INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

Case No. ARB/14/8

CEAC HOLDINGS LIMITED

Claimant

v

MONTENEGRO

Respondent

APPLICATION FOR ANNULMENT AND REQUEST FOR STAY OF ENFORCEMENT OF THE AWARD

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22 November 2016

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I. THE APPLICATION

1. In accordance with the provisions of Article 52 of the ICSID Convention and Rules 50, 52 and 54 of the ICSID Arbitration Rules, CEAC Holdings Limited ("**CEAC**", or the "**Claimant**") makes this application (the "**Application**") to the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**") requesting annulment and a stay of enforcement of the award made in ICSID Case No. ARB/14/8 between CEAC and Montenegro ("**Montenegro**", or the "**Respondent**") rendered by the Arbitral Tribunal on 26 July 2016 (the "**Award**").

2. The grounds for the Application are as follows:

   2.1 the Arbitral Tribunal has manifestly exceeded its power (Article 52(1)(b) of the ICSID Convention);

   2.2 there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention); and

   2.3 the Award has failed to state the reasons on which it is based (Article 52(1)(e) of the ICSID Convention).

3. The basis for each of the grounds is articulated below. In short, this is an unfortunate example of a tribunal having made inexplicable and grave errors. Most notably, the majority of the Arbitral Tribunal in the present case ignored the Parties' pleaded cases on the critical question of "seat". Instead, it constructed its own theory of the test for "seat", based on out of context evidence, unsupported by any authority and without giving CEAC an opportunity to address it. Having made this egregious mistake, the majority compounded it by embarking on a forensic analysis that was not only procedurally flawed and unfair, but also utterly irrelevant. Worst still, having pursued its own outlier approach, the majority then failed to answer the fundamental question – what is the definition of "seat" in the BIT, thus leaving a gaping hole in the Award that leads to its own series of errors and flaws.

4. CEAC sets out the reasons for its annulment request in the remainder of this Application. For the avoidance of doubt, CEAC reserves the right to develop and amplify the reasons for its annulment request in due course.

5. CEAC also requests that in accordance with Article 52(5) of the ICSID Convention and Rule 54(2) of the Arbitration Rules, the Committee to be appointed by the Secretary-General continue the automatic stay of enforcement of the Award.

6. The date of this Application is 22 November 2016, being a date falling within 120 days after the date on which the Award was rendered (*i.e.* 26 July 2016), as required by Article 52(2) of the ICSID Convention and Rule 50(3)(b)(i) of the ICSID Arbitration Rules.

7. This Application is accompanied by a payment of US$ 25,000 as the fee for lodging the application set by the Secretary-General on 1 July 2016 in accordance with Regulation 16 of the Administrative and Financial Regulations.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Background to the Dispute and CEAC's Claims

8. In brief, the underlying dispute between CEAC and Montenegro relates to an aluminium processing plant, Kombinat Aluminijuma Podgorica, A.D. ("**KAP**"), located near Montenegro's capital Podgorica. In July 2005, CEAC purchased majority stakes in KAP and Rudnici Boksits Nikšić, A.D. ("**RBN**"), a raw materials supplier, from Montenegro for US$ 45.5 million and US$ 6 million respectively. As part of the deal, CEAC undertook, amongst other things, to implement a modernisation programme at a cost of US$ 75 million. In turn, Montenegro agreed to support CEAC's modernisation programme by, amongst other things, guaranteeing a long-term electricity contract and by assuming responsibility and liability for environmental issues associated with operating KAP.

9. In 2007, a dispute arose between CEAC and Montenegro regarding alleged misrepresentations made by Montenegro during the privatisation process, which resulted in an UNCITRAL arbitration initiated by CEAC in November 2007. That arbitration was settled in November 2009. Pursuant to the settlement agreement, CEAC sold to Montenegro one half of its stake in KAP, whilst Montenegro agreed to provide a subsidy to KAP for the electricity supply and to issue state guarantees to KAP in the aggregate amount of €135 million to allow KAP to refinance its debts, raise further capital and finance KAP's social programme. It was also agreed that CEAC would retain control of the management of KAP.

10. After the 2009 settlement, CEAC and Montenegro continued to discuss a restructuring programme for KAP. One of the main difficulties was the provision of a long-term electricity supply contract for KAP, with the cost of electricity being one of the major heads of costs for KAP. By late 2012, KAP's existing electricity supply contract came to an end, without a new contract being agreed. KAP's existing electricity supplier, a majority stated-owned EPCG, requested a significant price increase, which, if accepted, would resulted in increased losses for KAP. KAP's inability to conclude a long-term electricity supply contract created the risk that electricity would be disconnected, leading to a production stoppage and irreparable damage to the smelting equipment.

11. Nevertheless, in breach of its obligations under the settlement agreement and assurances to the same effect, Montenegro failed to help secure a long-term electricity contract for KAP. Moreover, in late 2012, EPCG considerably reduced the supply of electricity to KAP, resulting in diminished aluminium production, and, as a consequence, lower revenues for KAP. Between January and June 2013, KAP continued to receive reduced volumes of electricity, notwithstanding that no electricity contract was in place. Despite KAP's requests, Montenegro refused to confirm the identity of the electricity supplier.

12. Moreover, by late 2012, a dispute arose between KAP/CEAC and Montenegro as to whether Montenegro provided the full amount of the electricity subsidy under the

settlement agreement. CEAC's position was and remains that Montenegro failed to do so.

13. Furthermore, throughout 2012 and 2013, Montenegro's representative on KAP's board of directors repeatedly took steps that were adverse to KAP's interests. In particular, Montenegro's representative refused to approve KAP's 2010 audited financial statements and KAP's business plan, which resulted in KAP breaching certain covenants in its loan agreements with Deutsche Bank. The effect of Montenegro representative's obstructive actions was that by 2012 KAP fell in default on its bank loans. Montenegro, as guarantor, repaid some of those loans and became a creditor of KAP.

14. By early June 2013, the relationship between KAP/CEAC and Montenegro's Government became particularly fraught. Then, on 14 June 2013, Montenegro, as KAP's creditor, initiated insolvency proceedings against KAP and took over the management of KAP from CEAC. The insolvency manager appointed by Montenegrin court was essentially a Government's representative, who acted solely in the Government's interests and against those of CEAC.

15. Shortly after his formal appointment, the insolvency manager entered into an agreement with a state oil trader, Montenegro Bonus, to manage KAP and to receive for its own benefit all revenues generated by KAP. The insolvency manager also excluded CEAC from the board of creditors of KAP in breach of the applicable Montenegrin law. Montenegrin state courts refused all claims by CEAC and other creditors in respect of various illegal actions of the insolvency manager. Subsequently, the insolvency manager sold KAP to an unknown Montenegrin company, Uniprom d.o.o., for a sum, which was considerably lower than the true value of KAP.

16. In June 2013, Montenegro also initiated criminal proceedings against one of CEAC-appointed managers of KAP, Mr Dmitry Potrubach, CFO of KAP, as an intimidation tactic against CEAC. Mr Potrubach was detained by Montenegro for allegedly "*stealing electricity from the European grid*." After an initial refusal to allow bail, Montenegro released Mr Potrubach from custody. Montenegro subsequently dismissed the case against Mr Potrubach with prejudice.

17. On 7 March 2014, CEAC commenced ICSID proceedings against Montenegro under the Cyprus – Serbia and Montenegro BIT (the "**BIT**"). In its Request for Arbitration, CEAC made the following claims:

> "*The facts described above constitute a violation of the BIT, including but not limited to the following obligations:*
>
> *50.1 to "encourage and create stable, equitable, favourable and transparent conditions for investors of* [Cyprus] *to make investments in its territory" (Art. 2.1 of the BIT);*
>
> *50.2 to provide fair and equitable treatment and full protection and security to CEAC's investments (Art. 2.2 of the BIT);*

50.3 to provide national and most-favoured-nation treatment including with respect to the "management, maintenance, use, enjoyment, expansion or disposal" of the CEAC's investments (Art. 3 of the BIT);

50.4 to ensure that CEAC's investments are not "nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation" except in cases in which such measures are taken in the public interest, observing due process of law, are not discriminatory, and are accompanied by adequate compensation effected without delay (Art. 5 of the BIT); and

50.5 to "guarantee . . . free transfers of payments" related to CEAC's investments (Art. 6 of the BIT)."

18. In light of those breaches, CEAC sought from the Arbitral Tribunal the following relief:

"73.1 a declaration that Montenegro has violated the BIT;

73.2 compensation to Claimant for all damages and loss it has sustained, to be developed and quantified in the course of this proceeding but likely to include, by way of example without limitation, compensation for the wrongful expropriation of Claimant's investment, and direct and consequential damages for Respondent's unfair and inequitable treatment of Claimant's investment;

73.3 all costs of these proceedings, including attorneys' fees and expenses;

73.4 pre- and post-award compound interest until the effective date of Respondent's full and final satisfaction of the award; and

73.5 such other relief as the Arbitral Tribunal may deem appropriate in the circumstances."

B. Procedural History

19. As noted above, CEAC filed its Request for Arbitration under the BIT on 7 March 2014. The Secretary-General registered the Request on 20 March 2014.

20. The Arbitral Tribunal was formally constituted on 14 July 2014 and consisted of Professor Bernard Hanotiau (national of Belgium), as the presiding arbitrator, and co-arbitrators Professor William Park (national of Switzerland and the United States of America), appointed by CEAC, and Professor Brigitte Stern (national of France), appointed by Montenegro.

21. On 12 August 2014, Montenegro filed Preliminary Objections under Rule 41(5) of the ICSID Arbitration Rules. One of the two grounds for Montenegro's preliminary objections was that CEAC was not an investor under the BIT because it lacked a seat in Cyprus, as required by 1(3)(b) of the BIT:

> "*Claimant does not qualify as an investor under Article 1 (3) (b) of the BIT since it lacks a seat in the sense of an effective centre of administration of its business operations in the territory of a contracting party to the BIT, i.e. in the territory of the Republic of Cyprus.*"[1]

22. On 10 September 2014, the Arbitral Tribunal held the first procedural hearing (by telephone) and on 17 September 2014 it issued Procedural Order No 1.

23. On 19 September 2014, CEAC filed its Response to Montenegro's preliminary objections; on 3 October 2014 Montenegro filed its Reply on preliminary objections; and on 17 October 2014 CEAC filed its Rejoinder on preliminary objections. On 11 December 2014, the Arbitral Tribunal held a hearing at the IDRC in London on Montenegro's preliminary objections, including the question of CEAC's seat.

24. On 27 January 2015, the Arbitral Tribunal issued its Decision on Montenegro's Objections under Rule 41(5) of the ICSID Arbitration Rules dismissing Montenegro's preliminary objections. In that Decision, the Arbitral Tribunal (of its own initiative) also decided that there should be a separate stage in the proceedings dedicated to determining whether CEAC had a seat in Cyprus:

> "*In light of the crucial importance of the issue of the "seat" to the resolution of the present dispute, the Tribunal recommends that the Parties confer and agree on a procedural calendar which would envisage successive rounds of submissions and a hearing dedicated solely to the determination of this issue. During this subsequent stage of the proceedings, the Parties are to present all the evidence and arguments that pertain to the issue of the "seat", in particular the definition, scope and content of the term "seat" as used in the Treaty, and the Tribunal will issue a ruling accordingly.*"[2]

25. On 16 February 2015, the Parties filed their respective proposals for the procedural calendar for the "seat" stage of the proceedings. On 2 March 2015, the Arbitral Tribunal issued Procedural Order No 2, setting out the procedural calendar, which, in essence, involved two sequential rounds of memorials with supporting evidence. In particular, the Arbitral Tribunal directed the parties as follows:

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[1] Montenegro's Preliminary Objections Pursuant to Rule 41(5) of the ICSID Arbitration Rules dated 12 August 2015, ¶8(i).

[2] Decision on Respondent's Preliminary Objections Pursuant to Rule 41(5) of the ICSID Arbitration Rules dated 12 August 2014, ¶110.

"The Parties shall submit with their written pleadings all evidence and arguments that pertain to the issue of the "seat", in particular the definition, scope and content of the term "seat" as used in the Agreement between the Republic of Cyprus and Serbia and Montenegro on the Reciprocal Promotion and Protection of Investments."[3]

26. The Arbitral Tribunal also directed that, notwithstanding that "*a party objecting to jurisdiction generally files its submission on the objection first*", CEAC, and not Montenegro, should file its memorial first.

27. On 7 April 2015, co-arbitrator Brigitte Stern made a supplemental disclosure regarding her appointment by Montenegro through its counsel Christopher Lindinger of Schönherr (same counsel as in the present case) as a co-arbitrator in the ICSID Case No. ARB(AF)/12/8 between *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*. On the basis of that disclosure, on 22 April 2015, CEAC filed a challenge to co-arbitrator Stern under Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules. On 7 May 2015, Montenegro filed its Reply to CEAC's challenge. On 14 May 2015, Professor Stern provided her comments on CEAC's challenge. On 20 May 2015, CEAC and Montenegro filed their respective further observations on CEAC's challenge.

28. On 27 May 2015, the non-challenged arbitrators Hanotiau and Park notified the Secretary-General that they were equally divided on the Claimant's Challenge and unable to reach a decision. On 12 June 2015, the Chairman of the ICSID Administrative Council issued a Decision on the Claimant's Proposal to Disqualify Professor Brigitte Stern, rejecting the challenge.

29. On 16 June 2015, CEAC filed its Memorial on the Interpretation of Seat under Article 1(3)(b) of the Treaty, accompanied by the expert reports of Dr Monique Sasson and Mr Alecos Markides, and factual and legal exhibits.

30. On 30 September 2015, Montenegro filed its Counter-Memorial on the Issue of Seat, together with the expert reports of Professor Vuk Radovic and Mr Kypros Ioannides, the witness statement of Mr Dracos Georgios Dracos, and legal authorities.

31. On 15 November 2015, CEAC filed its Reply Memorial on the Issue of Seat, accompanied by the second expert report of Dr Monique Sasson, the second expert report of Mr Alecos Markides, the witness statement of Georgios Iacovou, and factual exhibits and legal authorities.

32. On 31 December 2015, Montenegro filed its Rejoinder on the Issue of "Seat", together with the second expert report of Mr Kypros Ioannides, the witness statement of Mr Michalis Georgiou, and factual exhibits and legal authorities.

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[3] Order No. 2 of the Procedural Order No 2 dated 2 March 2015.

33. On 22 and 23 March 2016, the hearing on the issue of "seat" was held at the World Bank Conference Centre in Paris. The hearing was attended by the members of the Arbitral Tribunal, the Parties' respective representatives, and the factual and expert witnesses, except for Mr Chrysanthou.

34. Following the hearing, on 13 April 2016, the Parties filed their respective submissions on costs.

35. On 26 July 2016, the Arbitral Tribunal issued its majority Award, accompanied by a Separate Opinion of Professor Park (the "**Separate Opinion**").

C. The Award

36. In the Award, the majority of the Arbitral Tribunal (Professors Hanotiau and Stern) held that CEAC did not have a "seat" in Cyprus and does not qualify as an "investor" for the purposes of Article 1(3)(b) of the BIT, and that accordingly the Arbitral Tribunal lacked jurisdiction to hear the case. In particular, whilst the majority noted that "*its jurisdictional analysis will be made under international law*",[4] it then concluded that:

> "*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 (B.), nor a conclusion that it was managed and controlled from Cyprus (C.). Equally, the Tribunal finds that the term "seat" cannot be equated to tax residency (D.). 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*"[5] (emphasis added).

37. The Arbitral Tribunal further ordered that CEAC should be liable for the full costs of the arbitration in the amount of US$ 223,062.66 and for Montenegro's legal representation costs and expenses in the amount of € 707,105.71.

38. By contrast, in his Separate Opinion, Professor Park disagreed with the majority and concluded that under the only available standard, the "*Claimant appears to possess a seat, precluding dismissal of the arbitration on this ground alone.*"[6] In particular, Professor Park observed as follows:

> "*1. The Award declines to determine the meaning of "seat" in the 2005 investment treaty concluded by Cyprus with Serbia and*

[4] Award, ¶145.
[5] Award, ¶148.
[6] Separate Opinion, ¶22.

Montenegro, yet nevertheless finds that CEAC has no seat in Cyprus, dismissing all claims and ordering CEAC to bear full costs. The Award reasons that the record fails to support a finding of seat according to any interpretation put forward.

2. *In reaching that conclusion, the Award purports to consider Claimant's position on registered office, but in fact adopts Respondent's formulation, which not surprisingly fails to carry the day.*

[…]

20. *The first test, mandating management and control in Cyprus, imports into the Treaty an obligation of substantial economic activity similar to "denial of benefits" provisions of free trade agreements and treaty shopping rules in tax treaties. However desirable such standards might be from a policy perspective, an arbitral tribunal bears a duty of fidelity to the treaty text as drafted, and cannot rewrite the contracting states' bargain. If the negotiators of this Treaty had wished to require investors to prove "management and control" they could have done so by adding those three words.*

21. *The second test finds no support in either domestic or international law. The test defines registered office according to six criteria, and posits that non-observance of these factors leads to disregard of the office. Adoption of that standard would require arbitrators to assume a policy-making mission in excess of their authority.*

22. *The third test, looking to the plain meaning of registered office, best matches the meaning of "seat" in Cyprus as used in this particular Treaty. Although international law does not currently permit a uniform definition of seat for treaty purposes, the last test commends itself in the configuration of this dispute. Under that standard, Claimant appears to possess a seat, precluding dismissal of the arbitration on this ground alone*" (emphasis added).

39. CEAC respectfully agrees with the conclusions of Professor Park cited above, and notes that there are, indeed, further serious flaws with the majority's Award which justify its annulment in full. In the remainder of this Application, CEAC will explain in further detail why the decision of the majority amounts to a manifest excess of powers, was reached in consequence of a serious departure from a fundamental rule of procedure, and failed to state the reasons on which it was based.

III. GROUNDS FOR THE APPLICATION

A. Annulment Ground 1: Article 52(1)(b) – Manifest Excess of Powers

40. There are at least three reasons why the Arbitral Tribunal manifestly exceeded its powers in rendering the Award:

    40.1 first, the Award is not based on an exercise of international law, as required by Article 9 of the BIT. The Award expressly declined to make *any* determination as to the meaning of the term "seat" under international law. Instead, in a manifest excess of powers, the Arbitral Tribunal reached conclusions as to the existence or otherwise of CEAC's seat in Cyprus by reference to factors other than international law;

    40.2 secondly, the Arbitral Tribunal sought to assume a policy-making mission in excess of its authority in that it adopted a test that "*finds no support in either domestic or international law.*"[7] Yet, it is trite law no tribunal can purport to operate on a higher plane than the applicable law; and

    40.3 thirdly, the Arbitral Tribunal, in excess of its powers, refused to assume jurisdiction over the dispute in circumstances where it was obliged to do so under the BIT and ICSID Convention.

41. In the remainder of this section, CEAC sets out the relevant legal principles and then explains, in turn, each of the above reasons.

(1) General Principles

42. The general principles applicable to determining whether an award was rendered in manifest excess of power have been succinctly summarised by the Committee in *CDC v Seyshelles*[8] as follows:

> *"39. Article 52(1)(b) allows for annulment of an award where the Tribunal "manifestly exceeded its powers." That is, a tribunal (1) must do something in excess of its powers and (2) that excess must be "manifest." It is a dual requirement. The ad hoc Committee in MINE noted that the requirement that the excess be manifest "necessarily limits an ad hoc Committee's freedom of appreciation as to whether the tribunal has exceeded its powers.*
>
> *40. Common examples of such "excesses" are a Tribunal deciding questions not submitted to it or refusing to decide questions properly before it. Failure to apply the law specified by the parties is also an excess of powers. Essentially, a Tribunal's legitimate exercise of power is tied to the consent of the*

[7] Separate Opinion, ¶21.
[8] ICSID Case No. ARB/02/14.

> *parties, and so it exceeds its powers where it acts in contravention of that consent (or without their consent, i.e., absent jurisdiction)*"[9] (emphasis added).

43. In the context of a tribunal determining its own jurisdiction, the *ad hoc* Committee in *Vivendi I* stated:

> "*It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b)*"[10] (emphasis added, citations omitted).

(2) The Award is not Based on International Law

44. The stated purpose for a separate procedural stage devoted to the question of "seat" (which the Arbitral Tribunal initiated of its own motion) was to determine "*the definition, scope and content of the term "seat" as used in the Treaty*". However, in the Award, the Arbitral Tribunal expressly declined to make *any* determination on this point:

> "*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.*"

45. The result of the Arbitral Tribunal's refusal to make *any* determination as to the meaning of the term "seat" in the BIT under international law is that the Arbitral Tribunal exceeded its powers. It rejected a dispute on jurisdictional grounds without first making a determination under the applicable law. Thus, the Award cannot properly be considered to have been made in accordance with the law chosen by the Parties, that is, international law. As noted above, failure by the Arbitral Tribunal to apply the law chosen by the Parties amounts to an excess of power for the purposes of Article 52(1)(b) of the ICSID Convention. Given that the Arbitral Tribunal's refusal to determine the meaning of seat is expressly stated in the Award, the excess of power is self-evident and manifest.

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[9] *CDC v Seyshelles*, ¶¶ 39-40.

[10] ICSID Case No. ARB/97/3.

46. While not immediately apparent, proper analysis of the majority decision reveals that this failure was borne from necessity. Having approached the issues before it backwards (*i.e.* considering the facts first, the legal test second) and having concocted its own theory without support or argument from the Parties, the majority could not then reach a conclusion on this issue. To do so would require it to insert an unsupported test and definition as to "seat", not pursued by the Respondent and, unsurprisingly, not addressed by the Claimant. This would palpably reveal the errors and unfairness associated with its reasoning and approach. Thus, out of necessity, the majority ducked the crucial (and only) question it was asked to decide, asserting instead that this fundamental question no longer needed to be considered. The absurdity of this reasoning is apparent: a Claimant condemned at the jurisdictional phase by a decision that does not set forth the legal standard that the Claimant was required to meet to proceed to the merits.

(3) The Arbitral Tribunal Assumed a Policy-Making Mission

47. There were three tests pleaded by the Parties before the Arbitral Tribunal as to the meaning of "seat". Montenegro's case was that there was an autonomous test of "management and control" under international law, and, in the alternative, that there was a "central administration and management" test under Cypriot domestic law. Notably, both tests were barely distinguishable from the concept of tax residency, which the Arbitral Tribunal expressly rejected in the Award as not being equivalent to seat.[11]

48. CEAC's case was that there was no uniform definition of "seat" under international law, and that the meaning of the term "seat" in the BIT must be determining by *renvoi* to Cypriot municipal law. Under Cypriot corporate law, the term "seat" has no clear meaning; however, the closest concept is that of registered office.

49. The Arbitral Tribunal's conclusion that CEAC does not have a "seat" in Cyprus is primarily based on its view that CEAC does not have a *registered office* in Cyprus. In reaching this conclusion, the Arbitral Tribunal apparently rejected (or, indeed, ignored altogether) one of CEAC's central submissions that the only substantive condition to the existence of a registered office under Cypriot law is notification of an address to the Registrar of Companies.

50. Instead, the Arbitral Tribunal adopted a previously unheard test for determining the existence of a registered office, namely, a test that involves characteristics of both the registered office and central management and control. In particular, the Arbitral Tribunal adopted *ad hoc* observations of Montenegro's expert on Cypriot law, Mr Ioannides, regarding what he thought should be the "*minimal requirements*" for a registered office (*i.e.* a context other than what constituted "seat" under the treaty). Mr Ioannides's out of context comments appeared for the first time in the proceedings in his second expert opinion dated 28 December 2015, attached to the very last set of written submissions by Montenegro before the final hearing. Neither Party made any written submissions as to Mr Ioannides's observations, and they

[11] Award, ¶¶209-211.

were accordingly not addressed in the oral cross-examination of either Mr Ioannides himself, or that of CEAC's expert witness, Mr Markides, at all, let alone in the context of the meaning of "seat".

51. Mr Ioannides's observations could only have been given consideration by the Arbitral Tribunal as to the question of the probative value of certificates of registered office. This however, is an irrelevant enquiry in the context of the definition of "seat". As soon as the Arbitral Tribunal embarked upon such an enquiry, it exceeded its powers. Although not expressly stated it seems that the thrust of Mr Ioannides' observations was that the six "*minimum requirements*" represent substantive conditions to the existence of a registered office under Cypriot law.[12] However, Mr Ioannides never explained the basis for this (implicit) proposition. Worse still, they were never pleaded as part of Montenegro's positive case (which focused on an alleged "central administration and management" test). In particular, the six "*minimum requirements*" did not appear in Montenegro's Rejoinder (to which Mr Ioannides's second report was attached), nor in Montenegro's opening slides at the final hearing.

52. It is clear from the evidence that Mr Ioannides' observations, which were pursued as part of a collateral attack on the probative value of CEAC's certificates of registered office, are not derived from any international law source and do not represent the position under international law. Equally, his "*minimal requirements*" are not derived from Cypriot law either. Not a single Cypriot authority was quoted in the case to the effect that, as a matter of Cypriot law, the existence of a registered office is dependent on compliance with those six requirements.[13] Indeed, a cursory analysis of the applicable statute and the overwhelming weight of expert evidence suggests the contrary – these are administrative issues that are utterly irrelevant to the question of whether a Cypriot registered entity has a "seat" in Cyprus. Professor Park fairly and accurately noted in paragraph 21 of his Separate Opinion that Mr Ioannides's test "*finds no support in either domestic or international law*".

53. The Arbitral Tribunal's decision to take expert evidence out of context, to deploy it for a different purpose, to then (on the basis of this out of context evidence) adopt a test that was not pleaded or pursued by either Party, on which no written submissions were made, that was accordingly not tested in oral cross-examination of the experts, and that is not based on international or domestic law, is an act that goes beyond the scope of the Arbitral Tribunal's authority as conferred on it by the BIT and the ICSID Convention and equates to a manifest excess of powers. Put simply, the Arbitral Tribunal inexplicably sought to arrogate to itself a policy-making power that it is not entitled to exercise.

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12 Second Expert Opinion of Kypros Ioannides, ¶3.9 *et seq*.

13 As Professor Park noted at paragraph 7 in his Separate Opinion, CEAC's expert, Mr Markides "*carefully distinguished conditions to the existence of a registered office (incorporation and registration) from various purposes an office serves*" and "*Defective compliance with corporate obligations (such as name plate, ledgers and accessibility) may result in fines, but does not make the office disappear. Failure to comply with Respondent's six-part test does not rob CEAC of a registered office on Dimosthenous Street*".

(4) The Arbitral Tribunal Refused to Exercise Jurisdiction Given to It by the BIT and the ICSID Convention

54. The Arbitral Tribunal also manifestly exceeded its powers by refusing to accept jurisdiction over the present case given to it by the BIT and the ICSID Convention. Not only did it adopt a test that is not grounded in either international or domestic law, the Arbitral Tribunal also failed to consider and apply the test pleaded by CEAC, according to which the only substantive requirement to the existence of the registered office is notification of the address to the Registrar. As Professor Park noted in his Separate Opinion, that test "*rests on a registered office in the plain meaning of that terms: an office that is registered*" and further that it:

> "*best matches the meaning of "seat" in Cyprus as used in this particular Treaty. Although international law does not currently permit a uniform definition of seat for treaty purposes, the last test commends itself in the configuration of this dispute. Under that standard, Claimant appears to possess a seat, precluding dismissal of the arbitration on this ground alone.*"[14]

55. Accordingly, the Arbitral Tribunal wrongfully declined jurisdiction over CEAC's claims and therefore committed a manifest excess of power.

B. Annulment Ground 2: Article 52(1)(d) – Serious Departure from a Fundamental Rule of Procedure

(1) General Principles

56. This ground for annulment is aimed at preserving the basic fairness and integrity of the procedure that should be embraced in ICSID arbitral proceedings.[15] One can readily conclude from the contents of the above said subparagraph of the Convention that for an annulment request to succeed on this specific ground, three requirements need to be fulfilled cumulatively:

    56.1 the rule of procedure at issue must be "fundamental";

    56.2 a "departure" from that fundamental rule has occurred; and

    56.3 the said departure was "serious".

57. As far as the first requirement is concerned, it is widely accepted by annulment committees that such rules will embrace rules of natural justice which concern the fairness of arbitral proceedings, reflecting a set of minimal standards of procedure to be respected under international law.[16]

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14 Separate Opinion, ¶22.

15 *Fraport v AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, Decision on the Application for Annulment, ICSID Case No. ARB/03/25, ¶180.

16 *Wena Hotels Ltd. v. Arab Republic of Egypt*, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, ICSID Case No. ARB/98/4, ¶¶56-57. *See*

58. The second part of the test requires that an *ad hoc* Committee examine the full record, including the transcripts and the Award to determine whether or not the Arbitral Tribunal violated the rule in question.[17]

59. Finally, as regards the final limb of the test, annulment committees have interpreted the requirement for the departure to be "serious" in at least two different ways. Thus, under one interpretation, the applicant must show that it was deprived of the benefit or protection which the rule was intended to provide.[18] On another interpretation, this requirement entails that the departure at issue could have had an effect on the outcome of the dispute.[19] Yet another view, as expressed by the *CDC* annulment Committee, is that both of the above mentioned interpretations actually have the same meaning.[20] CEAC adheres to the latter view for present purposes.

60. CEAC accepts that it has a high burden to meet in order to persuade the *ad hoc* Committee to annul the Award on this ground, and it does not invoke the same lightly. CEAC submits, however, that the present case does indeed fall into this exceptional category given the grave nature of the procedural errors committed by the Arbitral Tribunal, as explained below.

(2) CEAC's Right to be Heard was Seriously Affected

61. In the words of the *TECO* Committee (citing with approval the *ad hoc* Committee decision in *Caratube v Kazakhstan*):

> "*The Committee has taken due note of Guatemala's argument according to which a tribunal is not required to communicate, consult or check with the parties with respect to its analysis or conclusions reached during deliberations. While generally this is correct, it is not without exceptions. <u>One such exception is when a tribunal effectively surprises the parties with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings. In such a scenario, a reasonable question to ask is whether the parties'</u>*

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also *CDC Group plc v. Republic of Seychelles, Decision of the Ad Hoc Committee on the Application for Annulment of the Republic of Seychelles,* ICSID Case No. ARB/02/14, ¶49, *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* Decision on Annulment, ICSID Case No. ARB/10/23, ¶86. An example of such rule is Article 18 of the UNCITRAL Model Law on International Commercial Arbitration, which provides that the parties must be treated with equality and be given full opportunity for presenting their case.

[17] *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* Decision on the Application for Annulment, ICSID Case No. ARB/98/2, ¶74.

[18] *Maritime International Nominees Establishment v. Republic of Guinea,* Decision of the *ad hoc* Annulment Committee, ICSID Case No. ARB/84/4, ¶5.05.

[19] *Wena Hotels Ltd. v. Arab Republic of Egypt*, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, ICSID Case No. ARB/98/4, ¶61. *See* also *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* Decision on the Application for Annulment, ICSID Case No. ARB/98/2, ¶78, *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* Decision on Annulment, ICSID Case No. ARB/10/23, ¶85.

[20] *CDC Group plc v. Republic of Seychelles, Decision of the Ad Hoc Committee on the Application for Annulment of the Republic of Seychelles,* ICSID Case No. ARB/02/14, ¶49.

right to be heard has been seriously affected. In this respect, the Committee aligns itself with the principle set out by the Caratube v. Kazakhstan annulment committee, according to which:

"[A] tribunal (and also a committee) is only free to adopt its own solution and reasoning without obligation to submit it to the parties beforehand, if it remains within the legal framework established by the parties. And vice versa: if a tribunal prefers to use a distinct legal framework, different from that argued by the parties, it must grant the parties the opportunity to be heard…

[…]

[T]ribunals do not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically advanced by the parties, provided that the tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal" (emphasis added).[21]

62. Turning to the case at hand, CEAC has already noted in paragraphs 50-52 above that the "Ioannides test" regarding the "*conditions*" which need to be fulfilled so that an office could qualify as a registered office under Cypriot law,[22] was articulated for the first time in Mr Ioannides's Second Opinion (the last filing before the final hearing). It was raised in the context of a collateral attack on the probative weight to be given to a certificate of a registered office. It was not raised or pursued as a formulation for a basis to determine, under International law, "seat". Not surprisingly, given this background, CEAC addressed throughout the oral hearing the actual case pursued by Montenegro on seat, which was entirely different.

63. In this regard, the Arbitral Tribunal generated a "test" that was not pleaded in Montenegro's submissions: it is not in the Rejoinder, not in Montenegro's Opening Presentation, and the way it was articulated in Montenegro's oral opening (Tr Day 1 pages 75-76) differed again from the manner it was presented in Mr Ioannides's Second Opinion. Further, this test was not put to either Mr Markides or Mr Ioannides in their respective cross-examination for the very good reason that it was not pleaded and the majority did not present their newly formulated theory to either party for comment. Put simply, this "test" was never part of the agreed legal framework established by the Parties throughout the proceedings, but was an after the fact contrivance created by the majority.

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21 *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* Decision on Annulment, ICSID Case No. ARB/10/23, ¶184.

22 Award, ¶171.

64. In light of the above, CEAC submits that the Arbitral Tribunal based its Award on a theory which CEAC did not have an opportunity to address, thus violating its right to be heard.

(3) The Arbitral Tribunal Violated Rules on Treatment of Evidence and Burden of Proof

65. The first and most obvious violation of the principle of proper treatment of rules of evidence is evident from paragraph 200 of the Award, where the Arbitral Tribunal (erroneously) states that "*the Claimant has not presented arguments or evidence indicating that a different address in Cyprus could ostensibly serve the purpose* of" establishing the presence CEAC's registered office in Cyprus.

66. This is an egregious violation. It contradicts numerous aspects of the evidence including witness and contemporaneous documentary evidence presented by CEAC throughout the proceedings (including the *unchallenged* witness evidence of Mr Chrysanthou), but is entirely inconsistent with the Arbitral Tribunal's own finding in paragraph 192 of the Award regarding the existence of CEAC's operating address at Palais d'Ivoire House, 2nd Floor, 12 Therm. Dervis Avenue, PO Box 21762, CY-1513 in Nicosia.

67. By the same token, the Arbitral Tribunal noted the evidence of Mr Chrysanthou regarding the operating office in Cyprus,[23] but did not consider the implications. In particular, it failed to draw the obvious conclusion that, on any view, CEAC's seat would be located in Cyprus, either at its registered office or, at least, the operating office.

68. Finally, the Arbitral Tribunal noted the evidence of Mr Chrysanthou and the relevant documentary evidence regarding mail and courier deliveries to the registered office submitted on behalf of CEAC,[24] but failed to give it any weight.

(4) The Arbitral Tribunal Violated the Principle of Equality Between the Parties

69. At paragraphs 161-168 of the Award, while analysing the differences between the expert opinions of the Parties' Cyprus law experts, the Arbitral Tribunal failed to give any weight to Mr Markides's evidence submitted on behalf of CEAC and without explanation, preferred that of Mr Ioannides. CEAC submits that this failure constitutes a breach of the principle of equality between the Parties.

70. CEAC further relies *mutatis mutandis* on the facts and matters stated in subsections B(1)-(3) above in support of its present argument that the Arbitral Tribunal violated the principle at hand.

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[23] *See* Award, ¶¶ 93 and 192.

[24] *See* Award, ¶¶195-196.

C. Annulment Ground 3: Article 52(1)(e) – Failure to State the Reasons on Which the Award is Based

(1) General Principles

71. This ground essentially relates to the manner in which the substantive decision is justified in the Award. It cannot be disputed that reasons are paramount to the legitimacy of any judicial or arbitral decision. As a corollary of that principle, the obligation to give a reasoned award is a guarantee that a tribunal has not decided the case in an arbitrary manner. In the present context, CEAC (and the Respondent) will invariably want to assure themselves as to how the Arbitral Tribunal reached its conclusions and whether such conclusions can be challenged before an *ad hoc* Committee. CEAC submits that the Award does not meet the above criteria and relies on the following reasons in support of its reliance on this ground for annulment.

(2) The Arbitral Tribunal Failed to Address Every Question Submitted to It

72. At the outset, one can note that this ground of annulment relates to Article 48(3) of the ICSID Convention and provides that the award "*shall deal with every question submitted to the tribunal, and shall state the reasons upon which it is based*." Several authorities consider that the requirement of exhaustiveness under Article 48(3) does not imply that the award must discuss every argument raised by the parties in the pleadings.[25]

73. At the same time, if a tribunal's failure to address a particular question submitted to it might have affected that tribunal's ultimate decision, this could, in the view of some *ad hoc* committees, amount to a failure to state reasons and could warrant annulment.[26] Furthermore, a recent decision on annulment found that the failure to address certain evidence relevant to the determination of damages amounted to a failure to state the reasons:

> "*While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, <u>that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory</u>. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and,*

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[25] *See, e.g.*, *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* Decision on Annulment, ICSID Case No. ARB/10/23, ¶125.

[26] *Amco Asia Corporation and others v. Republic of Indonesia,* Ad hoc Committee Decision on the Application for Annulment, ICSID Case No. ARB/81/1, ¶32; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, Ad hoc Committee Decision on Annulment, ICSID Case No. ARB/81/2, ¶115; *Maritime International Nominees Establishment v. Republic of Guinea*, Decision of the Ad hoc Annulment Committee, ICSID Case No. ARB/84/4, ¶5.13; *Hussein Nuaman Soufraki v. The United Arab Emirates,* Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, ICSID Case No. ARB/02/7, ¶126.

> *if it finds them to be of no assistance, to set out the reasons for this conclusion*"[27] (emphasis added).

74. Turning to the present case, the Arbitral Tribunal did not address the Parties' pleaded request for relief which asked the Arbitral Tribunal to determine whether the "seat" was "in Cyprus",[28] whereas the Arbitral Tribunal considered only whether the "seat" was at 4 Demosthenous Street, and ignored the operating office which is also in Cyprus (*see* paragraph 66 above).

75. Further, the Arbitral Tribunal's insistence on the need to "*provide sufficient and persuasive evidence*" on the issue of "seat", both in its Decision on Rule 41(5) and the passages in paragraphs 182-183 of the Award, presuppose that the relevant test for the term "seat" had already been established, which was not the case. The Arbitral Tribunal suggested in paragraph 184 that:

> *"With little to no difficulty, Claimant could have produced factual evidence dispelling any doubts that CEAC effectively had an office at that address, where the company could be contacted and its registered could be consulted by the public. It did not."*

76. This is wrong for two reasons. First, CEAC did produce compelling evidence of its address in the form of certificates of registered office. Second, this reasoning presupposes that the requisite test for "seat" is not only establishing the existence of a registered office, but also proving, by reference to a forensic analysis, that a "registered office" exists and is operational in some form, as proffered by Mr Ioannides. However, the Award entirely ignores the crucial step of considering the two alternative tests advanced by the Parties' respective experts. In essence, the Arbitral Tribunal first evaluated the evidence and only then chose the test which reflected the Arbitral Tribunal's view of the evidence. In other words, the Arbitral Tribunal put the cart before the horse.

77. It is therefore clear that the Arbitral Tribunal on this occasion failed to consider questions submitted to it for decision which amounted to a failure to state reasons, thus warranting annulment of the Award.

(3) The Arbitral Tribunal's Reasoning is Unclear, Frivolous and/or Contradictory

78. The Arbitral Tribunal stated in the context of determining the probative value of CEAC's certificate of registered office that "*this finding* [*i.e.* that it must determine the probative value of a certificate of registered office under international law] *does not in any way diminish the probative value of such certificates under domestic law*".[29] However, in considering whether CEAC has a registered office in Cyprus as a matter of Cypriot law (using the "Ioannides test" referred to above), the Arbitral

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27 *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* Decision on Annulment, ICSID Case No. ARB/10/23, ¶131.

28 *See* Award, ¶¶41-42.

29 Award, ¶155.

Tribunal's evaluation of the probative value must flow from the correct test for the existence of a registered office. If the sole pre-condition to the existence of a registered office is notification to the Registrar, then engaging in any further enquiry as to the operational basis of the registered office is frivolous as it is not a valid basis of enquiry.[30] That is, however, exactly what the Arbitral Tribunal did. Put another way, every step of the Arbitral Tribunal's evaluation of the probative value of the certificates was demonstrative of a complete failure to understand the applicable domestic legal test and thus properly apply the applicable law.

79. Furthermore, the Arbitral Tribunal's test for "registered office" is contradictory to Montenegro's own characterisation that a registered office does not require more than an address.[31]

80. To the extent that the Arbitral Tribunal's findings in this regard can be said to amount to a serious departure from a fundamental rule of procedure and/or a manifest excess of power, CEAC relies *mutatis mutandis* on the facts and matters stated at paragraphs 40-70 above in the context of the first and second grounds for annulment, respectively.

(4) The Arbitral Tribunal Posed (and Answered) the Wrong Question

81. The Arbitral Tribunal failed to apply international law insofar as it adopted a "test" that finds no support in either international law or Cypriot domestic law.[32] Montenegro's expert himself did not express it in terms of "conditions" but only as his view or what the "*minimum requirements*" "*should*" be.[33] Notably, the Ioannides statement appears in the section of his report dealing with whether a certificate of registered office is conclusive evidence. In other words, it is not an independent test proposed or relied upon by Montenegro or its expert.

82. To the extent that the Arbitral Tribunal's findings in this regard can be said to amount to a serious departure from a fundamental rule of procedure and/or a manifest excess of power, CEAC relies *mutatis mutandis* on the facts and matters stated at paragraphs 40-70 above in the context of the first ground and second grounds for annulment, respectively.

(5) The Arbitral Tribunal Ignored Witness Evidence Presented by CEAC

83. Despite the fact that it referred to having "*carefully considered the Parties' submissions and the evidence in the record*" in paragraph 143 of the Award, the Arbitral Tribunal barely discussed the Claimant's *unchallenged* witness evidence in the form of Witness Statements of Mr Chrysanthou and Mr Georgios Iacovou dated 19 September 2014 and 12 November 2015, respectively.

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30 As Professor Park put it in his Separate Opinion, *"failure to comply with Respondent's six-part test does not rob CEAC of a registered office on Dimosthenous Street."*

31 *See,* Award, ¶110.

32 *See*, Separate Opinion, ¶21. *See* also, Award, ¶¶145 and 148.

33 *See*, Award, ¶171. *See* also, Mr Ioannides's Second Opinion, ¶3.9.

84. Further and as demonstrated at paragraph 66 above, contrary to the Award's explicit holding, evidence on the issue of CEAC's operating address was on the record and was never challenged by the Respondent. Crucially, while the Arbitral Tribunal was within its right to hold that this evidence was unpersuasive, immaterial, or insufficient, it did not make any such finding, but one of nonexistence. Taking the Arbitral Tribunal's words at face value, the *ad hoc* Committee should only conclude that the Arbitral Tribunal ignored this evidence which, consequently, warrants annulment of the Award on this ground alone.[34]

85. Finally, to the extent that the Arbitral Tribunal's findings in this regard can be said to amount to a serious departure from a fundamental rule of procedure and/or a manifest excess of power, CEAC relies *mutatis mutandis* on the facts and matters stated at paragraphs 40-70 above in the context of the first and second grounds for annulment, respectively.

(6) Conclusion

86. It is clear from the above that although the Arbitral Tribunal did provide some explanations for its decision, these are insufficient from a logical point of view to justify the Arbitral Tribunal's conclusion. In other words, these reasons cannot logically explain the decision they are purportedly supporting, as a result of which the reader is therefore left guessing as to the Arbitral Tribunal's actual line of reasoning (which cannot be ascertained from the rest of the Arbitral Tribunal's analysis either). CEAC submits that a contradiction exists within the body of the Arbitral Tribunal's reasons which must lead to annulment of the Award.

IV. REQUEST FOR PROVISIONAL STAY OF ENFORCEMENT

87. CEAC requests a full stay of enforcement of the Award while the Application for annulment is pending resolution, pursuant to Article 52(5) of the ICSID Convention which provides as follows:

> "*The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request*."

88. Consequently, CEAC requests the Secretary-General to notify the Parties of the provisional stay as provided for in Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules. CEAC further requests that the *ad hoc* Committee to be appointed by the Secretary-General continue the automatic stay of enforcement of the Award pending its final decision on the present Application.

[34] Indeed, this was precisely the rationale behind the *ad hoc* Committee's annulment decision in *TECO v Guatemala – see* ¶¶133-135.

V. PRAYERS FOR RELIEF

89. In light of the foregoing, CEAC respectfully requests that:

89.1 the Award be annulled in its entirety pursuant to Article 52(1)(b) and/or Article 52(1)(d) and/or Article 52(1)(e) of the ICSID Convention;

89.2 the enforcement of the Award be stayed, pending the *ad hoc* Committee's final decision on the present Application; and

89.3 the Respondent be ordered to pay all legal costs and expenses incurred by CEAC in the present annulment proceedings, including all costs and expenses incurred by the ICSID.

Respectfully submitted,

King & Spalding International LLP

King & Spalding International LLP
for and on behalf of
CEAC Holdings Limited