



School of International Arbitration

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International Arbitration Case Law

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International Arbitration Case Law

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Award Name and Date:

Adem Dogan v. Turkmenistan (ICSID Case No. ARB/09/9) - Decision on Annulment

Case Report by:

Marine de Bailleul **, editor Ignacio Torterola ***

Summary:

In an annulment decision rendered on 15 January 2016, an ICSID annulment committee upheld an August 2014 Arbitral Award rendered in favor of a German investor. The decision dismisses all of Turkmenistan's challenges to the Award based on the grounds set forth in Articles 52(1)(b), (d), and (e) of the ICSID Convention, and definitively establishes that illegal expropriation without compensation took place.

Main Issues:

Annulment - ICSID Convention - manifest excess of powers - *ex aequo et bono* powers and equitable principles; Annulment - ICSID Convention - serious departure from a fundamental rule of procedure; Annulment - ICSID Convention - failure to state reasons; Tribunal interpretation.

Tribunal:

Prof. Jan Paulsson, Chair
Dr. Markus Wirth, appointed by Claimant
Prof. Philippe Sands QC, appointed by Respondent

Ad Hoc Committee:

Professor Piero Bernardini, President
Mr. Makhdoom Ali Khan, Member
Dr. Jacomijn van Haersolte-van Hof, Member

Claimant's Counsel:

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1. Procedural History

In an Arbitral Award dated 12 August 2014, an ICSID Tribunal held Turkmenistan liable for “severe” and “substantial” breaches of the Germany-Turkmenistan BIT for expropriating, and ultimately destroying a German investor’s, Mr. Adem Dogan, successful poultry farm. More specifically, the Tribunal found that Respondent breached its obligations under Articles 4(2) and (2)(1) of the BIT between Germany and Turkmenistan, which contemplate the expropriation provisions and the fair and equitable treatment standard, respectively (¶ 5).

The Tribunal ordered Turkmenistan to compensate Mr. Dogan for the damage suffered as a result of this illegal expropriation and destruction of the agricultural production business, as well as all costs and expenses. The Award is not public and the damages amount was not disclosed, although it has been reported that the investor claimed US\$ 45 million in damages.

The August 2014 Award incorporates the Tribunal’s Decision on Jurisdiction of 29 February 2012, in which the Tribunal found that it had jurisdiction over Claimant’s claims (¶ 4).

Only a few days after the issuance of this Arbitral Award did Turkmenistan file on 25 August 2014 an application seeking annulment of the Award rendered against it, pursuant to Article 52 of the ICSID Convention, which governs applications for annulment of ICSID awards (¶ 23), and Rule 50 of the ICSID Rules for Arbitration Proceedings.

Because the application contained a request for a stay of enforcement of the Arbitral Award, the Secretary-General notified the Parties that enforcement of the Award was provisionally stayed pursuant to Rule 54(2) of the ICSID Rules for Arbitration Proceedings (¶ 7). Furthermore, ICSID’s Secretary-General notified the Parties on 30 September 2014 that the *ad hoc* Committee had been constituted. This date corresponds to the beginning of the annulment proceedings (¶ 7).

On 15 October 2014, Respondent filed its Request for a Continuation of the Stay of Enforcement of the Award, to which Claimant replied by filing its observations on 24 October 2014. In this submission, the German investor requested that the Committee order the State to post a security in the total amount of the Award plus interest, and should Respondent fail to do so, to terminate the provisional stay of enforcement (¶ 8).

After a second round of written submissions on the request for a stay of enforcement, the Committee issued its decision on Turkmenistan’s application on 24 November 2014: as a condition to granting a stay of enforcement of the August 2014 ICSID Award, the Committee ordered the State to post a security for compliance with the Award, by providing an “*irrevocable and unconditional bank guarantee from an internationally reputable first-class bank*” (paragraph 61(a) of the Tribunal’s Decision on Turkmenistan’s Request for a Continuation of the Stay of Enforcement of the Award). This requirement was presumably motivated by Turkmenistan’s poor compliance history with previous Awards rendered against it. As such, the posting of a security is necessary to ensure that the State would abide by its payment obligations, by promptly satisfying the ICSID Award when required to do so. This provides the investor with security during the proceedings. The State complied with this order by posting a security on 16 December 2014, issued by Deutsche Bank (¶¶ 12-13).

A hearing on annulment took place on 21 July 2015 at the ICC Hearing Centre in Paris, after which the *ad hoc* Committee began its deliberations on Respondent's application. The closure of the annulment proceedings was announced on 17 December 2015 (¶¶ 17-22).

In a decision rendered on 15 January 2016 and released in a slightly-redacted form, the ICSID *ad hoc* annulment committee has denied Turkmenistan's efforts to annul the 12 August 2014 Arbitral Award rendered in favor of the German businessman.

2. Relevant Facts of the Case

In 1999, during the reign of Saparmurat Atayevich Niyazov, Mr. Adem Dogan, a German investor, established an agricultural production business in Turkmenistan. This poultry business involved the leasing of land in Turkmenistan and the restoration, outfitting, and use of buildings for its activities. Mr. Dogan quickly became the owner of the largest farm of its kind in the country.

The investment entitled Claimant to a share of profits in a Turkmen egg-production facility. Indeed, Mr. Dogan entered into a business venture with a Turkmen friend and his sons, which provided that Mr. Dogan would supply start-up support as well as agricultural equipment, in exchange of which it would share in a 30% stake of the future profits.

This agricultural business was one of the only successful western-backed investments in the country and produced a large quantity of eggs for domestic consumption. Despite its success, the farm encountered a series of unwelcome advances from the Turkmen Ministry of Defense, which eventually took over the leases used by the farm. Moreover, the State pressured the investor to transfer to it a share of its profits, and, later, requested that the ownership of the entire chicken farm be transferred. The investor resisted those demands.

The Turkmen government and its military subsequently took measures that led to the expropriation and ultimately to the destruction of the investor's farm. The expropriatory acts culminated in 2006 when the Turkmen government took physical control of the farm, shut down its operations, dismantled its equipment, and razed the entire site.

3. Turkmenistan's Grounds for Annulment

Based on Articles 52(1)(b), (d), and (e) of the ICSID Convention, the Committee rejected all of Turkmenistan's grounds for annulment of the Arbitral Award, ruling that: the Arbitral Tribunal (a) did not manifestly exceed its powers when issuing the Award; (b) did not seriously depart from a fundamental rule of procedure in these proceedings; and (c) adequately stated the reasons upon which the Award was based.

The Committee found it convenient to recall that the ICSID Convention provides for a very high threshold for annulment, defining it as a "*limited remedy with the aim of achieving a careful balance between the Convention's objective to ensure the finality of awards and the need to guarantee the fundamental integrity of the arbitral process.*" (¶¶ 27-28). The Tribunal also cited Professor Schreuer's position that annulment is "*designed to provide emergency relief for egregious violations of a few basic principles while preserving the finality of the decisions in most respects.*" (¶ 28), concluding that the Committee's role is not to sit in

appeal of the Award rendered by the Tribunal and that it is outside the Committee's remit to review the substantive correctness of the Award, either in fact or in law (¶ 29).

a) Tribunal's Manifest Excess of Powers: Article 52(1)(b) of the ICSID Convention

1. Manifest excess of powers in assuming jurisdiction

Respondent's main argument is that the Tribunal manifestly exceeded its powers by assuming *ex aequo et bono* powers that the parties never agreed upon. As such, the State submits that the Tribunal relied on "equitable principles" decision-making to rule on important aspects of the Award, rather than relying on the applicable law (¶ 31).

With respect to the Tribunal's Decision on Jurisdiction rendered on 29 February 2012, Respondent posits that the Tribunal manifestly exceeded its powers by departing from both the applicable law and basic rules of evidence (¶ 37).

First, Turkmenistan asserts that the ICSID Tribunal failed to identify the investment forming the basis of its jurisdiction under the ICSID Convention and the BIT, relying instead on "vague, cumulative or alternative conclusions" (¶ 38), and that it failed to apply applicable Turkmen law to decide whether the investment was made in accordance with the host State's laws. In this regard, the State alleges that the Tribunal disregarded Claimant's numerous violations of Turkmen law (including a failure to formalize any ownership interest, register any investment, and declare any benefit or profit from his activities to tax authorities) (¶ 41). Claimant submits that non-application of the law cannot justify annulment, as it would go to the substance of the Award, which is not reviewable (¶ 70). Instead, only a complete failure to apply the law can warrant annulment, which is not the case here since the Tribunal devoted an entire section of its Decision on Jurisdiction to the issue of the investment's conformity with Turkmen Law (¶ 78). In any event, Mr. Dogan argues that the Tribunal has properly identified the nature and extent of his investment, which "was discussed in detail numerous times." (¶ 75).

Second, Turkmenistan posits that the Tribunal's treatment of the evidence following an "equitable approach to jurisdiction", i.e. based on what the Tribunal considered to be fair instead of applying basic rules of evidence, amounts to a manifest excess of its powers (¶ 45). More specifically, Respondent alleged that the Tribunal ignored the documentary evidence showing that Claimant was merely a seller of poultry equipment to the Turkmen entities (¶ 137). Mr. Dogan contends that unauthorized exercise of *ex aequo et bono* powers and a departure from basic evidentiary rules in finding jurisdiction do not automatically warrant annulment, and that in any event, Respondent has failed to identify a single passage in the Award in which the Tribunal stated that it was deciding *ex aequo et bono* (¶¶ 70-72, 82-83).

The Committee reminded that to fall within Article 52(1)(b), there must be an excess of the scope of the Tribunal's powers as defined in the Parties' agreement to arbitrate (¶ 32). It is an undisputed principle in the arbitration field that the arbitrators' powers emanate from the will of the parties: an arbitrator can only enjoy those powers that the parties to the dispute have agreed to vest him with. Moreover, a tribunal may only decide certain issues *ex aequo et bono*, namely disregard the rules of law in favor of justice and fairness, if it was expressly allowed by the parties to do so. Thus, a tribunal's power to decide a dispute *ex aequo et bono* is subject to the parties' agreement under Article 42(3) of the ICSID Convention. In the case at hand, it is undisputed between the Parties that the Tribunal had not been granted such a

power (¶ 98). The key issue is to determine whether the excess of powers, if any, is “manifest”; therefore, the Committee’s interpretation of this concept is of fundamental importance (¶¶ 101-104).

The Committee held that by acting as an *amiable compositeur* the Tribunal had not overstepped its powers granted under the BIT. Indeed, there was no evidence that the Tribunal applied purely principles of equity or *ex aequo et bono*. To the contrary, the Award made frequent reference to the BIT, the ICSID Convention, and applicable Turkmen law. The annulment committee found that the Tribunal expressly applied all these instruments (¶ 100).

More particularly, the Committee ruled that the Tribunal adequately observed the jurisdictional requirement contained in the ICSID Convention and the BIT that the dispute must be shown to arise from an investment. It reached a “confident conclusion” based on Claimant’s “overwhelming evidence” that Claimant has a qualifying investment under the BIT (¶ 111). Indeed, Mr. Dogan had obtained a contractual interest in two Turkmen companies through his financing of agricultural equipment, which the Tribunal found to qualify as an investment under the expression “other kinds of company interests” under Article 1(1)(b) of the BIT, because of his portion of the farm’s future income stream. The Committee found that the BIT’s definition of an investment is “sufficiently broad” to encompass Mr. Dogan’s contractual interests and is of “very wide import” thus seeing “no reason to read these words narrowly” (¶¶ 114-119). As a consequence, the Committee dismissed the State’s arguments that the Tribunal had wrongly accepted jurisdiction and that Mr. Dogan was not a qualifying investor under the BIT.

Regarding Respondent’s argument that the Tribunal disregarded applicable Turkmen law, the Committee concluded that the Tribunal had extensively analyzed the investment’s conformity with Turkmen law at the time it was made, including with respect to the registration requirement of a foreign investment (¶¶ 126-136). Stressing that it should not sit as an appeals court on a tribunal’s assessment of the evidence, the Committee was reluctant to second-guess and interfere with the Tribunal’s particular findings in this context (¶¶ 122, 129-130). The Committee relied on several decisions, such as *Wena Hotels v. Egypt*, *Rumeli v. Kazakhstan*, *Alapli v. Turkey* and *CDC v. Seychelles*, to support this conclusion.

Regarding the State’s allegation that the Tribunal departed from basic rules of procedure, the Committee did not see any unauthorized recourse to equitable principles. It noted that the Tribunal had examined the evidentiary record to conclude that the German businessman had not acted as a mere seller of equipment, but instead as a “*true participant in contributing financially and by other means to the establishment and operation of the Farm.*” The Committee again stated that it was not within its remit to interfere with the Tribunal’s interpretation of the evidence (¶¶ 137-138).

As a consequence, the *ad hoc* Committee concluded that the Tribunal duly considered and applied the applicable Turkmen law based on the available evidence before it. The Tribunal, therefore, did not exercise *ex aequo et bono* powers for the purpose of finding jurisdiction (¶ 136).

2. *Manifest excess of powers in ruling on the merits*

Similarly to its allegations on jurisdiction, Respondent posits that the Tribunal, in rendering its decision on liability, manifestly exceeded its powers when it applied principles of equity and fairness in the place of the applicable law and basic rules of evidence (¶ 46).

First, Turkmenistan submits that the Tribunal engaged in an unauthorized assumption of *ex aequo et bono* powers, and ignored Turkmen law in the Award. More specifically, Respondent denounces the Tribunal's failure both (i) to address the consequences of the Mr. Dogan's non-compliance with the host State laws in carrying out his alleged investment activities, including applicable corporate, financial, accounting and tax regulations (¶¶ 51-52), and (ii) to identify the nature and extent of Claimant's alleged interest. Claimant qualified these arguments as being "essentially a repeat" of the ones on the Tribunal's jurisdiction and argued that they should be similarly dismissed, including because Respondent has failed to show any such "departure" (¶¶ 84-85).

Second, the State contends that the Tribunal departed from basic standards of evidence in its finding on liability. In particular, Turkmenistan's position is that the Tribunal failed to require Claimant to produce additional documentary evidence of his interest in the poultry business, despite the Tribunal's statement in its Award that there was no "sufficiently solid basis" in this regard. Instead, to excuse Claimant from producing evidence, the Tribunal relied on equitable considerations and on the fact that Mr. Dogan is an inexperienced and unsophisticated investor (¶¶ 53-56). The investor refers to its observations made in connection with jurisdiction, and asserts that the State is incorrect in stating that the Tribunal did not require Mr. Dogan to present evidence of the nature and extent of his investment (¶¶ 89-90).

The Committee found that the Tribunal made a decision regarding liability based on an assessment of the facts and the available evidence, and that the elements of Claimant's contractual interests were identified as part of the Tribunal's analysis, including the form, content, and qualification of Claimant's interest (¶¶ 141-142). The Committee further determined that the Tribunal did identify the parties to the Participation Agreement, concluding that Mr. Dogan himself was a "qualifying investor" entitled to a 30% contractual interest in the Turkmen entity based on that entity's future income stream, in exchange for his contribution to the business (¶¶ 143-146). The Committee repeated that it does not have the authority to sit as an appellate body of the Tribunal's appreciation of the evidence (¶ 149).

In any event, the Tribunal did not disregard Turkmen law in its ruling on liability, and even if the Tribunal made an error in applying certain provisions of Turkmen legislation, this does not warrant annulment of the Award (¶ 150).

To sum up, the Committee ruled that the Tribunal properly identified the nature and extent of Claimant's investment based on the evidence made available by the Parties, properly considered and applied Turkmen law to decide on merits issues, and did not act as an *amiable compositeur* for the purpose of finding liability.

3. *Manifest excess of powers in awarding damages*

Turkmenistan posits that the Tribunal manifestly exceeded its powers by (i) assuming *ex aequo et bono* powers without having received the Parties' consent to do so, and (ii) departing from the fair market value standard agreed by the Parties.

More specifically, the Turkmen government contends that the Tribunal failed to rely on any reliable documentary historical data in the evidentiary record reflecting the reality of the farm's operations (¶¶ 57-61). Moreover, it alleges that the Tribunal itself recognized that Mr. Dogan failed to submit appropriate documentary evidence and historical data to support its damages claims, such as evidence of his interest in the business and of the productivity and profitability of the farm (¶ 62). Once again, Turkmenistan submits that despite this lack of evidence, the Tribunal excused Claimant from failing to meet his burden of proof, on the basis of his unsophistication and relative modesty means (¶ 64).

According to Claimant, even if Respondent's allegations were true, they could not form the basis for an annulment and would amount to nothing more than a misapplication of the damages standard. In any event, the investor contends that the State failed to establish the significance of the standard of damages that the Tribunal has allegedly departed from (¶ 91). Finally, in light of the Tribunal's broad discretion in assessing damages, the Tribunal had no obligation to apply the Parties' agreed standard (¶¶ 92-93).

While the Committee referred to the Tribunal's recognition that the available record regarding Claimant's loss was limited, it stressed the necessity to differentiate between sufficiency and absence of evidence. In the present case, the evidence was insufficient; not absent. Indeed, in quantifying damages, the Tribunal relied on the evidence produced before it, primarily on the Parties' experts' estimations on the farms' prices and production figures, as well as on the Parties' witness statements and related documents (¶¶ 156, 165). The Tribunal has broad discretion when evaluation the probative value of such evidence introduced before it, and such discretion is different from the exercise of *ex aequo et bono* powers (¶¶ 165-166).

The Committee also noted that Respondent could have produced further evidence itself, including documents proving actual prices and production figures for the farm, original records, and invoices that should have been in its possession. Notably, the Committee stated that a tribunal may “*make certain assumption from both the evidence produced by one party and by the failure of the other party to produce evidence. A tribunal is at liberty to reach conclusions from the evidence produced and to draw inferences from a failure to produce it.*” (¶¶ 157-158).

Furthermore, the Committee rejected Respondent's arguments that the fair market value was the standard provided by the Germany-Turkmenistan BIT and agreed upon between the Parties. Instead, the BIT permitted the Tribunal to choose a different standard in light of the specific circumstances of the case, and the Parties did not clearly agree on the application of this standard as the only appropriate valuation method (¶¶ 159-161). Indeed, the fair market value standard is not the only valuation method for obtaining full reparation and wiping out all consequences of the illegal acts as set forth in the *Chorzow Factory* case (¶¶ 162, 164). The valuation method chosen by the Tribunal fairly reflects these elements.

The Committee concluded that there was sufficient evidence on the record for the Tribunal to form a judgment as to the quantification of Claimant's damages. The Tribunal evaluated the evidence proffered by the Parties, considered the applicability of the fair market value standard, and came to the conclusion that it would not be the appropriate method of valuation given the specific facts and circumstances of the case.

In sum, the annulment Committee found that the Tribunal has not exercised *ex aequo et bono* powers when it ruled on quantum and assessed damages. The Committee, therefore, rejected Respondent's request for annulment based on manifest excess of powers under Article 52(1)(b) of the ICSID Convention.

b) Tribunal's Serious Departure from a Fundamental Rule of Procedure: Article 52(1)(d) of the ICSID Convention

Respondent also seeks annulment of the Award in its entirety on the basis that the Tribunal committed serious departures from fundamental rules of procedure in its decisions on jurisdiction, liability and damages, in violation of Article 52(1)(d) of the ICSID Convention.

More specifically, Turkmenistan submits that three elements warrant annulment of the Award: (i) misallocation of the burden of proof between the Parties, ignoring the fundamental rule of evidence *actori probatio incumbit* and improperly drawing adverse inferences against Respondent; (ii) deprivation of Respondent's fundamental right to be heard; and (iii) violation of the fundamental principle of equal treatment of the Parties (¶¶ 168-170).

First, with respect to the Tribunal's decision on jurisdiction, Respondent alleges that the Tribunal has failed to draw adverse inferences from Claimant's non-production of documents evidencing the existence of a protected investment and of a capital contribution by Mr. Dogan, relying instead on the single Participation Agreement (¶ 174). Furthermore, Turkmenistan alleges that it was denied an opportunity to present its case "*on the Tribunal's novel theory of a contractual interest*" (¶¶ 176-177). Finally, Respondent posits that the Tribunal failed to treat the Parties equally in several ways, including by making unjustified adverse inferences against Turkmenistan (¶ 178).

Second, regarding the Tribunal's decision on liability, the State argues that the Tribunal (i) wrongly excused Claimant from failing to provide evidence for his alleged interest in the farm, thereby violating the fundamental principle of *actori probatio incumbit*, (ii) deprived it of its right to be heard regarding the forgery of the Participation Agreement by refusing to consider an expert report filed by Respondent, and (iii) treated the Parties unequally by selectively relying on evidence helpful to Claimant (¶¶ 181-183).

Third, with respect to damages, the Turkmen government asserts that the Tribunal departed from the undisputed fair market value standard by adopting a novel theory, on which Respondent did not have an opportunity to present its case, based on unfounded assumptions favoring Claimant. The State further alleges that the Tribunal discharged Claimant of his burden of establishing his damages. According to the State, these two elements warrant annulment of the Arbitral Award (¶¶ 184-188).

Claimant, in essence, posits that Turkmenistan has failed to satisfy the very high threshold under Article 52(1)(d) and with respect to the principle of equal treatment (¶¶ 189-191). In any event, the investor argues that the Tribunal applied the principle *actori probatio*

incumbit, respected Respondent’s right to be heard, and treated the Parties equally at all times (¶¶ 193-199).

Espousing the view adopted by the *Wena Hotels* committee on the definition of a “serious” departure, the Committee determined that the critical inquiry is the impact of the alleged violation on the Tribunal’s decision (¶¶ 207-208). The *ad hoc* Committee agreed with Claimant that the Tribunal had effectively applied the principle *actori probatio incumbit* when it relied on the Participation Agreement produced by Claimant to found its definition of Claimant’s investment for purposes of jurisdiction. Turkmenistan’s allegations are “unsubstantiated” (¶ 213), since the Tribunal has relied on other pieces of evidence produced by Claimant to establish jurisdiction (¶¶ 210-211).

Ultimately, the Committee refused to act as an appellate body by reexamining the Tribunal’s evaluation and appreciation of the probative value of the evidence before it, which it determined to be beyond the remit of an annulment committee to second-guess. The Committee simply concluded that in its view, the Tribunal duly considered the issues between the Parties in light of the available evidence (¶¶ 214-215).

Moreover, the Committee determined that the State had not been deprived of its right to be heard, because these specific issues were in fact the subject of debate at the hearing and addressed in Respondent’s Post-Hearing Brief (¶¶ 216-217). In addition, the Committee stated that the Tribunal’s wide discretion to assess damages entitled it to apply the most appropriate valuation method under the specific circumstances of the case (¶ 219).

To put it in a nutshell, the Committee concluded that the Tribunal did not seriously depart from a fundamental rule of procedure in reaching its decisions on jurisdiction, liability and damages. Turkmenistan’s request for annulment of the Award on this ground is therefore rejected.

c) Tribunal’s Failure to State Reasons on which the Arbitral Award is Based: Article 52(1)(e) of the ICSID Convention

Turkmenistan also challenges the Award on the basis that the Award has failed to state the reasons on which it is based or has provided contradictory reasons on issues material to the Tribunal’s decisions on jurisdiction, liability and quantum, contrary to Article 52(1)(e) of the ICSID Convention. The Parties agreed on the application of the standard set forth in *MINE v. Guinea*.

Regarding jurisdiction and liability, Turkmenistan submits that the Tribunal has failed to state reasons, or has provided contradictory reasons, on five main issues, including for its finding of an investment in the form of movable property and of a “contractual interest,” without pointing to any specific piece of evidence to support its reasoning (¶¶ 224-226, 230-232). Further, Respondent argued that the Tribunal continued to ignore at the merits stage the evidence showing that Mr. Dogan was not an investor but a mere seller of equipment to the Turkmen entities, and should have declined jurisdiction on that basis (¶¶ 227, 234). Simply put, Turkmenistan found that the Tribunal’s reasoning leading to its conclusion that Claimant made a protected investment under the BIT was “impossible to follow” (¶ 236). According to the State, these issues are outcome-determinative because they affect the Tribunal’s conclusions, therefore, a failure to deal with them constitutes a ground for annulment.

With respect to quantum, Respondent posits that the Tribunal contradicted itself when it awarded damages to Mr. Dogan despite having found that Claimant's documentary record was insufficient (¶ 238), and again offered contradictory reasons for rejecting the fair market value standard (¶ 240).

Claimant argued that Respondent has failed to satisfy the very high threshold for finding a failure to state reasons, by failing to prove that the points raised are essential to the outcome of the case. In any event, the *ad hoc* Committee is barred from reviewing the sufficiency and adequacy of the Tribunal's reasoning. According to Claimant, the Tribunal has addressed all questions in a well-reasoned manner, including determining on the basis of the record that Mr. Dogan was an investor on various alternative bases (¶¶ 243-252). In addition, Mr. Dogan rejects Respondent's claim that the Tribunal failed to state reasons in its decision on liability, considering that the arguments are a "repetition" of those relating to jurisdiction (¶ 253).

In the annulment committee's view, the requirement to state reasons only applied to issues essential to the outcome of the case, which could affect the Tribunal's conclusions. It distinguished a total failure to state reasons from a mere inadequacy or insufficiency of the reasons, the latter not being contemplated under Article 52(1)(e). Further, the Committee relied on the *Wena Hotels* committee's statement that "*reasons may be implicit in the considerations and conclusions contained in the Award, provided that they can be reasonably inferred from the terms used in the decision.*" (¶ 263).

With respect to the Tribunal's finding of an investment in the form of a contractual interest and financial contribution from Claimant, the Committee found that the Tribunal stated the reasons for its decision making, based on its interpretation of the evidence (¶¶ 265-267). Even if the Tribunal had failed to state reasons for finding an investment, the outcome of the case would not be altered because it had relied on alternative basis for jurisdiction, under Articles 1(1)(b) and (c) of the BIT (¶ 269).

With respect to the Tribunal's ruling on the merits, again, the Committee found that the Award clearly stated (i) the Tribunal's reasoning for finding that Turkmenistan breached the expropriation and fair and equitable treatment provisions under the BIT, (ii) that Mr. Dogan had a qualifying investment and was not a seller of equipment, and (iii) that there is a causal link between the Turkmen government's illegal acts and the damage resulting from the diminution in value of Claimant's investment (¶¶ 270-271).

Finally, the Committee found no contradiction in the Tribunal's reasoning for the finding of damages and assessment of the compensation owed to the investor. The Tribunal based its decision on sufficient evidence, including extensive expert testimony, making it easy for the reader to follow its reasoning on quantum (¶¶ 272-274).

In sum, the *ad hoc* Committee was not convinced by Turkmenistan's arguments. Instead, it concluded that the Tribunal's conclusions were easy to follow, and its reasons clearly developed on the basis of a critical review of the evidence and circumstances of the case. Respondent, therefore, has failed to prove that the Tribunal did not state reasons essential to the outcome of the case regarding its decisions on jurisdiction, liability or damages. As a consequence, Respondent's request for annulment of the award on the basis of Article 52(1)(e) of the ICSID Convention is rejected.

4. Costs

In deciding costs, the *ad hoc* Committee relied on the fact that because Mr. Dogan has prevailed in totality, he should therefore “*not be burdened by having to pay for his defense in this annulment proceeding*” (¶ 279). The Committee also found that Claimant’s relatively high legal fees in the annulment proceedings were reasonable, in light of its inevitable amount of work required to properly defend its case (¶ 280).

Accordingly, the Committee unanimously decided that Respondent should bear all ICSID costs, including the fees and expenses of the Members of the Committee, as well as Claimant’s legal costs and expenses (¶¶ 281-282).

5. Decision of the Ad Hoc Committee

The *ad hoc* Committee dismissed Turkmenistan’s arguments that the Tribunal manifestly exceeded its powers, failed to state reasons for its decisions and departed from fundamental rules of procedure. As a consequence, the Committee dismissed Respondent’s claims for annulment under Articles 52(1)(b), 52(1)(d), and 52(1)(e) of the ICSID Convention in their entirety (¶ 282). The Arbitral Award issued on 12 August 2014 is therefore upheld.

The Committee also unanimously decided that pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3) the stay of enforcement of the Arbitral Award is terminated (¶ 282)