EXHIBIT 1

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CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate rendition into English of the original document entitled "20231106 Decisión sobre la Recusación," which was written in Spanish.

City of Buenos Aires, November 20, 2023.

THE TR COMPANY TRANSLATION SERVICES

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CORTE PERMANENTE DE ARBITRAJE  PERMANENT COURT OF ARBITRATION

PCA Case No. AA920

IN THE MATTER OF AN ARBITRATION UNDER THE CONCESSION CONTRACT FOR THE NUEVAS DE LIMA PROJECT, DATED JANUARY 9, 2013

("Contract")

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (2021)

("UNCITRAL Rules")

- between -

RUTAS DE LIMA S.A.C.

("Claimant")

- and -

THE METROPOLITAN MUNICIPALITY OF LIMA

("Respondent" and, together with Claimant, "Parties")

DECISION ON CHALLENGE TO PROF. RADICATI DI BROZOLO AND PROF. ARIAS

November 6, 2023

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I. BACKGROUND

A. The Arbitration

1. This challenge arises out of an arbitration between Rutas de Lima S.A.C. ("**Claimant**" or "**RDL**") and the Metropolitan Municipality of Lima ("**Respondent**" or "**MML**," and, collectively with Claimant, "**Parties**") under the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**") and the *Concession Contract for the Nuevas de Lima Project,* entered into on January 9, 2013 ("**Contract**"). I was designated appointing authority by agreement of the Parties as per paragraph 47 of the Minutes of the First Session.

2. Claimant is represented in this proceeding by Ives Becerra, Miguel Oyarzo Vidal, Adriana Rojas, Rodrigo Franco, and Carlos Castro of Rutas de Lima S.A.C.; María del Carmen Tovar, Javier Tovar, Javier Ferrero, Diana Collazos, Natalia Mori, and Claudia Arméstar of Estudio Echecopar, a Member Firm of Baker & Mckenzie International; Rafael Llano, Marièle Coulet-Díaz, Paulo Maza Moreno, and Sabina Hidalgo Peralta of White & Case, S.C.; and Alejandro Martínez de Hoz of White & Case, LLP.

3. Respondent is represented by Carlos Enrique Cosavalente Chamorro, Walter Orlando Pastor Reyes, Karla Margot Astudillo, and Carlos Torres Zavaal of the Metropolitan Municipality of Lima; and Claudia Frutos-Peterson, Fernando Tupa, Arianna Sánchez, Ricardo Mier y Terán, Juan Jorge, Oscar Figueroa, and Marcelo Abramo de Curtis of Mallet-Prevost, Colt & Mosle LLP.

B. Constitution of the Tribunal and Challenge to Prof. Radicati di Brozolo and Prof. Arias

4. On December 29, 2022, in its Notice of Arbitration, Claimant appointed Prof. David Arias as co-arbitrator.

5. On January 30, 2023, in its Response to the Notice of Arbitration, Respondent appointed Prof. Elvira Martínez Coco as co-arbitrator in this proceeding.

6. On February 8, 2023, Prof. Luca Radicati di Brozolo accepted his appointment by the co-arbitrators as Presiding Arbitrator.

7. On June 22, 2023, Respondent filed its notice of challenge to Prof. Radicati ("**Challenge to Prof. Radicati**").

8. On June 26, 2023, Respondent filed its notice of challenge to the Tribunal[1] ("**Challenge**").

[1] Claimant's Challenge submission of June 26, 2023, will be referred to as "**Notice of Challenge**".

9. On the same date, Claimant objected to the Challenge.

10. On June 27, 2023, the PCA acknowledged receipt of the letters form the Parties dated June 26, 2023, and invited the Tribunal to submit its comments.

11. On July 5, 2023, in response to the PCA's invitation, Prof. Radicati submitted his comments on the Challenge against him.

12. On July 9, 2023, the Tribunal stated that it had no comments on the Challenge.

13. On July 10, 2023, the PCA acknowledged receipt of the Tribunal's letter of July 9, 2023. Moreover, pursuant to Article 13(4) of the UNCITRAL Rules, it invited Respondent to state, by July 26, 2023, at the latest, whether it would pursue its Challenge.

14. On July 13, 2023, Prof. Martínez Coco withdrew from her office as co-arbitrator in this proceeding.

15. On July 24, 2023, Respondent stated it would not pursue its Challenge to Prof. Radicati.

16. On July 26, 2023, Respondent confirmed it would pursue its Challenge and requested the Secretary-General of the PCA to issue a decision on the challenge, stating that, in the face of Prof. Martínez Coco's withdrawal, the Challenge would stand only against Professors Radicati di Brozolo and Arias. It also filed a 42-page submission (along with 77 exhibits), stating "the legal basis and reasons supporting and warranting its [Challenge]"[2] ("**Second Challenge Brief**").

17. On July 27, 2023, the PCA took note of the fact that Respondent would continue to pursue its Challenge and invited Claimant to submit any comments.

18. On July 31, 2023, Claimant requested a one-week extension to submit its comments.

19. On August 1, 2023, Respondent stated it had no objections to the extension requested by Claimant, which was then granted by the PCA the same day.

20. On August 16, 2023, through a 72-page submission accompanied by 144 exhibits, Claimant filed its response to the Challenge ("**Response**").

21. On August 17, 2023, Respondent filed a letter "reporting a new fact which occurred after the filing of the Challenge Request,"[3] mentioning certain statements made by Claimant when filing its Claim Memorial.

22. On August 18, 2023, Claimant objected to Respondent's submission, arguing that it had not been requested by the PCA, did not address any new fact, and, in any event, Respondent's

[2] Letter from Respondent dated July 26, 2023 [unofficial translation].

[3] Letter from Respondent dated August 17, 2023 [unofficial translation].

allegations "mischaracterize Claimant's statements."[4] Next, the Parties replied to each other once again, among other things, denying each other's statements and requesting that the PCA rule on the Challenge.

23. On the same day, the PCA acknowledged receipt of the Parties' letters and informed them that no additional comments were required.

II. THE CHALLENGE

A. Respondent's Position

24. Respondent's grounds to challenge the Tribunal[5] as stated in its Notice of Challenge and Second Challenge Brief are based, essentially, on the unequal treatment allegedly conferred to the Parties by the Tribunal in connection with Claimant's request for interim measures ("**Interim Measures**"). Basically, Respondent referred to **(i)** the issuance of the Emergency Interim Measure ("**Emergency Interim Measure**"); **(ii)** certain procedural decisions, most importantly the rejection of Respondent's filing of June 7, 2023, as inadmissible, in contrast to the admission of certain earlier filings by Claimant; and **(iii)** certain objections to the Decision on Interim Measures ("**Decision on Interim Measures**" or "**Procedural Order No. 5**").

i. The legal standard

25. In its Notice of Challenge, Respondent relied on the provisions of Article 17 of the UNCITRAL Rules to argue that the Tribunal did not treat the Parties equally and did not afford it a reasonable opportunity to present its case.[6]

26. In its Second Challenge Brief, Respondent argued that, pursuant to Article 12 of the UNCITRAL Rules, an objective standard should apply to challenges against arbitrators.[7] According to Respondent, "a challenge may be raised if there are 'justifiable doubts' as to the impartiality or independence of the appointed arbitrators."[8]

27. It is Respondent's contention that the threshold for this standard, which is the existence of circumstances giving rise to justifiable doubts, "does not require the challenging party to prove an actual lack of independence or impartiality […] it only requires that the challenging party prove an appearance of lack of independence or impartiality in the eyes of an objective,

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[4] Claimant's email dated August 18, 2023.

[5] It should be noted that any reference to the Parties' arguments regarding the reasons why Respondent challenged the "Tribunal" should be understood as a challenge currently standing against Prof. Radicati di Brozolo and Prof. Arias, after Prof. Martínez Coco's withdrawal from the Tribunal.

[6] Notice of Challenge, ¶ 19.

[7] Second Challenge Brief, ¶ 34.

[8] Second Challenge Brief, ¶ 34 [unofficial translation].

reasonable, and informed third party."[9]

ii. The merits of the Challenge

28. In its Notice of Challenge, Respondent raises three main arguments.

29. First, Respondent takes issue with the fact that it took the Tribunal 98 days to deal with the request for Interim Measures. Respondent states that Claimant filed its Supplemental Claim and Request for Interim Measures ("**Supplemental Claim and Request for Interim Measures**" or "**Request**") on March 7, 2023, but it was only on June 13, 2023, that the interim measures request was ruled on via Procedural Order No. 5, undercutting the urgency inherent in any interim measure.[10]

30. Second, Respondent argues that no procedural steps were taken in connection with the Interim Measures for 32 days—from the hearing on Interim Measures, which took place on April 17, 2023 ("**Hearing on Interim Measures**"), to Procedural Order No. 3, which was issued on May 19, 2023. Respondent contrasts this delay with the "unusual swiftness" of the proceeding after it filed its request for additional disclosure addressed to Prof. Radicati di Brozolo on June 6, 2023 ("**Request for Additional Disclosure**"), suggesting that such swiftness was precisely the result of its Request for Additional Disclosure.[11]

31. Third, Respondent argues that, since it filed its Request for Additional Disclosure, the Tribunal has shown apparent bias against it, as it did not treat the Parties equally, nor did it afford Respondent an opportunity to reasonably present its case. Specifically, Respondent complains of the following: (i) the Tribunal's rejection of the filing of June 7, 2023, with additional comments concerning the Request for Interim Measures; (ii) the lack of an opportunity to comment on Claimant's emails of June 8 and 9, 2023; (iii) the fact that the Tribunal considered Respondent's arguments of June 12, 2023 in less than 24 hours; and (iv) the denial of an opportunity to object to Procedural Order No. 3 prior to the issuance of Procedural Order No. 5, concerning the same issues.[12]

32. Moreover, Respondent argues that justifiable doubts as to the impartiality and independence of Prof. Radicati di Brozolo and Prof. Arias are established, among other things, by the fact that (i) the final 180 days of the period to exercise the contractual right of termination only ended on July 30, 2023, which means that the Tribunal had enough time to afford them an opportunity to exercise their rights; (ii) the Tribunal did not adequately state the reasons for its

[9] Second Challenge Brief, ¶ 37 [unofficial translation].

[10] Notice of Challenge, ¶¶ 19-20.

[11] Notice of Challenge, ¶ 20 [unofficial translation].

[12] Notice of Challenge, ¶ 20.

findings on the *fumus boni iuris* requirement, as it devoted only five paragraphs in Procedural Order No. 5 to establishing the requirement of a "reasonable possibility that the requesting party will succeed on the merits of the claim" and it did not take Respondent's arguments on the subject into consideration.[13]

33. On the other hand, in its Second Challenge Brief, Respondent submitted that (i) in issuing Procedural Order No. 5, the Tribunal prejudged the merits of the dispute; and (ii) the Tribunal's bias was demonstrated by a combination of circumstances surrounding the issuance of the Interim Measures.

34. First, Respondent argues that, in Procedural Order No. 5, the Tribunal prejudged the issue in its findings on the meaning of Section 17.7 of the Concession Contract for the Vías Nuevas de Lima Project ("**Contract**") by stating that the documents submitted by Respondent in support of the public interest requirement for terminating the Contract were inadequate.[14] Respondent contends that, given the broad nature of the opinions stated, "there is a credible appearance that, from now on, they will only be analyzing the case to confirm an opinion which they have already formed and issued."[15]

35. In particular, according to Respondent, the Tribunal prejudged certain aspects concerning the Contract, Council Agreement No. 11 ("**Council Agreement No. 11**") and Respondent's letter notifying Claimant of the termination of the Contract and providing support for the public interest underlying that decision.[16]

36. Moreover, Respondent claims that Prof. Radicati di Brozolo and Prof. Arias also stated their opinion on the compensation method provided for in the Contract, as they "made a definitive finding that the compensation method for termination of the Contract would not apply if MML did not *'establish'* the public interest reasons underlying such termination."[17] In the same vein, Respondent points out that Prof. Radicati di Brozolo and Prof. Arias "prejudged that the compensation provided for in the Contract would *'likely'* be insufficient to cover the damage sustained by Rutas as a result of the termination, if MML did not manage to *'establish'* such public interest reasons."[18]

37. Second, Respondent argues that a combination of circumstances surrounding the decision on

[13] Notice of Challenge, ¶¶ 20-22.

[14] Second Challenge Brief, ¶¶ 54-56.

[15] Second Challenge Brief, ¶ 60 [unofficial translation].

[16] Second Challenge Brief, ¶ 60.

[17] Second Challenge Brief, ¶¶ 61-62 [unofficial translation].

[18] Second Challenge Brief, ¶ 62 [unofficial translation].

Interim Measures also create justifiable doubts regarding the impartiality of Prof. Radicati di Brozolo and Prof. Arias.[19] According to Respondent, these include (i) ordering an Emergency Interim Measure in an *ultra petita*, *ex parte* and nonsensical manner through its letter of March 24, 2023;[20] and (ii) not allowing Respondent's additional submission on Interim Measures of June 7, 2023, while, however, allowing several of Claimant's submissions on the same subject.[21]

B. Claimant's position

38. Claimant objects to the Challenge, arguing that it follows a pattern of unacceptable conduct consisting of obstructive and arbitrary behavior by Respondent with a view to exacerbating the dispute.[22]

i. The legal standard

39. Claimant argues that the applicable standard under Article 12(1) of the UNCITRAL Rules is an objective standard that requires an "actual possibility" of bias, rather than the mere "appearance" suggested by Respondent.[23]

40. Moreover, Claimant points out that most challenges raised before the PCA, as well as other arbitration institutions, are unsuccessful, which speaks to "how rare and difficult it is to get a challenge against an arbitrator to succeed," particularly when "some kind of definitive ruling in other cases or some kind of external influence has not even been argued."[24]

41. On the other hand, Claimant argues that an arbitrator cannot be challenged due to procedural decisions, since the Parties have ordinary remedies available to them to question the arbitrators' decisions, and that "[i]t is only through these remedies that a Party may look to have a decision reversed; this outcome is not achievable through a challenge to an arbitrator."[25] Moreover, it claims that Respondent "did not mention any cases where an arbitrator has been successfully challenged on the basis of a procedural decision" and, quite the opposite, the authorities relied upon by Respondent lend support to Claimant's position.[26]

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[19] Second Challenge Brief, ¶ 65.

[20] Letter from the Tribunal dated March 24, 2023; Second Challenge Brief, ¶¶ 67, 69.

[21] Second Challenge Brief, ¶¶ 73-80.

[22] Response, ¶¶ 10-12.

[23] Response, ¶¶ 33-34 [unofficial translation].

[24] Response, ¶¶ 37-39 [unofficial translation].

[25] Response, ¶ 40 [unofficial translation].

[26] Response, ¶ 43 [unofficial translation].

42. In any event, in Claimant's view, Respondent should prove that the Tribunal made a decision "influenced by factors other than the merits of the case"[27] and that it is extremely rare for a challenge based on issue conflicts—which refer to other proceedings—to succeed, which is why it is even more difficult still for a challenge to an arbitrator to succeed based on the arbitrator's decisions in the same dispute in which a party is claiming that the arbitrator prejudged, particularly where the tribunal had to rule on an interim measure.[28]

ii. The merits of the Challenge

43. In the first place, in response to the alleged due process violation, Claimant contends that Respondent's argument simply conceals dissatisfaction with the content of the Emergency Interim Measure issued by the Tribunal and the Tribunal's decision to reject Respondent's submission of June 7, 2023. In any case, Claimant asserts that the Tribunal did not violate the provisions of Article 17(1) of the UNCITRAL Rules, as Respondent had ample opportunity to present its case throughout the proceeding.[29]

44. Specifically, as regards the issuance of the Emergency Interim Measure, Claimant argues that (i) the Tribunal issued such a measure in strict observance of the Parties' equality, considering the need to preserve the *statu quo* during the course of the Interim Measure proceeding, the need to prevent the exacerbation of the dispute, and the need to prevent Claimant from suffering damages during the course of such proceeding;[30] (ii) the measure was necessary to ensure equality between the Parties, since the deadline for the termination of the Contract was about to expire;[31] (iii) the Tribunal was authorized to issue such a measure both under the UNCITRAL Rules and the law of the seat of arbitration;[32] and (iv) Respondent suffered no harm as a consequence of the measure, as it decided not to comply and expressly acknowledged as much in its letter of June 8, 2023. For these reasons, according to Claimant, Respondent has violated the doctrine of estoppel with its Challenge.[33]

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[27] Response, ¶ 47 [unofficial translation].

[28] Response, ¶¶ 48-49.

[29] Response, ¶¶ 56-60.

[30] Response, ¶¶ 64-68.

[31] Response, ¶¶ 69-73.

[32] Response, ¶¶ 74-78. Regarding Respondent's argument that the seat of the arbitration does not allow a remedy such as an Emergency Interim Measure, it is Claimants' contention that the Tribunal already ruled on this issue in paragraph 135 of Procedural Order No. 5, by pointing out that, "unless the law of the seat of the arbitration establishes specific requirements for an arbitral tribunal to order interim measures, the requirements to be considered are only such as have been agreed by the parties or provided for in the international standards" [unofficial translation].

[33] Response, ¶¶ 95-101.

45. Moreover, Claimant argues that the Emergency Interim Measure was not ordered *ex parte* because Respondent did have the opportunity to raise objections to the measure immediately after it was granted, and it actually did so, which is why the Tribunal heard both Parties, including at a hearing. In any event, Claimant argues that, under Article 17 of the UNCITRAL Rules, arbitral tribunals are vested with inherent powers to issue *ex parte* measures.[34] It contends that it was not an *ultra petita* measure either, since it was issued in response to Claimant's explicit request in its Supplemental Claim and Request for Interim Measures, asking the Tribunal to grant "such further remedies as it deems just."[35] In any event, it points out that alleged concerns regarding the annulment or refusal of enforcement of awards that include *ultra petita* decisions have to do with final decisions of the tribunals, not procedural decisions and measures like the one Respondent takes issue with.[36]

46. As to the refusal to allow Respondent's submission of June 7, 2023, Claimant argues that (i) by then, Respondent had already been afforded two opportunities to present its case regarding the Interim Measures, both through its Response to the Supplemental Claim and Request for Interim Measures of April 10, 2023 ("**Response to Supplemental Claim and Request for Interim Measures**") and at the Hearing on Interim Measures;[37] (ii) no provision had been made in the procedural calendar for Respondent's submission; as per paragraph 16 of Procedural Order No. 1, unscheduled evidentiary submissions required prior approval from the Tribunal, at a party's request, prior to being filed;[38] (iii) Respondent itself acknowledged that it had had a reasonable opportunity to present its case prior to its submission of June 7, 2023;[39] and (iv) Respondent's submission concerns the overall background of the project and other claims by Claimant, not the request for Interim Measures.[40]

47. As to Respondent's June 7, 2023, submission having been treated differently from Claimant's submissions, Claimant contends that "[t]his argument starts off from the incorrect premise that these documents are comparable, and that the admissibility of the Unauthorized Submission should be analyzed in the same light as Rutas de Lima's procedural letters and observations during the course of the arbitration. In short, MML confuses ancillary filings of a procedural nature with substantive pleadings, and it has been MML who, if anything, has stood out due to

[34] Response, ¶ 91.

[35] Response, ¶ 91 [unofficial translation].

[36] Response, ¶ 91.

[37] Response, ¶¶ 104-106.

[38] Response, ¶¶ 108-111.

[39] Response, ¶¶ 116-117.

[40] Response, ¶ 118.

the number of such procedural filings in this case."[41]

48. Second, in response to Respondent's claims on the issue of prejudgment, Claimant argues that (i) challenges based on the content of the arbitrators' procedural decisions fail unless the challenging party proves that the arbitrator was seeking to benefit or harm one of the parties for reasons unrelated to the arbitration, which is not the case here;[42] (ii) it is well established that prejudgment is more difficult to prove when a tribunal applies the "reasonable possibility" standard for a request for interim measures;[43] and (iii) the Tribunal has not prejudged any aspect of this dispute, as it expressly stated that all of its findings were made *prima facie* and its analysis of the case documents was par for the course in the context of a request for interim measures.[44]

49. To conclude, Claimant believes that the Challenge fits into a disruptive strategy and an unacceptable pattern of conduct by MML.[45] In RDL's view, "[w]hat matters to MML is to retaliate against the arbitrators who issued interim measures to suspend its arbitrary unilateral termination of the Concession Contract. Filing criminal reports against them, challenging the President (and withdrawing the challenge), challenging all members based on certain reasons, then on others—whatever it takes to extract the desired result, or stop the undesired one."[46]

C. Comments by Prof. Radicati di Brozolo and Prof. Arias

50. In their letter of July 9, 2023, Prof. Radicati di Brozolo and Prof. Arias stated that they had "no comments to make" regarding the Challenge.

III. ANALYSIS OF THE CHALLENGE

51. It is my understanding, based on all of the arguments put forth by Respondent in its two written submissions, that these are the core issues being raised: the Tribunal's alleged unequal treatment of the Parties during the proceedings concerning the Interim Measures, including **(1)** the issuance of the Emergency Interim Measure; **(2)** certain procedural decisions, most notably the rejection of Respondent's June 7, 2023 submission, in contrast to the admission of certain prior submissions by Claimant; and **(3)** certain questions raised against the Decision on Interim Measures.

52. Based on the arguments as summarized in the previous section, I can see that there has been

[41] Response, ¶ 120 [unofficial translation].

[42] Response, ¶¶ 134-145.

[43] Response, ¶¶ 146-150 [unofficial translation].

[44] Response, ¶¶ 151-164.

[45] Response, ¶¶ 10-29.

[46] Response, ¶ 5 [unofficial translation].

a shift in focus regarding the grounds for the Challenge in Respondent's Notice of Challenge as compared to those put forth in its Second Brief. Claimant has, in fact, drawn my attention to this new focus by strongly criticizing Respondent's conduct in this regard .[47] In light of this shift in focus and the criticisms expressed, I will first **(A)** provide some clarification as to the admissibility of the Challenge, then to **(B)** address the grounds for the Challenge.

A. Admissibility of the Challenge

53. I will begin by quoting Article 13(1) of the UNCITRAL Rules:

> A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

54. There is no doubt that the 15-day deadline is final in nature. There are compelling reasons to set time limits for the filing of challenges. These time limits protect the integrity of the arbitral proceedings by forcing a Party with knowledge of circumstances which could warrant a challenge to raise those circumstances and immediately seek a ruling, otherwise risking being prevented from raising them in the future. Article 13(1) does not allow a party to reserve its right to raise a challenge at some indeterminate future date on the basis of circumstances already known to that party. Therefore, any late-notified challenge must be rejected as inadmissible with no need to address its merits.

55. As to the date of filing of the Challenge, I will begin by noting that, although the Notice of Challenge is dated "June 23, 2023," Respondent filed its Challenge with Claimant, the Tribunal and the PCA on Monday, 26 June 2023. In this regard, it should be noted that, through a letter issued the following day, June 27, 2023, the PCA acknowledged receipt "of (i) Respondent's letter received on **June 26, 2023** [emphasis added] asserting a challenge against all members of the Tribunal ('**Challenge Request'**); and (ii) Claimant's letter of June 26, 2023, stating its opposition to the Challenge Request."[48]

56. Regarding the first ground, Respondent complains about the Emergency Interim Measure, which was issued on March 24, 2023, *i.e.,* more than three months prior to the filing of the Challenge. Notably, on the same day this order was issued, MML objected to it (relying, in essence, on the same arguments it raised in the Notice of Challenge to challenge this decision)

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[47] Response, ¶¶ 4, 61, 128-134.

[48] In addition, through a letter dated July 10th, relying on Article 13(4) of the UNCITRAL Rules, the PCA invited Respondent to "state, by Wednesday July 26, 2023, at the latest, whether it would pursue its challenge against the Tribunal" [unofficial translation]. Said article provides for a period of "30 days from the date of the notice of challenge" for the challenging party to request a decision from the appointing authority. Indeed, Respondent confirmed that it would pursue its Challenge on 26, 2023, *i.e.,* exactly 30 days from the filing of its Challenge.

and requested its reconsideration. After notice to Claimant, the Tribunal rejected Respondent's request for reconsideration and affirmed the Emergency Interim Measure. This happened on April 4, 2023, *i.e.,* more than two and a half months before the Challenge. Likewise, by upholding its jurisdiction over the Supplemental Claim through Procedural Order No. 3, of May 19, 2023, the Tribunal reiterated its decision in the Emergency Interim Measure. This happened more than a month and a half in advance of the Challenge.

57. As to the second ground, Respondent complains about certain procedural decisions, most notably the rejection of a submission filed on June 7, 2023. This submission was rejected by the Tribunal one day later, on June 8, 2023, via Procedural Order No. 4, *i.e.,* 18 days prior to the Notice of Challenge. Had the Notice of Challenge been filed on June 23 (as incorrectly suggested by the date added to said document), it would have been filed within 15 days of rejection of the June 7, 2023, brief.

58. Despite the above, Respondent also appeared to complain, at least in its Notice of Challenge, albeit no longer so in its Second Brief, of the Tribunal's decision not to consider a June 12, 2023, letter from MML objecting to Procedural Order No. 3 by issuing its Decision on Interim Measures one day later, on June 13, 2023,[49] *i.e.,* 13 days before the Notice of Challenge.

59. As to the third ground, Respondent challenges the Decision on Interim Measures issued by the Tribunal on June 13, 2023, via Procedural Order No. 5. Because Respondent filed its Challenge on June 26, 2023, *i.e.,* 13 days later, the challenge to the Decision on Interim Measures was filed within the prescribed time period.

60. It should be noted that Respondent has challenged certain procedural steps that would fall outside the 15-day time limit of Article 13(1) of the UNCITRAL Rules. However, I have not overlooked the fact that Respondent has argued[50] that, while its core ground for the Challenge is the third ground, my analysis should consider "the totality of the circumstances under which the Challenged Arbitrators issued the interim measures, [as] they also warrant their challenge."[51] I am willing to accept the premise that the appearance of bias (in Respondent's eyes) may have occurred incrementally up to the issuance of the Decision on Interim

[49] Notice of Challenge, p. 7. In its Second Challenge Brief, Respondent did not include this circumstance as part of the core grounds for its Challenge (*see*, among others, ¶ 78, including complaints about procedural decisions that were made only up to the issuance of Procedural Order No. 4 on June 8, 2023).

[50] This argument by Respondent was intended to ensure consideration of the totality of the circumstances regarding the merits of the Challenge, but not its admissibility.

[51] Second Challenge Brief, ¶ 65 [unofficial translation], citing *Merck Sharpe & Dohme (I.A.) LLC v. the Republic of Ecuador*, PCA Case No. 2012-10, Decision on Challenge to Arbitrator Judge Stephen M. Schwebel, August 8, 2012, ¶ 94 (**MML-71**); and *Raimundo J. Santamarta Devis v. The Bolivarian Republic of Venezuela*, PCA Case No. AA780, Decision on the Challenge to Professor José Carlos Fernández Rozas, August 3, 2020, ¶¶ 56, 60 (**MML-72**).

Measures, at which point Respondent felt that there was a combination of circumstances that warranted filing its Challenge. I will therefore consider the merits with respect to the totality of the circumstances challenged by Respondent.

61. However, considering the radical shift in focus in Respondent's position and arguments in its Notice *vis-a-vis* its Second Challenge Brief, I find that certain clarifications are in order. Article 13(1) and 13(2) of the UNCITRAL Rules requires not only that any challenge be notified within 15 days of becoming aware of the relevant circumstances, but also that "[t]he notice of challenge […] state the reasons for the challenge." In other words, the challenging party must state its reasons within 15 days. Therefore, the instrument to lay out the essential grounds for the challenge, both factual and legal, is the "notice of challenge." Among other reasons, stating those grounds in the "notice of challenge" (rather than at a later time) ensures that challenges have genuine or credible grounds while preventing, at the same time, tactical or dilatory challenges by Parties who will first file a challenge and only later on decide why. In addition, because of how the challenge procedure is structured under Article 13(3) of the UNCITRAL Rules, the statement of reasons allows both the challenged arbitrator and the opposing party to assess whether there are justified reasons to agree to the challenge, thereby rendering a ruling by the appointing authority unnecessary.

62. The grounds set forth in the Notice of Challenge (a 9-page document with no exhibits) differ substantially from those stated in the Second Challenge Brief (a more robust, 42-page document with 77 exhibits). Some circumstances or arguments from the Notice of Challenge are nowhere to be found in the Second Challenge Brief, while other grounds from the Second Challenge Brief are not mentioned in the Notice of Challenge; and others still would seem to be inconsistent with certain previously expressed arguments. To allow a radical change of grounds after the expiration of the 15-day period would be tantamount to validating the filing of a new challenge based on the same factual circumstances. This would be inadmissible.

63. In particular, Respondent's central argument in its Notice of Challenge was the alleged unequal treatment of the Parties in the interim measure proceeding, including the issuance of the Emergency Interim Measure.[52] Respondent also subsidiarily complained that the alleged unequal treatment would be "exacerbated" by the Tribunal's failure to state reasons in its Decision on Interim Measures regarding the requirement in Article 26(3)(b) of the UNCITRAL Rules (*fumus boni iuris*).[53] Instead, the importance of the issues is reversed in the Second

[52] See, *e.g.,* Notice of Challenge, ¶ 20(c): "[o]bjectively, it has been established that the Arbitral Tribunal has failed to afford equal treatment to the parties during the interim measure proceeding since June 6, 2023, as it has not afforded MML a reasonable opportunity to assert its rights, even though it did afford such an opportunity to Rutas de Lima S.A.C. This is in violation of Article 17 of the UNCITRAL Rules" [unofficial translation].

[53] Notice of Challenge, ¶¶ 21, 22: "[t]hese conclusions are compounded if we consider that—notwithstanding the fact that we reserve our right to object to PO No. 05—, as regards the essential requirement for any interim measure that 'There [be] a reasonable possibility that the requesting party will succeed on the merits of the claim,' the

Challenge Brief: the spotlight is shifted onto the Decision on Interim Measures (albeit for different reasons) and the unequal treatment in the interim measure proceeding, including the Emergency Interim Measure, has now taken a back seat.

64. The fundamental change, however, has to do with why the Decision on Interim Measures is being challenged, since, in the Second Challenge Brief, the complaint is no longer for a failure to state reasons regarding the *fumus boni iuris* requirement, but for excessive reasoning instead, which allegedly resulted in "prejudgment."[54] In other words, the Notice of Challenge did not target the Decision on Interim Measures on the basis of prejudgment, and the arguments in this regard were belatedly raised. These circumstances could lead to the inadmissibility of the Second Challenge Brief or, at the very least, a substantial portion of the grounds therein stated. In any event, having analyzed the merits of the Challenge and concluded that it should be dismissed due to lack of merit, a final decision on its admissibility is not necessary.

B. Analysis of the grounds for the Challenge

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members of the Arbitral Tribunal stated the reasons for their decision as regards this essential requirement in just 5 paragraphs (of a total of 183 paragraphs in PO No. 05), as can be seen next: […]

This allows an inference that the appearance of bias is even worse because, after 3 months and 6 days (98 days) of the request for the interim measure, the Tribunal has only written 5 paragraphs to establish such a fundamental requirement as the *"reasonable possibility that the requesting party will succeed on the merits of the claim."* The Tribunal has failed to state the reasons why, in its view, the grounds put forth by MML (articulated in its various letters, at the Hearing of April 17th and also summarized in our letter of June 12th) [have no merit]. Therefore, we do not agree that just four paragraphs, namely paragraphs 153, 154, 155, and 156 (since the fifth paragraph, paragraph 157, contains no further grounds, just a final inference) are enough to establish a reasonable possibility that Rutas de Lima's claim will succeed on the merits. All of this creates more justifiable doubts regarding the impartiality of the members of the Arbitral Tribunal" [unofficial translation].

[54] At least 13 of the 42 pages of the Second Challenge Brief were devoted to the prejudgment issue. In Claimant's words, "[i]n fact, there are 37 instances of the word 'prejudge' or its variations throughout MML's second challenge brief. This is odd, considering that there are exactly zero instances of the word 'prejudge' or its variations in MML's first challenge submission against all members of the Tribunal. Indeed, in that submission, MML did not even raise prejudgment or anything similar as an argument. MML is being insincere with its statement in the second brief that its earlier submission was based on "the way in which [the Tribunal] had dealt with and ruled on the request for interim measures submitted by Rutas, including by […] (iiii) *(sic)* prejudging the merits of the claim in issuing Procedural Order No. 5" [unofficial translation]. This argument is not present in that submission. This is perhaps the reason why, in its second brief, MML never cites to paragraphs or pages from its earlier submission. As regards the very content of PO5, MML's only argument in its first submission was the alleged failure to state reasons, arguing that, "as regards the essential requirement for any interim measure that 'There [be] a reasonable possibility that the requesting party will succeed on the merits of the claim,' the members of the Arbitral Tribunal stated the reasons for their decision as regards this essential requirement in just 5 paragraphs", that "we do not agree that just four paragraphs, namely paragraphs 153, 154, 155, and 156 […] are enough to establish a reasonable possibility that Rutas de Lima's claim will succeed on the merits", and that the Tribunal "prematurely shared its opinion" regarding the "jurisdiction of the Tribunal over the supplemental claim" field by Rutas de Lima. In contrast, in the second challenge brief, the arguments concerning the alleged failure to state reasons and premature sharing of the decision on jurisdiction were left out completely (and should therefore be considered dropped)" (Response, ¶¶ 128-130) [unofficial translation].

i. Applicable standard and scope of review

65. The Parties agree that the legal standard applicable to the Challenge is set forth in Article 12(1) of the UNCITRAL Rules, under which an arbitrator may be challenged if there are "justifiable doubts" as to the arbitrator's impartiality or independence.[55] The Parties also agree that this is an objective standard under which the situation must be analyzed from the perspective of a reasonable and informed third party, taking all relevant circumstances into consideration.[56]

66. Respondent's complaints against the Tribunal's actions have some elements in common, as they refer to an alleged bias evidenced by certain decisions of the Tribunal. I therefore find it important to start my analysis with a series of general observations about the applicable standard and the permissible scope of the review which an appointing authority may undertake with respect to procedural steps or substantive decisions by an arbitral tribunal, such as those at issue in this Challenge.

67. Relying on Article 17 of the UNCITRAL Rules, Respondent complains, first of all, that the Tribunal did not treat the Parties equally and did not afford it a reasonable opportunity to present its case.[57] In addition, Respondent believes that this is a case of prejudgment by Prof. Radicati di Brozolo and Prof. Arias, in that they "said too much, too soon."[58] It explains, in this regard, that prejudgment takes place whenever "a procedural order is issued that assumes certain disputed facts as true for which evidence has not yet been presented."[59] Thus, Respondent contends that, in ruling on requests for interim relief, a tribunal must limit itself to "expressly assuming that certain facts are true in order to find that, subject to such facts being proven, the party seeking interim relief from the tribunal has presented a plausible case," instead of "determining issues on the merits of the dispute before hearing the Parties and analyzing their evidence."[60]

68. For its part, Claimant argues that an arbitrator may not be challenged on the basis of procedural decisions, and that Respondent has failed to present even one precedent where such a challenge has been successful. In this regard, Claimant points out that "PCA precedents confirm that a challenge concerning matters involving the Arbitral Tribunal's

[55] Second Challenge Brief, ¶¶ 33-34; Response, ¶ 33; UNCITRAL Rules (2021), Art. 12(1).

[56] Second Challenge Brief, ¶ 34; Response, ¶ 34.

[57] Notice of Challenge, ¶ 19.

[58] Second Challenge Brief, ¶¶ 43, 59-60 [unofficial translation].

[59] Second Challenge Brief, ¶ 44 [unofficial translation]; W. W. Park, *Arbitrator Bias*, 15-39 Boston University School Of Law, Public Law Research Paper, 2015, p. 65 (**MML-58**).

[60] Second Challenge Brief, ¶ 45 [unofficial translation].

discretion in the procedural handling of the case is not permissible."[61] Additionally, it argues that Respondent bears the rigorous burden of proving that the Tribunal made a decision "influenced by factors other than the merits of the case."[62]

69. The threshold for accepting a challenge targeting decisions of this nature that were made by virtue of a tribunal's jurisdiction is extremely high. Indeed, under the UNCITRAL Rules, the appointing authority is not authorized to take on the role of an appellate body via a challenge based on the content of decisions of the arbitral tribunal, nor is it allowed either, in particular, to reconsider the procedural, factual or substantive grounds for the decisions of an arbitral tribunal, regardless of the position that the appointing authority might take as to the soundness of such grounds.[63]

70. The mere existence of a decision (or series of decisions) adverse to the challenging party does not necessarily suggest, let alone prove, a lack of independence or impartiality. Indeed, it is not the role of a tribunal to reach conclusions that are mutually acceptable to the Parties or neutral in terms of their effects. On the contrary, in their role as impartial third parties called upon to adjudicate a dispute, tribunals have a duty to rule based on the facts, the evidence, and the applicable law. Such decisions—whether procedural or substantive in nature—will naturally be adverse to one or the other Party, as they settle the conflicting positions that caused the Parties to engage in a dispute.

71. This is not the appropriate forum to examine the correctness or relevance of the Tribunal's findings (or the appropriateness of the reasoning supporting those findings). In the words of Judge W.E. Haak, acting as appointing authority in the context of a challenge against Judges Skubiszewski and Arangio-Ruiz at the Iran-United States Claims Tribunal ("**IUSCT**"):[64]

> [T]he Appointing Authority's role in challenge proceedings is not to assess the correctness of the arbitrators' decision, nor to assume the functions of an appellate magistrate in review of the procedural and substantive matters [that] surround the issuance of [an award]. The Parties' consent [...] simply does not

[61] Response, ¶ 44 [unofficial translation].

[62] Response, ¶ 47 [unofficial translation].

[63] Decision of the Appointing Authority, Judge W. E. Haak, on the Challenges against Judges Krzysztof Skubiszewski and Gaetano Arangio-Ruiz, Iran-United States Claims Tribunal, March 5, 2010; Decision of the Appointing Authority, Judge Moons, on the Second Challenge by Iran of Judge Briner, September 19, 1989, quoted in David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary (2nd ed. Oxford Univ. Press 2013)*, pp. 220, 222 (**RDL-76**); *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. AA473, Decision on the Proposal to Disqualify all Members of the Arbitral Tribunal, March 25, 2019, ¶ 30.

[64] Decision of the Appointing Authority, Judge W. E. Haak, on the Challenges against Judges Krzysztof Skubiszewski and Gaetano Arangio-Ruiz of March 5, 2010, quoted in D. Caron, C. Caplan, *The UNCITRAL Arbitration Rules: A Commentary (2nd ed. Oxford Univ. Press 2013)*, p. 222 (**RDL-76**).

vest this function to the Appointing Authority.

72. As also observed by Judge Moons in connection with a challenge against Judge Briner at the IUSCT:[65]

> The appointing authority is not competent to assess the correctness of the arbitrators' judgment whether evidence is or not convincing nor of their decision to accept some evidence as a basis for their award and put other evidence aside [...] Given the freedom granted the arbitrators… to make their awards to the best of their knowledge and conviction, it cannot be concluded from an arbitrator's choices in this area that he is not impartial or independent.

73. This limitation serves an important function, since the appointing authority will not have the benefit of the totality of the pleadings and evidence submitted to the Tribunal. This is of particular importance in the instant case, given the number of issues involved and the length of this challenge proceeding (and the arbitration file in general).

74. The Challenge raises a number of alleged violations of Respondent's right to equal treatment and to have a reasonable opportunity to present its case, pursuant to Article 17(1) of the UNCITRAL Rules. Such violations have allegedly materialized through various decisions of the Tribunal. This is also not the appropriate forum to determine whether the Parties have been afforded equal treatment and/or a reasonable opportunity to present their cases in accordance with Article 17(1) of the Rules. Potential due process violations do not necessarily entail a lack of impartiality (they may be the product of error or a misunderstanding); an impartial tribunal does not ensure due process either. Accordingly, and without prejudice to other remedies that may be available to Respondent, these allegations do not independently constitute grounds for a challenge under the UNCITRAL Rules.

75. However, the decisions of an arbitral tribunal are not entirely immune from review in the context of a challenge under the UNCITRAL Rules. A challenge may be accepted where there is objective evidence that a tribunal's decision was based on factors that call into question its impartiality or independence. This may include references in the reasoning of a decision to factors beyond the merits of the case and the written submissions before the tribunal that affect the tribunal's impartiality or independence. However, where the only evidence of the alleged lack of impartiality or independence is an inference properly drawn from the substance of the tribunal's decision, the challenge cannot be accepted, unless the *only* explanation for the tribunal's decision-making is a bias to one side, or the influence of factors beyond the merits

[65] Decision of the Appointing Authority on the Second Challenge by Iran of Judge Briner of September 19, 1989, quoted in D. Caron, C. Caplan, *The UNCITRAL Arbitration Rules: A Commentary (2nd ed. Oxford Univ. Press 2013)*, p. 388 (**RDL-76**).

of the case. As also observed by Judge Moons in Judge Briner's challenge:[66]

> Complaints alleging infringement or misapplication of the rules of procedure can succeed only if the alleged infringement or misapplication [...] admits of no other explanation than that it has its cause in lack of impartiality or independence on the part of the challenged arbitrator and that any other cause, such an error or misunderstanding—which, as experience has taught, may happen to the most conscientious judge—can be ruled out.

76. Accordingly, I will undertake a review of those decisions by the Tribunal which have been challenged by Respondent (and the manner in which they were made) to assess whether or not the Challenge should succeed in light of the above standards. I wish to note, however, that I have carefully examined each and every one of the Tribunal's decisions being challenged here, notwithstanding the limited scrutiny which I am permitted to subject them to.

77. Given the extensive materials to be analyzed (almost 50 pages of Respondent's arguments, together with 77 exhibits; and 73 pages of Claimant's arguments, together with 144 exhibits), it should also be noted here that I have carefully considered all of the Parties' arguments, even though the reasoning that follows will only address those aspects which are necessary in order to reach my decision. The length of the arguments and submitted documents has also delayed the rendering of this decision slightly beyond what was expected.

78. For a better understanding, I will now proceed to analyze the three main grounds for the Challenge in turn, but will first point out, however, that my conclusions would remain unchanged even if I were to consider all the relevant circumstances as a whole.

ii. The Emergency Interim Measure

79. According to Respondent, the Emergency Interim Measure was a "prejudgment" of the Tribunal's jurisdiction over the Supplemental Claim and was issued in violation of the principle of equality.[67] Additionally, it was allegedly *ultra petita*, on the one hand, and issued *ex parte*, on the other; furthermore, Respondent labels such measure as "nonsensical."[68] In Respondent's view, the manner in which the Tribunal issued this measure "confirms the Challenged Arbitrators' apparent predisposition to believe that MML improperly and

[66] Decision of the Appointing Authority on the Second Challenge by Iran of Judge Briner dated September 19, 1989, quoted in D. Caron, C. Caplan, *The UNCITRAL Arbitration Rules: A Commentary (2nd ed. Oxford Univ. Press 2013)*, p. 388 (**RDL-76**).

[67] Notice of Challenge, ¶¶ 7(a), 7(b) [unofficial translation].

[68] Second Challenge Brief, ¶¶ 69-71 [unofficial translation].

unjustifiably declared the termination of the Contract."[69]

80. To understand Respondent's complaints, I must first address **(a)** the relevant factual background, then to move on to **(b)** the merits of the first ground for the Challenge.

(a) Background context for the Emergency Interim Measure

81. On March 7, 2023, in its Supplemental Claim and Request for Interim Measures, Claimant asked the Tribunal to order, *inter alia*, (i) "that the *statu quo* be maintained until the dispute is resolved" by staying the Contract termination procedure; (ii) Respondent to "refrain from exacerbating the dispute;" and (iii) "such further remedies as it deems just."[70]

82. On March 10, 2023, the Tribunal acknowledged receipt of Claimant's brief and forwarded it to Respondent for a response by March 24, 2023.[71] It also stated that it would soon be sharing certain documents to be discussed at a procedural session set for March 21, 2023.

83. On March 16, 2023, Claimant requested a postponement of the first procedural session on the conduct of the proceeding (scheduled for March 21st) to jointly discuss draft Procedural Order No. 1 and the issue of Interim Measures.[72]

84. On March 20, 2023, *i.e.,* 10 days after the Tribunal's notice, and 4 days before the expiration of the deadline to submit a response, Respondent requested an extension of 17 additional days to the deadline, *i.e.,* until April 10, 2023. Additionally, citing the need to complete the process of hiring external counsel and the resignation of the Municipal Counsel and the Deputy Municipal Counsel, Respondent requested that the hearing on Interim Measures and first procedural session be held no earlier than the first half of April.[73]

85. On March 21, 2023, Claimant objected to the requested extensions. Claimant argued that the extensions would compound the damage, resulting in "a lowering of its credit rating and other consequences which would not be able to be reversed through the final award," including, among others, "the potential acceleration of the debt incurred for the execution of the project," as well as "a potential insolvency situation."[74] However, Claimant stated that, in the interest of cooperation, it did not object to three additional days, until March 29, 2023, being allowed for the submission of Respondent's response to the Request for Interim Measures, on the

[69] Second Challenge Brief, ¶ 72 [unofficial translation].

[70] Supplemental Claim and Request for Interim Measures (MML-5), ¶¶ 20-25 [unofficial translation].

[71] Letter from the Tribunal to the Parties dated March 10, 2023 (**RDL-92**).

[72] Letter from the Tribunal dated March 24, 2023 (**MML-13**); Notice of Challenge, ¶ 4.

[73] Letter from Respondent dated March 20, 2023 (**MML-14**).

[74] Letter from Claimant dated March 21, 2023 (**MML-15**) [unofficial translation].

understanding that the first procedural hearing would be held as soon as possible.

86. On March 24, 2023, the Tribunal took note of the Parties' earlier letters, and, based on a series of considerations, it issued the Emergency Interim Measure. The Tribunal's decision contained an initial section outlining the most relevant procedural history, including the Parties' letters of March 7, 16, 20 and 21, 2023 (described above). Then, in a balancing exercise between the competing interests of the Parties in the interim measure proceeding, the Tribunal highlighted the following:

> The Tribunal, in light of:
>
> (i) MML's need to hire outside counsel, so as not to leave Respondent defenseless;
>
> (ii) The need to preserve the *statu quo* during the precautionary measure proceeding, in order to avoid an exacerbation of the present dispute and Claimant suffering damages as a consequence of MML's actions during this period of time;

87. In view of the above reasons, the Tribunal decided to:

> (i) **Grant** MML an extension of the deadline for submitting its response to the Request until April 10, 2023;
>
> (ii) **Order** MML to maintain the *statu quo* and refrain from any act that might affect it during the entire precautionary measure proceeding;
>
> (iii) **Invite** the Parties to act in good faith and to refrain from exacerbating the present dispute, including through public statements.

88. Also on March 24, 2023, Respondent objected to the Emergency Interim Measure and requested its reconsideration.[75]

89. On March 29, 2023, having been invited to comment by the Tribunal, Claimant objected to MML's request for reconsideration.[76]

90. On April 4, 2023, the Tribunal denied Respondent's request for reconsideration.[77]

(b) Analysis of the merits of the first ground for the Challenge

91. I am not in a position to accept the premise that the issuance of the Emergency Interim Measure evidences an apparent bias on the part of the Tribunal. In my role as appointing

[75] Letter from Respondent dated March 24, 2023 (**MML-16**).

[76] Letter from Claimant dated March 29, 2023 (**MML-17**).

[77] Letter from the Tribunal dated April 4, 2023 (**RDL-94**).

authority, and without prejudice to other judicial remedies that may be available to Respondent in connection with these complaints, it is not for me to determine whether the issuance of this measure constitutes a violation of Article 17 of the UNCITRAL Rules and/or due process. It is nevertheless worth mentioning that I find more than sufficient evidence to rule out the premise that a reasonable and informed third party, taking all relevant circumstances into consideration, would determine that the only explanation to justify the issuance of the Emergency Interim Measure would be a lack of impartiality on the part of the Tribunal.

92. To the extent that the Parties were treated equally and afforded a reasonable opportunity to assert their rights, the possibility of issuing such a measure was within the scope of the Tribunal's broad procedural authority under Article 17 of the Rules. The fact that another tribunal would not have issued the Emergency Interim Measure to counterbalance the extensions granted to Respondent is not necessarily evidence of bias.

93. In addition, on its face, the issuance of the Emergency Interim Measure can be explained as the product of the Tribunal's assessment of the legal interests at stake for both Parties and not necessarily the product of bias or some other factor. I therefore reject Respondent's assertion that "the Tribunal seems to have used the Municipality's request for a time extension for the sole and reckless purpose of issuing a biased ruling on one aspect of the Supplemental Claim and Request for Interim Measures [...] unduly favoring [sic] the Concessionaire […]."[78]

iii. The processing of the precautionary relief proceeding from the Emergency Interim Measure through the Decision on Interim Measures

94. Essentially, Respondent complains that the Tribunal treated the Parties unequally during the Interim Measures proceedings, including, in particular, by rejecting Respondent's June 7, 2023, submission.[79] Subsidiarily to this main complaint, Respondent mentions a number of additional circumstances that would demonstrate the Tribunal's bias. Specifically, MML complains that the Tribunal granted Claimant six opportunities to present its case, while Respondent was afforded only one such opportunity.[80] Finally, Respondent sees a bias in the time taken by the Tribunal to issue certain decisions and an alleged connection between those periods and the Request for Additional Disclosure to Prof. Radicati.[81]

95. To address this ground, I will first begin by **(a)** outlining the relevant factual background, then to analyze **(b)** the merits of the Challenge's second ground.

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[78] Notice of Challenge, ¶ 7 [unofficial translation].

[79] Notice of Challenge, ¶ 15 and table at p. 6; Second Challenge Brief, ¶¶ 73-82.

[80] Notice of Challenge, table at pp. 5-7, ¶ 20; Second Challenge Brief, ¶¶ 75-82.

[81] Notice of Challenge, ¶¶ 15, 16, 19, 20, table at pp. 5-7. This argument is not raised in the Second Challenge Brief.

(a) Background context for the precautionary measures proceeding

96. On April 10, 2023, Respondent filed its Response to the Supplemental Claim and Request for Interim Measures.[82]

97. On April 12, 2023, both Parties submitted comments on the draft Minutes of the First Session and Procedural Order No. 1.[83] Claimant also made certain proposals regarding the organization and sequence of the Hearing on Interim Measures and "reported" an alleged violation of the Emergency Interim Measure[84] through certain public statements made by the MML Mayor on March 24 and April 6, 2023.

98. On April 13, 2023, the Tribunal forwarded Claimant's letter of the previous day to Respondent for a response.[85]

99. On April 14, 2023, Respondent submitted a response regarding Claimant's letter of April 12, 2023,[86] stating that it had no comments regarding the organization and sequence of the Hearing on Interim Measures.

100. On April 15, 2023, the Tribunal informed the Parties that, because Respondent had not objected to Claimant's organizational proposal, the Hearing on Interim Measures would be conducted in accordance with that proposal.[87]

101. On April 17, 2023, the Hearing on Interim Measures was held via videoconference.[88] There, each Party was able to express its arguments on the Interim Measure.[89]

102. On April 19, 2023, the Tribunal issued Procedural Order No. 1, laying down the rules applicable to the arbitration proceedings, as well as the procedural calendar.[90]

103. On April 27, 2023, the Tribunal forwarded the Minutes of the First Session, which was signed by both Parties, to the Parties.[91]

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[82] Response to Supplemental Claim and Request for Interim Measures, págs. 26-29 (**MML-6**).

[83] Letter from the Tribunal dated April 13, 2023 (**MML-20**).

[84] Letter from Claimant dated April 12, 2023 (**MML-19**).

[85] Letter from the Tribunal dated April 13, 2023 (**MML-20**).

[86] Letter from Respondent dated April 14, 2023 (**MML-21**).

[87] Procedural Order No. 5, ¶ 15 (**MML-34**).

[88] Procedural Order No. 5, ¶ 15 (**MML-34**).

[89] Video recording of Hearing on Interim Measures (**RDL-113**); Transcript of Hearing on Interim Measures (**RDL-114**).

[90] Procedural Order No. 1 (**MML-23**).

[91] Minutes of the First Session of the Tribunal (**MML-1**).

104. On May 19, 2023, the Tribunal issued Procedural Order No. 3, whereby it decided to:

> **(i) Declare** that it has jurisdiction to rule on the supplemental claim;
>
> **(ii) Declare** that the supplemental claim is admissible;
>
> **(iii) Reserve** its decision on the costs of the present stage of the proceeding to a later decision or award; and
>
> **(iv) Reiterate** its order that, throughout the precautionary measure proceeding, MML maintain the *statu quo* and refrain from any act that could affect it, and its invitation to the Parties to act in good faith and to refrain from exacerbating the present dispute, including through public statements.[92]

105. On June 6, 2023, Claimant filed a letter reporting certain conduct by Respondent which, according to Claimant, was "in violation of the orders issued and repeatedly affirmed by the Tribunal regarding the maintenance of the *statu quo* in this dispute."[93]

106. Also on June 6, 2023, Respondent submitted its Request for Additional Disclosure to Prof. Radicati.[94]

107. On June 7, 2023, Respondent filed a 29-page brief with 42 exhibits to "supplement" its response to the Notice of Arbitration, its earlier submission in response to the Supplemental Claim and Request for Interim Measures, as well as its arguments put forth at the Hearing on Interim Measures.[95]

108. On June 8, 2023, Claimant sent an email requesting that Respondent's submission of the previous day not be admitted as, according to Claimant, it was an unauthorized brief.[96] On the same day, Claimant filed another letter, with an attachment, "urging the Tribunal to, at least, announce its decision on the interim measures."[97]

109. On June 8, 2023, the Tribunal issued Procedural Order No. 4, whereby, *inter alia*, it rejected Respondent's June 7, 2023, submission as it was "not provided for in the procedural calendar."[98] In the letter accompanying this ruling, the Tribunal also allowed Respondent time

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[92] Procedural Order No. 3 dated May 19, 2023, ¶ 118 (**MML-18**) [unofficial translation].

[93] Letter from Claimant dated June 6, 2023 (**MML-25**) [unofficial translation].

[94] Letter from Respondent dated June 6, 2023 (**MML-120**).

[95] Claimant's Brief dated June 7, 2023 (**MML-26**) [unofficial translation].

[96] Claimant's email dated June 7, 2023 (**MML-27**).

[97] Claimant's email dated June 8, 2023 (**MML-31**) [unofficial translation].

[98] Procedural Order No. 4 dated June 8, 2023, ¶ 7 (**MML-29**) [unofficial translation].

until June 12, 2023, to reply to Claimant's June 6, 2023, letter.[99]

110. On June 12, 2023, Respondent replied to the letter filed by Claimant on June 6, 2023, requesting, *inter alia*, that "Claimant's arguments regarding public statements, particularly those made during the month of April, be rejected."[100] On the same day, Respondent filed a second letter objecting to Procedural Order No. 3.[101]

111. On June 13, 2023, the Tribunal issued its Decision on Interim Measures through Procedural Order No. 5. In the letter accompanying this Order, the Tribunal acknowledged receipt of Respondent's two letters from the previous day and stated that, while it had considered the former when issuing its Decision on Interim Measures, it had not considered the latter "due to the need for an urgent ruling on the request for interim measures, which is inconsistent with the need to allow Claimant time to submit its comments on Respondent's objection."[102] It then invited Claimant to submit its comments on that letter.

(b) Analysis of the merits of the Second Ground

112. Respondent's allegations concern a potential violation of Article 17 of the UNCITRAL Rules by the Tribunal. Article 17 provides as follows:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

113. I will begin by pointing out, once again, that my role regarding this Challenge is not that of an appellate authority, nor may I reconsider the procedural, factual, or substantive grounds for the decisions of an arbitral tribunal, regardless of the position the appointing authority may take as to the correct or incorrect nature of those grounds. In this regard, without making any value judgment on the propriety of the Tribunal's procedural decisions and without prejudice to such other judicial remedies as Respondent may assert with respect to these complaints, it is my opinion that the Tribunal acted within its authority under the UNCITRAL Rules, and that all of its decisions appear to be properly founded. In other words, these are not decisions that

[99] Procedural Order No. 5 dated June 13, 2023, ¶ 26 (**MML-34**).

[100] Letter from Claimant dated June 12, 2023, ¶ (d) (**MML-33**) [unofficial translation].

[101] Letter from the Tribunal dated June 13, 2023 **(RDL-115)**.

[102] Letter from the Tribunal dated June 13, 2023 **(RDL-115)** [unofficial translation].

admit of no explanation other than a lack of impartiality.

114. Specifically, it is not for me to rule on whether the Tribunal treated the Parties equally during the interim measures proceeding or on whether Respondent was afforded a "reasonable opportunity of presenting its case" under Article 17 of the UNCITRAL Rules. However, my review of the interim measures proceeding has yielded no evidence of any appearance of bias with respect to the manner in which the Tribunal handled that proceeding. At least within the limited scope of the review which I am authorized to conduct, I find that the Tribunal considered each submission (by either Party without distinction) individually and determined, with supporting reasons and within the scope of its procedural authority, that some were admissible while others were not, based on its understanding and application of the relevant procedural rules. The fact that another tribunal, exercising its procedural discretion, would have reached different conclusions on the admissibility of the Parties' submissions at issue is not necessarily evidence of bias.

iv. The Decision on Interim Measures

115. Due to Respondent's shift in focus in challenging the Tribunal due to its alleged bias as a result of the Decision on Interim Measures, I will first analyze the argument of failure to state reasons regarding the *fumus boni iuris* requirement and will then address the argument of excessive reasons that supposedly resulted in the alleged "prejudgment."

(a) The alleged failure to state reasons

116. First, I will begin by stating, once again, that it is not for me to analyze the propriety of the Decision on Interim Measures or the adequacy, appropriateness, or sufficiency of the reasoning set forth by the Tribunal in Procedural Order No. 5.

117. Respondent complains that the Tribunal did not properly state reasons for its findings as to the *fumus boni iuris* requirement, as it devoted to this "just 5 paragraphs (of a total of 183 paragraphs in PO No. 05)."[103] However, I do not share the view that the Tribunal addressed its reasons in "just 5 paragraphs". Indeed, there are other paragraphs (*e.g.,* ¶¶ 147-157) that also help explain the Tribunal's analysis of the requirement at issue; including the reference to ¶ 144 of the Decision on Interim Measures and the incorporation by reference of everything that was analyzed and decided in Procedural Order No. 3 as to the Tribunal's jurisdiction over the Supplemental Claim, thus addressing one of Respondent's arguments that lack of jurisdiction precluded any reasonable possibility that the Supplemental Claim would succeed.[104]

[103] Notice of Challenge, ¶¶ 20-22 [unofficial translation].

[104] *See* Decision on Interim Measures, ¶ 150 (**MML-34**).

118. Although there are no defined rules regulating the length of the reasons a tribunal must state when analyzing each of the requirements of a request for interim measures, an analysis of whether the number of paragraphs devoted by the Tribunal to this issue is sufficient or not when addressing the *fumus boni iuris* requirement is beyond the scope of my duties.

119. However, on its face, the reasoning stated by the Tribunal for finding, by virtue of its full procedural powers, that there was *prima facie* a "*reasonable possibility*" that RDL's Supplemental Claim would succeed appears to be the result of a thorough and detailed analysis of the issues at stake. Indeed, a cursory examination of Procedural Order No. 5 shows the importance which the Tribunal attached to its decision on an issue that was complex, sensitive, and required a certain measure of urgency in its determination. While it is not for me to determine whether the Tribunal's reasoning was correct or appropriate, it should be noted that the Tribunal did provide reasons in support and, therefore, I reject Respondent's contention that the Tribunal "failed to state reasons."[105] The Tribunal considered the Parties' arguments in detail, including as regards the requirement in question. On the contrary, I find no objective evidence of bias simply because the Tribunal expressed its reasons in a given number of paragraphs. The fact that another tribunal might have been more extensive or exhaustive in discussing its reasons does not necessarily demonstrate any bias on the part of this Tribunal. Accordingly, I reject the Challenge based on the argument of a failure to state reasons.

(b) The alleged prejudgment

120. As to the new argument of excessive reasoning that allegedly resulted in "prejudgment," I have failed to find any persuasive objective evidence that the Tribunal's decision-making process in Procedural Order No. 5 was necessarily tarred by its undue prejudgment of certain issues related to the Supplemental Claim.

121. As regards the applicable standard for a finding of prejudgment, again as outlined above, in my capacity as appointing authority I cannot take on the role of an appellate body. Therefore, in analyzing the instances where, according to Respondent, the Tribunal prejudged the merits of the dispute, the standard to be applied will be highly rigorous, since the mere consideration of elements that relate to the merits of the dispute while dealing with a request for an interim measure does not necessarily lead to the conclusion that the tribunal prejudged those issues.

122. Thus, when requiring the party requesting an interim measure to persuade the arbitral tribunal that there is a reasonable possibility that its claim on the merits of the dispute will succeed, Article 26(3)(b) of the UNCITRAL Rules also contains a strong caveat: "[t]he determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent

[105] Notice of Challenge, ¶ 22.

determination."

123. This will be so unless the decision in question can only be explained as the result of a manifest and undue prejudgment of a nature such that it resembles a final decision on the merits, even when the tribunal does not have the necessary elements to make such a determination. Otherwise, if the mere consideration of certain aspects of the merits of a dispute could be qualified as "prejudgment" by a Party who is dissatisfied with the decision, it would be virtually impossible for tribunals to analyze the *fumus boni iuris* requirement when considering interim measures.

124. In addition, tribunals have the power to form opinions on specific issues in the context of making decisions on interim measures, provided that they observe the principles laid down in Article 17 of the UNCITRAL Rules. Issuing a final decision, or forming a set opinion on particular issues, before exhausting the "reasonable opportunity of presenting its case" which must be afforded to each party, is a matter of due process, not one of undue bias. Undue bias is defined, in principle, by a consideration of elements which are beyond the proceeding, not by the premature nature of the tribunal's decision. If an arbitrator expresses an opinion on an issue which has yet to be briefed by the Parties, it may be presumed that such opinion is based on elements outside the scope of the Proceeding.[106] This presumption does not apply when an arbitrator expresses an opinion that is more definitive or forceful than necessary on issues which have indeed been pleaded at that stage of the proceedings. Although this implies a lack of due process, it does not necessarily imply a lack of impartiality. A challenge is not always the appropriate procedural remedy to question such decisions.

125. Respondent alleges that the Tribunal prejudged certain issues: (i) the Contract (in particular, Section 17.7 on the termination of the Contract, and Sections 17.13 and 17.15 on the compensation methods); (ii) Council Agreement No. 11; (iii) the letter whereby Respondent notified Claimant of the termination of the Contract; and (iv) the fact that "the public interest reasons relied on [by MML] were not properly founded and justified."[107]

126. As first pointed out at the beginning of this sub-section, Respondent has failed to persuade me that the Decision on Interim Measures necessarily shows a bias on the part of the Tribunal due to it unduly prejudging substantive issues. Claimant raised serious arguments regarding the necessity and urgency of the Interim Measures and the irreparable harm it would suffer if

[106] LCIA Ref. No. 132498, Decision on Challenge, December 24, 2014, p. 1 ("[w]here the parties have agreed that the Tribunal decide preliminary issues relating to jurisdiction, an arbitrator who expresses his views on the merits of the case […] creates an appearance of bias").

[107] Second Challenge Brief, ¶ 58 [unofficial translation]

these were not granted.[108] MML's reply to these allegations was equally serious.[109] The Tribunal was therefore required to consider the allegations and engage in a preliminary analysis of the arguments and evidence before it. Even Respondent has acknowledged as much: "there is no question—and MML does not dispute—that the Tribunal had to engage in a preliminary analysis of the viability of the claim raised by Rutas against the declaration of the Contract's termination."[110]

127. In accordance with the requirements established in Article 26(3)(b) of the UNCITRAL Rules, the Tribunal analyzed whether there was a "reasonable possibility" that Claimant's Supplemental Claim would succeed in order for Interim Measures to be granted. In addition, in its Supplemental Claim and Request for Interim Measures, Claimant asked, among other things, that the Tribunal "[d]eclare that the Concession Contract was improperly terminated and that the Concession Contract should remain in force."[111]

128. Accordingly, it appears that the interpretation of Section 17.7 by Prof. Radicati di Brozolo and Prof. Arias was manifestly not beyond the facts of the dispute, and it therefore does not meet the applicable standard.

129. Respondent also alleges that the Tribunal issued a "final" ruling that the compensation method set forth in Sections 17.13 and 17.15 would not be applicable if Respondent could not justify the public interest reasons behind the termination, and that such method would likely be insufficient to cover the damages suffered by Claimant in connection with the termination of the Contract. Additionally, Respondent complains that the Tribunal's firm conclusions were adopted "without even hearing the Parties' position on this fundamental issue of contractual interpretation."[112]

130. By virtue of Article 26(3)(a) of the UNCITRAL Rules, the Tribunal had to consider whether "[h]arm not adequately reparable by an award of damages [was] likely to result if the measure is not ordered." In that context, as correctly pointed out by Claimant, the Tribunal received submissions from both Parties as to the possible applicable compensation methods, depending on whether the termination is lawful or unlawful.[113] I therefore reject Respondent's contention that the Tribunal made certain preliminary decisions "without even hearing the

[108] Supplemental Claim and Request for Interim Measures, *see, e.g.*, ¶¶ 6, 7, 86-112 (**MML-5**).

[109] Response to Supplemental Claim and Request for Interim Measures (**MML-6**).

[110] Second Challenge Brief, ¶ 49 [unofficial translation].

[111] Supplemental Claim and Request for Interim Measures, ¶ 113.b (**MML-5**) [unofficial translation].

[112] Second Challenge Brief, ¶ 62 [unofficial translation].

[113] *See*, *e.g.,* Response, ¶¶ 156-159; Video recording of Hearing on Interim Measures, 00:47:14, 00:59:50 (**RDL-113**); Transcript of Hearing on Interim Measures, pp. 8-10 (**RDL-114**); Claimant's Arguments on Interim Measures – Presentation dated April 17, 2023 (**MML-22**), slide 31.

Parties." The Tribunal's interpretation of the Contract's compensation method is thus the result of its analysis of an issue that was actually brought before it for a decision. Moreover, the opinion appears to be appropriate relative to the extent to which the issue was briefed before the Tribunal.

131. In any event, while it is not for me to determine whether that decision was (or was not) made pursuant to Articles 17 or 26 of the UNCITRAL Rules, I do note that the Tribunal used caution in expressing its preliminary conclusions. After rejecting some of Claimant's arguments, the arbitrators made it clear that their conclusion regarding the compensation method was made *"prima facie"* and that it was "**likely** that the harm Claimant would suffer could not be 'adequately' repaired through a future damages award against Respondent," also because a quantification of such harm would be "'*disproportionately difficult or even unreliable.*'"[114]

132. That another tribunal would have reached a different conclusion or used more caution in expressing its views does not necessarily prove undue prejudgment or bias on the part of the Tribunal.

133. Based on the foregoing reasons, it is my conclusion that there are no justifiable doubts as to the impartiality of Prof. Radicati and Prof. Arias, and I therefore reject the third ground for the Challenge. In this regard, it should be noted that I find more than sufficient evidence to rule out the premise that a reasonable and informed third party, taking all relevant circumstances into consideration, would conclude that the only possible explanation to justify the manner in which the Tribunal analyzed the *fumus boni iuris* requirement is undue prejudgment evidencing a lack of impartiality.

IV. COSTS

134. As regards Claimant's request for a costs award in connection with this challenge proceeding, the power to rule on and allocate the costs of the arbitration, including the fees and expenses of the appointing authority and other costs associated with the challenge, rests exclusively with the Tribunal, pursuant to Articles 40 and 42 of the UNCITRAL Rules. I thus lack the authority, in my capacity as appointing authority, to make any decisions on a costs claim.

V. DECISION

NOW, THEREFORE, I, Marcin Czepelak, Secretary-General of the PCA, having considered the submissions of the Parties and the comments of Prof. Radicati di Brozolo and Prof. Arias,

[114] Procedural Order No. 5, ¶ 171 (**MML-34**). Emphasis added. In addition, the Tribunal pointed out that, "if, at the end of this arbitration, the Tribunal were to conclude that the unilateral termination on January 19, 2023 was unlawful and thus grant the supplemental claim, the fact that Rutas de Lima had been paid the damages provided for in Sections 17.13 and 17.15 would likely not have eliminated the harm suffered by Claimant and would not eliminate the risk of harm described in ¶ 170 *supra*" [unofficial translation].

and having established to my satisfaction my competence to act as appointing authority and decide this Challenge in accordance with the UNCITRAL Rules, do,

HEREBY REJECT the Challenge raised by Respondent against Prof. Radicati and Prof. Arias.

[Signature]

Marcin Czepelak

Done at The Hague, November 6, 2023.