EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CEMENTOS LA UNIÓN S.A. AND ÁRIDOS JATIVA S.L.U.

(Applicants on Annulment)

and

ARAB REPUBLIC OF EGYPT

(Respondent on Annulment)

ICSID Case No. ARB/13/29
Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Prof. Mónica Pinto, President of *the ad hoc* Committee
Ms. Wendy J. Miles KC, Member of the *ad hoc* Committee
Ms. Carita Wallgren-Lindholm, Member of the *ad hoc* Committee

Secretary of the *ad hoc* Committee
Mr. Alex B. Kaplan

Date of dispatch to the Parties: 31 July 2023

REPRESENTATION OF THE PARTIES

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TABLE OF ABBREVIATIONS/DEFINED TERMS

Application	Application for Annulment filed on 25 February 2021
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in effect from 10 April 2006
Award	Award rendered on 30 October 2020 in the arbitration proceeding between Cementos La Union S.A. and Aridos Jativa S.L.U. and the Arab Republic of Egypt (ICSID Case No. ARB/13/29)
BIT	Treaty for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt, signed on 3 November 1992 and entered into force on 26 April 1994
C-[#]	Claimants' Exhibit
Mem.	Claimants' Memorial on Annulment dated 20 September 2021
Reply	Claimants' Reply on Annulment dated 20 April 2022
CL-[#]	Claimants' Legal Authority
Committee	*Ad hoc* Committee constituted on 26 March 2021 and composed of Prof. Mónica Pinto, President; Ms. Wendy J. Miles KC; and Ms. Carita Wallgren-Lindholm
Hearing	Hearing on Annulment held on 19 October 2022
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
R-[#]	Respondent's Exhibit

C-Mem.	Respondent's Counter-Memorial on Annulment dated 20 January 2022
Rej.	Respondent's Rejoinder on Annulment dated 20 July 2022
RL-[#]	Respondent's Legal Authority
Tr. Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 6 November 2014 and composed of Mr. Christer Söderlund, the Hon. Charles N. Brower, and Prof. Philippe Sands

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an application for partial annulment (the "**Application**") of the award rendered on 30 October 2020 in the arbitration proceeding between Cementos La Union S.A. ("**Cementos**") and Aridos Jativa S.L.U. ("**Aridos Jativa**") and the Arab Republic of Egypt ("**Egypt**") (ICSID Case No. ARB/13/29) by a Tribunal composed of Mr. Christer Söderlund as President, the Hon. Charles N. Brower, and Prof. Philippe Sands (the "**Award**"). This Decision will continue to use the "**Claimants**" to refer to Cementos and Aridos Jativa and the "**Respondent**" for Egypt, as in the original proceeding. The Claimants and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

2. The Award decided a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Treaty for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt, which was signed on 3 November 1992 and entered into force on 26 April 1994 (the "**BIT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

3. The dispute in the original proceeding related to the Claimants' alleged investment in the Egyptian cement industry through their shares in the Arabian Cement Company S.A.E. ("**ACC**").

4. In the Award, and of relevance to this partial annulment proceeding, the Tribunal decided unanimously that the Respondent had failed to provide "*effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties before the Egyptian Administrative Courts*." The Tribunal additionally decided, by majority, that "*no obligation arises to pay financial compensation on the part of the Respondent*" and that the Parties should bear their own fees and costs.

5. The Claimants applied for partial 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 reasons (Article 52(1)(e)).

II. PROCEDURAL HISTORY

6. On 25 February 2021, ICSID received the Application.

7. On 5 March 2021, pursuant to Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), the ICSID Secretary-General registered the Application.

8. By letter dated 26 March 2021, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Prof. Mónica Pinto, a national of the Argentine Republic, appointed to the ICSID Panel of Arbitrators (the "**Panel**") by the Argentine Republic, and designated as President of the Committee, Ms. Wendy J. Miles KC, a national of New Zealand and appointed to the Panel by the United Kingdom, and Ms. Carita Wallgren-Lindholm, a national of the Republic of Finland and appointed to the Panel by the Republic of Finland, had been constituted (the "**Committee**"). On the same date, the Parties were notified that Mr. Alex B. Kaplan, Legal Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

9. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the Parties on 20 May 2021 by video conference.

10. Following the first session, on 28 May 2021, the Committee issued Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties on procedural matters. PO1 provides, *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 Washington, D.C., United States of America. PO1 also sets out the agreed calendar for the annulment proceeding.

11. In accordance with the procedural calendar set forth in PO1, the Parties made the following submissions:

- on 20 September 2021, the Claimants filed their Memorial on Annulment ("**Memorial**"), together with new Exhibits C-234 through C-240 and new Legal Authorities CL-098 through CL-104;

- on 20 January 2022, the Respondent filed its Counter-Memorial on Annulment ("**Counter-Memorial**"), together with new Exhibits R-069 through R-081 and new Legal Authorities RL-104 through RL-164;

- on 20 April 2022, the Claimants filed their Reply on Annulment ("**Reply**"), together with new Legal Authorities CL-105 through CL-111; and

- on 20 July 2022, the Respondent filed its Rejoinder on Annulment ("**Rejoinder**"), together with new Legal Authorities RL-165 through RL-173.

12. By letter of 12 July 2022, the Committee confirmed with the Parties that a hearing on annulment would be held on 19 October 2022 in hybrid format.

13. On 12 September 2022, pursuant to Section 17.1 of PO1, the Committee held a pre-hearing organizational meeting with the Parties by video conference.

14. On 21 September 2022, the Committee issued Procedural Order No. 2 ("**PO2**") concerning the organization of the upcoming hearing.

15. A hearing on annulment was held on 19 October 2022 in hybrid format (the "**Hearing**"). The following persons attended the Hearing in-person at the International Dispute Resolution Centre in London, United Kingdom:

Committee

Ms. Wendy J. Miles KC	Member
Ms. Carita Wallgren-Lindholm	Member
Ms. Mónica Pinto	President of the Committee

ICSID Secretariat

Mr. Alex B. Kaplan	Secretary of the Committee

Court Reporter
Ms. Claire Hill

16. The following persons attended the Hearing remotely by video conference:

ICSID Secretariat	
Ms. Izabela Chabinska	ICSID Consultant
Ms. Colleen Ferguson	ICSID Paralegal
For the Claimants	
[redacted]	Cementos La Unión S.A. and Áridos Jativa S.L.U.
Dr. Karim Youssef	Youssef and Partners
Mr. Cesar Ternieden	Youssef and Partners
Mr. Ali Rifaah	Youssef and Partners
Ms. Nouran Salama	Youssef and Partners
Ms. Donia Khafagui	Youssef and Partners
For the Respondent	
Counselor Lela Kassem	Egyptian State Lawsuits Authority
Counselor Aya Sabry	Egyptian State Lawsuits Authority
Counselor Engy Aboelhassan	Egyptian State Lawsuits Authority
Counselor Reem Marwan	Egyptian State Lawsuits Authority
Mr. Tim Portwood	Bredin Prat
Ms. Laura Fadlallah	Bredin Prat
Mr. Suhaib Al Ali	Bredin Prat
Ms. Flora Marinho	Bredin Prat

17. The Parties filed their submissions on costs on 9 November 2022.

18. The proceeding was closed on 23 June 2023.

III. THE AWARD AND THE REQUESTS FOR RELIEF

A. THE AWARD

19. On 30 October 2020, the Arbitral Tribunal issued the Award finding in favour of jurisdiction, as well as breach in respect of one of the Claimants' causes of action and no breach in respect of the remaining claims. The Claimants succeeded in their claim for

failure to provide "*effective means of asserting claims and enforcing rights*" and the Tribunal awarded no monetary compensation in respect of that breach. In particular, at paragraphs 939 to 944 of the Award, the dispositif, the Tribunal stated:

> "*939. For the reasons stated above, the Tribunal unanimously:*
>
> *(1) decides that it has jurisdiction over the claims submitted by the Claimants;*
>
> *(2) declares that the Respondent has breached the Treaty by failing to provide "effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties" before the Egyptian Administrative Courts; and*
>
> *(3) finds that the Respondent has not breached its obligation to accord justice from its judicial and administrative authorities under the Treaty and international law with respect to the Claimants' investment.*
>
> *940. The Tribunal finds, by majority, that the declaration in paragraph 939(2) of the dispositive that the Respondent has breached the Treaty by failing to provide "effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties," constitutes adequate satisfaction to the Claimants and that no obligation arises to pay financial compensation on the part of the Respondent.*
>
> *941. The Tribunal by majority decides that the measures taken by Egypt through IDA and other central and regional authorities since 2006, attributed to Egypt and impugned by the Claimants, do not constitute breaches of the following standards set out in the Treaty or customary international law:*

(1) the right to fair and equitable treatment, under Article 4(1);

(2) the prohibition against unjustified or discriminatory actions that could hamper investments or related activities, including the management, maintenance, use, enjoyment, expansion, sale, or liquidation, under Article 3(1); and

(3) the obligation to grant the necessary permits relating to investments and allowing the execution of contracts related to manufacturing licenses and technical, commercial, financial and administrative assistance, under Article 3(2).

The Claimants' claims for monetary relief are therefore dismissed in their entirety.

942. The Tribunal unanimously dismisses the Claimants' denial of justice claim.

943. The Tribunal unanimously dismisses all other claims of the Parties.

944. The Tribunal decides, by majority, that the Claimants and the Respondent, respectively, shall bear their own costs in the arbitration, including 50 percent of the fees and costs of the Tribunal and ICSID. The Respondent is therefore ordered to pay the Claimants USD 546,221.96, representing 50 percent of the expended portion of the advances paid by the Claimants."

B. THE CLAIMANTS' APPLICATION

20. In these Annulment Proceedings, the Claimants request that the Committee annul elements of paragraph 939(2) and paragraph 940 of the Award relating to the scope and consequences of breach of the "*effective means*" standard and paragraph 941 of the Award relating to compensation.

21. On the grounds of alleged excess of mandate and/or related failure to give reasons, the Claimants request that the Committee:[1]

> "*156. … annul the following portions of the Award:*
>
> *a. Paragraph 939(2) of the Award and the corresponding portions of the Award, to the extent that it is limited only to Respondent's failure to provide 'effective means' before the Egyptian Administrative Courts, instead of also finding such failure with respect to the proceedings before the Ministerial Committee …;*
>
> *b. Paragraph 940 of the Award and the corresponding portions in the Award finding by majority that 'the declaration in paragraph 939(2) of the dispositive that the Respondent has breached the Treaty by failing to provide "effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties," constitutes adequate satisfaction to the Claimants and that no obligation arises to pay financial compensation on the part of the Respondent.'*"

22. On the grounds of alleged serious departure from a fundamental rule of procedure and/or related failure to give reasons, the Claimants request that the Committee:

> "*156. … annul the following portions of the Award:*
>
> *…*
>
> *c. To the extent that this Committee finds that the Tribunal has committed a serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention in A) failing to admit into the record the Negative List Decree; and/or B) ignoring the evidence submitted by Claimants regarding the implementation of the investment laws and GAFI's 'one-stop shop'*

[1] Reply #156.

procedures for investors' licenses as well as the applicability of the 1958 Industry Law,[…], affecting the Tribunal's following findings: Paragraph 941 of the Award and the corresponding portions in the Award finding by majority that 'the measures taken by Egypt through IDA and other central and regional authorities since 2006, attributed to Egypt and impugned by the Claimants, do not constitute breaches of the following standards set out in the Treaty or customary international law:

(1) the right to fair and equitable treatment, under Article 4(1);

(2) the prohibition against unjustified or discriminatory actions that could hamper investments or related activities, including the management, maintenance, use, enjoyment, expansion, sale, or liquidation, under Article 3(1); and

(3) the obligation to grant the necessary permits relating to investments and allowing the execution of contracts related to manufacturing licenses and technical, commercial, financial and administrative assistance, under Article 3(2);

d. Paragraph 941 of the Award and the corresponding portions in the Award finding by majority that '[t]he Claimants' claims for monetary relief are dismissed in their entirety.""

23. As to costs relating to all grounds for annulment, the Claimansts request that the Committee:

"*156. … annul the following portions of the Award:*

…

e. Paragraph 944 of the Award and the corresponding portions in the Award finding by majority that "the Claimants and the Respondent, respectively, shall bear their own costs in the

arbitration, including 50 percent of the fees and costs of the Tribunal and ICSID; and is therefore ordered to pay the Claimants USD 546,221.96, representing 50 percent of the expended portion of the advances paid by the Claimants"; and

f. ORDER Respondent to pay all costs of these annulment proceedings, including Claimants' legal representation costs, with interest."

24. The relief at paragraphs 21 to 23 above is as stated in the Claimants' Reply Memorial. It bears mentioning that the architecture of the Claimants' case evolved during the written phase of the proceedings, as follows:

a. in the Memorial, the Claimants initially raised three grounds under Article 52(1) of the ICSID Convention, namely that the Tribunal:

i. manifestly exceeded its powers by subjecting its determination of compensation for a breach of the "*effective means*" standard to the more demanding, or less favorable, application of the FET standard analysis and by failing to state reasons for doing so which are grounds for annulment of the award under Articles 52(1)(b) and 52(1)(e) of the ICSID Convention;

ii. manifestly exceeded its powers in violation of Article 52(1)(b) by failing to apply the entirety of Article II(7) of the Egypt-US BIT to the Settlement or Ministerial Committee; and

iii. committed a departure of a fundamental rule of procedure in violation of Article 52(1)(d) of the ICSID Convention.[2]

b. in the Reply, the Claimants articulated their Article 52(1) grounds as being that the Tribunal:

[2] Mem. p.i-ii.

i. manifestly exceeded its powers and failed to state reasons in connection with its finding that no financial compensation was due for the breach of the Effective Means Standard (Article 52(1)(b) and (e) of ICSID Convention);[3]

ii. manifestly exceeded its powers by refusing to apply the "*effective means*" standard to the Settlement Committee (Art.52(1)(b));

iii. departed from a fundamental rule of procedure in violation of Article 52(1)(d) of the ICSID Convention;[4] and

iv. at the Hearing, the Claimants followed the formulation in the Reply.

25. The Committee's Decision on Annulment will follow the final structure as adopted by the Claimants in Reply and at the Hearing (set out in the immediately preceding paragraph).

26. The primary basis for the Application remains that the Claimants accept the Tribunal's finding in their favour as to breach of the "*effective means*" standard, but seek to annul the Tribunal's decision not to award financial compensation in respect of that breach.[5] In this regard, the Claimants rely in particular on paragraphs 915 and 939(2) of the Award, where the Tribunal unanimously found that the Respondent had violated its obligation towards the Claimants to provide "*effective means"* of asserting claims and enforcing rights with respect to, *inter alia,* investment authorizations before the Egyptian Administrative Court.[6]

27. The Claimants further rely on a series of additional statements and findings in the Award relating to the Tribunal's consideration of "*effective means*" in the Award as follows:

a. the Tribunal accepted the Claimants' position that the MFN clause under Article 4(2) of the BIT incorporated into the Treaty the "*effective means*" of asserting claims and enforcing rights with respect to investment authorizations and could be

[3] Reply #13-61.
[4] Reply p.i.
[5] Mem. #63-65.
[6] Mem. #54.

considered as part of the Respondent's undertaking to afford FET treatment to the Claimants' investments, stating that:[7]

> "*… the provision of effective means may be subsumed under the FET standard; it is not a freestanding standard separate from the FET standard but, still, informs the FET standard in a way that is relevant for the Tribunal's present enquiry; i.e., within the scope of Article II(7) of the Egypt-US BIT as regards — as of relevance here — the assertion of claims and enforcement of rights with respect to investment authorizations.*"

b. the Tribunal held that the "*effective means*" standard in the applicable BIT may be said to be of a less demanding nature than denial of justice under international customary law;

c. the Tribunal relied upon the *Chevron v Ecuador* tribunal's analysis as to "*effective means*," as follows:[8]

> "*The obligations created by Article II(7) overlap significantly with the prohibition of denial of justice under customary international law. The provision appears to be directed at many of the same potential wrongs as denial of justice. The Tribunal thus agrees with the idea, expressed in Duke Energy v. Ecuador, that Article II(7), to some extent, 'seeks to implement and form part of the more general guarantee against denial of justice.' Article II(7), however, appears in the BIT as an independent, specific treaty obligation and does not make any explicit reference to denial of justice or customary international law. The Tribunal thus finds that Article II(7), setting out an 'effective means' standard, constitutes a* lex specialis *and not a mere restatement of the law on denial of justice. Indeed, the latter intent could have been easily*

[7] Mem. #55-56, quoting Award #901.
[8] Mem. #57-58, quoting Award #902.

expressed through the inclusion of explicit language to that effect or by using language corresponding to the prevailing standard for denial of justice at the time of drafting."[9]

d. the Tribunal further relied upon the *White Industries v India* tribunal's analysis, as follows:

> "*(a) the 'effective means' standard is* lex specialis *and is a distinct and potentially less demanding test, in comparison to denial of justice in customary international law;*
>
> *(b) the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case;*
>
> *(c) a claimant alleging a breach of the effective means standard does not need to establish that the host State interfered in judicial proceedings to establish a breach;*
>
> *(d) indefinite or undue delay in the host State's courts dealing with an investor's 'claim' may amount to a breach of the effective means standard;*
>
> *(e) court congestion and backlogs are relevant factors to consider, but do not constitute a complete defence. To the extent that the host State's courts experience regular and extensive delays, this may be evidence of a systemic problem with the court system, which would also constitute a breach of the effective means standard;*
>
> *(f) the issue of whether or not 'effective means' have been provided by the host State is to be measured against an objective, international standard;*
>
> *(g) a claimant alleging a breach of the standard does not need to prove that it has exhausted local remedies. A claimant must, however, adequately utilise the means available to it to assert claims and enforce rights. It will be up to the host State to prove*

[9] Mem. #58, mentioning Award #903 and RL-62, *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010 ("*Chevron v Ecuador*"), #242.

that local remedies are available and the claimant to show that those remedies were ineffective or futile;

(h) whether or not a delay in dealing with an investor's claim breaches the standard will depend on the facts of the case; and

(i) as with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case and the behaviour of the courts themselves.

11.3.3 The Tribunal considers this description of the 'effective means' standard to be equally appropriate for application in this case."[10]

e. the Tribunal reasoned in the current Award in this regard that:

"*It is also so that the 'effective means', representing a more demanding standard, is a more favorable application of the FET standard addressing the liability of a host State for undue or egregious delays in primarily domestic court proceedings. Contrary to the Respondent's assertion, the Claimants do allege such delay in the Administrative Court proceedings.*"[11]

f. the Tribunal considered that it was:

"*… rational to examine, in the first instance, whether the Respondent has failed in providing 'effective means' as required by the standard contained in the Egypt-US BIT by operation of the MFN clause of the Treaty, as this inquiry represents a less exacting test than the one that follows from a denial of justice analysis.*"[12]
and

[10] Mem. #59, mentioning Award #904 and RL-30, *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award, 30 November 2011 ("*White Industries v India*"), #11.3.2-11.3.3.
[11] Mem. #60, Award # 905.
[12] Mem. #61, Award #911.

g. ultimately, the Tribunal went on to conclude that:

> "*… the instances of delays in the proceedings of the Administrative Court are not consistent with the 'effective means' requirement and that, as a consequence, the Respondent is in breach of its obligation to provide such means to ACC to assert its claims by reason of the procedure and the substantive terms that it was subjected to for purposes of obtaining an Industrial License*."[13]

28. It is against that reasoning in the Award, as summarised above, that the Claimants seek to annul the Tribunal's decision not to grant compensation for the finding of breach of the "*effective means*" standard. As noted, they additionally seek to annul paragraph 941 of the Award on the grounds of serious departure from a fundamental rule of procedure (and/or failure to state reasons).

C. THE RESPONDENT'S RESPONSE

29. In response to the Application, the Respondent requests that the Committee:

> "*DISMISS each of the [Claimants'] requests for partial annulment of the Award based on Article 52(1) of the ICSID Convention;*
>
> *ORDER the [Claimants'] to bear all the costs of these Annulment Proceedings, including the Committee's fees, ICSID administrative fees and Egypt's attorneys' fees, together with interest at the rate of EURIBOR+2% compounded annually from the date of the Committee's decision on annulment.*"[14]

30. As to the Claimants' case on annulment arising out of the finding of a breach of the "*effective means*" standard, the Respondent argues that the Claimants are making a whole new case in the Application on the basis of "*effective means*," which had not previously

[13] Mem. #62, quoting Award #915.
[14] C-Mem. #232.

been put to the Tribunal in the underlying arbitration. According to the Respondent, this warrants the firmest of dismissals with a full award on costs in favor of Egypt. [15]

31. In this regard, the Respondent submits that:

> "*As explained in Egypt's Counter-Memorial on Annulment, through this so-called ground for annulment, the [Claimants] are blatantly attempting to relitigate the merits of the dispute – bearing in mind that, during the Arbitration, Claimants had made no specific claim for damages in connection with the alleged breach of the Effective Means standard. This failure to make a specific claim for damages on Claimants' part was criticized by Respondent but Claimants chose to leave this criticism unanswered. That they are now trying to use the decision precisely not to award damages where none were claimed to seek annulment of the Award is nothing shy of abusive*."[16]

IV. GROUNDS FOR ANNULMENT

32. Ultimately, the Claimants raise three primary grounds for annulment pursuant to: (i) Article 52(1)(b) excess of mandate on the grounds of failure to apply the proper standard of law; (ii) Article 52(1)(d) departure from a fundamental rule of procedure; and (iii) Article 52(1)(e) failure to state reasons. Each of these grounds is considered separately below.

A. GROUND 1: MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B))

33. As to the first ground, excess of mandate, the Claimants raise two separate claims for annulment. The first is that the Tribunal failed to apply the proper "*effective means*" standard. The second is that the Tribunal failed to apply the proper standard to the Settlement Committee. Each of these grounds will be dealt with in turn below, following

[15] Rej. #4-5.
[16] Rej. #8.

the discussion of the Parties' positions and the Committee's decision as to the standard applicable to it pursuant to Article 52(1)(b).

(1) Standard of Review for Manifest Excess of Powers

a. The Parties' Positions

i. The Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

ii. The Respondent's Position

[redacted]

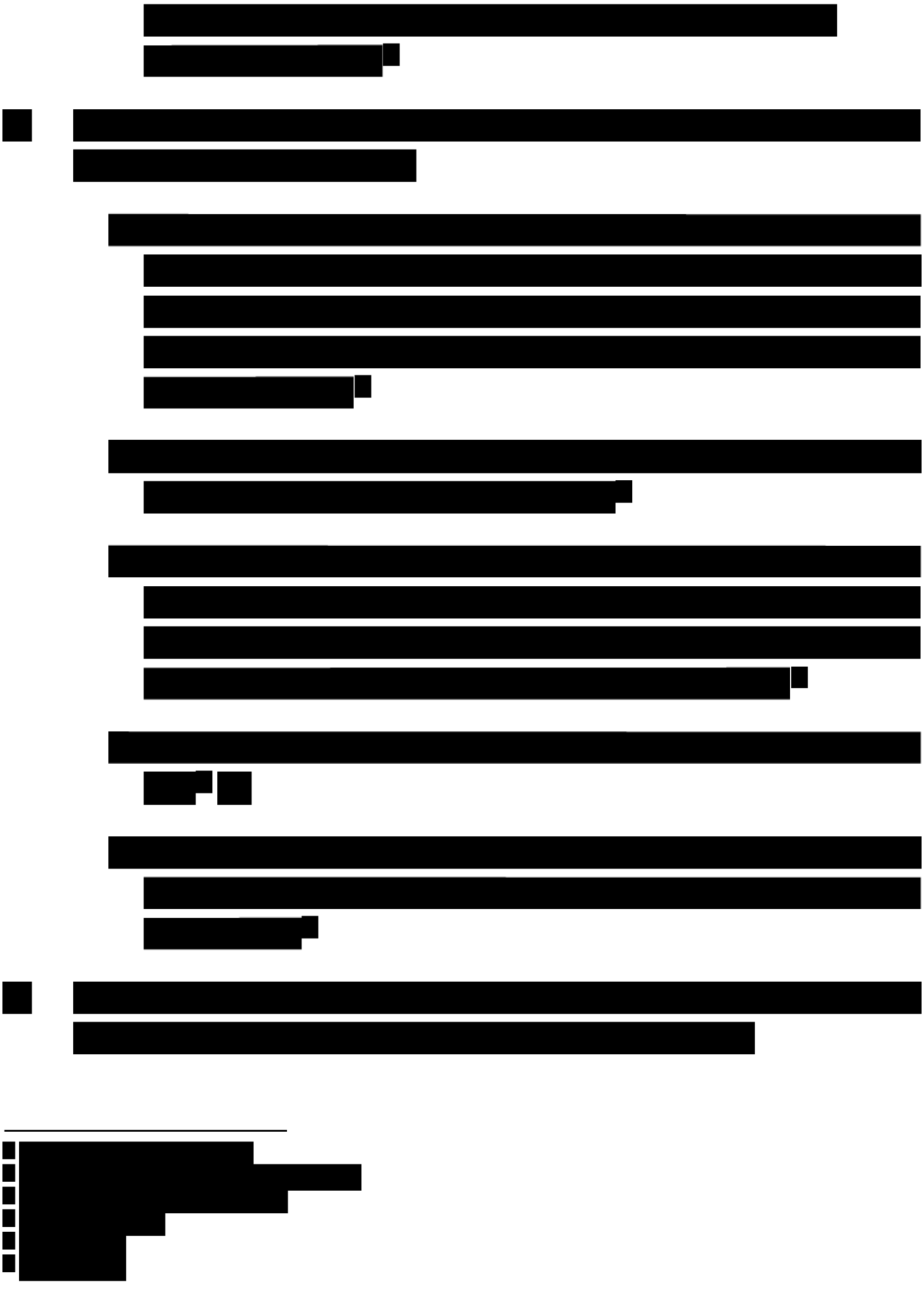
[redacted]

[redacted]

[redacted]

[redacted]

[redacted]



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[redacted]

b. The Committee's Analysis

48. As to the proper standard of review in annulment, the Committee agrees with the Parties that annulment is an exceptional and limited remedy, strictly limited by the ICSID Convention to the five stated grounds in Article 52(1). In no case do those grounds provide the basis for an appeal from the underlying tribunal's award.

49. Article 52(1) of the ICSID Convention further limits annulment proceedings to the validity of the award itself. Pursuant to Article 48 of the ICSID Convention, the award is defined as the decision "*by a majority of the votes of all its members*" (Article 48(1)), which "*shall be in writing and shall be signed by the members of the Tribunal who voted for it*" (Article

[redacted]

48(2)) and "*shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based*" (Article 48(3)). Annulment is available in respect of an award only, i.e., the decision by majority.

50. As to the standard applicable for excess of mandate in annulment proceedings, the Committee finds that there is no dispute between the Parties that it is required to engage in a two-stage inquiry: (i) assessment of the existence of any excess of powers and, if so, (ii) whether or not such excess of powers is manifest.

51. The "*manifest*" nature of the excess of powers is an excess that is obvious, clear or self-evident. It is discernable without the need for an elaborate analysis of the award.[47]

52. As to failure to apply the law as a basis for excess of mandate, the Committee acknowledges that the practice of *ad hoc* committees has been to recognize that, where a tribunal does not apply the law applicable to the arbitration, there is ground for annulment under Article 52(1)(b).[48] Nevertheless, in such cases, the *ad hoc* committee must limit itself to determining if the tribunal did, in fact, apply the law it was bound to apply, without reviewing whether or not that law was properly applied.[49] The latter would be stepping into the territory of appeal and that is not permitted by Article 52(1).

53. Accordingly, regarding the Claimants' first ground for annulment based on excess of mandate, this Committee must examine whether or not the Tribunal properly identified the applicable law and applied that law.

(2) Excess of Mandate Arising Out of the Treatment of "*Effective Means*"

a. The Parties' Positions

i. The Claimants' Position

[redacted]

[47] CLA-89, *Updated Background Paper on Annulment for the Administration Council of ICSID,* 5 May 2016 ("*ICSID Background Paper on Annulment*"), #83.
[48] CLA-89, *ICSID Background Paper on Annulment*, #90-92.
[49] CLA-89, *ICSID Background Paper on Annulment*, #93.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

ii. The Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

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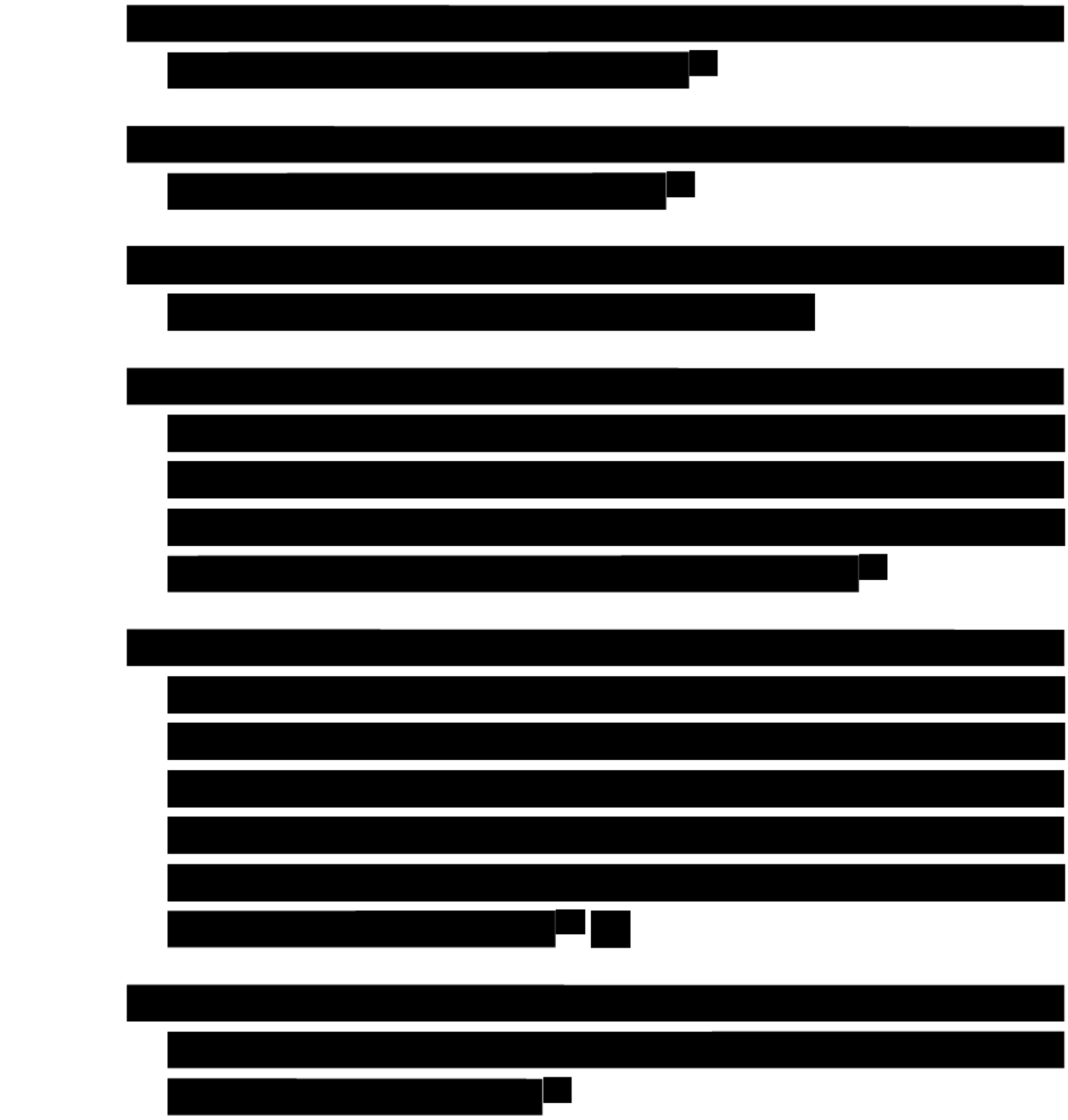

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b. The Committee's Analysis

82. The Committee has seriously considered the arguments put forward by both Parties and the evidence and authorities on file, including as summarised briefly above. The Committee finds that the Claimants' first basis for annulment pursuant to Article 52(1)(b) fails for the seven reasons set out below.

83. Article 52(1)(b) provides that:

> "*Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *…*
>
> *(b) that the Tribunal has manifestly exceeded its powers … .*"

84. The essence of the Claimants' first basis for annulment is that the Tribunal exceeded its powers by failing to apply the applicable legal standard to its decision not to award compensation for the Respondent's breach of the "*effective means*" standard arising out of delays in the Egyptian court proceedings. They consider the Award to be conflicted and contradictory in respect of its treatment of "*effective means*," as the lower standard applies both to breach **and** to the consequences of breach in the approach to compensation.[130]

85. First, the source of the applicable law regarding "e*ffective means*" is the Egypt-Spain BIT, which incorporates Article II(7) of the Egypt-US BIT through the MFN clause in Article 4(2) into the Respondent's existing FET protection.

86. Secondly, as to the relationship between the "*effective means*" and FET, the Egypt-Spain BIT subordinates "*effective means*" to the FET standard. This subordination was not the

[redacted]

[130] Mem. #90-91.

Tribunal's decision; it was the expressed will of the State parties to the Egypt-Spain BIT through their adoption of the expression "*this treatment*," as explained by the Tribunal in the Award. In this regard, the Tribunal accepted the Claimants' own assertion in their Reply to the Merits that the "*effective means*" standard provided for in Article II(7) of the Egypt-US BIT may be considered part of the Respondent's FET undertaking.[131]

87. The Claimants acknowledged this reasoning in paragraph 117 of their Memorial on Annulment:

> "*In the Tribunal's view, the word 'this' in Article 4(2) of the BIT justifies the application of the MFN clause is such a limited form that subjects the resulting incorporated 'effective means' protection to and equates it to the FET standards. The Tribunal's myopic reading of 'this' in Article 4(2) of the BIT ultimately results in the Tribunal's wholly effective nullification, rejection, derogation from, and re-drafting of, any effective application of the 'effective means' protection standard.*"

88. In the Award, the Tribunal considered the relationship between the FET and the "*effective means*" standards, as well as the denial of justice standard, observing as follows:

> "*The Tribunal believes that the provision of effective means may be subsumed under the FET standard; it is not a freestanding standard separate from the FET standard but, still, informs the FET standard in a way that is relevant for the Tribunal's present enquiry; i.e., within the scope of Article II (7) of the Egypt-US BIT as regards—as of relevance here—the assertion of claims and enforcement of rights with respect to investment authorizations.*"[132]

89. The Tribunal further explained in the Award that "*[t]he Claimants first articulated their denial of justice claim by reference to international law and the FET provision of the BIT. In the Reply Memorial, the Claimants added the contention that Egypt breached its*

[131] Reply on the Merits #386-387; Award #900.
[132] Award #901.

obligation to provide 'effective means' for the Claimants to assert their claims."[133] At paragraph 902, it referred to the arguments put by the Parties in relation to the Egypt-US BIT and found that "*the 'effective means' standard in this BIT may be said to be of a less demanding nature than denial of justice under international customary law*".

90. The Tribunal's reasoning was consistent with the position adopted by the Claimants in their submissions in the underlying arbitration. In particular, in the Reply on Merits, the Claimants had:

a. as noted by the Respondent,[134] explicitly acknowledged that the Respondent "*agreed that this treatment 'shall not be less favorable than that which is extended by each Party to the investments made in its territory by investors of a third country' (Most Favored Nation or MFN)*";[135]

b. under the heading "Applicable Legal Standard," alleged that "*[i]n parallel to the denial of justice claim, Claimants contend that the [Egypt] also breached its international obligation to provide 'effective means' for asserting their claims*";[136] and

c. submitted that the "*Respondent's obligation under Article II (7) to provide effective means is an obligation of result, providing a distinct and lower standard than that of denial of justice under customary international law.*"[137]

91. On the basis of the submissions by the Parties in the underlying arbitration, it seems clear to the Committee that the Tribunal adopted the arguments put by the Claimants regarding the difference between the "*effective means*" and denial of justice standards. The Tribunal did not adopt any arguments as to the difference between "*effective means*" and FET standards as none was made, by any Party. Accordingly, at paragraph 901 of the Award, the Tribunal discussed the FET standard under the Egypt-Spain BIT as a single FET

[133] Award #364, referring to Memorial on the Merits #213-231, Reply on the Merits #386-396.
[134] C-Mem. #54, 58, referring to paragraph 387 of the Claimants' Reply to the Merits.
[135] Reply on the Merits #387.
[136] Reply on the Merits #386.
[137] Reply on the Merits #396.

standard. The discussion of the "*effective means*" standard being of a "*less demanding nature than denial of justice*" at paragraph 902 following, is confined to the difference between the "*effective means*" and denial of justice standards. No less demanding (or indeed any) comparison is made to the FET standard, save to say at paragraph 901 that "*the provision of effective means may be subsumed under the FET standard.*"

92. Third, as to the Tribunal's treatment of the reasoning in the *Chevron v Ecuador* award in relation to "*effective means*," it:

a. adopted the same approach in treating "*effective means*" "*as a* lex specialis *and a not a mere restatement on the law of denial of justice*";[138]

b. reasoned that "*[i]t is also so that the 'effective means,' representing a more demanding standard, is a more favorable application of the FET standard addressing the liability of a host State for undue or egregious delays in primarily domestic court proceedings*";[139]

c. considered that FET is more robust in the Claimants' case because it embodies the "*effective me*ans" standard, this is why it refers to "*a more demanding standard*";[140]

d. found that the Tribunal's "*inquiry is a less exacting test than the one that follows denial of justice*" because no interference in the functioning of those means had to be shown;[141] and

e. concluded that in the given case, it was not dealing with denial of justice but with the "*effective means*" standard and, applying the standard to the facts, found that "*the instances of delays are not consistent with the 'effective means' standard.*"[142]

93. In light of the above, the Committee considers that the Tribunal did consider the difference between the "*effective means*" and denial of justice standards, based on the arguments put

[138] Award #903.
[139] Award #905.
[140] Award #905.
[141] Award #911.
[142] Award #915.

forward in the arbitration by the Claimants.[143] Moreover, it found in the Claimants' favour in this regard. The Claimants' arguments relating to the breach of the "*effective means*" standard focused on the "*effective means*" standard as compared to denial of justice. None of those arguments obviously addressed a separate standard for reparation for breach of "*effective means*," as separate from compensation for breach of FET protection overall. As observed by the Respondent, "*the criticized sections [of the Award] only relate to the finding of breach – not the decision on compensation – and therefore does not concern the part of the Award that the [Claimants] seek to annul*."[144]

94. Fourth, and as the Parties have accepted, an error in the application of the law is not a basis for annulment under Article 52(1)(b).

95. The Respondent has argued that even if the Tribunal were wrong in its application of the "*effective means*" standard, this is an error in law as opposed to non-application. The Claimants assert that the "*Tribunal's analysis does not amount to only a mere error of law*" on the basis that "*it thoroughly rejected, derogated from and negated the 'effective means' standard itself"* because it rendered – lacking the power to do so – the *"effective means"* standard dependent on the FET standard despite its being recognized as a more favorable standard than the FET.[145]

96. Relatedly, the Claimants argued that the Tribunal's analysis turned out to be unjust for their case,[146] and for that reason went beyond a mere error.[147]

97. The Committee reiterates that neither an error in the application of the law or an application of the law giving rise to unjustness for a party's case is a ground for annulment under the ICSID Convention under Article 52(1)(b). Manifest excess of powers arising out of the failure to apply the law is limited to situations where the tribunal did not apply the law. Its incorrect application is not a basis for annulment. This position is confirmed in the 2016 *Updated Background Paper on Annulment for the Administrative Council of ICSID*, and

[143] See also C-Mem. #93.
[144] C-Mem. #88-90.
[145] Mem. #99-102, Reply #47.
[146] Reply #30; Mem. #85.
[147] Mem. #99.

myriad ICSID *ad hoc* committee decisions on annulment as discussed therein (and subsequently).[148] The consequences, unjust or otherwise, of a tribunal's error in the application of law similarly do not provide the basis for annulment under Article 52(1)((b).

98. Fifth, the Committee does not accept the Claimants' characterisation of "*the Tribunal's denial of financial compensation for the 'effective means' violation based on the lack of other treaty breaches*" as "*necessarily a complete rejection and denial of the 'effective means' protection standard, which the Tribunal has no power to do [and,] [a]s such, it amounts to a manifest excess of power and a violation of Article 52(1)(b) of the ICSID Convention.*"[149]

99. In support of their argument that a derogation from a rule may constitute a failure to apply the law, the Claimants had relied on the reasoning in the *MINE v Guinea ad hoc* committee decision that:

> "*a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision* ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power*."[150]

100. The Claimants relied further on *Amco v Indonesia*, where it was reasoned that, "*[m]ore realistically, an* Ad Hoc *Committee may find that the misapplication, etc. of national law is of such a nature or degree as to constitute objectively (regardless of the Tribunal's actual or presumed intentions) its effective nonapplication*".[151]

101. The Committee observes that the Claimants failed to articulate in the annulment proceedings precisely how the Tribunal's decision not to grant it compensation derogated

[148] CLA-89, *ICSID Background Paper on Annulment*, #90.
[149] Mem. #98.
[150] CLA-90, *MINE v Guinea,* #5.03.
[151] CLA-93, *Amco v Indonesia*, #7.19.

from the application of the applicable law to the extent that would constitute a manifest excess of powers by reason, effectively, of non-application of that law.

102. The Committee considers that the characterisation of the Tribunal's treatment of "*effective means*" as a derogation from the law, in theory, could provide a basis for annulment pursuant to Article 52(1)(b). As explained in the 2016 *Updated Background Paper on Annulment for the Administrative Council of ICSID*:[152]

> "*Some* ad hoc *Committees have concluded that gross or egregious misapplication or misinterpretation of the law may lead to annulment, while others have found that such an approach comes too close to an appeal. […] These discussions have led* ad hoc *Committees to observe that there is sometimes a fine line between failure to apply the proper law and erroneous application of the law.*"

103. However, that standard is a high one and the misapplication or misinterpretation would need to be so serious as to amount to a failure to apply the law at all.

104. Having carefully considered the Claimants' arguments as to the Tribunal's treatment of "*effective means*," this Committee is satisfied that this did not constitute a derogation sufficient to constitute such "*gross or egregious misapplication or misinterpretation of the law*" as required to permit annulment. The Tribunal plainly considered and applied the "*effective means*" standard, as argued by the Claimants, and accepted their case as to the difference between that standard and the denial of justice standard.

105. The Claimants' complaint is that "*despite holding that Respondent breached the Effective Means Standard, it refused to grant compensation*". This is not a failure to apply the "*effective means*" standard, neither as a result of non-application nor as a result of such gross or egregious application as to amount to effective non-application. It is the precise opposite. The Tribunal **did** apply the "*effective means*" standard as argued by the Claimants in the underlying arbitration, and indeed found in their favour. It just determined in its application of that standard that the Claimants were not entitled to compensation as a

[152] CLA-89, *ICSID Background Paper on Annulment,* #93, 74.

consequence of the breach. Even if this were an error of law on the part of the Tribunal, it is not an error constituting non-application that could give rise to annulment under Article 52(1)(b).

106. Sixth, the Claimants appeared to raise a separate argument on the basis that the Tribunal should have followed the entire reasoning in *Chevron v Ecuador*, which they deem to be the applicable test to the adjudication of effective means claims. On the basis that the Tribunal failed to do so, the Claimants argued that the outcome of their case differed and was unjust.

107. Preliminarily in relation to the status of the *Chevron v Ecuador* award, the Committee recalls that there is no provision on binding precedent in the framework of ICSID governing rules. As set out above at paragraphs 85 to 86, the applicable law regarding the "*effective means*" standard is the relevant Egypt-Spain BIT. However, that does not mean that both tribunals and *ad hoc* committees cannot take account of the decisions adopted by other arbitration bodies.

108. Therefore, the Tribunal was under no duty to follow the reasoning of the tribunal in the *Chevron v Ecuador* award in respect of "*effective means.*"[153] Nonetheless, at paragraphs 902 to 903 of the Award it considered the criteria in the *Chevron v Ecuador* award against which to determine a violation of "*effective means*" in the current case.

109. The Claimants' complaint, however, is that "*the outcome would have been different had the Tribunal applied the* Chevron *test*" in the same way that it was applied in *Chevron.* The Committee does not accept that this is a credible basis for annulment under Article 52(1)(b). Aside from the point that the Tribunal was under no duty to follow the decision and outcome in the *Chevron v Ecuador* award, for the reasons mentioned above, each claim will turn on its own facts, evidence, applicable law (based on the relevant treaty) and the articulation of the claims and defences by the parties in the proceedings.

[153] See also C-Mem. #135-136, 140; Rej. #38-42.

110. The mere fact that the consequence of breach of an "*effective means*" standard in one case was different is not a basis for annulling the decision as to the consequence of breach of an "*effective means*" standard in another case.

111. In any event, the Committee recalls that in paragraph 916 of the Award, the Tribunal did consider the consequences of the breach of "*effective means*" on the facts of the current arbitration, using a "*but for*" scenario and reasoned as follows:

> "*[i]n view of this conclusion [of breach], the Tribunal will have to evaluate the implications of this finding. The Tribunal must note in this regard its conclusion that the impugned circumstances, i.e., those relating to the auction proceedings and the imposition of license fees and other terms, do not constitute Treaty breaches. This being so, the Respondent's failure to provide 'effective means' as regards the resultant court proceedings, has not altered this situation and cannot, therefore, despite its violatory nature, in and of itself give rise to a duty of the Respondent to indemnify the Claimants. In fact, the Respondent argued that no harm has been alleged.*"

112. The Committee accepts the position as put forward by the Respondent in its Counter-Memorial at paragraphs 152 and 153 as follows:

> "*The so-called* Chevron *test involves 'evaluat[ing] the merits of the underlying cases and decid[ing] upon them as [the Tribunal] believes an honest, independent, and impartial [local] court should have'. In other words, it involves assessing the situation of the investor without the breach to compare it with the situation of the investor having suffered from the breach. That is to say, assessing whether, if the host State had provided the investor the effective means of asserting its claims or enforcing its rights, the investor would have been in a different (i.e. better) situation –*

> *in essence, a 'but-for' versus actual scenario analysis. This is what the Tribunal did in the instant case*."[154]
>
> "*The Tribunal's ruling on compensation was clearly based on a comparison of the actual and but-for situation of the investor*."[155]

113. Therefore, for the aforementioned reasons, the Committee finds that there was no manifest excess of powers by the Tribunal arising out of it having reached a different outcome as to the consequences of breach of the "*effective means*" standard from that reached by the tribunal in the *Chevron v Ecuador* award.

114. Finally, in relation to the first ground for annulment, the Respondent set out in detail the reasons why, even if the Tribunal had exceeded its powers in failing to apply the "*excessive means*" standard, it would not be manifest, meaning neither obvious nor serious.

115. The Respondent's argument as to lack of obviousness arises out of the Claimants' approach to the arbitration in making their "*effective means*" argument only *en passant*, in a Reply Memorial, and making "*no specific claims or arguments about compensation under the Effective Means standard.*"[156] It insisted that the Claimants did not articulate a claim on compensation for the breach of the "*effective means*" standard. Further, it argued that, during the Hearing, a specific question was put to the Claimants in this regard.[157] The Claimants' response was as follows:[158]

> "*We have reviewed the Statement of Reply and the post-hearing briefs, I understand that the effective means protection request was put forward and discussed generally, but not specific itemised discussion of compensation that would exist under that, as a result of the specific application of that*."

[154] C-Mem. #152.
[155] C-Mem. #153.
[156] C-Mem. #59-60.
[157] Tr. Day1, 146:8-17.
[158] Tr. Day1, 148:6-12.

116. The Committee finds that, in light of the Claimants' failure to put the specific issue to the Tribunal in the underlying arbitration that compensation for breach of "*effective means*" was subject to a separate standard independent of the overall assessment of compensation pursuant to the FET provision, there can be no obvious excess of mandate arising out of the Tribunal's failure to consider that specific question. A Tribunal cannot exceed its mandate for failing to consider a question that was not put to it; its mandate is confined to the material before it at the time of the arbitration. For that reason, the seriousness requirement of this grounds for annulment also has not been met.

117. Accordingly, the Committee finds that there was no excess of mandate on the first basis and, even if there were, it would not have been manifest because it was neither serious nor obvious in light of the manner in which the Claimants put their case on "*excessive means*" to the Tribunal in the underlying arbitration.

(3) Excess of Mandate Regarding the Settlement Committee / Article II(7)

a. The Parties' Positions

i. The Claimants' Position

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[redacted] [redacted]

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[redacted] [redacted]

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ii. The Respondent's Position

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b. The Committee's Analysis

136. The Committee has seriously considered the arguments put forward by both Parties and the evidence and authorities on file regarding the second basis for excess of mandate, including as summarised briefly above. The Committee finds that the Claimants' second basis for annulment for excess of mandate fails for the reasons set out below.

137. The basis for the second excess of mandate claim is that the Tribunal did not consider the Settlement Committee to be one of the bodies included in the "*effective means*" standard and, accordingly, it did not attribute to Egypt the corresponding breach of the standard

[redacted]

regarding the Settlement Committee's conduct. The Claimants refer to the Tribunal's declaration *that "the Respondent ha[d] breached the Treaty by failing to provide 'effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties' before the Egyptian Administrative Courts*," but not by failing to provide "*effective means*" before the Settlement Committee.[185] According to the Claimants, "*[b]y doing so, the Tribunal turned a blind eye to the provisions of the BIT and exceeded its powers in violation of Article 52(1)(b) of the ICSID Convention.*"[186]

138. As set out above, the Respondent provided the roadmap for the submissions made by the Parties in the underlying arbitration and the reasoning followed by the Tribunal based on those submissions.[187] On the basis of those Party submissions and Tribunal reasoning as set out, the Committee concludes that the high threshold provided for the manifest excess of powers is not met in relation to the Tribunal's conclusion as to the Select Committee.[188]

139. The Committee bases this decision on the fact that the Tribunal dealt with the relevant "*facts of the case*" in the Award, stating as follows:

> "*As a first step, ACC turned to the Settlement Committee which, according to Article 2 of the applicable Decree No. 1272/2004, was tasked with the following role: 'The Ministry Committee is competent in dealing with disputes that are raised by investors and that oppose investors to ministries and the interests of governmental agencies, general authorities and local administrative entities, in addition to disputes that oppose these entities against each other.' In the event that the Settlement Committee did not deal with the matter — or at least did not render a proposal or recommendation — this is to be deplored. However, it is not of the nature to trigger responsibility for failing to provide 'effective means' as this Committee did not have judicial functions and, more importantly, its*

[185] Mem. #158-159, quoting Award #939(2).
[186] Mem. #160.
[187] C-Mem. #168-174.
[188] C-Mem. #178-179.

> *having been seized did not prevent a party from raising the matter before an administrative court, as occurred in this case*."[189]

140. Thus, the Tribunal acknowledged the role of the Settlement Committee to deal with disputes raised by investors, such as the one in the underlying arbitration. It was critical of the situation where the Settlement Committee did not deal with such matters, at least to render a proposal or recommendation. It described this as something "*to be deplored.*" But the Tribunal went on to reason that the Settlement Committee "*did not have judicial functions*" and its involvement did not preclude a party from raising the same matter "*before an administrative court.*" It explained further that:

> "*… it is not of the nature to trigger responsibility for failing to provide 'effective means' as this Committee did not have judicial functions and, more importantly, its having been seized did not prevent a party from raising the matter before an administrative court, as occurred in this case.*"[190]

141. Accordingly, the Tribunal determined that the Respondent was accountable for the breach of the "*effective means*" standard regarding the Administrative Court's delays in rendering a decision, but not for those of the Settlement Committee. This was because (i) whatever the decision of the Settlement Committee, it did not prevent the Claimants from seizing a judicial body having the legal capacity to decide the matter, and (ii) the Settlement Committee did not fulfil its duties in the light of the "*effective means*" standard, i.e., it did not have a judicial function.

142. The Tribunal plainly did consider whether or not to apply the "*effective means*" standard to the Settlement Committee. Having so considered, it determined that it did not apply. Accordingly, there is no basis for annulment on the grounds that the Tribunal exceeded its mandate by failing to apply the law (i.e., the "*effective means*" standard) in this regard. The Claimants' real complaint would appear to be that the Tribunal's application of the law may not have resulted in the outcome the Claimants wanted, but that outcome does not

[189] Award #905-906.
[190] Award #907.

arise out of a failure to apply the law or otherwise by excess of mandate, manifest or otherwise.

143. Accordingly, the Committee finds that there was no excess of mandate arising out of the Tribunal's decision that the "*effective means*" standard did not apply to the Settlement Committee.

B. GROUND 2: SERIOUS DEPARTURE FROM FUNDAMENTAL RULE OF PROCEDURE (ARTICLE 52(1)(D))

144. As to the second ground, departure from a fundamental rule of procedure, the Claimants again raise two separate claims for annulment. The first is that the Tribunal failed to admit to the record evidence in the form of the so-called Negative List document ("Negative List Decree"). The second is that the Tribunal ignored other evidence on the record. Each of these grounds will be dealt with in turn below, following the discussion of the Parties' positions and the Committee's decision as to the standard applicable to it pursuant to Article 52(1)(d).

(1) Standard of Review for Serious Departure from Fundamental Rule of Procedure

a. The Parties' Positions

i. The Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

ii. The Respondent's Position

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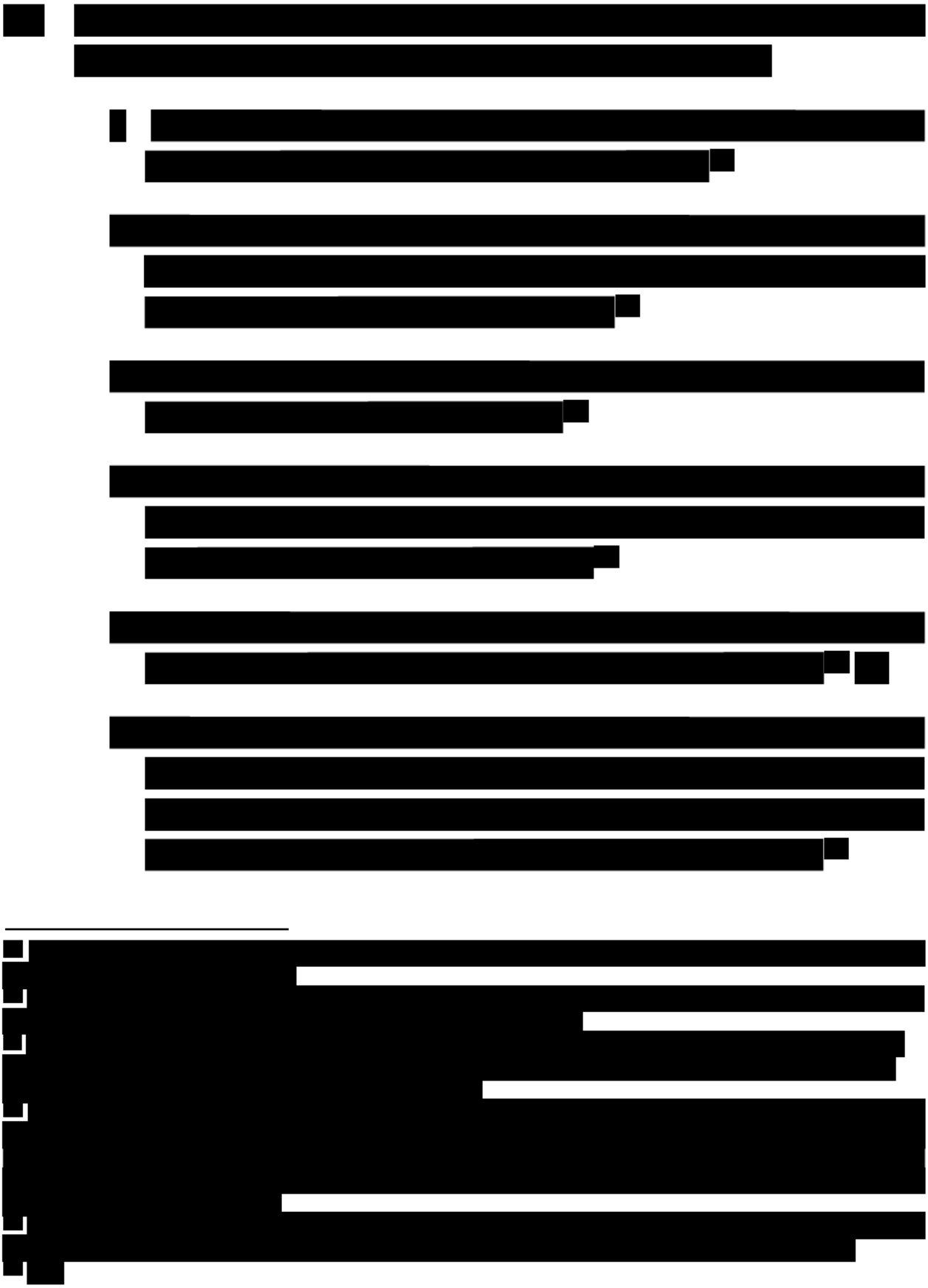

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b. The Committee's Analysis

153. As to the standard applicable for serious departure from a fundamental rule of procedure, the Committee again finds that there is no dispute between the Parties that it is required to engage in a two-stage inquiry: (i) to assess whether the Tribunal has departed from a fundamental rule of procedure and (ii) if so, to determine whether or not such a departure was "*serious.*"

154. Regarding the requirement of seriousness, the Committee agrees with other *ad hoc* committees that:

> "*… for a departure to be serious it need not be outcome determinative in the sense that the Applicant has to demonstrate that the Tribunal's decision would have been different had the fundamental procedural rule been observed. The Applicant, however, has the burden to demonstrate that there is a distinct possibility that the departure may have made a difference on a critical issue of the Tribunal's decision.*"[209]

155. First, the Committee recalls that the fundamental rules of procedure addressed in Article 52(1)(d) of the ICSID Convention are principles concerned with the integrity and fairness of the arbitral process.[210] The treatment of evidence and burden of proof, as alleged by the Claimants, may be a category of such fundamental rules.[211] The 2016 *Updated Background Paper on Annulment for the Administrative Council of ICSID* points out that:

> "*It appears from the drafting history of the ICSID Convention that the ground of a 'serious departure from a fundamental rule of procedure' has a wide connotation including principles of natural justice, but that it*

[208] C-Mem. #195.
[209] CLA-92, *Perenco Ecuador Ltd. v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021 ("*Perenco v Ecuador*"), #137.
[210] CLA-89, *ICSID Background Paper on Annulment*, #98.
[211] CLA-89, *ICSID Background Paper on Annulment*, #99.

> *excludes the Tribunal's failure to observe ordinary arbitration rules. The phrase 'fundamental rules of procedure' was explained by the drafters as a reference to principles. One such fundamental principle mentioned during the negotiations was the parties' right to be heard. The drafting history thus indicates that this ground is concerned with the integrity and fairness of the arbitral process.*"

156. Secondly, the Committee considers that in order for a departure from a procedural rule to be serious, it must have deprived the rule of its intended effect.[212] In the Committee's view, a breach is serious if the Tribunal's decision would have been potentially different had the breach not been committed.[213]

157. In this regard, the Committee agrees with the *ad hoc* committee in *Perenco v Ecuador* which found that:

> "*... for a departure to be serious it need not be outcome determinative in the sense that the Applicant has to demonstrate that the Tribunal's decision would have been different had the fundamental procedural rule been observed. The Applicant, however, has the burden to demonstrate that there is a distinct possibility that the departure may have made a difference on a critical issue of the Tribunal's decision*."[214]

158. Therefore, on the basis of the language of Article 52(1)(d), the discussion in the 2016 *Updated Background Paper on Annulment for the Administrative Council of ICSID*, and ICSID *ad hoc* committee decisions discussed therein and determined thereafter, this Committee reiterates that: (i) the treatment of evidence and burden of proof may constitute a fundamental rule of procedure; (ii) a serious departure must have deprived the applicant of the intended effect of the rule; and (iii) the tribunal's decision would have been materially different as a result.

[212] CLA-90, *MINE v Guinea*, #5.05.
[213] CLA-89, *ICSID Background Paper on Annulment*, #100. CLA-99, *Wena v Egypt,* #58.
[214] CLA-92, *Perenco v Ecuador*, #137.

(2) Tribunal's Decision Not To Admit the Negative List Decree into the Record

a. The Parties' Positions

i. The Claimants' Position

[redacted]

[redacted]

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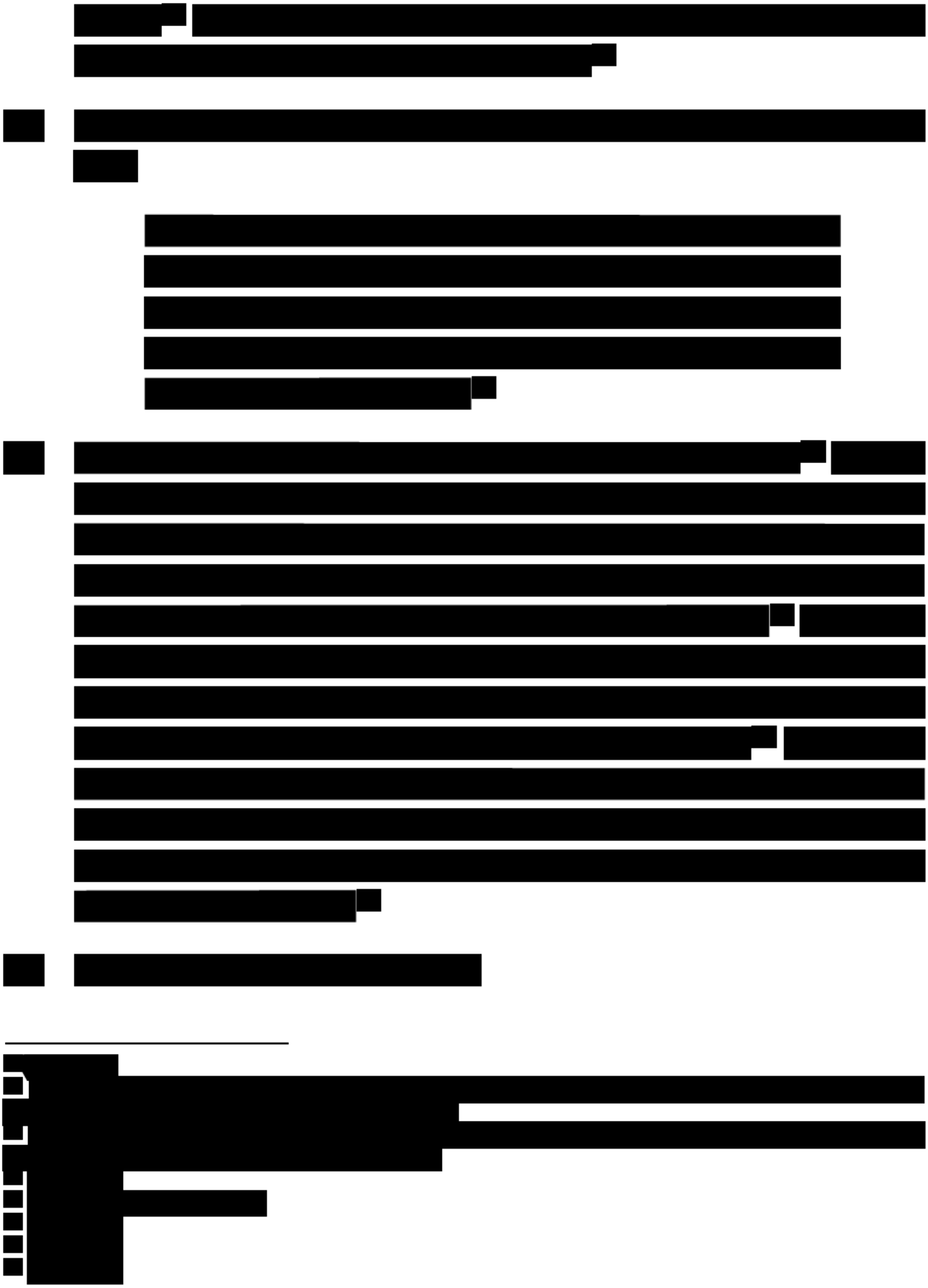

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ii. The Respondent's Position

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[redacted].

[redacted]

b. The Committee's Analysis

186. The Committee has seriously considered the arguments put forward by the Parties and the evidence and authorities on file regarding the first alleged basis for serious departure from a fundamental rule of procedure, including as summarised briefly above. The Committee finds that this first basis for annulment pursuant to Article 52(1)(d) fails for the reasons set out below.

187. Article 52(1)(d) provides that:

> "*Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *...*
>
> *(d) that there has been a serious departure from a fundamental rule of procedure ... .*"

[264] Tr.Day1, 122:9-25.

188. The basis for the first Article 52(1)(d) claim is that the Tribunal did not admit the Negative List Decree as evidence into the arbitration. The essence of the complaint is that the Tribunal breached the principle of equality between the parties by rejecting the Claimants' new and, as the Tribunal found, late evidence. The Claimants further attribute bad faith to the Respondent in the document production phase. The Claimants allege that the Tribunal's decision not to admit the Negative List Decree in the context of the Respondent's bad faith was also a serious departure from a fundamental rule of procedure, in violation of Article 52(1)(d).

189. As to the procedure concerning the Tribunal's decision not to admit the Negative List Decree into evidence, including the allegations of bad faith arising out of the Respondent's disclosure of documents, the Committee refers to Procedural Order No.7 of 6 April 2019 regarding pre-hearing issues.[265] The Committee acknowledges that in Procedural Order No. 7, the Tribunal considered applications: (i) by the Respondent for orders concerning the non-attendance of its expert at the hearing due to a medical condition; and (ii) by the Claimants "*to enter into the record a document referred to as a 2005 judgment rendered by the Egyptian State Council*" (i.e., the Negative List Decree),[266] and made on the basis of those submissions the following orders:

a. the Respondent's requested directions for the non-attendance of its expert were accepted by the Tribunal;[267] and

b. the Claimant's request to admit an additional document (the Negative List Decree) was rejected by the Tribunal, stating that "*no additional documents shall be admitted into the record*," as supported by the Tribunal's previous ruling of 5 June 2018 (determining that no documentary evidence would be submitted after 11 February 2019).[268]

[265] C-236, PO7.
[266] C-236, PO7, #3, 21-26.
[267] C-236, PO7, #24-25.
[268] C-236, PO7, #25-26.

190. In the Award, paragraph 74, the Tribunal referred to its decisions in Procedural Order No. 7 as follows:

> "*On 6 April 2019, the Tribunal issued Procedural Order No. 7 deciding that the Legal Opinion of* [redacted] *would not to be struck from the record, but should be considered in light of his inability to testify at the hearing and the Claimants' resulting inability to cross-examine him. The Tribunal further decided to grant the Claimants 45 minutes of hearing time to comment on* [redacted] *Opinion. Finally, the Tribunal denied the Claimants' request to submit additional documents into the record, ruling that 'no additional documents shall be submitted into the record.'*"

191. Further in the Award, paragraph 611 to 613, the Tribunal generally addressed the Claimants' case as to a relevant "*negative list*" (to which the Negative List Decree relates) and it explained that:[269]

> "*There is no evidence before the Tribunal to support the conclusion that a 'negative list' existed. As reflected in the Supreme Administrative Court judgment of 22 May 2013, there may have been such a list issued in the early 1990s, which may have specified which industries could not be licensed (which by no means implies that other industries would receive "immediate licenses"). It should be noted, however, that this affirmation was advanced by the complainant in that particular court case and lacks any documentary or other evidential support. It appears, additionally, to have been an internal instruction within the agency and, therefore, nothing that a putative investor could rely on as a dispensation from the obligation to apply for a license.*
>
> *Moreover, the contents of such a 'negative list,' if indeed it existed, are not known. It would be highly unlikely that such a list would*

[269] Award #611-613.

> *include a blanket approval of cement plants, since they are known to be amongst the most polluting and energy-consuming of industrial processes.*
>
> *The Tribunal concludes that there is no evidence before it to support the conclusion that there was a 'negative list' of any regulatory relevance in existence at the relevant times. Equally, there is no evidence to show that if such a list had existed, it would have exempted cement plants from any licensing requirement.*"

192. The Committee acknowledges the Claimants' concern that the Tribunal made an affirmative finding in the Award that there was "*no evidence before it to support the conclusion that there was a 'negative list*,*'*" having previously decided not to admit into evidence the document that the Claimants sought to adduce to support that conclusion (i.e., the Negative List Decree). However, the Tribunal did not conclude that there was no evidence relating to any "*negative list.*" Instead it found at paragraph 613 that there was:

a. no evidence before it "*to support the conclusion that there was a 'negative list' of any regulatory relevance* ***in existence at the relevant times***"; and

b. no evidence to show that "*if such list had existed, it* ***would have exempted cement plants*** *from any licensing requirement*" (emphasis added).

193. The Committee considers the totality of the Tribunal's conclusions regarding the existence of a "*negative list*" to be notable. In particular, the Negative List Decree is an administrative decision dated 2005, dealing with tobacco, which the Claimants state referred to a "*negative list.*" However, included in the evidential record at R-23 was a more recent 2008 judicial decision, dealing with cement, which also referred to a "*negative list.*" Given that the Tribunal reached its conclusions at paragraphs 611 to 613 of the Award with the benefit of R-23 in the evidential record, it seems unlikely to this Committee that the outcome would have changed had it also admitted and considered the Negative List Decree.

194. Having made that observation, the Committee affirms that even if that were not the case, it is not enough for annulment on the grounds of Article 52(1)(d) that a tribunal refused to admit evidence. It must also have done so in a manner that seriously departed from fundamental rules of procedure. In that regard, the Committee has had the benefit of the Parties' submissions as to the background of Procedural Order No. 7, and the order by the Tribunal not to admit new evidence in the days immediately prior to the hearing.

195. Against that background, the Committee considers that there is no breach of the principle of equality arising out of the Tribunal's decision not to accept requests for submissions that are extemporaneous in light of the calendar agreed by the Parties. The Tribunal's decision not to admit the new documentary evidence out of time was made in light of the schedule agreed by the Parties and approved by the Tribunal.

196. As to the circumstances that triggered the application to submit new evidence, the non-attendance of the Respondent's expert due to illness was similarly managed by the Tribunal in a manner that does not appear to this Committee to have departed from any fundamental rule of procedure. In particular, although the Tribunal did not permit the Claimants to admit the Negative List Decree to challenge the Respondent's expert report, it did permit the Claimants an additional 45 minutes of hearing time to comment on the expert report in his absence. That approach was entirely within the Tribunal's discretion. In the Committee's view, it further addressed any perceived concerns as to lack of equality.

197. As to the Claimants' allegation of bad faith on the part of the Respondent during the document production exercise, the Tribunal took note of this in its Procedural Order No.7, as reiterated in the Claimants' Memorial on Annulment.[270] The Committee considers that the Tribunal's lack of any bad faith finding as a matter of fact or law, in Procedural Order No. 7 or the Award, is not a serious departure from a fundamental rule of procedure. It considered the Claimants' arguments, as acknowledged in its decision.

[270] C-236, PO7, #17; Mem. #192-193.

198. Accordingly, the Committee finds that there was no serious departure from a fundamental rule of procedure as a result of the Tribunal's decision not to admit the Negative List Decree into evidence outside the schedule.

(3) Tribunal's Consideration of Evidence on Record

a. The Parties' Positions

i. The Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

ii. The Respondent's Position

[redacted]

[redacted]

[redacted]

[redacted]

b. The Committee's Analysis

208. The Committee has seriously considered the arguments put forward by the Parties and the evidence and authorities on file regarding the second alleged basis for serious departure from a fundamental rule of procedure, including as summarised briefly above. The Committee finds that this second basis for annulment, that the Tribunal ignored evidence submitted by the Claimants on the "*one-stop shop*" of GAFI, also fails for the reasons set out below.

209. The Award, in paragraph 600, deals with the Claimants' and the Respondent's positions on this point.[282] Having set out those respective positions, the Tribunal stated at paragraph 603 that it was:

> "*… unable to conclude, on the basis of the record before it, that there existed an arrangement that could be described as a 'one-stop shop' during the relevant period of time, or that the Ministry of Trade and Industry could be considered to have put in place an all-inclusive obligation that GAFI ensure that a putative applicant secured all necessary approvals to implement an industrial project. Moreover, it is to be noted that ACC did not seize the Ministry of Trade and Industry with a license application until it made a submission to IDA on 18 September 2006 (although it may well be that this application, which is not on record, was not, as may be deduced from later exchanges, for a license but for the registration of a license in the industrial register). It should be noted that*

[redacted]
[282] Award #600-602.

> *GAFI, which issued the preliminary approval, does not function under the Ministry of Trade and Industry but the Ministry of Investment*."[283]

210. The Award therefore deals with the Claimants' "*one-stop shop*" argument in some detail, as quoted in the Claimants' Memorial on Annulment at paragraph 228.

211. The Tribunal further stated at paragraph 604 of the Award that:

> "*The record shows that ACC did not act on the basis of a belief that there existed a 'one-stop shop' mechanism on which it could rely. In fact, starting from 1996, ACC turned to a multiplicity of State agencies in order to secure a number of different approvals … This course of action also proceeded in the period following the Claimants' investment in ACC in 2004*."[284]

212. It is apparent from the Award, as set out above, that the Tribunal was not ignorant of the evidence on file. On the contrary, the Award (and the Claimants' Memorial on Annulment) demonstrate that the Tribunal was aware of and considered the evidence submitted by the Claimants in respect of the licensing procedure, transparently setting out in the Award its consideration in this respect. The Tribunal apparently considered it important that the Claimants themselves contemporaneously appeared to act on the assumption that it had to liaise with a multiplicity of agencies.

213. Accordingly, the Committee finds that there was no serious departure from a fundamental rule of procedure as a result of the Tribunal having ignored evidence on the record in the arbitration, as alleged by the Claimants.

C. GROUND 3: FAILURE TO STATE REASONS (ARTICLE 52(1)(E))

214. As to the third and final ground, failure to state reasons, the Claimants reiterate each of their grounds for excess of mandate and serious departure from a fundamental rule of procedure as independent bases for failure to state reasons pursuant to Article 52(1)(d).

[283] Award #603.
[284] Award #604.

These four additional bases for failure to state reasons as a ground for annulment will be dealt with below, following the discussion of the Parties' positions and the Committee's decision as to the standard applicable to it pursuant to Article 52(1)(e).

(1) Standard of Review for Failure to State Reasons

a. The Parties' Positions

i. The Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

ii. The Respondent's Position

[redacted]

[redacted]

- [redacted]

- [redacted]

- [redacted]

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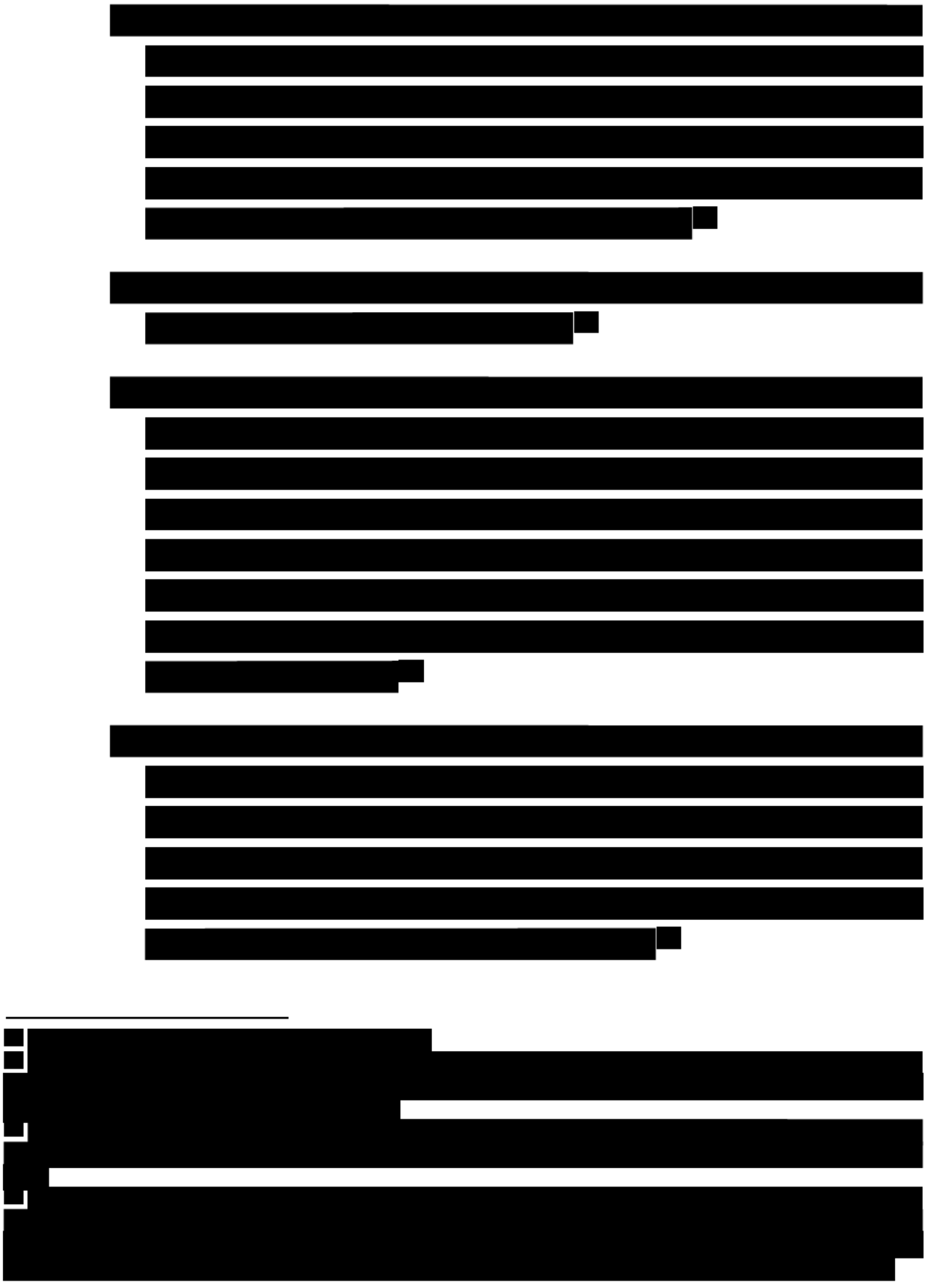

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b. The Committee's Analysis

221. The Committee recalls that this ground for annulment is consistent with Article 48(3) of the ICSID Convention, which requires that the award deal with every question submitted to the Tribunal and state the reasons upon which it is based, and with Rule 47(1)(i), which requires the award to contain the decision of the Tribunal on every question submitted to it together with the reasons upon which the decision is based.

222. In regard to the standard of review for failure to state reasons, as a ground for annulment established in Article 52(1)(e) of the ICSID Convention, the Committee agrees with the *ad hoc* committee in the *MINE v Guinea* decision, which found that "*the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*"[304]

[redacted]

[304] CLA-90, *MINE v Guinea*, #5.09.

223. Furthermore, the Committee observes that the premises leading to a decision may be either implicit or explicit. As stated in the decision of the *ad hoc* committee in *Wena v Egypt,* what is paramount is that the Tribunal's conclusions follow from a set of premises.[305]

224. As the *ad hoc* committee in the *Perenco v Ecuador* decision pointed out, "*[i]n sum, a decision is reasoned when the Tribunal's conclusions clearly follow from a set of either express or implicit premises. If there are no reasons supporting a conclusion, or a conclusion is based on contradictory premises, an award or any part thereof is annullable under Article 52(1)(e) of the ICSID Convention*."[306] The Committee agrees with this recapitulation of the standard.

(2) Failure to State Reasons for the "*Effective Means*" Decision on Compensation

a. The Parties' Positions

i. The Claimants' Position

225. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[307] Mem. #66; Reply #15.

[redacted]

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ii. The Respondent's Position

[redacted]

[redacted]

> [redacted]

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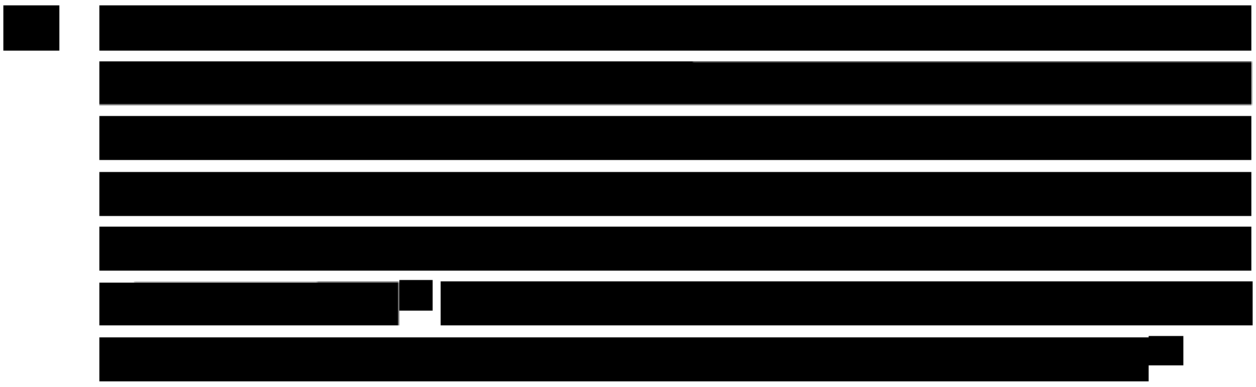

[redacted]

b. The Committee's Analysis

247. The Committee has seriously considered the arguments put forward by the Parties and the evidence and authorities on file regarding the third ground for annulment on the basis of the Tribunal's failure to give reasons in the Award, as summarised briefly above. The Committee finds that the first of the four bases for annulment for failure to give reasons fails for the reasons set out below.

248. First, as set out above, the Article 25(1)(e) requirement to state reasons "*is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law.*"[334]

249. The Committee understands the Claimants' position to be that the Tribunal failed "*to provide an explanation as to how 'a more favourable application of the FET standard', which is 'of a less demanding nature' and a 'less exacting test' could possibly at the same time 'represent a more demanding standard,'*" based on paragraphs 901 and 902 of the Award in particular. The Committee refers to the reasons stated at paragraph 117 above in relation to this Committee's finding that the Tribunal did not exceed its mandate in applying the "*effective means*" standard. It does not need repeat those; for the same reasons the Tribunal does not accept that the Tribunal failed to give reasons for that decision. On the contrary, the Tribunal has provided reasons for having considered the "*effective means*" standard to be "*of a less demanding nature*" when compared to "*denial of justice under international customary law*" only. This is independent of and consistent with its commensurate finding that any allegation of breach under the relevant FET provision was subject to the FET standard. That seems clear and cogent from the plain language of the Award.

250. Secondly, even if the Tribunal's reasoning contained an error of fact or law (which has not been established to have been the case), those reasons suffice for the purpose of preventing annulment under Article 52(1)(e).

[334] CLA-90, *MINE v Guinea*, #5.09.

251. Thirdly, the Claimants submit that the Tribunal's reasons were "*illogical, unreasonable, conflictive and contradictory in nature.*"[335] They insist in that "*[t]his conflictive and contradictory review amounts to a failure to state reasons.*"[336] The Committee does not accept that, on the face of the relevant paragraphs, the Tribunal's reasons were "*either contradictory or frivolous.*"[337]

252. As shown above at paragraph 117, when the Committee dealt with the application of the "Standard of Manifest Excess of Power to Failure to the Treatment of Effective Means," the considerations are not conflictive or contradictory. As happened with those arguments, this ground must also fail.

253. As to the lack of compensation awarded by the Tribunal for breach of the "*effective means*" standard, the Claimants have not established that this was a consequence of its application of a different FET standard. Indeed, the Tribunal in the Award dispositive:

a. at paragraph 939(2), unanimously declared that the Respondent breached the Treaty by failing to provide "*effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties*" before the Egyptian Administrative Courts; and

b. at paragraph 940, by majority found that the declaration in paragraph 939(2) of the dispositive that the Respondent has breached the Treaty by failing to provide "*effective means of asserting claims and enforcing rights with respect to investment agreements, investments authorizations and properties,*" constitutes adequate satisfaction to the Claimants and that no obligation arises to pay financial compensation on the part of the Respondent.

[335] Mem. #76-77.
[336] Mem. #89.
[337] CLA-90, *MINE v Guinea*, #5.09

(3) Application of the Standard to the Remaining Failure to Give Reasons Arguments

254. As set out above, the Claimants raised in passing three additional bases for arguing that the Tribunal failed to give reasons pursuant to Article 51(1)(e):

a. in the decision in the Award regarding breach of the "*effective means*" standard, the Tribunal's failure to consider the Settlement or Ministerial Committee as an adjudicatory authority "*also constitutes grounds under 52(1)(e), for failure to provide reasons*";[338]

b. in its decision in Procedural Order No. 7 not to admit into the evidential record the Claimants' Negative List document, the Tribunal's "*summary conclusion, conclusory rejection and complete failure to provide any explanation for its rejection, other than the obvious lateness, caused it to deprive its own self from carrying out discretionary determination, amounts to a failure to state reasons under Article 52(1)(e) as well*";[339] and

c. in its decision in the Award that it was unable to conclude that there existed an arrangement that could be described as a "*one-stop shop*" during the relevant period of time the Tribunal's allegedly "*serious disregard for the extensive body of evidence submitted deprived the Claimants of their right to a full and effective hearing, and their right to be heard*," and "*such serious disregard for the extensive body amounts for a ground for annulment under 52(1)(e)*."[340]

255. As also indicated above, the Claimants did not expand on the second, third and fourth grounds in any detail in written or oral submissions. Nonetheless, they were each included in the grounds for annulment and, for the sake of completeness, are briefly dealt with below.

256. None of the remaining arguments adequately provide a basis upon which to set aside the Award for failure to give reasons. In summary, the Committee dealt above—paragraphs

[338] Tr. Day1, 32:20-23. See also 33:1-6.
[339] Tr. Day1, 49:10-16.
[340] Tr. Day1, 53:22-25 and 54:1-3.

136 to 143—with the Tribunal's treatment of the Settlement Committee and found that paragraphs 905 and 906 of the Award adequately explain that the Tribunal acted within its competence and gave the reasons for its decision. As to the treatment of the "*one-stop shop*," in paragraphs 208 to 213 above, the Committee considered the Parties' allegations and found that in paragraphs 603 and 604 of the Award the Tribunal again acted within its competence and gave the reasons for its decision. The decision in Procedural Order No. 7 did not form part of the Award as relevant to engage Article 52(1)(e).

* * *

V. COSTS

A. THE CLAIMANTS' COST SUBMISSIONS

257. In their submission on costs, on the grounds of an agreement concluded with legal counsel, the Claimants argue that "*if Claimants are the successful party, or partially successful party, Claimants should be awarded the full costs incurred by them in relation to these Annulment Proceedings as such amounts were necessary to be paid in order for Claimants to effectively pursue their rights*."[341] In such a case, an additional 50% of the amounts listed in the invoices should be paid by Claimants to their Counsel. On the other hand, if they are not successful, "*Claimants would not be required to pay the amounts listed in the legal counsel's invoices*."[342]

258. In their Conclusion, "*Claimants seek payment by Respondent of the costs arising out of, or in relation to, the present Annulment Proceedings*."[343] Accordingly, in the Claimants' view, the Respondent should bear the total arbitration costs incurred by the Claimants, including legal fees and expenses totaling USD 813,098.63, broken down as follows:

Legal Fees – Invoices 1265/1-4	USD 525,483.00
Additional 50%	USD 262,741.50

[341] Claimant's Submission on Costs #19.
[342] Claimant's Submission on Costs #8.
[343] Claimant's Submission on Costs #22.

Expenses incurred by Counsel	USD 24,874.13

259. The Claimants do not elaborate further on the legal criteria for allocating costs.

B. THE RESPONDENT'S COST SUBMISSIONS

260. In its submission on costs, the Respondent submits that the Claimants should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses totaling EUR 600,000 corresponding to the full costs of Egypt's representation (fees and expenses of Egypt's attorneys).[344] The Respondent argues that when allocating the costs of unsuccessful annulment proceedings, committees have applied the costs-follow-the-event principle (unless exceptional circumstances warrant another allocation formula), which has now become the rule in such cases[345] and it recalls ICSID caselaw in that sense.

261. On the other hand, the Respondent contends that "*if this Committee were to partially annul the Award, the reasons for such annulment would be entirely foreign to Egypt and solely attributable to the [Claimants'] strategy in the Arbitration and/or the Tribunal's Award and use of its powers under Rule 34(1) of the 2006 ICSID Arbitration Rules. Therefore, even in such a case, Egypt should not bear any of the costs of these Annulment Proceedings*."[346]

262. In such a case, the Respondent requests the Committee to "*ORDER the [Claimants] to bear all the costs of these Annulment Proceedings, including the Committee's fees, ICSID administrative fees and Egypt's attorneys' fees, together with interest at the rate of EURIBOR+2% compounded annually from the date of the Committee's decision on annulment*."[347]

263. The Respondent has only submitted the above claims for legal and other costs.

[344] Respondent's Submission on Costs #7.
[345] Respondent's Submission on Costs #3, relying on CLA-89, *ICSID Background Paper on Annulment*, #65.
[346] Respondent's Submission on Costs #6.
[347] Respondent's Submission on Costs #8.

C. THE COMMITTEE'S DECISION ON COSTS

264. 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.*

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

266. The Committee finds that the principle that costs follow event should be applied here. The Committee's decision on costs is grounded on the failure of the three grounds for annulment raised by the Claimants and which only regarded the Tribunal's decision not to award financial compensation for the breach of the effective means standard.

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

Committee Members' fees and expenses	
Professor Mónica Pinto	USD 64,883.86
Ms. Wendy J. Miles KC	USD 63,319.75
Ms. Carita Wallgren-Lindholm	USD 71,592.43
ICSID's administrative fees	USD 126,000.00
Direct expenses	USD 17,150.64
Total	**USD 342,946.68**

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

269. Accordingly, the Committee orders the Applicant Party to bear all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses and USD 600,000.00 to cover the Responding Party's legal fees and expenses.

VI. DECISION

270. For the reasons set forth above, the *ad hoc* Committee unanimously decides as follows:

(1) To DISMISS the application for partial annulment; and

(2) To ORDER that the Applicant Parties bear all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses and EUR 600,000.00 to cover the Responding Party's legal fees and expenses.

[redacted]

Ms. Wendy J. Miles KC
Member of the *ad hoc* Committee

Date: 31 JUL 2023

Ms. Carita Wallgren-Lindholm
Member of the *ad hoc* Committee

Date:

Dr. Mónica Pinto
President of the *ad hoc* Committee

Date:

Ms. Wendy J. Miles KC
Member of the *ad hoc* Committee

Date:

Ms. Carita Wallgren-Lindholm
Member of the *ad hoc* Committee

Date: 31 JUL 2023

Dr. Mónica Pinto
President of the *ad hoc* Committee

Date:

Ms. Wendy J. Miles KC
Member of the *ad hoc* Committee

Date:

Ms. Carita Wallgren-Lindholm
Member of the *ad hoc* Committee

Date:

Dr. Mónica Pinto
President of the *ad hoc* Committee

Date: 31 JUL 2023