered them in the context of applying CEAC's own argument that international law required a *renvoi* to the law of Cyprus. It then held, on the basis of its examination of the expert evidence on Cypriot law, that an office which did not meet these requirements was not a registered office under the law of Cyprus. Even if that conclusion were wrong, it was based upon expert evidence and could not amount to a manifest excess of power.

(7) The Tribunal ignored CEAC's evidence regarding management and control

129. The Tribunal has already dealt with this argument at paragraphs 116 to 118 above. The Committee has no power to annul the Award under Article 52(1)(b) of the ICSID Convention merely because the Tribunal did not refer to the evidence of Mr Chrysanthou on this point and was persuaded by the absence of documentary evidence of management activities in Cyprus at the relevant date.

(8) Montenegro's autonomous definition of seat and (9) Treatment of tax residency

130. Grounds (8) and (9) of CEAC's challenge to the Award do not involve an allegation of manifest excess of power.

(10) The Tribunal entirely failed to consider Montenegro's "real seat" theory

131. This argument again recasts what has gone before, particularly under Ground (8). The Committee has already held that the Tribunal was not obliged to determine the precise meaning of "seat" in the BIT and thus to decide whether the Montenegrin theory was right as a matter of international law. The essence of that theory was that a company had its seat in the State from which it was managed and controlled and the Tribunal considered that the evidence put forward by CEAC was insufficient to show that it could satisfy that test.

[105] Dissent, para. 21.

It was not a manifest excess of power that the Tribunal did not inquire further into the Montenegrin theory.

(11) The evaluation of CEAC's evidence was unnecessarily arbitrary and frivolous

132. This argument overlaps almost completely with the arguments raised under headings (5) and (7). As the Committee has already explained, nothing in the treatment of the evidence by the Tribunal comes close to sustaining a finding that there was a manifest excess of power.

133. The Committee thus dismisses CEAC's application for annulment under Article 52(1)(b) of the ICSID Convention.

D. SERIOUS BREACH OF A FUNDAMENTAL RULE OF PROCEDURE

134. Grounds (1), (2), (3), (4), (5) and (7) are also claimed by CEAC to entail a serious departure from a fundamental rule of procedure.

135. The Committee does not consider it necessary to review each of these grounds separately. Insofar as CEAC maintains that Ground (1) involves such a procedural default, the Committee repeats what it has already said in respect of manifest excess of powers. The decision of the Tribunal to adopt the approach that it did and not to decide on the meaning of "seat" involved no serious departure from anything which might be regarded as a fundamental rule of procedure.

136. The other grounds listed above essentially concern the Tribunal's treatment of the evidence. The Committee has already discussed that in paragraphs 110 to 119 above. The Committee considers that the Tribunal's handling of the evidence before it entailed no procedural default of any kind. Contrary to what is said by CEAC, the Committee considers that the treatment of the evidence was in no way "frivolous" or "arbitrary". Nor does the record support the allegation that the treatment of the evidence disclosed a lack of impartiality on the part of the Tribunal, or that the Tribunal had prejudged any of the issues which it had to decide.

137. One further comment is required as regards Ground (4). One aspect of the challenge under these two grounds is that CEAC was not given a proper opportunity to put forward its case, because the Tribunal chose to treat the evidence of Mr Ioannides as relevant to the question of the substantive requirements of Cypriot law for a registered office when it had not been put forward by Montenegro for that purpose. The Committee does not accept that criticism of the Tribunal. As it has already explained, the Committee considers that the evidence of Mr Ioannides was clear on its face and, given that the hearing was to determine whether CEAC had its seat in Cyprus, CEAC had the opportunity to challenge that evidence and should have done so. That it did not take that opportunity does not constitute a procedural default by the Tribunal.

138. The challenge under Article 52(1)(d) of the ICSID Convention also fails.

E. FAILURE TO STATE REASONS

139. The Committee can also deal quite briefly with the allegation that the Award failed to state the reasons on which it was based (a complaint which forms part of Grounds (1), (2), (3), (4), (5), (7), (8), (9) and (11)). For the reasons already set out in paragraphs 95 to 98, above, the Committee is of the view that the bar which an applicant for annulment must clear under Article 52(1)(e) is a high one. The Committee has no doubt that CEAC has failed in this respect. Just as these grounds of challenge have failed to establish the existence of a manifest excess of power or a serious departure from a fundamental rule of procedure, they also fail to establish a default within Article 52(1)(e). Under this paragraph of Article 52, the Committee is not empowered to reconsider whether the Tribunal's reasons were appropriate or convincing. The test is simply whether the Tribunal was guilty of a failure to state its reasons in such a way that there is a lack of expressed rationale or that the reasoning cannot be followed. That is not the case here. However unconvincing CEAC may consider the reasoning, there is no difficulty in following the line of reasoning in the Award and understanding how the Tribunal came to each of its conclusions.

140. A brief additional comment is, however, needed in respect of Grounds (8) and (9), because they relate only to Article 52(1)(e). Little need be said about Ground (8) – that the Tribunal failed properly to consider and give content to Montenegro's autonomous definition of

"seat" under international law. That Ground largely overlaps with Ground (10), which has already been considered. The Tribunal made clear its reasons for not going into Montenegro's test. They explained that it was unnecessary to determine the precise meaning of "seat" in the BIT and that CEAC had failed to establish that it was managed and controlled from Cyprus at the relevant time. With regard to Ground (9), that the Tribunal's treatment of "tax residency" was incompatible with its approach to the "autonomous definition", the Committee considers that this allegation is simply not borne out by a consideration of the Award. The "tax residency" test was CEAC's alternative argument and it was rejected for reasons which are clearly set out at paragraphs 209 to 211 of the Award.

141. The Committee thus dismisses the application to annul the Award under Article 52(1)(e) of the ICSID Convention.

F. THE COMMITTEE'S CONCLUSIONS

142. For the reasons stated above, the Committee dismisses in its entirety the Application for Annulment in the present case.

VI. COSTS

A. APPLICANT'S COST SUBMISSIONS

143. In its submission on costs dated 12 January 2018, the Applicant argues that the Respondent should bear the total arbitration costs incurred by the Applicant, including legal fees and expenses, broken down as follows:

a) Legal Fees: USD 581,018.30

b) Disbursements for translation and duplicating costs: USD 5,332.93

c) Payments to ICSID: USD 425,000.00

Total: USD 1,011,351.23

B. RESPONDENT'S COST SUBMISSIONS

144. In its submission on costs dated 12 January 2018, the Respondent submits that the Applicant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses, broken down as follows:

a) Legal Fees: EUR 323,999.56

b) Disbursements (unspecified): EUR 11,193.55

Total: EUR 335,193.11

145. Montenegro acknowledges that the ICSID Convention and the ICSID Arbitration Rules permit the Committee to allocate the costs of the proceeding but provide no further guidance to the Committee on how to allocate those costs. In the absence of such guidance, Montenegro urges the Committee to apply the "costs follow the event" principle in which the unsuccessful party bears the costs of the prevailing party.

146. Montenegro asserts that such an allocation is particularly warranted here where the Applicant initiated this annulment proceeding as an improper attempt to secure a "second bite at the apple" by seeking *de novo* review of the Award. Further, according to Montenegro, the present annulment proceeding is "only one component of a coordinated litigation assault" consisting of four interconnected proceedings against the Respondent and its limited resources.

147. In addition, Montenegro argues that the Committee should allocate all of its costs to the Applicant due to the Applicant's own procedural misconduct, namely, waiting until the final round of its written submissions to elaborate its position and its time-consuming attempts on the eve of the hearing to withhold certain exhibits from the hearing bundle.

148. In view of the above, Montenegro requests that the Committee order that CEAC (i) bear the costs of this annulment proceeding (ii) pay interest on any costs awarded to the Respondent at a rate to be determined by the Committee; and (iii) reimburse Montenegro for its costs and any interest due thereon within 30 days of the date of the Committee's decision.

C. THE COMMITTEE'S DECISION ON COSTS

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

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

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

151. In accordance with Administrative and Financial Regulation 14(3)(e), CEAC, as the Party seeking annulment of the Award, has been responsible to date for all the advance payments required to cover the costs of the proceeding, including the fees and expenses of the members of the Committee. The Committee considers that the normal course should be for an applicant for annulment who has been wholly unsuccessful, as CEAC has been, to bear the entire costs of the proceeding, including the fees and expenses of the members of the Committee, unless there are exceptional circumstances which warrant a different allocation of costs. The Committee can see no such exceptional circumstances in the present case. CEAC must, therefore, bear the entire costs of the proceeding.

152. The costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to:

Committee's fees and expenses:	
Sir Christopher Greenwood	USD 47,920.12
Professor Joongi Kim	USD 56,461.21
Ms Tinuade Oyekunle	USD 72,628.85
ICSID's administrative fees	USD 74,000
Direct expenses[106]	USD 20,031.37
Total	**USD 271,041.55**

153. The above costs have been paid out of the advances made by the Applicant pursuant to Administrative and Financial Regulation 14(3)(e).[107]

154. With regard to the costs of legal representation of the Parties, each Party has, in accordance with Procedural Order No. 2, provided details of the costs which it incurred in relation to the annulment proceedings. CEAC informed the Committee that its costs of legal representation amounted to USD 581,018.30, together with disbursements of USD 5,332.93, a total of USD 586,351.23.[108] Montenegro's costs, including disbursements, came to EUR 335,193.11.[109]

155. The Committee has taken into account the fact that CEAC has not succeeded in any of the grounds for annulment which it advanced, that the Tribunal ordered CEAC to reimburse Montenegro's costs and that CEAC has pursued this application for annulment notwithstanding the fact that its ultimate owner has initiated other proceedings against Montenegro with regard to the same underlying facts, thus obliging Montenegro simultaneously to defend two sets of proceedings.[110] In these circumstances, the

[106] This amount includes actual charges relating to the dispatch of this Award (printing, copying and courier).

[107] The remaining balance will be reimbursed to the Applicant, which paid the all of the advance payments to ICSID.

[108] CEAC Costs Schedule, 12 January 2018.

[109] Respondent's Costs Submission, 12 January 2018.

[110] Montenegro Counter-Memorial, para. 18, and fn. 34; Montenegro Rejoinder, para. 12; Tr. Day 2, 158:19-25.

Committee considers that it is an appropriate exercise of its discretion under Article 61(2) of the Convention to decide that, in this case, costs should follow the event. It therefore decides that CEAC shall, within 30 days of the date of this Decision, reimburse Montenegro EUR 335,193.11.

VII. DECISION

156. For the reasons set forth above, the Committee unanimously decides that:

(1) the Application for Annulment of the Award of 26 July 2016 submitted by CEAC is dismissed in its entirety;

(2) CEAC shall bear the entire costs of the proceeding, including the fees and expenses of the Members of the Committee, in the amount of USD 271,041.55; and

(3) CEAC shall, within thirty days of the date of dispatch of this Decision, pay to Montenegro the sum of EUR 335,193.11 in respect of the latter's costs of legal representation.

Professor Joongi Kim
Member of the *ad hoc* Committee

Date: 13 April 2018

Ms Tinuade Oyekunle
Member of the *ad hoc* Committee

Date: 23 April 2018

Sir Christopher Greenwood
President of the *ad hoc* Committee

Date: 5 April 2018