

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/19/34

AMEC FOSTER WHEELER USA CORPORATION, PROCESS
CONSULTANTS, INC., AND JOINT VENTURE FOSTER WHEELER USA
CORPORATION AND PROCESS CONSULTANTS, INC.

Applicants

v.

REPUBLIC OF COLOMBIA

Respondent

COUNTER-MEMORIAL ON ANNULMENT

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I. INTRODUCTION

1. The Republic of Colombia (“Colombia” or the “Respondent”) submits this Counter-Memorial on Annulment (“Counter-Memorial”) in response to the Memorial on Annulment filed by Amec Foster Wheeler USA Corporation (“Foster Wheeler”), Process Consultants, Inc. (“Process Consultants”) and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. (“FPJVC”) (together “Claimants” or “Applicants”) on January 19, 2026 (“Memorial”), in accordance with Procedural Order No. 1 of September 24, 2025.¹

2. Annulment under the ICSID Convention is an extraordinary remedy, available only in the limited circumstances expressly enumerated therein. It is not an appeal. Yet that is precisely what Applicants seek: a second look at a unanimous decision rendered by a highly respected and experienced arbitral tribunal (the “Tribunal”) after extensive proceedings and careful deliberation. The Tribunal issued its award on December 19, 2024 (the “Award”), following arbitral proceedings (the “Arbitration”) in which the Parties exchanged two full rounds of written submissions totaling 562 pages, supported by an evidentiary record comprising 155 factual exhibits, 594 legal authorities, and five witness statements submitted by Claimants. A comprehensive two-day hearing was held in person on May 19 and 20, 2022. The resulting 88-page Award was unanimous and reflects the Tribunal’s systematic

¹ References in the form of “**Ex. RA-**” and “**Ex. RALA-**” are to the factual exhibits and legal authorities, respectively, submitted by Respondent in this annulment proceeding; while those in the form of “**Ex. AA-**” and “**Ex. AALA-**” are to the factual exhibits and legal authorities, respectively, submitted by Applicants in this annulment proceeding. This Counter-Memorial uses the following notation: period (“.”) to separate thousands, comma (“,”) to separate decimals, “US\$” to refer to U.S. dollars and “COP\$” to refer to Colombian pesos.

engagement with the Parties' core arguments, culminating in the dismissal of all of Claimants' claims through a detailed and well-reasoned analysis.

3. In its Award, the Tribunal dismissed all of Claimants' claims as premature and inadmissible. The Award was a preliminary, threshold decision under Article 10.20.4 of Chapter Ten (Investment) of the U.S.–Colombia Trade Promotion Agreement (the “Treaty” or the “TPA”), which allows tribunals to dismiss claims in respect of which an award cannot be made in favor of the claimants, as a matter of law.

4. The heart of Colombia's objection was simple: when Claimants filed their Request for Arbitration, there was no “measure” in existence capable of constituting a breach of the Treaty. Colombia's central point was that, at the time Claimants filed their Request for Arbitration, the only step taken in the fiscal liability proceeding at issue in the Arbitration was the “Indictment Order” (“*Auto de Imputación*”) — a procedural administrative act that did not define any legal situation and was subject to judicial remedies and, therefore, could not constitute a “measure” for purposes of Article 10.16.1 of the Treaty, which sets forth the requirements for a valid submission of a claim to arbitration under the Treaty.

5. The Tribunal agreed. As the core holding, the Tribunal interpreted Article 10.16.1 to require that “a measure capable of constituting a Treaty breach must have existed as of the date of the submission,”² and therefore asked whether such a measure existed when the Request for Arbitration was filed. The Tribunal found there was no dispute between the Parties that, at the time the Arbitration was initiated, only the Indictment Order had been issued and a final administrative decision was still pending, and it accepted that the Indictment Order was a mere procedural administrative act that did not define any legal

² **Ex. AA-7**, *Amec Foster Wheeler USA Corporation et al v. Republic of Colombia*, ICSID Case No. ARB/19/34, Award, December 19, 2024 (“Award”), ¶ 204.

situation. On that basis, the Tribunal held that a final administrative act had to exist at the time of filing — and did not — so the Indictment Order was not a “measure” capable of breaching the Treaty.

6. That finding was dispositive. The Tribunal concluded that the absence of such a measure at the time of initiation of the Arbitration rendered Claimants’ claims premature and inadmissible, and this dispositive finding made it unnecessary to consider the rest of Colombia’s preliminary arguments under Article 10.20.4 of the Treaty or its five jurisdictional objections.

7. Although the primary holding was fully sufficient to dispose of the case, the Tribunal went on to conduct an additional, subsidiary analysis — performed entirely for the sake of argument — examining whether Claimants’ claims had at least ripened by the time the Tribunal issued its Award.

8. The Tribunal addressed — alternatively — whether the Ruling with Fiscal Liability, issued 17 months after Claimants filed the Notice of Arbitration, could qualify as a measure capable of constituting a Treaty breach, while emphasizing that post-filing material could not be used to satisfy the Treaty’s prerequisites for admissibility at submission. In other words, this analysis had no bearing on the outcome: admissibility is assessed at the time of submission of the Notice of Arbitration, and the Tribunal had already held that Claimants failed that test.

9. Nevertheless, the Tribunal found that Claimants’ claims had not ripened even by the time of the Award. Agreeing with the United States’ non-disputing party submission and with Respondent, it reasoned that it is well established “that the international responsibility of States may not be invoked with respect to non-final acts, unless recourse to

further domestic remedies is obviously futile or manifestly ineffective.”³ The Tribunal further found Colombia had demonstrated examples of fiscal liability rulings reversed through judicial review, while Claimants had not substantiated futility.

10. In that same alternative analysis, the Tribunal rejected Claimants’ contention that the fiscal liability proceedings were “administrative adjudicatory proceedings” within Article 10.5.2(a) of the Treaty, holding instead that Article 10.5.2(a) refers to judicial proceedings before the administrative adjudicatory jurisdiction — not purely administrative proceedings — and that without judicial intervention there could be no denial of justice under customary international law.

11. The bottom line of the Award is this: Claimants’ claims were not ripe when they filed their Request for Arbitration — the primary and sufficient holding — and were still not ripe at the time the Tribunal rendered its Award, as confirmed by the Tribunal’s subsidiary analysis.

12. Applicants have built their entire annulment case around the Tribunal’s subsidiary analysis, without challenging the Tribunal’s primary holding. That is the fundamental flaw in Applicants’ annulment application. Even if every argument Applicants raise in connection with the subsidiary analysis were correct (*quod non*), the annulment would still fail: the Tribunal’s dispositive holding — that the Indictment Order was not a measure capable of constituting a breach at the time of submission — stands untouched and independently justifies the Tribunal’s dismissal of all claims.

13. In their Memorial on Annulment, Applicants point to six alleged “acts” or “omissions” by the Tribunal justifying annulment of the Award: (A) the alleged reliance on

³ Ex. AA-7, Award, ¶ 217.

expedited proceedings to dismiss the claims; (B) the allegedly incorrect application of the Treaty, including the Tribunal's interpretation of "administrative adjudicatory proceedings" and the alleged imposition of an exhaustion of local remedies requirement; (C) the Tribunal's evidentiary decisions; (D) allegedly contradictory reasoning on the fiscal liability proceedings; (E) failure to rule on all claims, including an amended request for arbitration submitted during the Tribunal's deliberation period; and (F) the alleged delay in rendering the Award.

14. Based on these alleged "acts" or "omissions," Applicants invoke three annulment grounds under Article 52 of the ICSID Convention: manifest excess of powers, failure to state reasons, and serious departure from a fundamental rule of procedure.

15. None of these grounds is met. At its core, this annulment application is an impermissible attempt by Claimants to reargue the case on the merits. ICSID annulment is an exceptional remedy concerned with procedural integrity, not an appeal, and the Committee has no mandate to review whether the Tribunal correctly interpreted or applied the law. Colombia's position is that none of these alleged "acts" or "omissions" establishes any ground for annulment. Applicants do not come close to meeting the high threshold required under any of the three grounds they invoke, and their application should be dismissed in its entirety.

16. What is more, before the Tribunal rendered the Award, and contemporaneously with the filing of the amended request for arbitration, Claimants initiated a new ICSID arbitration under the Treaty based on substantially the same facts, but after the Ruling with Fiscal Liability had become binding. That new arbitration is currently suspended pending a decision on this annulment application. Put differently, Applicants already have an avenue through which to pursue their Treaty claims in those new proceedings;

accordingly, this annulment application amounts to nothing more than an attempt to obtain a third bite at the apple.

17. This Counter-Memorial is structured as follows. First, Respondent briefly summarizes the factual and procedural background of the Arbitration. Second, Respondent sets out the legal framework governing the three grounds for annulment under Article 52 of the ICSID Convention invoked by Applicants. Third, Respondent provides a detailed analysis of the acts and omissions that Applicants allege constitute grounds for annulment. Finally, Respondent explains why costs should be awarded against Applicants in this proceeding.

II. FACTUAL AND PROCEDURAL BACKGROUND

18. Respondent summarizes below the factual and procedural background of the Arbitration between Claimants and Respondent leading to the Award. In recognition of the limited scope of an ICSID annulment proceeding, Respondent provides this background only to help familiarize the Committee with the subject matter of the dispute.

A. Background of the Dispute

19. In the 2000s, Ecopetrol launched a major modernization initiative for the Cartagena Refinery, a large industrial complex on Colombia's Atlantic coast (the "Project").⁴ For this purpose, Ecopetrol incorporated a new company called Refinería de Cartagena, S.A. ("Reficar"), which it wholly owned.⁵ The Republic of Colombia is the majority shareholder of Ecopetrol, with 88.49% of the capital stock.⁶

⁴ **Ex. AA-7**, Award, ¶ 66; **Ex. AA-3**, Colombia's Memorial on Preliminary Objections, July 1, 2021, ¶¶ 14-15.

⁵ **Ex. AA-7**, Award, ¶ 66.

⁶ *Id.*

20. In late 2007, Reficar engaged Chicago Bridge & Iron Company N.V. and affiliates (“CB&I”) to perform engineering, procurement, and construction work on a cost-reimbursable basis.⁷ In October 2009, Foster Wheeler and Process Consultants, both Delaware corporations, formed a joint venture (“FPJVC”) to bid on management consulting services for the Project.⁸ The joint venture agreement provided that FPJVC would be unincorporated and lack separate legal personality under New York law.⁹

21. On November 19, 2009, Reficar accepted FPJVC’s proposal to provide project management and oversight services including design supervision, procurement control, contractor management, and construction oversight for the Project (the “Services Contract”).¹⁰

22. Under the Services Contract, FPJVC received consideration commensurate with the consulting hours it provided.¹¹ FPJVC bore no investment risk; it recovered all resources invested and earned fixed fees based solely on hours worked.¹²

23. The Project experienced substantial delays and cost overruns, reaching approximately US\$ 8 billion — double the original budget — with operations concluding in October 2015, over two years late.¹³

⁷ Ex. AA-3, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 16-22.

⁸ Ex. AA-7, Award, ¶ 67.

⁹ Ex. AA-3, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 301-302.

¹⁰ Ex. AA-7, Award, ¶ 68.

¹¹ Ex. AA-3, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 33-53, 296.

¹² *Id.*, ¶¶ 22, 45-52, 281-298.

¹³ *Id.*, ¶¶ 66-70.

24. In December 2015, the Comptroller General (“CGR”) directed its Mining and Energy Sector division to audit the Project.¹⁴ The audit identified deficiencies in engineering, procurement, and construction performance, including significant irregularities that could constitute grounds for initiating fiscal liability proceedings.¹⁵ In Colombia, fiscal liability proceedings are administrative investigations through which the CGR establishes accountability for entities whose conduct damages public assets through negligent or willful action.¹⁶

25. On March 10, 2017, the CGR formally initiated fiscal liability proceedings targeting over US\$ 6 billion in alleged damages arising from five budget expansions of the Project, naming six corporations and 35 individuals, including Foster Wheeler, Process Consultants and certain Reficar officials (the “Initiation Order”).¹⁷ Foster Wheeler and Process Consultants, as well as the other parties under investigation, submitted defenses during the initiation stage.¹⁸

26. On June 5, 2018, the CGR issued an indictment charging individuals and entities, including Foster Wheeler and Process Consultants, with gross negligence for over US\$ 2 billion in damages (the “Indictment Order”) (*Auto de Imputación*).¹⁹ The Indictment Order (*Auto de Imputación*) was a procedural administrative act (*acto administrativo de*

¹⁴ **Ex. AA-7**, Award, ¶ 70.

¹⁵ *Id.*, ¶¶ 71-72.

¹⁶ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 71-83. Fiscal responsibility operates independently from contractual liability and applies to private contractors managing public funds. **Ex. RL-20**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019, ¶ 1083.

¹⁷ **Ex. AA-7**, Award, ¶ 72; **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 122-124.

¹⁸ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶ 124.

¹⁹ **Ex. AA-7**, Award, ¶ 73.

trámite) that did not define any legal situation. After the CGR issued the Indictment Order (*Auto de Imputación*), the parties under investigation had four months to present arguments and evidence.²⁰

27. On December 6, 2019, Claimants filed their initial notice of arbitration (the “Notice of Arbitration”).

28. On April 26, 2021, 17 months into the Arbitration, the CGR issued a ruling establishing joint and several liability for 12 individuals and 4 corporations, including Foster Wheeler and Process Consultants, in the amount of US\$ 997 million (the “Ruling with Fiscal Liability”).²¹

29. Under Colombian law, Claimants had a right to pursue administrative remedies to challenge the Ruling with Fiscal Liability. Accordingly, in May 2021, Foster Wheeler and Process Consultants filed a timely administrative appeal (*recurso de apelación*) against the Ruling with Fiscal Liability before the CGR’s administrative review chamber (the “Fiscal Chamber”) (*sala fiscal sancionatoria*).²² On July 6, 2021, the Fiscal Chamber rejected the administrative appeal, upholding the Ruling with Fiscal Liability.²³ The Fiscal Chamber’s decision brought an end to the declaratory stage (*etapa declarativa*) of the administrative proceeding (*procedimiento administrativo*), with the Ruling with Fiscal Liability thus becoming “binding” (*ejecutoriado or en firme*).²⁴

²⁰ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 202, pp. 77, 201.

²¹ **Ex. AA-7**, Award, ¶ 78.

²² *Id.*, ¶ 80; **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 159, 174.

²³ **Ex. AA-7**, Award, ¶ 81.

²⁴ **Ex. AA-10**, Colombia’s Reply on Preliminary Objections, December 13, 2021, ¶ 36.

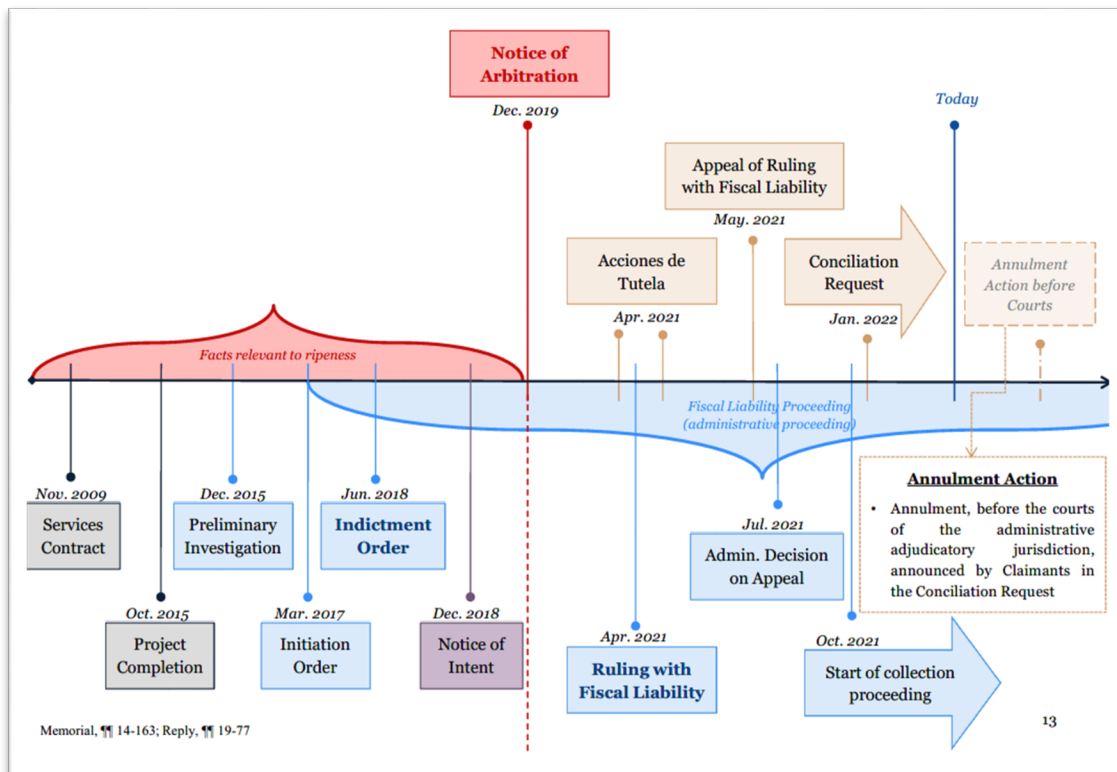
30. With the Ruling with Fiscal Liability upheld at the administrative level, Foster Wheeler and Process Consultants were free to file an annulment and reinstatement of rights action (*acción de nulidad y restablecimiento del derecho*) before the courts of the administrative adjudicatory jurisdiction (*cortes de la jurisdicción contencioso administrativa*).²⁵ They, however, decided not to, forgoing judicial review of the Ruling with Fiscal Liability by Colombian courts.

31. The following diagram depicts the moment Claimants filed their original Notice of Arbitration:²⁶ after the Indictment (*imputación*), which was a procedural administrative act (*acto administrativo de trámite*), and 17 months before the Ruling with Fiscal Liability, which

²⁵ *Id.*, ¶¶ 36, 41-45.

²⁶ **Ex. RA-1**, Respondent's Opening Presentation, Hearing on Preliminary Objections, May 19, 2022, p. 13.

was subject to challenge before judicial administrative courts (*cortes contencioso administrativas*).



B. Overview of the Arbitration

1. The Original Request for Arbitration and Colombia's Objections

32. As noted above, Claimants filed their initial Notice of Arbitration on December 6, 2019. The Parties agreed to appoint arbitrators in accordance with Article 37(2)(a) of the ICSID Convention, constituting the Tribunal on June 18, 2020.

33. Prior to holding a first session, the Tribunal invited the Parties to confer on a draft procedural order No. 1 and on a procedural timetable. The Parties largely agreed on a proposed order but were unable to reach agreement on the procedural timetable.

34. On August 24, 2020, Respondent wrote to the Tribunal formally requesting that it hear and consider as a preliminary matter Colombia's objection under Article 10.20.4 of the Treaty: that, as a matter of law, the claim submitted by Claimants was not a claim in respect of which the Tribunal could make an award in favor of Claimants pursuant to Article 10.26 of the Treaty.²⁷ Claimants responded with a lengthy letter dated September 8, 2020, arguing that Respondent's Article 10.20.4 objection was improper, untimely and without merit, and could not be considered on an expedited basis.²⁸

35. The Tribunal held a first session on September 18, 2020, allowing both Parties an opportunity to orally brief it on the matter of Colombia's 10.20.4 objection.²⁹ Both Parties presented their arguments, with Respondent indicating its intention to also assert admissibility and jurisdictional objections.

36. After the first session, the Parties reached agreement on a couple of outstanding procedural matters but continued to disagree on the procedural timetable, with Claimants proposing a protracted calendar (over 24 months of briefing) that included two rounds of document production just in the preliminary phase.³⁰

37. Having considered both Parties' detailed written and oral arguments, the Tribunal issued Procedural Order No. 1, along with a procedural timetable, on March 18,

²⁷ **Ex. AA-4**, Colombia's Letter to the Tribunal regarding Preliminary Questions, August 24, 2020.

²⁸ **Ex. RA-2**, Claimants' letter to the Tribunal, September 8, 2020.

²⁹ **Ex. RA-3**, Email from the ICSID Secretariat to the Parties, September 17, 2020.

³⁰ **Ex. RA-4**, Letters from the Parties to the Tribunal, October 9, 2020.

2021.³¹ The Tribunal sided with Respondent in deciding that it would hear and decide on Respondent's 10.20.4 objection and any other admissibility and jurisdictional objections as a preliminary matter, suspending the proceedings on the merits. In the relevant section, Procedural Order No. 1 reads:

14.6. The Respondent shall file a memorial regarding its objection that, as a matter of law, the claim submitted is not a claim for which an award in favor of Claimants may be made under Article 10.26.10 of the US-Colombia TPA in compliance with the timetable set out in Annex A thereto.

14.7. Respondent shall also address any other admissibility and jurisdictional objections that it proposes to raise for determination by the Tribunal in the Memorial filed pursuant to Section 14.6 above.

14.8. Claimants shall submit a Counter-Memorial addressing the Respondent's preliminary question pursuant to Article 10.20.4 of the US-Colombia PTA and any other admissibility and jurisdictional objections raised by the Respondent in its Memorial in compliance with the timetable set out in Annex A thereto. The Parties are further invited to file their Reply and Rejoinder in compliance with the timetable set out in Annex A thereto.

14.9. Pending any determination of such preliminary issue(s), the Tribunal shall suspend any proceedings on the merits.

14.10. The Tribunal will then issue its ruling on the Respondent's objections, including on the scope of Article 10.20.4 of the US-Colombia TPA. Following issuance of this ruling, the Tribunal will fix, in consultation with the Parties, the procedural calendar for the remainder of the proceeding, if necessary.³²

38. The Tribunal set a procedural timetable that spanned over a year and included two rounds of written submissions (with substantial time allotted between each submission),

³¹ Ex. AA-6, Procedural Order No. 1, March 18, 2021; Ex. AA-5, Procedural Order No. 1, Revised Annex A, Procedural Calendar, October 7, 2021.

³² Ex. AA-6, Procedural Order No. 1, March 18, 2021, ¶¶ 14.6-14.10.

followed by a two-day hearing in Washington D.C. (the “Preliminary Questions Phase”). While the procedural schedule did not include a formal document production phase, Procedural Order No. 1 nevertheless provided the Parties a right to request the production of documents.³³

39. On July 1, 2021, in accordance with Procedural Order No. 1, Respondent submitted its Memorial, raising an objection under Article 10.20.4 of the Treaty (the “Preliminary Objection”).³⁴ Respondent also raised five additional objections to be decided by the Tribunal on a preliminary basis (the “Jurisdictional Objections”) (the Preliminary Objection and the Jurisdictional Objections are collectively referred to as “Colombia’s Objections”).

2. Application for Temporary Emergency Protection and Provisional Measures

40. On September 2, 2021, Claimants submitted an Application for Provisional Measures and Emergency Temporary Relief, together with several witness statements including that of Mr. César Torrente. Claimants sought to enjoin the enforcement of the Ruling with Fiscal Liability on the basis that enforcement would disrupt the *status quo*. After two rounds of briefing, on October 25, 2021, the Tribunal decided on Claimants’ Application for Emergency Temporary Relief, rejecting it for lack of urgency and necessity.

41. On November 4, 2021, the Tribunal held a hearing on Claimants’ outstanding provisional measures application. Both Parties presented oral arguments in furtherance of their respective written arguments submitted in anticipation of the hearing. On May 31, 2022, the Tribunal denied Claimants’ Application for Provisional Measures because Claimants had

³³ *Id.*, ¶ 15.

³⁴ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021.

not established that their assets were under any immediate threat, or that the enforcement proceedings gave rise to an “imminent risk that Claimants [would] suffer irreparable harm.”³⁵ The Tribunal’s decision mentioned Mr. Torrente’s initial and supplemental witness statements as part of Claimants’ evidence (the “Torrente Witness Statements”).³⁶

3. The Preliminary Questions Phase

42. Claimants filed their Counter-Memorial on Preliminary Objections on October 14, 2021.

43. In the second round of written submissions, Colombia filed its Reply on Preliminary Objections on December 13, 2021, and Claimants filed their Rejoinder on Preliminary Objections on February 11, 2022.

44. Across the two rounds of written submissions, the Parties exchanged extensive arguments on each of Colombia’s Objections, supported by hundreds of legal authorities and factual exhibits.

45. On April 4, 2022, the United States of America filed a non-disputing party submission pursuant to Article 10.20.2 of the Treaty. Both Parties submitted comments on that submission on April 25, 2022.

46. In their Counter-Memorial on Preliminary Objections and their Rejoinder on Preliminary Objections — the two rounds of submissions in which Claimants specifically responded to Colombia’s Objections — Claimants did not rely on the Torrente Witness

³⁵ **Ex. RA-5**, Procedural Order No. 3, May 31, 2022, ¶¶ 115-116.

³⁶ **Ex. RA-5**, Procedural Order No. 3, May 31, 2022, ¶¶ 1, 12.

Statements to substantiate their allegation that local remedies in Colombia were obviously futile or manifestly ineffective.³⁷

47. On May 19 and 20, 2022, the Tribunal held a two-day hearing in Washington D.C., at which the Parties presented extensive oral argument on all of Colombia's Objections (the "Hearing"). The Hearing was followed by the filing of submissions on costs by the Parties.

4. The Tribunal's Deliberations

48. Following the Hearing, the Tribunal took the proceedings under advisement.

49. More than six months into deliberations, on December 21, 2022, Claimants informed the Tribunal that they would seek leave to introduce new documents into the record together with a written submission addressing their significance.³⁸ Colombia objected to Claimants' attempt to introduce new documents into the record of the Preliminary Questions Phase,³⁹ and the Tribunal indicated that it would consider such request if and when made.⁴⁰ Claimants took until February 7, 2023 to submit their application to introduce new documents into the record, raising many arguments as to how those documents supported their responses to Colombia's Objections (the "Application to Introduce New Documents").⁴¹ This application led to an exchange of letters between the Parties throughout February 2023.⁴² On March 7, 2023, the Tribunal granted Claimants leave to introduce the new documents

³⁷ See ¶¶ 314-316, *infra*.

³⁸ **Ex. RA-6**, Claimants' letter to the Tribunal, December 21, 2022.

³⁹ **Ex. RA-7**, Colombia's letter to the Tribunal, January 3, 2023, p. 2.

⁴⁰ **Ex. RA-8**, Email from the ICSID Secretariat to the Parties, January 9, 2023.

⁴¹ **Ex. RA-9**, Claimants' letter to the Tribunal, February 7, 2023.

⁴² **Ex. RA-10**, Colombia's letter to the Tribunal, February 15, 2023; **Ex. RA-11**, Claimants' letter to the Tribunal, February 24, 2023.

into the record of the case (the “Newly Introduced Documents”).⁴³ The Newly Introduced Documents were therefore admitted to the record of the case and the Parties exchanged comments on their impact on the case until March 31, 2023.⁴⁴

50. Thereafter, the Tribunal's deliberations were interrupted due to an illness of the President of the Tribunal. On July 31, 2023, prompted by an inquiry made by Colombia days earlier,⁴⁵ the ICSID Secretariat informed the Parties that the Tribunal was currently drafting its ruling, which it was hoping to issue by the end of September 2023.⁴⁶ However, on October 24, 2023, the ICSID Secretariat informed the Parties that “the President of the Tribunal’s recent surgery and ensuing COVID infection have prevented the Tribunal from advancing in the drafting of its ruling.”⁴⁷ The President resumed his duties in late February 2024, approximately ten months before the Award was rendered, on December 19, 2024.⁴⁸

5. Claimants’ Amended Request for Arbitration

51. More than two years after the Hearing, on June 21, 2024, and while the Tribunal was in deliberation, Claimants submitted an amended request for arbitration (the “Amended Request for Arbitration”) by which they purportedly added ancillary claims to the Arbitration, relying on ICSID Arbitration Rule 40. On July 1, 2024, Respondent opposed the introduction of the Amended Request for Arbitration into the record.⁴⁹

⁴³ **Ex. AA-7**, Award, ¶ 54; **Ex. RA-12**, Tribunal's letter to the Parties, March 7, 2023, p. 2.

⁴⁴ **Ex. RA-13**, Claimant's letter to the Tribunal, March 17, 2023; **Ex. RA-14**, Colombia's letter to the Tribunal, March 31, 2023.

⁴⁵ **Ex. RA-15**, Colombia's email to the ICSID Secretariat, July 24, 2023.

⁴⁶ **Ex. RA-16**, Email from the ICSID Secretariat to the Parties, July 31, 2023.

⁴⁷ **Ex. RA-17**, Email from the ICSID Secretariat to the Parties, October 24, 2023.

⁴⁸ **Ex. RA-18**, Email from the ICSID Secretariat to the Parties, February 26, 2024.

⁴⁹ **Ex. RA-19**, Colombia's email to the Tribunal, July 1, 2024.

52. On July 6, 2024, Claimants indicated that they had filed a new case before ICSID, setting forth the supposed ancillary claims pleaded in the Amended Request for Arbitration.⁵⁰ ICSID registered this case on April 7, 2025.

53. On July 12, 2024, the Tribunal sided with Claimants, admitting the Amended Request for Arbitration as part of the record of the Arbitration. However, the Tribunal had already noted previously on July 3, 2024, that it would “not entertain a discussion on the ‘Amended and Restated Request for Arbitration’ until after [it had] issu[ed] its ruling on the Respondent’s Preliminary Objections, if appropriate.”⁵¹

6. Issuance of the Award

54. The Tribunal rendered its Award on December 19, 2024.

55. Throughout the deliberation period, Claimants neither enquired with the Tribunal regarding the status of the proceedings or the expected date of issuance of the Award, nor expressed any concern about the length of the Tribunal’s discussions.

C. Summary of the Tribunal’s Award

1. Summary of Colombia’s Objections

56. In its Award, the Tribunal began its analysis by summarizing Colombia’s Objections:

Respondent submits a preliminary objection under Article 10.20.4 of the Treaty, alleging that the claim submitted to arbitration by Claimants is not a claim in respect of which, as a matter of law, an award in their favour can be made,

⁵⁰ **Ex. AA-7**, Award, ¶ 63. This case, ICSID Case No. ARB/25/16, is currently suspended pursuant to party agreement. It remains active and subject to a lifting of the suspension.

⁵¹ **Ex. RA-20**, Email from the ICSID Secretariat to the Parties, July 3, 2024.

because the requirements set forth in Article 10.16.1 of the Treaty for the submission of a valid claim to arbitration are not met; and Claimants' claims exceed the forms of relief that the Tribunal is empowered to grant under Article 10.26 of the Treaty ("**Preliminary Objection**").

Additionally, Respondent presents the following five jurisdictional objections: first, Respondent argues that Claimants do not have a protected investment under the Treaty and the ICSID Convention. Second, Respondent alleges that Claimant FPJVC does not qualify as a "Juridical Person" under Article 25(2)(b) of the ICSID Convention. Third, Respondent argues that the Notice of Intent was issued by FPJVC alone and not by the other Claimants. Fourth, Respondent submits that Claimants have definitively elected to submit their claim for breach of fair and equitable treatment to the Colombian Courts. Finally, Respondent argues that there is no consent to submit Claimants' claims to arbitration, because their waiver is invalid [(the "**Jurisdictional Objections**")].⁵²

57. The Tribunal then discussed the test to establish jurisdiction, distinguishing between the standard to decide the Preliminary Objection and the Jurisdictional Objections:

Article 10.20.4(c) provides that '[i]n deciding an objection *under this paragraph*, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration [...].'⁵² It is thus clear that only in analysing Respondent's objections which fall under Article 10.20.4 of the Treaty, is the Tribunal to proceed on the basis of an assumption that Claimants' factual allegations are true.

Colombia's jurisdiction objections are brought under different provisions of the Treaty. They do not come within the scope of Article 10.20.4(c). The burden is thus on Claimants to prove the necessary and relevant facts to establish that this Tribunal has jurisdiction to hear their claims.⁵³

⁵² **Ex. AA-7**, Award, ¶¶ 103-104.

⁵³ *Id.*, ¶¶ 99-100 (emphasis in original).

58. Ultimately, the Tribunal dismissed all of Claimants' claims at the Preliminary Questions Phase under Article 10.20.4 of the Treaty, rendering all of Claimants' claims inadmissible and eliminating the need for the Tribunal to address the merits or any of the Jurisdictional Objections raised by Colombia. The Tribunal's reasoning is set out below.

2. The Indictment Order (*Auto de Imputación*) Was Not a "Measure" Capable of Constituting a Breach of the Treaty

59. The Tribunal began by addressing the first prong of Colombia's Preliminary Objection: that an award could not be made in Claimants' favor because the requirements of Article 10.16.1 of the Treaty had not been met.⁵⁴

60. Citing to Article 10.16.1(a) of the Treaty, the Tribunal determined that "for a claim to be admissible, a measure capable of constituting a Treaty breach must have existed as of the date of the submission."⁵⁵ Thus, the Tribunal proceeded to "analyse whether, as of the day of the submission of the present Request for Arbitration, a measure capable of constituting a Treaty breach existed."⁵⁶ For the Tribunal, the answer was "no."

61. The Tribunal started by recapping the Parties' arguments as to the issue of ripeness:

Claimants contend that nothing further than what has been set forth in the Request for Arbitration is required for their claims to be sufficiently "ripe" and that more recent events in connection with the Fiscal Liability Proceedings have only exacerbated the violations of law committed by Colombia.

Colombia, however, argues that, according to Article 10.16.1 of the TPA, the submission of a valid claim to arbitration requires that a substantive obligation under the Treaty had been breached as of the date of the submission. At the time

⁵⁴ *Id.*, ¶¶ 106 *et seq.*

⁵⁵ *Id.*, ¶ 204.

⁵⁶ *Id.*, ¶ 204.

Claimants filed their Notice of Arbitration, Claimants had failed to identify any measure in the Fiscal Liability Proceedings capable of constituting such a breach, since at that moment, only the Indictment Order, which is a procedural administrative act that did not define any legal situation, had been issued.

According to Respondent, despite the fact that the CGR issued the Ruling with Fiscal Liability on July 6, 2021, months after the commencement of this arbitration, Claimants' claim remains premature as any administrative act that is subject to subsequent judicial control cannot constitute a breach under the Treaty.⁵⁷

62. The Tribunal then noted that “there [wa]s no dispute between the Parties that, at the time the arbitration was initiated, only the Indictment Order had been issued and a final administrative decision was still pending.”⁵⁸ As Respondent repeatedly explained — and Claimants never disputed — the Indictment Order (*Auto de Imputación*) was not a final administrative act but rather a mere procedural administrative act (*acto administrativo de trámite*) that did not define any legal situation.⁵⁹ In the Tribunal’s words, for Claimants’ claims to be admissible, “[a] final administrative act had to be in existence at the time of the filing of the Request for Arbitration, **and it was not.**”⁶⁰ The Indictment Order (*Auto de Imputación*) therefore did not constitute a “measure” giving rise to a breach of the Treaty.

3. The Ruling with Fiscal Liability Was Also Not a “Measure” Capable of Constituting a Breach of the Treaty

63. The Tribunal’s conclusion that there was no final administrative act in existence at the time Claimants filed their Request for Arbitration — and therefore no measure capable of constituting a breach of the Treaty — was enough to dismiss the entirety of their claims.

⁵⁷ *Id.*, ¶¶ 200-202 (emphasis added).

⁵⁸ *Id.*, ¶ 207.

⁵⁹ See *id.*, p. 22, n. 36.

⁶⁰ *Id.*, ¶ 221 (emphasis added).

64. Nevertheless, the Tribunal also addressed whether the Ruling with Fiscal Liability (issued *after* Claimants filed their Request for Arbitration) constituted a “measure” capable of constituting a breach of the Treaty, reaching the same conclusion: it did not constitute such a measure.

65. While the Tribunal recognized that evidence supporting a claim might in certain cases become available only after the filing of the request for arbitration, it made clear that this circumstance did not operate as “a blank check allowing a claimant to introduce documents periodically throughout the arbitration,”⁶¹ and that the **“introduction of [evidence relevant to admissibility that was only obtained after the relevant filing] may not be considered in ascertaining the fulfilment of the prerequisites under the Treaty.”**⁶²

66. Agreeing with the United States NDP Submission and Colombia’s comments thereon,⁶³ rendered in their respective capacities as States Parties to the Treaty, the Tribunal determined that a non-final act cannot establish the international responsibility of a State “unless recourse to further domestic remedies is obviously futile or manifestly ineffective.”⁶⁴ In the Tribunal’s opinion, Respondent provided “several examples of rulings with fiscal liability issued by the Deputy Comptroller that have been rendered ineffective or reversed, in whole or in part, following a prosecution of judicial remedies,”⁶⁵ while Claimants did not present evidence to substantiate their allegations of futility.⁶⁶

⁶¹ *Id.*, ¶ 205.

⁶² *Id.*, ¶ 206 (emphasis added).

⁶³ **Ex. RA-21**, Submission of the United States of America in the Underlying Arbitration, April 4, 2022, ¶ 5; **Ex. RA-22**, Colombia’s Comments on the Non-Disputing Party Submission of the United States of America, April 25, 2022, ¶ 9.

⁶⁴ **Ex. AA-7**, Award, ¶ 217.

⁶⁵ *Id.*

⁶⁶ *Id.*

67. Addressing Claimants' denial of justice claim specifically, the Tribunal disagreed with Claimants' interpretation of Article 10.5.2(a) of the Treaty, explaining that "the administrative adjudicatory proceeding referred to in Article 10.5.2(a) is a judicial proceeding before the administrative adjudicatory jurisdiction, and not an administrative proceeding as the Fiscal Liability Proceeding."⁶⁷

68. The Tribunal supported its conclusion by pointing to the Spanish version of Article 10.5.2(a) of the Treaty, reading Article 10.5.2(a) as a whole, and noting the terminology used in other provisions of the Treaty, as follows:

- "the expression used in the Spanish version of the Treaty is helpful to confirm such understanding in so far as '*procedimiento contencioso administrativo*' unequivocally means a proceeding initiated before a national court."⁶⁸
- "It is clear from the text of [Article 10.5.2(a)] that the obligation not to deny justice encompasses all of criminal, civil and administrative *adjudicatory* proceedings."⁶⁹
- "When [other provisions of Chapter 10 of the Treaty] refer specifically to purely administrative proceedings, as opposed to judicial proceedings, it makes reference to 'administrative proceedings' and 'administrative process.' The only instance in which the expression 'administrative adjudicatory proceedings' is used is in Article 10.5.2(a) which, when read in conjunction with 'criminal, civil, or' must refer to judicial proceedings."⁷⁰

69. Since, for the Tribunal, "the obligation not to deny justice established in the Treaty is limited to proceedings of a judicial nature before national courts and does not cover purely administrative proceedings,"⁷¹ and Colombian courts had yet to intervene with respect

⁶⁷ *Id.*, ¶ 210.

⁶⁸ *Id.*, ¶ 211 (emphasis in original).

⁶⁹ *Id.*, ¶ 212 (emphasis added).

⁷⁰ *Id.*, ¶ 213.

⁷¹ *Id.*, ¶ 214.

to the Ruling with Fiscal Liability, it could not “be considered that there could be a denial of justice under customary international law.”⁷²

70. “Even if one might argue that subsequent events could ripen a claim after the commencement of the arbitration”⁷³ because “the Ruling with Fiscal Liability could be overturned after judicial review, it **cannot constitute** a denial of justice or **a breach of any of the other substantive obligations under the Treaty alleged by Claimants.**”⁷⁴

4. The Tribunal’s Decision: Claimants’ Claims Are Unripe and Inadmissible, Making it Unnecessary to Review the Remainder of Colombia’s Objections

71. Ultimately, for the Tribunal, “the absence of a measure capable of constituting a breach of a substantive obligation under the TPA by Respondent at the time the arbitration was initiated ma[de] Claimants’ claim premature and inadmissible.”⁷⁵

72. Given its finding that Claimants’ claims were premature and inadmissible, the Tribunal determined that it did not need to analyze the second requirement for submission of a claim to arbitration under Article 10.16.1(a) (*i.e.*, whether loss or damage existed at the time the claim was submitted to arbitration)⁷⁶ or the second prong of Colombia’s Preliminary Objection (*i.e.*, whether Claimants’ claims exceed the forms of relief that the Tribunal is empowered to grant under Article 10.26 of the Treaty).⁷⁷

⁷² *Id.*, ¶ 215.

⁷³ *Id.*, ¶ 216.

⁷⁴ *Id.*, (emphasis added).

⁷⁵ *Id.*, ¶ 219.

⁷⁶ *Id.*, ¶ 223.

⁷⁷ *Id.*, ¶ 224.

73. For the remainder of the Award, the Tribunal outlined each of the five Jurisdictional Objections, setting forth Respondent's and Claimants' arguments.⁷⁸ However, given "[its] decision regarding the inadmissibility of the claims when appraising the Preliminary Objection," the Tribunal determined it need not examine the merits of Respondent's Jurisdictional Objections.⁷⁹

D. Overview of Applicants' Annulment Request

74. On January 19, 2026, Applicants filed their Memorial on Annulment (the "Memorial"). The Memorial is organized around a series of alleged acts or omissions of the Tribunal, which Applicants allege each meet one of three stated grounds for annulment (serious departure from fundamental rules of procedure; manifest excess of powers; and failure to state reasons) under Article 52 of the ICSID Convention. According to Applicants, these acts or omissions include (i) the Tribunal's alleged reliance on expedited proceedings to dismiss the claims; (ii) the Tribunal's allegedly incorrect application of the Treaty's provisions, specifically its interpretation of "administrative adjudicatory proceedings" and the alleged imposition of an exhaustion of local remedies requirement; (iii) the Tribunal's decisions on evidentiary matters; (iv) the Tribunal's alleged contradictory reasoning on the status of the fiscal liability proceedings (which Applicants call the "CGR proceedings"); (v) the

⁷⁸ *Id.*, ¶¶ 225 *et seq.*

⁷⁹ *Id.*, ¶¶ 236 (addressing Respondent's first Jurisdictional Objection: Claimants do not have a protected investment under the Treaty and the ICSID Convention), 247 (addressing Respondent's second Jurisdictional Objection: Claimant FPJVC does not qualify as a "juridical person" under Article 25(2)(b) of the ICSID Convention), 255 (addressing Respondent's third Jurisdictional Objection: the Notice of Intent was only sent by FPJVC and not by the other Claimants), 269 (addressing Respondent's fourth Jurisdictional Objection: Claimants have definitely elected to submit their claim for breach of FET to the Colombian Courts), 283 (addressing Respondent's fifth Jurisdictional Objection: Claimants' waiver is invalid, and thus there is no consent to submit their claim to arbitration under the Treaty).

Tribunal's alleged failure to rule on all of Claimants' claims, including the Amended Request for Arbitration; and (vi) the Tribunal's delay in rendering the Award.

75. Applicants' primary complaint is that the dispute was too "complex" for the Tribunal to employ the expedited disposition mechanism under Article 10.20.4 of the TPA.⁸⁰ Applicants emphasize that the interpretation of "administrative adjudicatory proceedings" is a "complex" legal question and that the question of whether exhaustion of local remedies is required involves mixed questions of law and fact.⁸¹

76. Next, Applicants challenge the Tribunal's interpretation of the term "administrative adjudicatory proceedings," contending that the Tribunal's interpretation failed to apply the rules of customary international law regarding the interpretation of treaties,⁸² and was so "egregiously wrong as to constitute a failure to apply the proper law."⁸³ Applicants argue that the fiscal liability proceedings (which Applicants call the "CGR proceedings"), which involve written briefs, evidentiary hearings, and the imposition of monetary liability, constitute adjudicatory proceedings and therefore should be covered by the Treaty's denial of justice provision.⁸⁴ Applicants further argue that "administrative process" is a broad term encompassing both rulemaking and adjudication.⁸⁵ Applicants cite Decision No. 9 of the Free Trade Commission of the TPA dated January 15, 2025 ("Decision No. 9 of the Free Trade Commission") to claim that Colombia took a contradictory position on the Treaty's meaning during the Arbitration.⁸⁶ Applicants also argue that the Tribunal imposed a

⁸⁰ Memorial on Annulment, ¶¶ 129-140.

⁸¹ *Id.*

⁸² *Id.*, ¶¶ 162-184.

⁸³ *Id.*, ¶¶ 169-184.

⁸⁴ *Id.*, ¶ 171.

⁸⁵ *Id.*, ¶ 177.

⁸⁶ *Id.*, ¶¶ 182-184.

requirement to exhaust local remedies that does not exist in the TPA.⁸⁷ They contend that Article 26 of the ICSID Convention permits exhaustion of local remedies requirements only if expressly stated in the underlying treaty.⁸⁸ Applicants further argue that the TPA's fork-in-the-road provision is inconsistent with an exhaustion of local remedies requirement.⁸⁹ Applicants also note that other investment treaties to which Colombia is a party explicitly require exhaustion of local remedies, suggesting deliberate omission in the TPA in the eyes of Applicants.⁹⁰

77. Applicants have several complaints regarding the Tribunal's treatment of evidence and burdens of proof.⁹¹ Citing Article 10.20.4(c) of the Treaty, Applicants contend that the Tribunal improperly required them to prove that pursuing local remedies would be futile or ineffective, rather than assuming the truth of their factual allegations at the Preliminary Questions Phase.⁹² Applicants also argue that the Tribunal disregarded evidence, specifically the Torrente Witness Statements, the CGR's former General Counsel, which detailed difficulties in pursuing Colombian judicial remedies.⁹³

78. Applicants allege the Tribunal's reasoning regarding the fiscal liability proceedings to be contradictory.⁹⁴ They point to the Tribunal's finding that the administrative

⁸⁷ *Id.*, ¶¶ 112-118.

⁸⁸ *Id.*, ¶¶ 113-114.

⁸⁹ *Id.*, ¶ 116.

⁹⁰ *Id.*, ¶ 188.

⁹¹ *Id.*, ¶¶ 119, 128, 198-204.

⁹² *Id.*, ¶¶ 121-122.

⁹³ *Id.*, ¶¶ 127, 201-203.

⁹⁴ *Id.*, ¶¶ 205-209.

appeal of the fiscal liability proceedings was exhausted, compared to its finding that no final administrative act existed at the time Claimants filed their Request for Arbitration.⁹⁵

79. A central aspect of Applicants' request concerns the Tribunal's alleged failure to substantively address the claims on the merits.⁹⁶ Applicants contend the Tribunal addressed only the denial of justice component of the FET claim and dismissed all other claims — including national treatment, indirect expropriation, umbrella clause, and breach of investment agreement — without substantive analysis, relying instead on a formulaic reference to the denial of justice finding.⁹⁷ Applicants argue that the Tribunal's approach violated their right to be heard.⁹⁸ Applicants also fault the Tribunal for failing to address their alleged ancillary claims filed under ICSID Arbitration Rule 40, even though the Tribunal confirmed the Amended Request for Arbitration was part of the record.⁹⁹

80. Finally, Applicants complain that the Tribunal's delay in issuing the award constituted a departure from a fundamental rule of procedure.¹⁰⁰

⁹⁵ *Id.*

⁹⁶ *Id.*, ¶¶ 142-151.

⁹⁷ *Id.*

⁹⁸ *Id.*, ¶¶ 101-111.

⁹⁹ *Id.*, ¶¶ 152-158.

¹⁰⁰ *Id.*, ¶¶ 138-140.

III. LEGAL BACKGROUND APPLICABLE TO APPLICANTS' ANNULMENT REQUEST

81. Before addressing Applicants' grounds for annulment in detail, Respondent sets out the legal framework governing annulment proceedings under the ICSID Convention. Section A describes the nature of annulment and its limited scope — the essential backdrop against which each of Applicants' grounds must be assessed. Sections B, C, and D address, respectively, the three specific grounds Applicants invoke in their Memorial on Annulment: manifest excess of powers under Article 52(1)(b), failure to state reasons under Article 52(1)(e), and serious departure from a fundamental rule of procedure under Article 52(1)(d). Lastly, Section E discusses the inadmissibility of annulment grounds based on purported irregularities that Applicants failed to invoke before the Tribunal.

A. The Nature of Annulment and Its Limited Scope

1. Annulment Is an Extraordinary Remedy, Not an Appeal

82. A fundamental objective of the ICSID Convention is assuring the finality of ICSID awards.¹⁰¹ Pursuant to Article 53 of the ICSID Convention, an award is “binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in [the] Convention.”¹⁰² In that context, annulment is an “exceptional recourse that should respect the finality of the award,”¹⁰³ which was “designed purposefully to confer a limited scope of review which would safeguard against ‘violation of the fundamental

¹⁰¹ **Ex. RALA-1**, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, March 2024 (“Updated Background Paper on Annulment”), ¶ 77 (“[T]he drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system.”).

¹⁰² **Ex. AALA-6**, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), Article 53.

¹⁰³ **Ex. RALA-2**, *Impregilo S.p.A v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision on Annulment, January 24, 2014 (“*Impregilo v. Argentina*”), ¶ 118.

principles of law governing the Tribunal's proceedings'.¹⁰⁴ As the ICSID Secretariat explains:

The drafting history of the ICSID Convention also demonstrates that annulment “is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment].” It does not provide a mechanism to appeal alleged misapplication of law or mistake in fact. The Legal Committee confirmed by a vote that even a “manifestly incorrect application of the law” is not a ground for annulment.¹⁰⁵

83. Consistent with this limited scope and purpose, annulment is “an extraordinary remedy” that is reserved “for unusual and important cases”¹⁰⁶ in which “egregious violations of certain basic principles” threaten the “integrity of ICSID proceedings” and the “legitimacy of the process of a decision.”¹⁰⁷ Complaints falling short of this high standard cannot form the basis of an annulment.

84. Accordingly, annulment does not serve as a remedy for challenging decisions that a party considers incorrect. The final decision on the matters in dispute, including questions of jurisdiction, admissibility, and merits, rests with the tribunal pursuant to the parties' agreement to submit their dispute to ICSID arbitration. Contrary to national court systems that use appellate mechanisms to ensure a correct and unitary interpretation of the

¹⁰⁴ **Ex. RALA-1**, Updated Background Paper on Annulment, ¶ 77.

¹⁰⁵ **Ex. RALA-1**, Updated Background Paper on Annulment, ¶ 78.

¹⁰⁶ **Ex. RALA-3**, Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS 17 (E. Galliard and Y. Banifatemi eds., Juris Publishing 2004), p. 17; **Ex. RALA-4**, *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005 (“*CDC v. Seychelles*”), ¶ 34.

¹⁰⁷ **Ex. RALA-5**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015 (“*Tulip v. Turkey*”), ¶¶ 39-43. See also **Ex. AALA-33**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007 (“*Soufraki v. United Arab Emirates*”), ¶ 27.

law, ICSID annulment committees do not have that purpose. Instead, their purpose is to ensure the integrity of the arbitral procedure. To that end, the role of an ICSID annulment committee is circumscribed by the five grounds listed in Article 52(1) of the ICSID Convention that provide the sole bases for annulling an award. As the committee in *MTD v. Chile* noted:

Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal.¹⁰⁸

85. Many other committees have made these points in similar terms:

- The grounds for annulment listed in Article 52(1) are “exhaustive and restrictive” and do not permit any form of substantive review by a committee of the merits of the underlying award.¹⁰⁹
- A committee cannot “substitute its own view of the law and its own appreciation of the facts for those of the tribunal.”¹¹⁰

¹⁰⁸ **Ex. CL-98**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007 (“*MTD v. Chile*”), ¶ 31. See also **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 20 (“It is not contested by the parties that the annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award. In other words, it is not contested that ‘. . . an *ad hoc* committee does not have the jurisdiction to review the merits of the original award in any way. The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings.”); **Ex. RALA-6**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2016 (“*EDF v. Argentina*”), ¶¶ 64-65.

¹⁰⁹ **Ex. RALA-2**, *Impregilo v. Argentina*, ¶ 118; **Ex. RALA-5**, *Tulip v. Turkey*, ¶¶ 41-44; **Ex. RALA-6**, *EDF v. Argentina*, ¶¶ 67, 143.

¹¹⁰ **Ex. AALA-51**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007 (“*CMS v. Argentina*”), ¶ 136; **Ex. CL-98**, *MTD v. Chile*, ¶ 54 (“[T]he role of an *ad hoc* committee in the ICSID system is a limited one. It cannot substitute its determination on the merits for that of the tribunal.”); **Ex. AALA-11**, *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, October 19, 2009 (“*M.C.I. v. Ecuador*”), ¶ 24 (“[T]he role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness. The committee cannot for example substitute its determination on the merits for that of the tribunal”); **Ex. AALA-27**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007 (“*Lucchetti v. Peru*”), ¶ 97 (“[I]t is no part of the Committee’s functions to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal . . .”).

- The annulment mechanism “is not designed to bring about consistency in the interpretation and application of international investment law,”¹¹¹ and is certainly “not a remedy against an incorrect decision.”¹¹²
- Even if a committee were to consider that a tribunal has made evident errors of fact or law, a committee cannot intervene and must “resist the temptation to rectify incorrect decisions or to annul unjust awards.”¹¹³

86. The mandate of this Committee is therefore extremely limited.

2. Committees Are Not Empowered to Review the Merits of the Underlying Arbitration

87. Due to the limited power of committees as described above, (a) committees cannot consider new evidence or arguments on the merits, (b) nor can they reassess the probative value of evidence that was in the record of the underlying arbitration.

a. New Evidence or Arguments on the Merits Are Irrelevant to Annulment Proceedings

88. A committee must base its analysis on “the record before the Tribunal”¹¹⁴ — nothing more. No new evidence or arguments on the merits of the underlying arbitration can be submitted to the annulment committee. In *Vieira v. Chile*, the committee found:

[A]ny new argument or new evidence on the merits of the dispute will be irrelevant to the annulment proceeding.¹¹⁵

89. Likewise, the *Sempra v. Argentina* committee held:

¹¹¹ **Ex. AALA-11**, *M.C.I. v. Ecuador*, ¶ 24.

¹¹² **Ex. AALA-57**, *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, December 22, 1989 (“*MINE v. Guinea*”), ¶ 4.04.

¹¹³ **Ex. RALA-7**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Second Annulment Proceeding), Decision on Annulment of Award and of Supplemental Award, December 3, 1992, ¶ 1.18.

¹¹⁴ **Ex. CL-98**, *MTD v. Chile*, ¶ 31 (“Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal.”) (emphasis added).

¹¹⁵ **Ex. RALA-8**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision on the Application for Annulment, December 10, 2010, ¶ 237 (translation from Spanish).

New arguments or evidence on the merits will therefore be irrelevant for the annulment process, and therefore not admissible.¹¹⁶

90. Leading commentators have similarly confirmed that no new evidence or arguments on the merits may be introduced in annulment proceedings. In his well-known Commentary on the ICSID Convention, Professor Schreuer states:

[A] party may not present new arguments on fact and law that it failed to put forward in the original arbitral proceeding. . . . Nor should a party present new contemporaneous evidence, since annulment takes as its premise “the record before the tribunal.”¹¹⁷

91. Similarly, Bishop and Marchili, in their treatise devoted exclusively to annulment under the ICSID Convention, state:

Given that annulment is not an appellate mechanism, the applicant is not entitled to advance new arguments on the issues before the tribunal or present new evidence that was not submitted during the original proceeding.¹¹⁸

92. Thus, when a committee is called upon to determine whether a tribunal manifestly exceeded its powers, failed to state reasons, or seriously departed from a fundamental rule of procedure — as is the case here — that determination must be based solely on the record before the tribunal, and not on new evidence or arguments on the merits that were not before that tribunal.

¹¹⁶ **Ex. RALA-9**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Application for Annulment of the Award, June 29, 2010 (“*Sempra v. Argentina*”), ¶ 74.

¹¹⁷ **Ex. RALA-10**, Christoph Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY (2nd ed., Cambridge University Press 2009), p. 932, ¶ 108 (emphasis added). See also *id.*, p. 902, ¶ 12.

¹¹⁸ **Ex. RALA-11**, R. Doak Bishop and Silvia M. Marchili, ANNULMENT UNDER THE ICSID CONVENTION (Oxford University Press 2012), p. 199, ¶¶ 10.08, 10.13 (emphasis added).

b. Committees Cannot Reassess the Probative Value of Evidence Already in the Record of the Arbitration

93. Another important principle relating to the scope of review of an award under Article 52 of the ICSID Convention is that committees cannot reassess the probative value of evidence already in the record of the arbitration. ICSID Arbitration Rule 34(1) provides that the tribunal is the judge of the probative value of the evidence produced by the parties.¹¹⁹

The *Wena v. Egypt* committee recalled this fundamental principle as follows:

Irrespective whether the matter is one of substance or procedure, it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party. Arbitration Rule 34(1) recalls that the Tribunal is the judge of the probative value of the evidence produced.¹²⁰

94. Committees do not have authority to review the original tribunal's factual findings or to reassess the probative value of the evidence submitted in the underlying arbitration.¹²¹ The *Rumeli v. Kazakhstan* committee held in that regard:

An ad hoc committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties. . . . Where, as here, the question of jurisdiction depends not on a question of law but rather on an appreciation of the evidence, it would not be proper for an ad hoc

¹¹⁹ **Ex. AALA-2**, ICSID, Rules of Procedure for Arbitration Proceedings (2006), Rule 34(1) ("The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.").

¹²⁰ **Ex. AALA-7**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB 98/4, Decision on Annulment, February 5, 2002 ("*Wena v. Egypt*"), ¶ 65. See also **Ex. RALA-5**, *Tulip v. Turkey*, ¶ 84.

¹²¹ See for example **Ex. RALA-12**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, August 22, 2018 ("*Standard Chartered Bank v. Tanzania*"), ¶ 61 ("Therefore, an annulment proceeding is not concerned with how the tribunal appreciated the arguments and evidence submitted by the parties or the conclusion it arrived therefrom. Instead, it is merely concerned that such assessment or evaluation indeed took place, on a fair and equitable basis, and that the findings of the Tribunal were based in its appreciation and analysis of said evidence and arguments, and thus is not arbitrary.").

committee to overturn a tribunal's treatment of the evidence to which it was referred.¹²²

95. Scholars have also noted that if the issue submitted to the committee “requires examination of the materials on which the tribunal’s decision is based, the tribunal’s determination is conclusive.”¹²³

96. While reviewing Applicants’ annulment grounds, this Committee should therefore not consider new arguments or evidence that Claimants failed to raise in the underlying Arbitration, nor engage into a *de novo* review of the Tribunal’s findings.

3. Applicants Have the Burden of Proof Under a High Threshold

97. The burden of establishing that one or more grounds for annulment under Article 52(1) of the ICSID Convention is satisfied rests entirely on the applicant. Following the general principle of *onus probandi incumbit ei qui dicit, non ei qui negat*,¹²⁴ committees have consistently held that it is for the party seeking annulment to prove each ground it invokes. That burden is not a light one. Annulment is an “extraordinary remedy with a high threshold.”¹²⁵

¹²² **Ex. RALA-13**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the ad hoc Committee, March 25, 2010 (“*Rumeli v. Kazakhstan*”), ¶ 96 (emphasis added).

¹²³ **Ex. RALA-14**, Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2(1) ICSID REVIEW — FOREIGN INVESTMENT LAW JOURNAL 85 (1987), p. 101.

¹²⁴ **Ex. RALA-15**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021 (“*Perenco v. Ecuador*”), ¶ 61 (“Following the general principle *onus probandi incumbit ei qui agit non qui negat*, the Applicant has the burden of demonstrating that the Award or any part thereof should be annulled under one or more of the grounds provided in Article 52(1) of the ICSID Convention.”). See also **Ex. RALA-16**, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, November 21, 2018, ¶ 238 (“Thus, the practice of ICSID annulment committees has confirmed that the grounds of annulment listed in Article 52 are exclusive, and that it is the applicant that carries the burden of proof in establishing that any of the annulment grounds it invokes exist.”); **Ex. RALA-1**, Updated Background Paper on Annulment, p. 45 [of the PDF].

¹²⁵ **Ex. RALA-17**, *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Partial Annulment, September 29, 2016 (“*Poštová v. Greece*, Decision on Partial Annulment”), ¶ 127; **Ex. RALA-18**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian*

98. Accordingly, Applicants bear not only the burden of establishing each ground they allege but must do so within the narrowly circumscribed and under the exacting standard governing the limited scope of this Committee's review.¹²⁶

4. Annulment is a Discretionary Remedy

99. Even if an annulment committee were persuaded that the applicant has met the high threshold of establishing that one of the annulment grounds in Article 52(1) of the ICSID Convention applies, the committee is not required to annul the Award but retains some flexibility and discretion in determining whether annulment is appropriate.¹²⁷ This discretion stems from Article 52 of the ICSID Convention, which gives committees the “authority to annul” awards, but does not compel annulment.¹²⁸ Article 52(3) of the ICSID Convention provides that:

Republic of Venezuela (II), ICSID Case No. ARB/12/23, Decision on Annulment, December 28, 2018 (“*Tenaris v. Venezuela (II)*”), ¶ 43; **Ex. RALA-19**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, March 28, 2022 (“*Cube v. Spain*”), ¶ 92 (“... [A]nnulment is an exceptional and narrowly circumscribed remedy and that annulment proceedings cannot be equated with appeal proceedings.”).

¹²⁶ **Ex. RALA-1**, Updated Background Paper on Annulment, ¶ 77 (“[T]he drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system. As a result, annulment was designed purposefully to confer a limited scope of review which would safeguard against ‘violation of the fundamental principles of law governing the Tribunal’s proceedings.’”) (emphasis added). See also *id.*, pp. 49-50, 74-75.

¹²⁷ See for example **Ex. RL-133**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic I*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 (“*Vivendi v. Argentina (I)*, Decision on Annulment”), ¶ 66 (“[I]t appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annulable error is found.”); **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 37 (“[T]he *ad hoc* Committees operating during the last two decades have considered that a Committee has discretion to determine not to annul an Award even where a ground for annulment under Article 52(1) is found to exist.”) (internal citation omitted).

¹²⁸ **Ex. RALA-6**, *EDF v. Argentina*, ¶ 73 (“The Committee considers that the italicised words [shall have the authority to annul] clearly indicate that committees were intended to have a degree of discretion. To say that a committee ‘shall have the authority to annul the award’ is very different from saying that a committee ‘shall annul the award’. Moreover, the Committee notes that other *ad hoc* committees have proceeded on the basis that annulment was not mandatory and that they enjoyed a discretion whether or not to annul the award under consideration. The Committee concludes that, even if an Article 52(1) ground is made out, it nevertheless retains a discretion as to whether or not to annul the award.”).

The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

100. Numerous committees have confirmed that, even where a ground for annulment is established, “an annulment need not be the necessary outcome in all circumstances.”¹²⁹ When exercising this discretion, committees should take into account all relevant factors, including the gravity of the circumstances that constitute ground for annulment, whether the established defects had or could have had a material effect on the outcome of the case, and the “overall question of fairness to both Parties.”¹³⁰

101. Therefore, even assuming Applicants established one of their grounds for annulment — which they have not — this Committee would retain discretion to decline to annul the Award. That discretion is particularly apposite in the present case, where Applicants have already filed a second ICSID arbitration against Colombia arising out of the same dispute. They are already pursuing a second bite at the apple. Annulment would give them a third.

B. Manifest Excess of Powers

102. A “manifest excess of powers” within the meaning of Article 52(1)(b) of the ICSID Convention occurs when a tribunal acts beyond the scope of its authority in

¹²⁹ **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 24. See also **Ex. RALA-20**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic’s Request for Annulment of the Award rendered on 20 August 2007, August 10, 2010, ¶ 252 (“[E]ven in the case of annulable error, the *ad hoc* Committee still has a measure of discretion under Article 52(3) in ordering annulment or in refusing to do so.”); **Ex. AALA-57**, *MINE v. Guinea*, ¶ 4.10 (“An *ad hoc* Committee retains a measure of discretion in ruling on applications for annulment.”).

¹³⁰ **Ex. RALA-6**, *EDF v. Argentina*, ¶ 73; **Ex. RALA-21**, *Victor Pey Casado and Foundation Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2 (Second Annulment Proceeding), Decision on Annulment, January 8, 2020 (“*Pey Casado v. Chile*, Second Decision on Annulment”), ¶ 210.

contravention of the parties' consent to arbitration.¹³¹ Article 52(1)(b) requires a two-step inquiry that considers: (i) whether the tribunal acted in excess of its powers beyond the parties' consent; and, if so, (ii) whether such excess of powers was "manifest."¹³²

103. As discussed below, the cases and commentaries addressing ICSID Article 52(1)(b) confirm that Article 52(1)(b) requires a showing that the excess was "manifest" in the sense of being clear, obvious, and discernible without extensive analysis of the award. Given that requirement, this ground does not permit committees to undertake a *de novo* review of a tribunal's decisions — including on jurisdictional matters — so as to reassess their correctness, whether in respect of findings of fact or the interpretation and application of the law. Further, because the excess of powers must be manifest, a tribunal

¹³¹ **Ex. RL-252**, ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, VOL II, PART 1 (ICSID 2009) ("HISTORY OF THE ICSID CONVENTION, VOL II-1"), p. 517 ("[T]he drafters had intended by the words '*excès de pouvoir*' to refer to the case where a decision of the tribunal went beyond the terms of the *compromis* or compromisory clause." (emphasis in original)); **Ex. RL-253**, ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, VOL II, PART 2 (ICSID 2006) ("HISTORY OF THE ICSID CONVENTION, VOL II-2") p. 850 ("Mr. BROCHES (Chairman) said that the expression 'manifestly exceeded its powers' concerned the cases referred to earlier as *ultra petita*, namely, where the Tribunal would have gone beyond the scope of agreement of the parties or would have decided points which had not been submitted to it or had been improperly submitted to it.") (emphasis omitted); **Ex. AALA-31**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad-hoc Committee, June 14, 2010, ¶ 40 ("The question whether an ICSID arbitral tribunal has exceeded its powers is determined by reference to the agreement of the parties. It is that agreement or *compromis* from which the tribunal's powers flow, and which accordingly determines the extent of those powers."); **Ex. RALA-22**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, February 12, 2015, ¶ 76 ("*Tza Yap Shum v. Peru*") ("More generally, an excess of powers occurs every time the powers exercised by the arbitrators are not those which have been granted to them. It follows that an arbitral tribunal usurps its powers whenever it attributes to the parties agreements and declarations which they have not made."); **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 40 ("Essentially, a Tribunal's legitimate exercise of power is tied to the consent of the parties, and so it exceeds its powers where it acts in contravention of that consent (or without their consent, *i.e.*, absent jurisdiction)"). See also **Ex. AALA-32**, *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the Ad Hoc Committee, March 1, 2011 ("*Duke v. Peru*"), ¶ 95; **Ex. RALA-5**, *Tulip v. Turkey*, ¶ 55; **Ex. RALA-1**, Updated Background Paper on Annulment, ¶ 87.

¹³² See for example **Ex. AALA-55**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016 ("*TECO v. Guatemala*"), ¶ 76; **Ex. RALA-23**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, February 1, 2016 ("*Total v. Argentina*"), ¶ 171.

decision that follows established legal authorities on an issue where there are diverging opinions is *prima facie* not subject to annulment. In addition to establishing that high standard, the authorities cited below further support the view that the ground applies only where the excess of powers had serious consequences on the outcome of the award. We will delve into each of these requirements, below.

1. The Meaning of “Manifest”

104. Consistent with the “extraordinary remedy” offered by annulment as described above, the drafters of the ICSID Convention made a conscious effort to limit annulment to “very rare cases because in the ordinary course of events the award should be treated as final.”¹³³ To reflect this underlying principle in the specific ground for annulment of excess of powers, the drafters included the term “manifestly” to “make the section more restrictive” and thus minimize the “risk of frustration of awards.”¹³⁴

a. The Excess of Power Is Not “Manifest” if the Solution Adopted by The Tribunal, Even if Incorrect, Is Debatable or Tenable

105. Against this background, the “manifest” requirement is a safeguard of the finality of awards, with committees interpreting it as a limitation on their scope of review.¹³⁵ To reflect this high threshold and avoid transforming an annulment proceeding into an appeal, committees have read “manifest” — and Applicants agree with this reading —¹³⁶ as

¹³³ **Ex. RL-253**, HISTORY OF THE ICSID CONVENTION, VOL II-2, p. 852.

¹³⁴ **Ex. RL-252**, HISTORY OF THE ICSID CONVENTION, VOL II-1, p. 423.

¹³⁵ See for example **Ex. RALA-18**, *Tenaris v. Venezuela (II)*, ¶ 73 (“In the Committee’s mind, the term ‘manifest’ underlines the limited and exceptional character of an annulment as opposed to an appeal. The finality of an award must not be disturbed if the excess of power is not manifest. This objective must be taken into account when establishing the standard.”).

¹³⁶ Memorial on Annulment, ¶ 145.

requiring the excess of power to be “clear,” “obvious,” “plain on its face,” “textually obvious,” “self-evident” and discernible, “without the need for an elaborate analysis of the award.”¹³⁷

106. Numerous committees have confirmed that Article 52(1)(b) of the ICSID Convention sets a high threshold that does not allow for the second-guessing of tribunal decisions, ruling that an excess of powers cannot be “manifest” if the solution adopted by the tribunal — even if incorrect — is debatable or if more than one interpretation is possible:

- In *CDC v. Seychelles*, the committee observed: “If the issue is debatable or requires examination of the materials on which the tribunal’s decision is based, the tribunal’s determination is conclusive.”¹³⁸
- In *Duke v. Peru*, the committee held that “[a]n *ad hoc* committee will not therefore annul an award if the tribunal’s disposition on a question of law is tenable, even if the committee considers that it is incorrect as a matter of law A debatable solution is not amenable to annulment, since the excess of powers would not then be ‘manifest’.”¹³⁹
- In *Teinver v. Argentina* the committee found that “the fact that a tribunal has relied to make its decision on tenable solutions adopted in several previous cases may be considered as an indication that an excess of powers is not manifest.”¹⁴⁰
- The committee in *Rumeli v. Kazakhstan* concluded that “[a]n *ad hoc* committee will not annul an award if the tribunal’s approach is

¹³⁷ Ex. AALA-7, *Wena v. Egypt*, ¶ 25; Ex. RALA-4, *CDC v. Seychelles*, ¶ 41; Ex. RALA-23, *Total v. Argentina*, ¶ 173; Ex. AALA-55, *TECO v. Guatemala*, ¶ 77; Ex. AALA-33, *Soufraki v. United Arab Emirates*, ¶¶ 39-40; Ex. RALA-24, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014 (“*Alapli v. Turkey*”), ¶ 77; Ex. RALA-25, *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision on Annulment, June 29, 2012 (“*AES v. Hungary*”), ¶ 31; Ex. RALA-26, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Annulment, December 6, 2018 (“*OI European Group v. Venezuela*”), ¶ 187.

¹³⁸ Ex. RALA-4, *CDC v. Seychelles*, ¶ 41 (emphasis added).

¹³⁹ Ex. AALA-32, *Duke v. Peru*, ¶ 99 (emphasis added).

¹⁴⁰ Ex. RALA-27, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, May 29, 2019, ¶ 59 (emphasis added).

reasonable or tenable, even if the committee might have taken a different view on a debatable point of law.”¹⁴¹

- In *Wena v. Egypt*, the committee held: “[T]he excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.”¹⁴²
- In *Daimler v. Argentina*, the committee “consider[ed] that when more than one interpretation is possible, an award cannot be annulled on the ground that it suffers from an exercise of excess of powers, much less a manifest excess of powers.”¹⁴³
- In *Standard Chartered Bank v. Tanzania*, the committee recognized that “[i]t is widely accepted that, when ‘reasonable minds’ differ as to whether a tribunal has jurisdiction, the ‘manifest’ requirement is not fulfilled, and the excess of powers of the tribunal, even if it exists, does not amount to a ground for annulment.”¹⁴⁴
- In *Global Telecom v. Canada*, the committee reiterated the principle regarding jurisdictional matters and concluded that “if a tribunal proposes a tenable interpretation of a basis for its jurisdiction, it will be difficult for the excess of powers to be considered manifest.”¹⁴⁵
- In *Valores Mundiales v. Venezuela*, the committee similarly held: “[I]n cases where the determination of the Tribunal’s jurisdiction is a matter for debate or disagreement, it is not for the Committee to substitute its assessment for that of the Tribunal, even if it disagrees with it. If so, the Committee would be acting as an appellate judge in disregard of the qualifier ‘manifestly’.”¹⁴⁶

107. There is a clear and important reason for this standard. As indicated above, it is undisputed that the annulment mechanism “is not an appeal and therefore, is not a

¹⁴¹ **Ex. RALA-13**, *Rumeli v. Kazakhstan*, ¶ 96 (emphasis added).

¹⁴² **Ex. AALA-7**, *Wena v. Egypt*, ¶ 25 (emphasis added).

¹⁴³ **Ex. AALA-58**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, January 7, 2015 (“*Daimler v. Argentina*”), ¶ 187 (emphasis added).

¹⁴⁴ **Ex. RALA-12**, *Standard Chartered Bank v. Tanzania*, ¶ 222.

¹⁴⁵ **Ex. RALA-28**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, September 30, 2022 (“*Global Telecom v. Canada*”), ¶ 59 (emphasis added).

¹⁴⁶ **Ex. RALA-29**, *Valores Mundiales S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Decision on Annulment, December 21, 2021, ¶ 122 (translation from Spanish; emphasis added).

mechanism to correct alleged errors of fact or law that a tribunal may have committed.”¹⁴⁷ Were a committee to annul an award on the ground that, with respect to a “debatable” issue or “tenable” interpretation adopted by a tribunal, the committee’s “understanding of facts or interpretation of law or appreciation of evidence is different from that of the Tribunal,” it would “cross the line that separates annulment from appeal.”¹⁴⁸

b. The Excess of Power Must Be Serious or Material to The Outcome of The Award

108. Other committees, such as the committee in *Soufraki v. United Arab Emirates*, have interpreted “manifest” as requiring not only that the excess of powers be “obvious” or “self-evident,” but also that it have “substantively serious” consequences on the award.¹⁴⁹ The committee in *Libananco v. Turkey* “concur[red] with the *Soufraki* annulment decision” in understanding “manifest” as implying “obvious” or “evident,” and in viewing “annulment as an exceptional measure [that] should not be resorted to unless the tribunal’s act or its failure to act has had, or at least may have had, serious consequences for a party.”¹⁵⁰ Similarly, in *Standard Chartered Bank v. Tanzania*, the committee found that “[i]n addition” to being “obvious” and “self-evident,” “manifest” requires that “the excess be serious or material to the outcome of the case.”¹⁵¹

109. Annulment under Article 52(1)(b) of the ICSID Convention is therefore warranted where the excess of powers was not only “manifest” but also had substantively

¹⁴⁷ **Ex. AALA-58**, *Daimler v. Argentina*, ¶ 188.

¹⁴⁸ *Id.*

¹⁴⁹ **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 40 (“It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.”) (emphasis added).

¹⁵⁰ **Ex. RALA-30**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Excerpts of Decision on Annulment, May 22, 2013 (“*Libananco v. Turkey*”), ¶ 102 (emphasis added).

¹⁵¹ **Ex. RALA-12**, *Standard Chartered Bank v. Tanzania*, ¶ 181, n. 190 (emphasis added).

serious consequences on the outcome of the Award. An excess of powers that would have had no bearing on the result cannot be a ground for annulment.

2. The Meaning of “Excess of Powers”

110. Turning back to the first element of the standard, an “excess of powers” occurs “when [a Tribunal] went beyond the scope of the parties’ arbitration agreement, decided points which had not been submitted to it, or failed to apply the law agreed by the parties.”¹⁵² Each of these instances is analyzed in more detail below.

a. Excess of Power with Respect to the Applicable Law

111. A tribunal can manifestly exceed its powers if it fails to “apply the proper law, or did not apply the law agreed upon by the parties.”¹⁵³ However, contrary to Applicants’ contention,¹⁵⁴ a “wrong” or “mistaken” application of the law does not constitute a manifest excess of powers and cannot lead to annulment.¹⁵⁵

112. The *travaux préparatoires* of the ICSID Convention confirm that conclusion. In the drafting process, one of the delegates proposed to include “manifestly incorrect application of the law” as an annulment ground.¹⁵⁶ That proposal was rejected, thereby

¹⁵² **Ex. RALA-1**, Updated Background Paper on Annulment, ¶ 87. See also **Ex. RALA-31**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Annulment, September 22, 2014 (“*El Paso v. Argentina*”), ¶ 138 (“The manifest excess of powers of an arbitral tribunal may take place when a Tribunal is resolving jurisdictional issues or issues concerning the merits of the case. This can happen when a tribunal rules on matters that the parties did not submit for its decision; when it did not to apply the proper law; or when it did not apply the law agreed on by the parties. In these cases, the excess of powers must be ‘manifest.’”); **Ex. AALA-55**, *TECO v. Guatemala*, ¶ 77 (“[T]he Committee finds that a tribunal commits an excess of powers: (i) if it goes beyond the parties’ consent by either exercising jurisdiction it does not have or by failing to exercise a jurisdiction which it possesses; or (ii) if it fails to apply the law agreed by the parties.”).

¹⁵³ See for example **Ex. RALA-2**, *Impregilo v. Argentina*, ¶ 125.

¹⁵⁴ See Memorial on Annulment, ¶ 160.

¹⁵⁵ See **Ex. RALA-1**, Updated Background Paper on Annulment, ¶¶ 90-91.

¹⁵⁶ **Ex. RL-253**, HISTORY OF THE ICSID CONVENTION, VOL II-2, pp. 853-854.

confirming that the drafters intended only a failure to apply the proper system of law — and not an incorrect interpretation or application of the law — to constitute a ground for annulment.¹⁵⁷

113. Committees have repeatedly made that point,¹⁵⁸ and have established that an excess of powers may only occur in a situation in which the tribunal failed to apply “the proper law *in toto*.”¹⁵⁹ A relevant example would be if the tribunal was required to apply a treaty but relied exclusively on domestic law instead. Thus, awards have been annulled for failure to apply the proper law only in extreme circumstances of “complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention.”¹⁶⁰ As the *Impregilo v. Argentina* committee concluded:

In the opinion of this Committee it is necessary to differentiate between a failure to apply the proper law and an error in

¹⁵⁷ *Id.*

¹⁵⁸ See for example **Ex. AALA-12**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad Hoc Committee Decision on the Application for Annulment, May 16, 1986, ¶ 23; **Ex. AALA-57**, *MINE v. Guinea*, ¶¶ 5.02-5.04; **Ex. RALA-4**, *CDC v. Seychelles*, ¶¶ 43, 45; **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 45; **Ex. RALA-26**, *OI European Group v. Venezuela*, ¶ 185; **Ex. RALA-31**, *El Paso v. Argentina*, ¶ 144; **Ex. RALA-2**, *Impregilo v. Argentina*, ¶ 131; **Ex. AALA-7**, *Wena v. Egypt*, ¶ 22; **Ex. AALA-51**, *CMS v. Argentina*, ¶¶ 49-52.

¹⁵⁹ **Ex. RALA-25**, *AES v. Hungary*, ¶ 35. See also **Ex. RALA-26**, *OI European Group v. Venezuela*, ¶ 185 (“[T]his Committee finds that an excess of powers of substantive nature may arise only from a complete failure to apply the correct body of law.”) (emphasis added); **Ex. AALA-32**, *Duke v. Peru*, ¶¶ 212-213 (“Nor can the Tribunal be criticized for having exceeded its mandate in applying the Civil Code to the resolution of this issue. On the contrary, the obligation upon a tribunal under Article 42(1) of the ICSID Convention to apply, *inter alia*, ‘the law of the Contracting State’ is a reference to the whole of that law, such as the Tribunal may determine to be relevant and applicable to the issue before it, and not to any particular portion of it. Peru may well disagree with the view that the Tribunal formed as to the correct solution of the issue before it under Peruvian law. But an *ad hoc* committee may not enter upon an assessment of whether a tribunal made a correct assessment of the content of the applicable law.”) (italics in original) (emphasis added).

¹⁶⁰ **Ex. AALA-51**, *CMS v. Argentina*, ¶ 49. See also **Ex. RALA-32**, *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017 (“*Mobil v. Venezuela*”), ¶ 189 (“The Tribunal exceeded its powers by failing to apply the proper law, and the ‘manifest’ nature of this failure is shown by the inadequacies in the Tribunal’s reasoning for the choice of applicable law, in both its positive (the law chosen) and negative (the law rejected) aspects.”); **Ex. RALA-9**, *Sempra v. Argentina*, ¶ 214; **Ex. AALA-37**, *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010 (“*Enron v. Argentina*”), ¶ 393.

applying the law. The first is a ground for annulment under Article 52, the second is not. Reviewing the substantive reasoning by which the Tribunal arrived at its conclusions would demand reviewing how the Tribunal applied the law or interpreted the same, resulting in the Committee acting as a court of appeal, thereby exceeding the powers granted to it by Article 52 of the ICSID Convention. In order to decide whether the Tribunal misapplied or misinterpreted the law to the matter decided, the Committee would necessarily have to evaluate the facts and evidence as well as the correctness of the legal principles submitted by the parties, assessed and applied by the Tribunal. Obviously that is the function of an appellate court and not of an Annulment Committee.¹⁶¹

114. In support of their argument that an error in the application of the law may lead, in certain circumstances, to annulment of an award, Applicants refer to the decisions in *Soufraki* and *M.C.I. v. Ecuador*.¹⁶² While these isolated decisions depart from the authorities reviewed above, in providing for a possibility of annulment on the basis of an incorrect application of the law, they set a very high threshold for such a finding, one that essentially requires the incorrect application to be tantamount to a failure to apply the law at all.

115. In *Soufraki*, the committee stated that “ICSID *ad hoc* committees have commonly been quite clear in their statements . . . that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the

¹⁶¹ **Ex. RALA-2**, *Impregilo v. Argentina*, ¶ 131 (emphasis added). See also **Ex. RALA-33**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment, and the Application for Partial Annulment, September 16, 2011 (“*Continental Casualty v. Argentina*”), ¶¶ 91-92 (“In the Committee’s view, it will amount to a non-application of the applicable law for a tribunal to apply, for instance, the law of State X to determine a dispute when the applicable law is in fact the law of State Y or public international law. However, if the applicable law is the law of State X, and if the tribunal in fact applies the law of State X, it is not the role of an annulment committee to determine for itself whether the tribunal correctly identified all of the provisions of the law of State X that were relevant to the case before it, or whether the tribunal gave adequate consideration to each of those specific provisions and to the relationship between them, since this would be to venture into an enquiry into whether the tribunal applied the law correctly. Questions as to the relevance of particular provisions of the applicable law, and of their legal effect and interaction with other provisions of the applicable law, go to the substantive legal merits of the case and are within the power of a tribunal to decide. A tribunal’s decision on such questions cannot amount to a manifest excess of power. . . . [T]he tribunal is not required to deal expressly with every provision of the applicable law that a party has invoked in its argument, and a *fortiori*, provisions that the parties did not invoke in their arguments before the tribunal.”) (emphasis added).

¹⁶² Memorial on Annulment, ¶ 160; **Ex. AALA-33**, *Soufraki v. United Arab Emirates*.

application of the law, which is not a ground for annulment.”¹⁶³ It found that a “misinterpretation or misapplication of the proper law” may only lead to annulment if “[s]uch gross and consequential misinterpretation or misapplication of the proper law” is so egregious that “no reasonable person (*bon père de famille*) could accept [it].”¹⁶⁴ The committee also established that a “simple error — even a serious error — in the interpretation of the law” does not meet that threshold.¹⁶⁵

116. In *M.C.I. v. Ecuador*, the committee found that an “egregious violation,” which in certain circumstances might give rise to annulment, entails “a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations.”¹⁶⁶

b. Excess of Power with Respect to Jurisdiction

117. Regarding jurisdiction, a tribunal might commit an excess of powers by “exercising jurisdiction it does not have or by failing to exercise a jurisdiction which it possesses.”¹⁶⁷ In either case, ICSID Article 52(1)(b) remains subject to the requirement of “manifest” described above.

118. A manifest excess of powers relating to jurisdiction is not subject to a different standard and does not allow for a *de novo* review of a tribunal’s factual determinations and legal interpretations. It is undeniable that ICSID tribunals “are to be the judges of their own competence.”¹⁶⁸ As a corollary of this cornerstone principle of ICSID arbitration, committees

¹⁶³ **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 85.

¹⁶⁴ *Id.*, ¶ 86.

¹⁶⁵ *Id.*

¹⁶⁶ **Ex. AALA-11**, *M.C.I. v. Ecuador*, ¶ 51.

¹⁶⁷ **Ex. AALA-55**, *TECO v. Guatemala*, ¶ 77.

¹⁶⁸ **Ex. R-126**, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, March 18, 1965, ¶ 38.

cannot review *de novo* the jurisdictional decisions made by tribunals. As the *Perenco v. Ecuador* committee explained:

Under the principle of *compétence de la compétence*, a tribunal is the judge of its own competence and has the power to determine whether it has jurisdiction under the parties' arbitration agreement. ICSID annulment proceedings do not avail for a *de novo* review of jurisdiction. That would be tantamount to an appeal. As explained by Prof. Schreuer, "the stability of the system could be threatened if an *ad hoc* committee could simply substitute its view on jurisdiction for that of the tribunal."¹⁶⁹

119. Several other committees have similarly confirmed that under the ICSID Convention "*ad hoc* committees do not have the power to reconsider ICSID tribunals' jurisdictional decisions *de novo*."¹⁷⁰ As the *Sodexo v. Hungary* committee noted, revisiting

¹⁶⁹ **Ex. RALA-15**, *Perenco v. Ecuador*, ¶ 94.

¹⁷⁰ **Ex. RALA-34**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, June 10, 2022 ("*RREEF v. Spain*"), ¶¶ 18-19. See also **Ex. RALA-28**, *Global Telecom v. Canada*, ¶ 60 ("This Committee agrees with other *ad hoc* committees in that the ICSID Convention provides that the tribunal is the judge of its own competence, a power generally referred to as *compétence de la compétence*. As stated by the *Perenco v. Ecuador* committee, 'ICSID annulment proceedings do not avail for a *de novo* review of jurisdiction. That would be tantamount to an appeal.'"); **Ex. RALA-35**, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, May 19, 2014 ("*SGS v. Paraguay*"), ¶ 114 ("Under Article 41 of the ICSID Convention, the Tribunal shall be the judge of its own competence, and thus its decision on the scope of its jurisdiction cannot be reviewed *de novo* by an Annulment Committee."); **Ex. RALA-19**, *Cube v. Spain*, ¶ 176 ("As to jurisdiction, while an excess of power may relate to a tribunal's incorrect conclusion that it has jurisdiction, as the Updated ICSID Background Paper on Annulment notes, the tribunal is the judge of its own competence. This needs to be kept in mind in reviewing the alleged excess of power, to avoid straying beyond the limited remit of an annulment committee."); **Ex. RALA-36**, *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment, May 7, 2021 ("*Sodexo v. Hungary*"), ¶ 93 ("Indeed, considering that the tribunal is the judge of its own competence, the 'manifest' requirement gains particular relevance in the context of jurisdiction. An *ad hoc* committee must be mindful of and, therefore, respect the tribunal's margin of appreciation, rather than undertake a *de novo* evaluation of the facts and law supporting the tribunal's jurisdiction. It need only be satisfied that the decision on jurisdiction is clearly neither unreasonable nor untenable. A debatable solution is not subject to annulment since the excess of powers would not then be 'manifest'."); **Ex. RALA-37**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment, April 15, 2019, ¶ 175 ("[A] Committee may not consider *de novo* the jurisdictional determinations made by a Tribunal, nor generally in an annulment proceeding reconsider findings of fact or law made by a Tribunal, and indeed it does not do so.") (translation from Spanish); **Ex. RALA-23**, *Total v. Argentina*, ¶ 242 ("[A]n *ad hoc* committee cannot generally review *de novo* the decision of the tribunal on jurisdiction."); **Ex. RALA-26**, *Oi European Group v. Venezuela*, ¶ 183 ("[I]t is clear that the Committee cannot conduct a *de novo* analysis of the reasoning

the factual determinations and legal interpretations that led a tribunal to decide whether or not to exercise jurisdiction “oversimplifies the legitimate disagreement that may exist on complex factual and normative considerations that affect a tribunal’s jurisdiction. The decision on such matters falls to the tribunal.”¹⁷¹ Accordingly, “there is no difference in the standard of review applicable to a claim of manifest excess of powers on the basis of jurisdiction or on the merits.”¹⁷²

* * *

120. In sum, to annul the Award under Article 52(1)(b) of the ICSID Convention, this Committee must first identify an excess of powers — that is, a failure to apply the proper law *in toto* or a failure to exercise (or an unwarranted exercise of) jurisdiction. Second, it must find that such excess of powers was manifest — that is, obvious and self-evident, thereby excluding any *de novo* review of the Tribunal’s findings — and that it had substantively serious consequences on the outcome of the Award.

C. Failure to State Reasons

121. Article 52(1)(e) of the ICSID Convention entitles a committee to annul an award if it “has failed to state the reasons on which it is based.” Committees have stressed that the

underlying the Tribunal’s jurisdictional decision.”); **Ex. RALA-38**, *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009 (“*Azurix v. Argentina*”), ¶ 68 (“The Committee is of the view that Article 52(1)(b) does not provide a mechanism for *de novo* consideration of, or an appeal against, a decision of a tribunal under Article 41(1) after the tribunal has given its final award.”).

¹⁷¹ **Ex. RALA-36**, *Sodexo v. Hungary*, ¶ 92.

¹⁷² **Ex. RALA-35**, *SGS v. Paraguay*, ¶ 114; **Ex. AALA-54**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Argentina’s Application for Annulment, May 5, 2017 (“*Suez v. Argentina*”), ¶ 117 (“[T]he Committee agrees with Claimant that there is no indication in either the text of Article 52(1)(b), its context or in the object and purpose of the annulment proceeding within the regime of the ICSID Convention that would support the position that the standard of review to be applied to jurisdiction decisions is different from that applied to merits decisions.”); **Ex. AALA-27**, *Lucchetti v. Peru*, ¶¶ 100-102; **Ex. RALA-38**, *Azurix v. Argentina*, ¶ 66.

threshold to annul an award for failure to state reasons under Article 52(1)(e) is very high¹⁷³ and “should only occur in a clear case,”¹⁷⁴ in which “there has been a failure . . . to state any reasons for its decision on a particular question”¹⁷⁵ and “circumstances [where] there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point.”¹⁷⁶

122. Moreover, committees have consistently held that, even where a tribunal’s reasoning is found to be entirely absent, unintelligible, contradictory, or frivolous, that deficiency alone is not sufficient to warrant annulment under Article 52(1)(e). The applicant must prove that the failure affected “a point which is essential to the outcome of the case” or “an issue that was outcome-determinative.”¹⁷⁷

¹⁷³ See for example **Ex. RALA-26**, *OI European Group v. Venezuela*, ¶ 320 (“Prior annulment committees have recalled that the standard under Article 52(1)(e) is a minimum standard, which is intended to ensure that a reasonable reader may understand the award. Thus, this Committee concurs in the view that, as in the case of the other annulment grounds, the scope of review under Article 52(1)(e) is strict and the threshold for annulment is high.”) (internal citation omitted); **Ex. RALA-39**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, July 30, 2021 (“*Infrastructure Services v. Spain*”), ¶ 234 (“[A]n award should only be annulled under Article 52(1)(e) where there are gaps in the tribunal’s reasoning so large as to make it impossible to follow. An award may contain various errors, omissions, inconsistencies or contradictions but even then, annulment cannot be justified unless they meet the high threshold required.”); **Ex. AALA-58**, *Daimler v. Argentina*, ¶ 79.

¹⁷⁴ **Ex. RL-133**, *Vivendi v. Argentina (I)*, Decision on Annulment, ¶ 65 (“In the Committee’s view, annulment under Article 52(1)(e) should only occur in a clear case.”). See also **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 102; **Ex. RALA-21**, *Pey Casado v. Chile*, Second Decision on Annulment, ¶ 83.

¹⁷⁵ **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 100 (emphasis added).

¹⁷⁶ **Ex. RALA-9**, *Sempra v. Argentina*, ¶ 167. See also **Ex. RALA-31**, *El Paso v. Argentina*, ¶ 217 (“Annulment committees are concerned with the existence of reasoning and not the correctness, content or adequacy of the same. Unless the findings cannot be supported by any reasons reflected in the award, there is no basis for annulment.”).

¹⁷⁷ **Ex. RALA-24**, *Alapli v. Turkey*, ¶ 202 (“[T]he *ad hoc* Committee finds that the threshold for annulment under Article 52(1)(e) of the ICSID Convention is very high. Indeed, the Applicant bears the burden of proving that the Tribunal’s reasoning on a point which is essential to the outcome of the case was either unintelligible or contradictory or frivolous or absent.”); **Ex. RALA-17**, *Poštová v. Greece*, Decision on Partial Annulment, ¶ 143 (“Finally, the Committee notes that, even where an absence of reasons is found, in order for a failure to state reasons to justify an annulment, the error must relate to an issue that was outcome-determinative. This has been accepted by the Parties and confirmed by a number of *ad hoc* committees.”) (emphasis added). See also **Ex. RALA-26**, *OI European Group v. Venezuela*, ¶ 353 (“Thus, the Applicant

1. The Correctness of the Tribunal's Reasoning or Whether It Is Convincing Is Not Relevant

123. It is well established that the analysis of this ground for annulment does not permit any inquiry “into the quality or persuasiveness of [a tribunal’s] reasons.”¹⁷⁸ Professor Kaufmann-Kohler explains:

For purposes of Article 52(1)(e), it is irrelevant whether the reasons are correct or convincing; otherwise, the *ad hoc* committee would be drawn into a review of the merits. The test is met as long as the reader is able to follow the train of thought of the tribunal, even if the latter made mistakes of fact or law.¹⁷⁹

124. If such high threshold is not met, an award cannot be annulled, regardless of the correctness or persuasiveness of the tribunal’s reasoning.¹⁸⁰ This was made clear in the oft-cited decision in *MINE v. Guinea*, which was endorsed by most subsequent annulment committees:

has not sustained its burden of proving that the Tribunal’s reasoning on ‘a point which is essential to the outcome of the case’ was absent or contradictory. Accordingly, there is no annullable error for failure to state reasons as regards the Tribunal’s determination that the Applicant violated the due process requirement under Article 6 of the BIT.”); **Ex. RALA-40**, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016, ¶ 139 (“The standard for annulment under Article 52(1)(e) of the ICSID Convention is, therefore, high. It does not permit an *ad hoc* committee to second-guess the reasoning of the tribunal. It imposes on the applicant the burden of proving that the reasoning of the tribunal on a point that is essential for the outcome of the case was either absent, unintelligible, contradictory or frivolous. In order to succeed, the Applicant must discharge this burden.”).

¹⁷⁸ **Ex. RALA-10**, C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, p. 1011, ¶ 388.

¹⁷⁹ **Ex. RALA-41**, Gabrielle Kaufmann-Kohler, *Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?*, in ANNULMENT OF ICSID AWARDS 189 (E. Galliard and Y. Banifatemi eds., Juris Publishing 2004), pp. 193-194 (emphasis added).

¹⁸⁰ **Ex. RALA-1**, Updated Background Paper on Annulment, ¶ 111. See also **Ex. RL-133**, *Vivendi v. Argentina (I)*, Decision on Annulment, ¶ 64 (“[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons.”) (italics in original; emphasis added); **Ex. AALA-32**, *Duke v. Peru*, ¶ 162 (“The failure to state reasons which is contemplated by Article 52(1)(e) of the ICSID Convention is not the failure to state correct or convincing reasons as this would otherwise draw an *ad hoc* committee into reviewing the substance of the arbitral tribunal’s decision.”) (emphasis added); **Ex. RALA-42**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, April 2, 2021, ¶ 155 (“[T]he adequacy of a tribunal’s reasoning is not a basis for annulment. The question is whether the decision meets the minimum standard of intelligibility.”) (emphasis added).

The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (l)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.

In the Committee's view, 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.¹⁸¹

125. A committee may not annul an award under Article 52(1)(e) because it disagrees with the reasons provided by a tribunal or finds them unconvincing.¹⁸² An examination of reasons by an annulment committee cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based, because this would clearly amount to an appeal in violation of Article 53(1) of the ICSID Convention. As stated by the *Vivendi v. Argentina (I)* committee:

[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be

¹⁸¹ **Ex. AALA-57**, *MINE v. Guinea*, ¶ 5.09 (emphasis added). The *MINE* approach has been followed by the great majority of ICSID annulment committees. See for example **Ex. AALA-7**, *Wena v. Egypt*, ¶ 79; **Ex. AALA-32**, *Duke v. Peru*, ¶ 203; **Ex. RALA-24**, *Alapli v. Turkey*, ¶ 198; **Ex. AALA-8**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, December 23, 2010 ("*Fraport v. Philippines*"), ¶ 249; **Ex. AALA-27**, *Lucchetti v. Peru*, ¶ 127; **Ex. AALA-37**, *Enron v. Argentina*, ¶ 74; **Ex. RALA-13**, *Rumeli v. Kazakhstan*, ¶ 99; **Ex. AALA-58**, *Daimler v. Argentina*, ¶ 75.

¹⁸² **Ex. RALA-10**, C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, p. 1011, ¶ 388 ("dissatisf[action] with the adequacy of reasons" is "not grounds for annulment").

stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.¹⁸³

126. Committees have unanimously endorsed this principle.¹⁸⁴ In fact, the committee in *Kılıç v. Turkmenistan* warned against the use of words such as “adequate” or “sufficient” in the context of annulment based on the grounds of failure to state reasons and the danger of the review of the reasons presented by the tribunal becoming an appellate review.¹⁸⁵

¹⁸³ **Ex. RL-133**, *Vivendi v. Argentina (I)*, Decision on Annulment, ¶ 64 (emphasis added).

¹⁸⁴ See for example **Ex. RALA-10**, C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, pp. 1003, 1008, ¶¶ 363, 377 (“Once an *ad hoc* committee starts looking into whether the tribunal’s explanation is sufficient to constitute a statement of reasons, it has already embarked upon a quality control of the award. The formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal . . . becomes blurred. . . . The *Vivendi I* Committee’s exposition on the standard of annulment in Art. 52(1)(e) has informed every subsequent annulment decision.”); **Ex. AALA-32**, *Duke v. Peru*, ¶ 165 (“The role of an *ad hoc* committee is to ensure the stability of the ICSID arbitration system, not to overthrow awards because of its disagreement with the arbitral tribunal. Otherwise, the annulment mechanism of Article 52 would slide into an appeal.”) (emphasis added), ¶ 204 (agreeing with *Vivendi I*); **Ex. AALA-8**, *Fraport v. Philippines*, ¶ 277 (“It is not the task of the *ad hoc* Committee under Article 52(1)(e) of the ICSID Convention to consider whether the reasons given by the Tribunal are convincing.”) (emphasis added); **Ex. RALA-24**, *Alapli v. Turkey*, ¶ 210 (“As a preliminary matter, the Committee wishes to again stress that its mandate is not to sit in appeal on the Tribunal’s reasoning. An award is not to be annulled merely because an annulment Committee forms the view that, on the same facts and evidence, it would have reached a different conclusion. . . . This Committee is of the view that a tribunal and a committee can reasonably come to different and even opposite conclusions, when evaluating or analyzing the same set of facts and evidence without the opinion of either being regarded as being devoid of reasons. The only scrutiny that may be undertaken, by a Committee, on the basis of Article 52(1)(e) of the ICSID Convention is whether the Award satisfies the requirements of reasoning which enable the reader to discern what considerations prompted the Tribunal to reach its conclusions.”) (emphasis added); **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 70 (“Article 52(1)(e) requires that the Tribunal have stated reasons, and that such reasons be coherent, *i.e.*, neither ‘contradictory’ nor ‘frivolous,’ but does not provide us with the opportunity to opine on whether the Tribunal’s analysis was correct or its reasoning persuasive.”) (emphasis added); **Ex. AALA-11**, *M.C.I. v. Ecuador*, ¶¶ 81-82 (quoting the standards regarding Article 52(1)(e) of the ICSID Convention adopted by the *ad hoc* committees in *MINE v. Guinea* and *Vivendi I* approvingly and stating “the Committee cannot review this conclusion [of the tribunal that it had no jurisdiction], or express its agreement or disagreement with it, or examine whether or not the reasons given by the Tribunal are convincing.”).

¹⁸⁵ **Ex. RALA-43**, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015 (“*Kılıç v. Turkmenistan*”), ¶ 62 (“The Committee first observes that a word of caution is in order in respect of use of words such as ‘adequate’ or ‘sufficient’ in the context of annulment. The doctrine and the case law warn about the danger of the review of reasons becoming an appellate review: ‘[o]nce an *ad hoc* committee starts looking into whether the tribunal explanation is sufficient to constitute a statement of reasons, it has already embarked upon a quality control

127. When assessing a tribunal's reasoning, committees should also bear in mind that "different legal traditions differ in their modes of expressing reasons" and thus "Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning."¹⁸⁶ Moreover, Article 52(1)(e) "does not require that each reason be stated expressly" so that the "Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision."¹⁸⁷ Tribunals also are not required to cite the specific legal authorities or evidence in support of their reasons.¹⁸⁸ Ultimately, "[t]here are no rigid or formulaic requirements as to the form or method by which a tribunal must state its reasons" and, as committees have held, a tribunal may comply with its duty to state reasons "by referring to, and expressing agreement with, the reasoning in a previous ICSID case, or indeed, the reasoning in any other arbitration or judicial decision, or for that matter the reasoning in a commentary or publication or in any other source."¹⁸⁹

of the award. The formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal becomes blurred.' The *Soufraki ad hoc* committee quoted by Applicant was aware that the assessment of the insufficiency or inadequacy of reasons might easily place an *ad hoc* committee in a court of appeal role. It stated: '[i]nsufficient or inadequate reasons as a ground for annulment have thus to be distinguished from *wrong or unconvincing reasons*.' In support of this statement, the *Soufraki ad hoc* committee refers to the *Wena ad hoc* committee's explanation that 'Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not'.") (italics in original; emphasis added; internal citations omitted).

¹⁸⁶ **Ex. RL-133**, *Vivendi v. Argentina (I)*, Decision on Annulment, ¶ 64.

¹⁸⁷ **Ex. AALA-7**, *Wena v. Egypt*, ¶ 81. See also **Ex. RALA-38**, *Azurix v. Argentina*, ¶ 54; **Ex. AALA-51**, *CMS v. Argentina*, ¶ 127 ("In the Committee's view, although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal . . . therefore, the submission of Argentina cannot be upheld.").

¹⁸⁸ **Ex. AALA-32**, *Duke v. Peru*, ¶ 217; **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 128.

¹⁸⁹ **Ex. AALA-37**, *Enron v. Argentina*, ¶¶ 94-95.

128. Applicants claim that Article 52(1)(e) also covers “reliance on reasons that are so egregiously erroneous that they are frivolous or even not reasons at all,”¹⁹⁰ citing to the *Patrick Mitchell v. Congo* committee’s decision in support of that assertion.¹⁹¹ But that is misleading. In that case, the committee only meant to stress the coherence of the reasoning, stating that “a failure to state reasons exists whenever reasons are purely and simply not given, or are so inadequate that the coherence of the reasoning is seriously affected. In other words, the Committee embraces the position adopted by the *ad hoc* Committee in the *MINE* case”¹⁹² According to the doctrine, “[t]he reference to the inadequacy of reasons [in this case] is at odds with the developing line of cases,”¹⁹³ with many authors referring to the *Patrick Mitchell* annulment decision as “a further example of an *ad hoc* committee undermining the finality of the investor-state arbitration process by annulling an award on the basis of a review of the merits”¹⁹⁴ and criticizing that committee for “crossing the line between annulment and appeal” by replacing “its own views as to the correctness of the reasoning of the tribunal.”¹⁹⁵

129. Likewise, Applicants’ reference to the *Soufraki v. United Arab Emirates* decision is to no avail.¹⁹⁶ As explained by the *Kılıç v. Turkmenistan* committee, the *Soufraki* committee “was aware that the assessment of the insufficiency or inadequacy of reasons

¹⁹⁰ Memorial on Annulment, ¶ 196.

¹⁹¹ *Id.*, n. 311; **Ex. RL-199**, *Mr. Patrick H. Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, November 1, 2006 (“*Patrick Mitchell v. Congo*”), ¶ 21.

¹⁹² **Ex. RL-199**, *Patrick Mitchell v. Congo*, ¶ 21.

¹⁹³ **Ex. RALA-10**, C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, p. 1009, ¶ 380.

¹⁹⁴ **Ex. RALA-44**, Jason Clapham, *Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?*, 26(3) JOURNAL OF INTERNATIONAL ARBITRATION 437 (2009), p. 458.

¹⁹⁵ **Ex. RALA-45**, Emmanuel Gaillard, *A Black Year for ICSID*, 4(5) TRANSNATIONAL DISPUTE MANAGEMENT (2007), pp. 5-6 [of the PDF].

¹⁹⁶ Memorial on Annulment, ¶ 196, n. 311; **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 128.

might easily place an *ad hoc* committee in a court of appeal role.”¹⁹⁷ In *Soufraki*, the committee reminded that “[i]nsufficient or inadequate reasons as a ground for annulment have thus to be distinguished from *wrong or unconvincing reasons*” and referred to the *Wena v. Egypt* committee’s explanation that “Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal’s decisions were appropriate or not, convincing or not.”¹⁹⁸

130. Applicants also refer to the recent decision from the *Nachingwea v. Tanzania* committee.¹⁹⁹ However, in that case, the committee clearly emphasized that it agreed with the general consensus established in the case law in that “as long as [the tribunal] do not jeopardize the objective of the provision to provide a motivation for the award and thereby guarantee the sound administration of justice, [] [the committee should] not venture into the sphere of an appeal.”²⁰⁰ It further stated that “the terms ‘insufficient’ or ‘inadequate’ reasons may be appropriate if understood to describe reasons which cannot be followed by a willing and intelligent reader” but that “it is clear that these terms will lead to an inadmissible appeal if they extend to reasons which a party considers too weak or inadequate to justify the determination of the tribunal.”²⁰¹

¹⁹⁷ **Ex. RALA-43**, *Kılıç v. Turkmenistan*, ¶ 62.

¹⁹⁸ **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 123 (emphasis in original).

¹⁹⁹ Memorial on Annulment, ¶ 196, n. 311; **Ex. AALA-53**, *Nachingwea U.K. Limited v. United Republic of Tanzania*, ICSID Case No. ARB/20/38, Decision on Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), February 2, 2024 (“*Nachingwea v. Tanzania*”).

²⁰⁰ **Ex. AALA-53**, *Nachingwea v. Tanzania*, ¶ 60 (emphasis added).

²⁰¹ *Id.* (emphasis added).

2. A Tribunal Is Not Required to Address Every Issue Raised or Every Piece of Evidence Submitted by the Parties

131. While tribunals need to provide reasons for their conclusions, they are not obligated to address every single argument raised by the Parties. It is true, as Applicants suggest,²⁰² that Article 48(3) of the ICSID Convention requires tribunals to “deal with every question submitted” to them by the parties.²⁰³ However, while the English version of the Convention uses the term “question,” the French version uses “*chefs de conclusions*” and the Spanish version “*pretensiones*.” Accordingly, annulment committees have held that Article 48(3) does not refer to “questions in general” (*i.e.*, every single question that might arise from every argument and piece of evidence submitted by the parties), but instead to “the parties’ heads of claim (the English language equivalent of ‘*chefs de conclusions*’ and ‘*todas las pretensiones*’).”²⁰⁴

132. The drafting history of the Convention is instructive on this point. While the drafters did, of course, agree on the text of Article 48(3), they also decided that the “failure to comply with this duty” would not “give the parties the right to seek annulment.”²⁰⁵ Such a failure may constitute an annulment ground only when it constitutes a failure to state reasons in the sense that, absent reasons relating to the unaddressed question, it is impossible to follow the tribunal’s stated reasoning for resolving the dispute “from point A to point B.”²⁰⁶

133. In light of the above, committees have consistently held that tribunals are not required to address every single argument raised by the parties, and that the failure to do so

²⁰² Memorial on Annulment, ¶ 143.

²⁰³ **Ex. AALA-6**, ICSID Convention, Article 48(3) (emphasis added).

²⁰⁴ **Ex. RALA-24**, *Alapli v. Turkey*, ¶¶ 111, 120-124. See also **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 229.

²⁰⁵ **Ex. RL-253**, HISTORY OF THE ICSID CONVENTION, VOL II-2, p. 849. See also **Ex. AALA-7**, *Wena v. Egypt*, ¶ 100.

²⁰⁶ **Ex. AALA-7**, *Wena v. Egypt*, ¶ 101.

does not constitute grounds for annulment.²⁰⁷ As the *NextEra v. Spain* committee noted, the requirement to state reasons “does not call for tribunals to strain every sinew to convince the losing party that the decision was the right one.”²⁰⁸

134. In fact, tribunals often do not discuss the legal and factual arguments before them — even arguments that one party presented as highly significant — where the tribunal considers such arguments unnecessary to the resolution of the dispute. To use the language in Article 48(3) of the ICSID Convention, tribunals regularly “deal with” some questions submitted to them²⁰⁹ implicitly — they find those questions irrelevant and decide not to address them in the award. If this practice justified annulment, many if not all awards would be annulable — at least until tribunals shifted to a practice of issuing 1000-page awards specifically addressing every single factual and legal point raised by the parties.

135. Likewise, tribunals are not required to address each piece of evidence submitted by the Parties. Under ICSID Arbitration Rule 34(1) tribunals have broad discretion in the assessment of evidence, as they “shall be the judge of the admissibility of any evidence

²⁰⁷ **Ex. AALA-34**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, November 2, 2015, (“*Occidental v. Ecuador*”), ¶ 101 (“[I]t is settled law that a tribunal has no obligation to address each and every argument put forth by the parties.”); **Ex. RALA-6**, *EDF v. Argentina*, ¶ 197 (noting that tribunals are not “required to deal explicitly with every detail of every argument advanced by the parties or to refer to every authority which they invoke”); **Ex. RALA-46**, *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Decision on Annulment, April 8, 2020, ¶ 156 (“[A] tribunal is not under the obligation to address every single argument made by a party, particularly if it is not decisive for the outcome.”); **Ex. AALA-11**, *M.M.C.I. v. Ecuador*, ¶ 67 (“[I]t would be unreasonable to require a tribunal to answer each and every argument which was made in connection with the issues that the tribunal has to decide.”); **Ex. RALA-13**, *Rumeli v. Kazakhstan*, ¶ 84 (“[T]here is no need explicitly to address each and every one of the arguments raised in support of the particular claims, and it is in the discretion of the tribunal not to do so.”); **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 98 (noting that a tribunal “is not required to comment on all arguments of the parties”); **Ex. RALA-39**, *Infrastructure Services v. Spain*, ¶ 232 (“[A] tribunal is not required to state every reason explicitly, nor is it required to address all the parties’ arguments individually.”).

²⁰⁸ **Ex. RALA-47**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, March 18, 2022, ¶ 126.

²⁰⁹ **Ex. AALA-6**, ICSID Convention, Article 48(3).

adduced and of its probative value.”²¹⁰ This broad discretion is not incidental, it is the very reason why Article 52(1)(e) of the ICSID Convention cannot be read to require a tribunal to account for every piece of evidence in the record, nor that it expressly announce the weight it assigns to each piece of evidence. To hold otherwise would render Rule 34(1)’s grant of discretion largely illusory, as any party dissatisfied with a tribunal’s evidentiary choices could repackage its grievance as a failure to state reasons, effectively subjecting the tribunal’s assessment of the evidence to annulment review through the back door. As Schreuer’s Commentary confirms: “[t]he failure of a tribunal to address each and every piece of evidence before it does not amount to a failure to state reasons.”²¹¹

136. This principle is consistently followed by committees. In *Rumeli v. Kazakhstan*, the committee held that:

The purpose of the reasons requirement under Article 52(1)(e) of the ICSID Convention is not to require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party, surely an excessive burden for any court or tribunal. Rather, it is to enable the reader (and specifically the parties) to see the reasons upon which the award itself is based.²¹²

137. The same committee further observed that “the award will not be annulled on the basis that the tribunal could have given more detailed reasons and analysis for its findings of fact or law, or that the tribunal did not expressly state its evaluation in respect to each

²¹⁰ **Ex. AALA-2**, ICSID, Rules of Procedure for Arbitration Proceedings (2006), Rule 34(1).

²¹¹ **Ex. RALA-48**, Christoph Schreuer, Stephan W. Schill, Loretta Malintoppi and August Reinisch, SCHREUER’S COMMENTARY ON THE ICSID CONVENTION (3rd ed., Cambridge University Press 2022), p. 1342, ¶ 453.

²¹² **Ex. RALA-13**, *Rumeli v. Kazakhstan*, ¶ 104 (emphasis added). See also **Ex. RALA-49**, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Annulment, March 19, 2021 (“*Cortec v. Kenya*”), ¶ 228(c) (“There is likewise no requirement to address any particular piece of evidence produced by a party, or to give reasons for preferring some evidence over other evidence.”).

individual item of evidence . . .²¹³ This is consistent with the broader recognition that “the premises leading to a decision may be either implicit or explicit. What is paramount is that the Tribunal’s conclusions follow from a set of premises.”²¹⁴ Similarly, in *Cortec v. Kenya*, the committee held that there is “no requirement that the Tribunal expressly address . . . [a] piece of evidence proffered by the Parties before it.”²¹⁵

138. In *Tza Yap Shum v. Peru*, the committee held that it is not adequate for a party to criticize a tribunal for “failing to make [a] determination with respect to all other pieces of evidence it had before it,” and that “[t]he relevance and weight of evidence before the Arbitral Tribunal cannot be reevaluated by the Committee which is not an appellate body.”²¹⁶ As a direct consequence, a tribunal’s silence with respect to a particular piece of evidence does not, without more, give rise to an annulable failure to state reasons.

139. Applicants referred to the decision in *TECO v. Guatemala* to suggest that a failure to consider or address a piece of evidence can result in annulment.²¹⁷ That decision concerned extraordinary circumstances, but was still subject to the same high threshold outlined above.²¹⁸ The committee in *TECO* explained that it was annulling the tribunal’s

²¹³ **Ex. AALA-37**, *Enron v. Argentina*, ¶ 222 (emphasis added). See also **Ex. RALA-50**, *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Decision on Annulment, March 7, 2025 (“*Pawlowski v. Czech Republic*”), ¶ 57 (“[r]equiring a tribunal explicitly to provide reasons why it does not consider arguments and/or evidence to be relevant erodes the tribunal’s prerogative to determine which elements are relevant building blocks for its decision, and conversely, which are not”; it further noted that this reasoning “would appear to be circular.”).

²¹⁴ **Ex. RALA-15**, *Perenco v. Ecuador*, ¶ 166.

²¹⁵ **Ex. RALA-49**, *Cortec v. Kenya*, ¶ 232.

²¹⁶ **Ex. RALA-22**, *Tza Yap Shum v. Peru*, ¶ 110.

²¹⁷ Memorial on Annulment, ¶ 200.

²¹⁸ The *TECO* committee reiterated the applicable legal standard and confirmed that: (i) annulment is not warranted as long as the award “allows readers to comprehend and follow its reasoning”; (ii) a “tribunal’s reasoning need not be explicit in every respect, as long as the reasons can be understood from the rest of the award”; (iii) a “tribunal is not under an obligation to address every piece of evidence in the record or every single argument made by the parties”; and (iv) “it is not the role of an annulment committee to conduct a re-evaluation of the record before the tribunal.” **Ex. AALA-55**, *TECO v. Guatemala*, ¶¶ 124-126.

assessment of a loss of value claim because the tribunal's reasoning was "not clear at all," and could not be followed by the committee despite having "the benefit of the Parties' submissions and of the entire record before it."²¹⁹

140. The *TECO* committee reached that conclusion because, in the arbitration, the parties had submitted four expert reports on damages, amounting "to about 1200 pages of analysis,"²²⁰ but the tribunal then "did not discuss *at all* the Parties' respective expert reports" and instead "limited itself" to concluding "that there was 'no sufficient evidence'" on the effect that the evolution of certain tariffs would have had on the claimant's loss of value claim.²²¹ The committee found the "complete absence of any discussion of the Parties' expert reports," including any discussion of why the tribunal found them "unsatisfactory" or not "sufficient evidence,"²²² to be shocking and improper, particularly because the parties had deemed their expert reports "to be highly relevant to their case" and "placed significant emphasis" on them.²²³

141. The *TECO* committee also explained that, without any analysis of the expert reports and any explanation of why the tribunal found them unsatisfactory, it was not possible to follow the tribunal's reasoning in concluding that there was not enough evidence on the loss of value claim.²²⁴ In making those determinations, the committee emphasized that it was not making and could not "make any finding with respect to the relevance or otherwise"

²¹⁹ *Id.*, ¶ 128.

²²⁰ *Id.*, ¶ 130.

²²¹ *Id.*

²²² *Id.*, ¶¶ 130-131.

²²³ *Id.*, ¶ 131 (emphasis added).

²²⁴ *Id.*, ¶¶ 128-132. Similarly, the committee was unable to follow the reasoning that led the tribunal to find that "the record contained 'no evidence'" on (i) how a specific transaction price had been determined and (ii) the establishment of certain tariffs, when it was clear that "evidence on the issue existed" and it was "undisputed that the record included information on this matter." *Id.*, ¶¶ 133-135.

of the evidence, as it “was within the Tribunal’s discretion to assess” the admissibility and relevance of the evidence, and was instead limiting its analysis to the intelligibility of the tribunal’s reasoning.²²⁵ Ultimately, the committee decided to annul the tribunal’s decision on the loss of value claim because “the Committee could not understand the Tribunal’s reasoning” on the issue.²²⁶

142. Applicants additionally referred to the decision in *Suez v. Argentina* to suggest that a failure to consider “highly relevant” evidence “constitutes a failure to state reasons.”²²⁷ Applicants’ reliance on *Suez* is misplaced. That annulment decision actually supports Colombia’s position. The *Suez* committee, applying the *TECO* standard, held that “a tribunal can be required to address certain pieces of evidence only to the extent that they are deemed ‘highly relevant’,”²²⁸ meaning its consideration “must have the potential to have an impact on the outcome of the Award.”²²⁹

143. The *Suez* decision is instructive because the committee dismissed an argument materially identical to the one Applicants advance here.²³⁰ In that case, Applicants argued that the tribunal had failed to consider highly relevant evidence it had submitted, namely: “five expert reports,” a “witness statement,” the “documentary evidence submitted by Respondent,” and “the *amicus curiae*” brief filed by five non-governmental organizations.²³¹

²²⁵ *Id.*, ¶¶ 131, 133.

²²⁶ *Id.*, ¶ 136.

²²⁷ Memorial on Annulment, ¶ 199.

²²⁸ **Ex. AALA-54**, *Suez v. Argentina*, ¶ 303 (emphasis added).

²²⁹ **Ex. AALA-54**, *Suez v. Argentina*, ¶ 303.

²³⁰ See ¶¶ 310-321, *infra*; **Ex. AALA-54**, *Suez v. Argentina*, ¶ 298.

²³¹ *Id.*

144. However, the *Suez* committee ultimately rejected this ground because the applicant's own experts had conceded that it had contributed to the economic crisis, and the remaining question — whether that contribution was sufficiently substantial to preclude a necessity defense — was a purely legal determination that the allegedly ignored evidence could not resolve.²³² The evidence was therefore not “highly relevant” in an outcome-determinative sense, and the tribunal's failure to address it did not warrant annulment.²³³

145. Contrary to Applicants' effort to suggest otherwise, committees have consistently held that tribunals are not required to address every single piece of evidence submitted by the parties. Annulment is all the less warranted when, as in *Suez*, the evidence the tribunal allegedly ignored is not highly relevant, that is, outcome-determinative.

3. The Threshold to Find That Contradictory Reasons Constitute a Failure to State Reasons Is Very High

146. While contradictory reasons may, in exceptional circumstances, amount to a failure to state reasons, the threshold for such a finding is very high. For a contradiction to give rise to annulment under Article 52(1)(e), two conditions must be met: (i) the contradiction must be “apparent on the face” of the award, and (ii) “serious enough to vitiate the Tribunal's reasoning . . . as a whole.”²³⁴

147. Committees have held that “the reasons must be genuinely contradictory in that they cancel each other out so as to amount to no reasons at all” and that the contradiction

²³² **Ex. AALA-54**, *Suez v. Argentina*, ¶ 306. When referring to the significance of the piece of evidence, the committee went as far as stating that “[i]n fact, if the Tribunal had looked for guidance on this legal question in any of the expert reports, it could have been found to have committed the same annulable error that the *Enron* committee found, *i.e.*, deference to an economic expert report where the tribunal should have made its own legal assessment of a requirement under international law.” The committee then confirmed that the tribunal did precisely what was required of it: “[t]o the contrary, the Tribunal made its own assessment of the evidence put before it, which is not to be re-evaluated by this Committee . . .” *Id.*, ¶¶ 306-307.

²³³ *Id.*, ¶¶ 306-309.

²³⁴ **Ex. RALA-32**, *Mobil v. Venezuela*, ¶ 119.

must refer to an outcome-determinative issue that “is necessary for the tribunal’s decision.”²³⁵ Absent the exceptional circumstances in which this very high threshold is met, contradictions and mere inconsistencies do not constitute a failure to state reasons.

148. When assessing a claim of contradictory reasons, committees should be conscious of the important distinction between genuine contradictions that “cancel each other out,” on the one hand, and a tribunal’s assessment of conflicting considerations, on the other.²³⁶ They should also bear in mind the distinction between genuinely contradictory reasons and “dissatisfaction with the reasons expressed in the award.”²³⁷ It is not difficult for sophisticated counsel to find a way to infer purported inconsistencies from a parsing of the tribunal’s reasoning²³⁸ but accepting such efforts as sufficient to find a failure to state reasons risks transforming the annulment mechanism into a *de novo* appeal.²³⁹

²³⁵ **Ex. AALA-58**, *Daimler v. Argentina*, ¶ 77 (emphasis added) (citing *Vivendi v. Argentina (I)*, Decision on Annulment, ¶ 65).

²³⁶ **Ex. RL-133**, *Vivendi v. Argentina (I)*, Decision on Annulment, ¶ 65 (“[T]ribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal’s reasons could more truly be said to be but a reflection of such conflicting considerations.”); **Ex. RALA-24**, *Alapli v. Turkey*, ¶ 200 (“[A]nnulment committees should not be quick to find contradiction when in fact what is evident from the award is the compromise reached in an international collegiate adjudicative body.”).

²³⁷ **Ex. AALA-32**, *Duke v. Peru*, ¶ 166; **Ex. AALA-11**, *M.C.I. v. Ecuador*, ¶ 85 (“[C]ontradictory reasons should be distinguished from reasons which are claimed to be legally or factually wrong, the latter escaping . . . from review by an *ad hoc* committee.”); **Ex. RALA-24**, *Alapli v. Turkey*, ¶ 210 (“There is a difference between an absence of reasons and reasons which are genuinely contradictory or frivolous on the one hand and reasons with which a party or a committee simply disagrees on the other. The former may form the basis of an annulment but the latter cannot.”).

²³⁸ See ¶¶ 322-329, *infra*.

²³⁹ **Ex. RALA-19**, *Cube v. Spain*, ¶ 321 (“Moreover, while some committees have entertained a review involving whether a tribunal’s reasons were ‘contradictory or frivolous,’ such review should be considered with ‘prudence and measure’ as it will inevitably cross the border to the scrutiny of the quality of the award and thereby to an appeal award.”).

149. For these reasons, committees “generally seek to construe the language of the Award in a way that results in consistency, as opposed to finding its possible inner contradictions.”²⁴⁰ As the committee in *Daimler v. Argentina* explained:

Therefore, in reviewing the alleged contradictions, an *ad hoc* committee must be mindful of the fact that what sometimes may appear as a contradiction may be the result of a compromise reached by a collegiate body to reach a decision. In addition, in reviewing the apparent contradictions, the *ad hoc* committee should, to the extent possible and considering each case, prefer an interpretation which confirms an award’s consistency as opposed to its alleged inner contradictions.²⁴¹

* * *

150. In sum, under Article 52(1)(e) of the ICSID Convention, this Committee should not consider whether the Tribunal’s reasoning is incorrect, unconvincing, or inadequate; whether it properly addressed all the evidence, or all the arguments presented by the Parties; or whether some inconsistencies can be inferred in the Tribunal’s reasoning. Instead, the Committee should limit itself to verifying that the Tribunal’s reasoning can be followed from Point A to Point B.

D. Serious Departure from a Fundamental Rule of Procedure

151. Article 52(1)(d) of the ICSID Convention allows annulment when “there has been a serious departure from a fundamental rule of procedure.” This ground is “intended

²⁴⁰ **Ex. RALA-26**, *Ol European Group v. Venezuela*, ¶ 319 (emphasis added); **Ex. RALA-24**, *Alapli v. Turkey*, ¶ 201 (“The Committee is persuaded that, if possible, an interpretation which confirms an award’s consistency as opposed to its alleged inner contradictions should be preferred.”); **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 81 (“In construing awards, as in construing statutes and legal instruments generally, one necessarily should construe the language in issue, whenever possible, in a way that results in consistency”); **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 103 (“In cases where it is merely arguable whether there is a contradiction or inconsistency in the tribunal’s reasoning, it is not for an annulment committee to resolve that argument. Nor is it the role of an annulment committee to express its own view on whether or not the reasons given by the tribunal are logical or rational or correct.”).

²⁴¹ **Ex. AALA-58**, *Daimler v. Argentina*, ¶ 78.

to ensure that a set of minimal standards of procedure is observed in the arbitral proceedings.”²⁴²

152. As the committee in *Occidental v. Ecuador* noted, “the hurdles for the acceptance of this ground are high.”²⁴³ Bishop and Marchili explain that “[t]he qualifiers ‘serious’ and ‘fundamental’ are indicative of the object and purpose of the Convention to provide for a high threshold for annulment, and a material (rather than a technical) violation approach.”²⁴⁴

153. For a request for annulment under Article 52(1)(d) of the ICSID Convention to succeed, the applicant needs to meet three cumulative requirements: (1) identify the “fundamental” rule of procedure at issue; (2) show that a “departure” from that fundamental rule of procedure occurred; and (3) demonstrate that such departure is “serious.”²⁴⁵

1. The Rule at Issue Must Be “Fundamental” — Not Just Any Rule

154. For a request for annulment under Article 52(1)(d) to succeed, applicants must first establish that the rule of procedure at issue is *fundamental*. As noted by the *MINE v. Guinea* committee, “even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is ‘fundamental’.”²⁴⁶

155. The drafting history of the Convention confirms that “fundamental rules” were understood as comprising “the so-called principles of natural justice”²⁴⁷ that concern “the

²⁴² **Ex. AALA-54**, *Suez v. Argentina*, ¶ 128.

²⁴³ **Ex. AALA-34**, *Occidental v. Ecuador*, ¶ 61.

²⁴⁴ **Ex. RALA-11**, R. D. Bishop and S. M. Marchili, ANNULMENT UNDER THE ICSID CONVENTION, p. 132, ¶ 8.11 (internal citation omitted; emphasis added).

²⁴⁵ *Id.* See also **Ex. AALA-7**, *Wena v. Egypt*, ¶ 58 (“[T]he [a]pplicant has to identify the fundamental rule of procedure from which the Tribunal departed and it has to show that such departure has been serious.”).

²⁴⁶ **Ex. AALA-57**, *MINE v. Guinea*, ¶ 5.06.

²⁴⁷ **Ex. RL-252**, HISTORY OF THE ICSID CONVENTION, VOL II-1, p. 480.

essential fairness of the proceeding.”²⁴⁸ This concept is “restricted to the principles of natural justice, including the principles that both parties must be heard and that there must be adequate opportunity for rebuttal.”²⁴⁹

156. In an attempt to define the scope of the rules of procedure that can be qualified as “fundamental” within the meaning of Article 52(1)(d) of the ICSID Convention, the committee in *Wena v. Egypt* stated that Article 52(1)(d) “refers to a set of minimal standards of procedure to be respected as a matter of international law.”²⁵⁰ The *Wena* committee noted that the right to be heard before an independent and impartial tribunal, including the right to state its claims and defense and to produce all arguments in support of it, constituted a fundamental feature of a proper procedure.²⁵¹

157. On the contrary, there was consensus amongst the drafters of the ICSID Convention that “it excludes the Tribunal’s failure to observe ordinary arbitration rules.”²⁵² Thus, Committees have recognized “that not all rules of procedure contained in the ICSID Arbitration Rules would fall under” the fundamental rules of procedure referred to in Article 52(1)(d),²⁵³ and that these fundamental rules do not include “ordinary rules which are not concerned with the integrity and fairness of the arbitral process.”²⁵⁴

²⁴⁸ **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 49; **Ex. RALA-24**, *Alapli v. Turkey*, ¶ 132.

²⁴⁹ **Ex. AALA-8**, *Fraport v. Philippines*, ¶ 186.

²⁵⁰ **Ex. AALA-7**, *Wena v. Egypt*, ¶ 57.

²⁵¹ *Id.*

²⁵² **Ex. RALA-1**, Updated Background Paper on Annulment, ¶ 104.

²⁵³ **Ex. AALA-8**, *Fraport v. Philippines*, ¶ 186.

²⁵⁴ **Ex. RALA-26**, *OI European Group v. Venezuela*, ¶ 246.

2. A “Departure” From That Fundamental Rule Must Have Occurred

158. Secondly, for a request for annulment under Article 52(1)(d) to succeed, an applicant on annulment must establish that a departure from that fundamental rule occurred. In particular, the applicants must prove that the departure affected the way the procedure was conducted, not the decision of the tribunal:

Annulment under Article 52(1)(d) also requires that the tribunal must have “departed” from a rule of procedure. Committees and authors have emphasized that this ground is not related to the decision of the tribunal itself, but to the manner in which the tribunal proceeded. As evidenced in the following subsections, ICSID annulment decisions illustrate that this basis for annulment poses certain insurmountable challenges for applicants under Article 52(1)(d). In particular, applicants have had difficulty proving the existence of a “departure” given that under the ICSID Convention and Arbitration Rules, tribunals have a significant degree of discretion in how they conduct the case and admit and evaluate evidence.²⁵⁵

159. Annulment committees must not second-guess how a tribunal exercises its discretionary powers in the management of the procedure.²⁵⁶ As explained by the *Azurix v. Argentina* committee, “[a] decision by a tribunal whether or not to exercise a discretionary power that it has under a rule of procedure is an exercise of that rule of procedure, and not a departure from that rule of procedure.”²⁵⁷

²⁵⁵ **Ex. RALA-11**, R. D. Bishop and S. M. Marchili, ANNULMENT UNDER THE ICSID CONVENTION, pp. 133-134, ¶ 8.17 (internal citations omitted; emphasis added).

²⁵⁶ **Ex. AALA-37**, *Enron v. Argentina*, ¶ 192.

²⁵⁷ **Ex. RALA-38**, *Azurix v. Argentina*, ¶ 210 (emphasis omitted).

3. The Departure Must Be “Serious”

160. Finally, for a claim of annulment to succeed under Article 52(1)(d), an applicant requesting annulment must also establish that the departure from the fundamental rule of procedure at issue was “serious.”

161. According to Bishop, “the ‘serious’ nature of the departure entails a sense of gravity, which can be identified by the existence of a concrete consequence attributable to it.”²⁵⁸ Dolzer and Schreuer further explain that the seriousness of the departure requires that it be “more than minimal and that it must have had a material effect on a party,”²⁵⁹ since a “minor and inconsequential breach of a rule of procedure is no ground for annulment.”²⁶⁰ One committee stated that: “Annuling an award based on a lesser showing would amount to excessive formalism, speculation and second-guessing of decisions taken in the original arbitration in a manner that is improper for an annulment proceeding, thus frustrating the purpose of the arbitration.”²⁶¹

162. Committees have consistently interpreted the departure to be “serious” if it had a material effect on the tribunal’s decision. For instance, the *Wena v. Egypt* committee held:

In order to be a “serious” departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such rule been observed.²⁶²

²⁵⁸ **Ex. RALA-11**, R. D. Bishop and S. M. Marchili, ANNULMENT UNDER THE ICSID CONVENTION, p. 133, ¶ 8.16.

²⁵⁹ **Ex. RALA-51**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press 2008), p. 283.

²⁶⁰ *Id.*

²⁶¹ **Ex. RALA-26**, *OI European Group v. Venezuela*, ¶ 248.

²⁶² **Ex. AALA-7**, *Wena v. Egypt*, ¶ 58 (emphasis added). See also **Ex. RALA-52**, *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, January 8, 2007, ¶ 81 (internal citation omitted).

163. Likewise, the *CDC v. Seychelles*,²⁶³ *Enron v. Argentina*,²⁶⁴ *Azurix v. Argentina*,²⁶⁵ *Continental Casualty v. Argentina*,²⁶⁶ and *Total v. Argentina*²⁶⁷ committees adopted the same conclusion that the departure from a fundamental rule of procedure must be “serious” in the sense that it “must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.” As the *El Paso v. Argentina* committee noted, “to be grounds for annulment, the departure has to have a material impact on the outcome of the award.”²⁶⁸ While committees have formulated the seriousness requirement in different terms, they consistently signal a very high threshold, such as the departure being substantial enough “to deprive a party of the benefit or protection which the rule was intended to provide.”²⁶⁹

164. Other committees have adopted a slightly more flexible approach, not requiring proof that a serious departure from a fundamental rule of procedure actually had a material impact on the award, but rather that such departure could have “had the potential of causing the tribunal to render an award substantially different from what it actually decided.”²⁷⁰ For those committees, the standard remains high, however, as the applicant must show that the

²⁶³ **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 49.

²⁶⁴ **Ex. AALA-37**, *Enron v. Argentina*, ¶ 71.

²⁶⁵ **Ex. RALA-38**, *Azurix v. Argentina*, ¶ 234.

²⁶⁶ **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 96.

²⁶⁷ **Ex. RALA-23**, *Total v. Argentina*, ¶¶ 308, 313.

²⁶⁸ **Ex. RALA-31**, *El Paso v. Argentina*, ¶ 269.

²⁶⁹ **Ex. AALA-57**, *MINE v. Guinea*, ¶ 5.05; **Ex. RALA-38**, *Azurix v. Argentina*, ¶ 51; **Ex. AALA-37**, *Enron v. Argentina*, ¶ 71; **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 96; **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 49.

²⁷⁰ **Ex. RALA-5**, *Tulip v. Turkey*, ¶ 78 (emphasis omitted). See also **Ex. AALA-9**, *Victor Pey Casado & Foundation Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, December 18, 2012 (“*Pey Casado v. Chile*, First Decision on Annulment”), ¶ 80; **Ex. RALA-53**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, February 21, 2014 (“*Caratube v. Kazakhstan*”), ¶ 99.

departure was “with respect to an outcome-determinative issue” and was of such a magnitude that the tribunal could have potentially reached a “substantially different” decision.²⁷¹ As the *Tulip v. Turkey* committee held, the requirement of showing this potential effect on the outcome of the award is “[i]n addition” to showing that the departure “deprived the affected party of the benefit of the rule in question.”²⁷²

* * *

165. In sum, this Committee should not annul the Award under Article 52(1)(d) of the ICSID Convention unless Applicants: (i) identified a *fundamental* rule of procedure — that is, a rule of natural justice and not just any procedural rule; (ii) proved a procedural *departure* from that rule; and (iii) established that the departure was so *serious* that it not only deprived Applicants of the protection offered by the rule, but also had a material effect — or at least could have had a material effect — on the outcome of the Arbitration.

E. Inadmissibility of Grounds Based on Irregularities Applicants Failed to Invoke Promptly Before the Tribunal

166. Under the ICSID system, applicants cannot invoke before the annulment committee the procedural irregularities they failed to invoke promptly before the arbitral tribunal. ICSID Arbitration Rule 27 provides as follows:

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be

²⁷¹ **Ex. AALA-9**, *Pey Casado v. Chile*, First Decision on Annulment, ¶ 80; **Ex. RALA-5**, *Tulip v. Turkey*, ¶ 78.

²⁷² **Ex. RALA-5**, *Tulip v. Turkey*, ¶ 78.

deemed—subject to Article 45 of the Convention—to have waived its right to object.²⁷³

167. As explained in Schreuer's commentary of the ICSID Convention:

A party that is aware of a violation of proper procedure must react immediately by stating its objection and by demanding compliance. Under Arbitration Rule 27 failure to do so will be interpreted as a waiver to object at a later stage. It follows that a party that has failed to protest against a perceived procedural irregularity before the tribunal is precluded from claiming that this irregularity constituted a serious departure from a fundamental rule of procedure for purposes of annulment. To hold otherwise would mean that a party could leave a procedural irregularity unopposed to keep it in store as ammunition against a possible unfavorable award in annulment proceedings.²⁷⁴

168. Committees apply this principle strictly. In *Klöckner v. Cameroon (I)*, the committee rejected a claim that the tribunal seriously departed from a fundamental rule of procedure, noting that “it suffices to note that the Claimant has not established that it made a timely protest against the serious procedural irregularities it now complains of” and that “Rule 26 [now Rule 27] of the ICSID Rules of Procedure for Arbitration Proceedings would therefore rule out a good part of its complaints.”²⁷⁵ The committee in *CDC v. Seychelles* also reasoned that failure to raise an irregularity before the tribunal gave rise to “questions regarding the bona fides of the objection.”²⁷⁶ More recently, the *Fraport v. Philippines* committee stated in regard to a claim that the tribunal seriously departed from a fundamental rule of procedure that “Rule 27 gives effect to a more fundamental principle. That is: a party

²⁷³ **Ex. AALA-2**, ICSID, Rules of Procedure for Arbitration Proceedings (2006), Rule 27 (emphasis added).

²⁷⁴ **Ex. RALA-48**, C. Schreuer *et al.*, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, p. 1342, ¶ 416 (internal references omitted) (emphasis added).

²⁷⁵ **Ex. RALA-54**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee, May 3, 1985, ¶ 88.

²⁷⁶ **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 53.

forfeits its right to seek annulment under Article 52(1)(d) if it has failed promptly to raise its objection to the tribunal's procedure."²⁷⁷

169. Accordingly, this Committee must dismiss any ground for annulment under Article 52(1)(d) of the ICSID Convention that is predicated on procedural irregularities which Applicants failed to raise promptly before the Tribunal during the Arbitration. Pursuant to ICSID Arbitration Rule 27, a party that knew or should have known of a procedural irregularity and failed to state its objection thereto in a timely manner shall be deemed to have waived its right to object. That waiver extends to annulment proceedings and precludes Applicants from invoking before this Committee any procedural irregularity that they did not challenge before the Tribunal. Any annulment ground so tainted must be rejected as inadmissible.

²⁷⁷ **Ex. AALA-8**, *Fraport v. Philippines*, ¶ 206.

IV. THERE ARE NO GROUNDS FOR ANNULMENT OF THE AWARD

170. Applicants base their annulment request on six “acts” or “omissions” of the Tribunal: (A) the Tribunal’s alleged reliance on expedited proceedings to dismiss their claims; (B) the Tribunal’s allegedly incorrect application of the Treaty’s provisions, specifically its supposed incorrect interpretation of the term “administrative adjudicatory proceedings” and the alleged imposition of an exhaustion of local remedies requirement; (C) the Tribunal’s alleged improper decisions on evidentiary matters; (D) the Tribunal’s alleged contradictory reasoning on the status of the fiscal liability proceedings (which Applicants call the “CGR proceedings”); (E) the Tribunal’s alleged failure to rule on all of Claimants’ claims, including the Amended Request for Arbitration; and (F) the Tribunal’s alleged delay in rendering the Award.

171. As detailed below, these alleged acts or omissions are without merit and do not constitute any ground for annulment of the Award.

A. The Tribunal’s Alleged Reliance on Summary Proceedings to Dismiss all of Claimants’ Claims

172. Applicants contend that the Award should be annulled under Article 52(1)(d) of the ICSID Convention because the Tribunal seriously departed from a fundamental rule of procedure by resolving “complex” questions of law and fact as a preliminary matter, through “summary proceedings.”²⁷⁸ However, (1) annulment of the Award on this basis is inadmissible because Claimants never complained before the Tribunal that the procedural configuration of the Preliminary Questions Phase did not offer sufficient opportunity to present their case. In any event, (2) this ground is meritless because Applicants do not prove

²⁷⁸ Memorial on Annulment, p. 70, Title IV(A)4.

that the cumulative conditions provided under Article 52(1)(d) of the ICSID Convention are satisfied. In addition, (3) Applicants attempt to lead the Committee to a *de novo* review of the Tribunal's decision to conduct a Preliminary Questions Phase, which is not permissible under Article 52 of the ICSID Convention. Lastly, (4) contrary to what Applicants portray, the Preliminary Questions Phase was not a summary proceeding.

1. Applicants' Ground is Inadmissible

173. Applicants cannot seek annulment of the Award pursuant to Article 52(1)(d) of the ICSID Convention on the ground that the Tribunal resolved “complex questions of fact or mixed questions of law and fact through summary proceedings.”²⁷⁹ At no point during the Arbitration did Claimants allege the incompleteness of the proceedings, nor did they contend that the procedural configuration of the Preliminary Questions Phase impaired their ability to present their case on the purported “complex” issues of fact and law raised by Colombia's Objections.

174. As set forth above, pursuant to ICSID Arbitration Rule 27, procedural irregularities that a party failed to raise in a timely manner before the Tribunal are inadmissible before the Committee.²⁸⁰ With respect to an alleged serious departure from a fundamental rule of procedure, Bishop and Marchili confirm that “if a party fails to protest against a perceived irregularity, it is estopped from relying on that irregularity in invoking Article 52(1)(d).”²⁸¹

²⁷⁹ *Id.*

²⁸⁰ See ¶¶ 166-168, *supra*.

²⁸¹ **Ex. RALA-11**, R. D. Bishop and S. M. Marchili, ANNULMENT UNDER THE ICSID CONVENTION, p. 135, ¶ 8.23.

175. In the present case, Applicants' ground that the Tribunal seriously departed from a fundamental rule of procedure rests on the premise that Claimants should have been "allowed to present evidence and argument substantiating its allegations during a full arbitration proceeding and with the benefit of document disclosure or discovery."²⁸² That premise is belied by the record. The Preliminary Questions Phase was a comprehensive proceeding in which each party was afforded the opportunity to present its case fully through multiple rounds of written submissions addressing Colombia's Objections at length, the filing of hundreds of legal authorities and factual exhibits, and the submission of witness statements.²⁸³

176. In addition, Section 15.3 of Procedural Order No. 1 granted Claimants the right to seek document production at any time, including during the Preliminary Questions Phase.²⁸⁴

177. Despite these procedural safeguards, Claimants never asserted before the Tribunal that the procedural configuration of the Preliminary Questions Phase denied them an adequate opportunity to present evidence and arguments. Nor did they exercise their right under Section 15.3 of Procedural Order No. 1 to request the production of documents. More fundamentally, at the Hearing on Preliminary Objections, Claimants expressly acknowledged that the record was sufficiently developed for the Tribunal to decide on the issues before it:

MR. SILLS: Mr. President, I think, as your comment suggests, there is an extensive record here. The issues have been vetted. Of course, if there is a particular question that the

²⁸² Memorial on Annulment, ¶ 137.

²⁸³ See ¶ 206, *infra*.

²⁸⁴ **Ex. AA-6**, Procedural Order No. 1, March 18, 2021, Section 15.3, p. 14.

Tribunal feels has not been sufficiently aired, we would be pleased to respond to it in writing.

But I have to say, from Claimants' perspective, we think that these preliminary questions--and they are only preliminary questions--are ripe for a decision at this point. And if the Tribunal is of that view, we would certainly not insist on yet another round of written submissions, perhaps to be followed by a further argument. Much that we enjoy meeting with the Tribunal and with our colleagues across the table, I think **the record is sufficiently developed on these questions at this point for the Tribunal to decide.**²⁸⁵

178. Consequently, Applicants' annulment ground on this basis is inadmissible. Pursuant to ICSID Arbitration Rule 27, they are deemed to have waived their right to invoke these alleged procedural irregularities before the Committee. That conclusion is reinforced by Claimants' own concession at the Hearing that the record was sufficiently developed for the Tribunal to decide the issues before it. Having expressly acknowledged both the adequacy of the Preliminary Questions Phase and the completeness of the record, Applicants are now precluded from invoking any procedural deficiency in those proceedings as a basis for annulment.

2. The Tribunal Did Not Seriously Depart from Any Fundamental Rule of Procedure

179. Even if the Committee were to find that Applicants are not precluded from alleging the supposed procedural inadequacy of the Preliminary Questions Phase as a ground for annulment of the Award, the Committee should still reject it because it is meritless.

180. Applicants assert that the Tribunal departed from a fundamental rule of procedure "by resolving complex questions of fact or mixed questions of law and fact through

²⁸⁵ **Ex. AA-13**, Preliminary Objections Hearing Transcript, Volume 2, May 20, 2022, pp. 364:10-365:5 (emphasis added).

summary proceedings.”²⁸⁶ This ground cannot succeed under Article 52(1)(d) of the ICSID Convention because: (a) there is no rule of procedure, much less a *fundamental* rule of procedure, preventing tribunals from resolving legal and factual questions in a preliminary manner without a full briefing on the merits of the case; (b) the Tribunal did not *depart* from any rule of procedure by resolving Colombia’s Objections through the Preliminary Questions Phase — it simply followed the rule set forth in Article 10.20.4 of the Treaty; and (c) the alleged departure is not *serious* because Claimants’ claims would have been found premature and inadmissible regardless of the procedure followed.

a. No Rule of Procedure, Much Less Any *Fundamental* Rule of Procedure, Required the Tribunal to Conduct a Full Merits Proceedings Before Dismissing the Claims

181. Applicants contend that the Tribunal departed from a fundamental rule of procedure by dismissing claims that, in their view, did not manifestly lack legal merit and therefore required a full hearing on the merits because they involved allegedly “complex” questions of law and facts.²⁸⁷ That contention fails at the threshold. No rule of procedure — fundamental or otherwise — required the Tribunal to conduct full merits proceedings before dismissing Claimants’ claims. To the contrary, the applicable procedural framework was designed precisely to allow tribunals to dismiss claims without needlessly engaging the merits.

182. *First*, Applicants fail to identify any *fundamental* rule of procedure that prohibited the Tribunal from ruling on the questions of law and facts arising out of Colombia’s Objections prior to a briefing of the merits of these claims. As set forth above,²⁸⁸ for a request

²⁸⁶ Memorial on Annulment, p. 70.

²⁸⁷ *Id.*, ¶¶ 129-137.

²⁸⁸ See ¶ 155, *supra*.

for annulment under Article 52(1)(d) of the ICSID Convention to succeed, “[t]he Applicant has to identify the *fundamental* rule of procedure from which the Tribunal departed and it has to show that such departure has been serious.”²⁸⁹ The concept of *fundamental* rule of procedure is confined to the principles of natural justice, excluding all the ordinary procedural rules.²⁹⁰ Applicants do not — and cannot — assert that the alleged “well-defined contours of preliminary objections that prohibit resolution of complex factual and legal issues”²⁹¹ constitute a fundamental rules of procedure. There is no support in the practice of ICSID annulment committees for the proposition that a tribunal violates a fundamental rule of procedure “by resolving complex questions of fact or mixed questions of law and fact through summary proceedings.”²⁹²

183. To the contrary, the applicable procedural framework under both the Treaty and the ICSID Convention expressly authorizes tribunals to dismiss claims without engaging the merits — even when doing so requires engaging in complex legal and factual determinations. Under Article 41(2) of the ICSID Convention and ICSID Arbitration Rule 41(4), a tribunal facing jurisdictional objections — which routinely involve complex legal and factual questions — has discretion to address them as a preliminary issue without proceeding to the merits.²⁹³

²⁸⁹ **Ex. AALA-7**, *Wena v. Egypt*, ¶ 56 (emphasis added).

²⁹⁰ See ¶ 155, *supra*.

²⁹¹ Memorial on Annulment, ¶ 137.

²⁹² *Id.*, p. 70.

²⁹³ **Ex. AALA-6**, ICSID Convention, Article 41(2) (“Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”) (emphasis added); **Ex. AALA-2**, ICSID, Rules of Procedure for Arbitration Proceedings (2006), Rule 41(4) (“The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute.”).

184. Likewise, ICSID Arbitration Rule 41(5) and Article 10.20.4 of the Treaty explicitly allow tribunals to dismiss claims prior to any briefing on the merits of the case.²⁹⁴ Article 10.20.4 was adopted precisely in response to cases such as *Methanex v. USA* in which a tribunal conducted a fully briefed merits proceedings only to rule that the claims were doomed to fail from the outset.²⁹⁵ As the *Bridgestone v. Panama* tribunal, Article 10.20.4 of the US-Panama BIT (the exact equivalent to Article 10.20.4 of the Treaty) was precisely “designed to enable a tribunal to dismiss at an early stage claims that are demonstrably doomed to failure, thereby saving time and costs” because “[r]esolution of such issues against the claimant can result in a final award against it that obviates the need for the hearing on the merits.”²⁹⁶ The applicable procedural framework does not prevent the dismissal of claims before the merits — it was designed to enable it.

²⁹⁴ **Ex. AALA-2**, ICSID, Rules of Procedure for Arbitration Proceedings (2006), Rule 41(5); **Ex. RL-1**, United States – Colombia Trade Promotion Agreement, signed on November 22, 2006 and effective from May 15, 2012, Chapter 10 (“Treaty”), Article 10.20.4.

²⁹⁵ **Ex. CL-272**, *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, December 13, 2017 (“*Bridgestone v. Panama*, Decision on Expedited Objections”), ¶ 97 (“They, or very similar provisions, were first introduced by the United States into its investment treaty-making practice in or about 2002 in reaction to the NAFTA case *Methanex*. In that case, the United States argued at an early stage that the claims were inadmissible because they were without legal merit, but the tribunal ruled that it could not address this issue in a preliminary stage. Only after years of costly proceedings did the tribunal finally dismiss the claims, on the grounds that they fell outside its jurisdiction and, in any event, were devoid of merit. Thus Article 10.20.4 is designed to enable a tribunal to dismiss at an early stage claims that are demonstrably doomed to failure, thereby saving time and costs.”). See also **Ex. RL-185**, *Bridgestone Licensing Services, Inc., Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Submission of the United States of America, August 28, 2017, ¶¶ 3-4 (“[T]he United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner. The U.S.-Panama TPA contains such expedited review mechanisms in Articles 10.20.4 and 10.20.5 . . .”); **Ex. RL-209**, *Methanex Corp. v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶ 126 (“We also reject as jurisdictional challenges the USA’s submissions . . .”); **Ex. RL-342**, *Methanex Corp. v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, Part VI, ¶ 1(1) (“The Tribunal decides, pursuant to Article 21 of the UNCITRAL Arbitration Rules and Article 1101 NAFTA, that it has no jurisdiction to determine the claims advanced by *Methanex* in its Second Amended Statement of Claim . . .”) (emphasis added).

²⁹⁶ **Ex. CL-272**, *Bridgestone v. Panama*, Decision on Expedited Objections, ¶¶ 97-98.

185. *Second*, Applicants' reliance on ICSID Arbitration Rule 41(5) to assert that it delineates "the permissible scope of preliminary objections," allegedly limited "to assess whether 'a claim is manifestly without legal merit'," ²⁹⁷ is misplaced. The Preliminary Questions Phase took place under Article 10.20.4 of the Treaty, not under Rule 41(5). Likewise, the cases and commentaries of ICSID Arbitration Rule 41(5) cited by Applicants are similarly unavailing. ²⁹⁸

186. It is well settled that treaty provisions supersede arbitration rules. ²⁹⁹ More specifically to the present case, Article 10.16 of the Treaty provides that the applicable arbitration rules "shall govern the arbitration except to the extent modified by this Agreement." ³⁰⁰ The Treaty therefore represents the *lex specialis* over the general ICSID Arbitration Rules, and Rule 41(5) applies "[u]nless the parties have agreed to another expedited procedure for making preliminary objections." ³⁰¹ Under Article 10.20.4, the Treaty provides for a specific mechanism for preliminary objections, distinct from the default mechanism provided under ICSID Arbitration Rule 41(5). In *Pac Rim v. El Salvador*, the tribunal agreed that the preliminary questions mechanism provided under Article 10.20.4 of the CAFTA-DR (the exact equivalent to Article 10.20.4 of the Treaty) pre-empted ICSID

²⁹⁷ Memorial on Annulment, ¶ 131.

²⁹⁸ *Id.*, ¶¶ 132-133.

²⁹⁹ **Ex. RL-1**, Treaty, Article 10.22.1; **Ex. RL-291**, Free Trade Agreement between the Dominican Republic, Central America and the United States of America, signed on August 5, 2004 and effective from January 1, 2009, Chapter 10 ("DR-CAFTA"), Article 10.22.1; **Ex. RALA-56**, North American Free Trade Agreement, signed on December 17, 1992, entered into force on January 1, 1994, terminated on July 1, 2020, Chapter 11, Article 1131.1.

³⁰⁰ **Ex. RL-1**, Treaty, Article 10.16.5.

³⁰¹ **Ex. AALA-2**, ICSID, Rules of Procedure for Arbitration Proceedings (2006), Rule 41(5).

Arbitration Rule 41(5).³⁰² Scholars also acknowledge that Rule 41(5) does not apply when another procedure for expedited proceedings exists under the relevant treaty:

- a commentary of the ICSID Arbitration Rules confirms that “Rule 41(5) has been interpreted as giving ‘proper prominence’ to other forms of expedited procedures for dealing with preliminary objections that may have been provided for in the relevant instrument, and would only apply to the extent that the relevant instrument does not provide for any other forms of expedited procedures”,³⁰³ and
- another author explains that “Arbitration Rule 41(5) acknowledges that the parties can agree to another expedited procedure for making preliminary objections, taking into consideration that, at the time of the drafting, States such as the USA had already put a particular procedure in place in some of their investment treaties or free trade agreements.”³⁰⁴

187. In the present case, there is no dispute between the Parties that, following Colombia’s Objections, the Preliminary Questions Phase took place under Article 10.20.4 of the Treaty.³⁰⁵ In *Renco v. Peru*, the tribunal rejected any comparison between Rule 41(5)

³⁰² **Ex. RL-36**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010 (“*Pac Rim v. El Salvador*”), ¶¶ 81, 85 (“The Respondent submits that the Parties agreed to use CAFTA’s expedited procedure for the Respondent’s Preliminary Objections to the Claimant’s claims because (i) these arbitration proceedings are subject to the ICSID Arbitration Rules; (ii) the first sentence of ICSID Arbitration Rule 41(5) expressly provides that the procedure under ICSID Arbitration Rule 41(5) does not apply if ‘the parties have agreed to another expedited procedure for making preliminary objections ...’; and (iii) the Parties are here taken to have consented to ‘another expedited procedure’ in the form of CAFTA Articles 10.20.4 and 10.20.5. . . . The Tribunal is content to accept the Respondent’s submissions on the application to these ICSID proceedings of CAFTA Articles 10.20.4 and 10.20.5 as an expedited procedure.”). See also **Ex. AALA-20**, Koh Swee Yen and Alvin Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures*, in ICSID RULES AND REGULATIONS 2022: ARTICLE-BY-ARTICLE COMMENTARY (Richard Happ and Stephan Wilske eds.), p. 436, ¶ 12 (“For example, in *Pac Rim v El Salvador*, the Tribunal accepted El Salvador’s submission that the expedited procedure provided for under Articles 10.20.4 and 10.20.5 of the CAFTA trumped the previous Rule 41(5) and was the proper procedure to be applied in addressing preliminary objections.”) (emphasis added).

³⁰³ **Ex. AALA-20**, K. S. Yen and A. Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures*, in ICSID RULES AND REGULATIONS 2022: ARTICLE-BY-ARTICLE COMMENTARY, p. 436, ¶ 12 (emphasis added).

³⁰⁴ **Ex. RALA-55**, Lars Markert, *Summary Dismissal of ICSID Proceedings*, 31(3) ICSID REVIEW — FOREIGN INVESTMENT LAW JOURNAL 690 (2016), p. 692.

³⁰⁵ See ¶¶ 34-39, *supra*.

and Article 10.20.4 of the Peru-US TPA (the exact equivalent to Article 10.20.4 of the Treaty), noting that:

the Tribunal has not been materially assisted by comparisons between the provisions contained in ICSID Arbitration Rule 41.5 and the Treaty provisions of concern in this case. In the Tribunal's judgment, ICSID Rule 41.5 contains language that is very different from that found in Articles 10.20.4 and 10.20.5 of the Treaty. Nor does ICSID Rule 41.5 share precisely the same object and purpose as Articles 10.20.4 and 10.20.5 of the Treaty.³⁰⁶

Applicants' reliance on Rule 41(5) is therefore mistaken.

188. *Third*, Article 10.20.4 of the Treaty itself *requires* a determination of the factual and legal questions arising out of preliminary objections. Article 10.20.4 provides that the tribunal “shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.”³⁰⁷ It contains no language limiting the Tribunal's inquiry to claims that manifestly lack legal merit or prohibiting it from resolving complex questions of law and fact at the preliminary stage. Applicants' suggestion that Article 10.20.4 is confined to manifestly unmeritorious claims finds no support in the text of the provision. To the contrary, as the *Pac Rim v. El Salvador* tribunal confirmed:

The Tribunal does not consider that the standard of review under Article 10.20.4 is limited to “frivolous” claims or “legally impossible” claims, contrary to the submissions of the Claimant. These words could have been used by the Contracting Parties in agreeing CAFTA; but all are significantly absent. Moreover, the implied addition of these

³⁰⁶ **Ex. CL-273**, *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4, December 18, 2014 (“*Renco v. Peru*”), ¶ 237 (emphasis added). See also **Ex. RL-36**, *Pac Rim v. El Salvador*, ¶ 118 (“The Tribunal was also not materially assisted by comparisons with . . . New ICSID Arbitration Rule 41.5, which have different wording and do not share exactly the same object and purpose.”) (emphasis added).

³⁰⁷ **Ex. RL-1**, Treaty, Article 10.20.4.

or similar words would significantly restrict the arbitral remedy under Article 10.20.4, when the structure of this provision permits a more natural and effective interpretation consistent with its object and purpose.³⁰⁸

Applicants invoke this decision in support of their submissions on this issue yet omit this central holding.³⁰⁹

189. The essence of a preliminary objection under Article 10.20.4 of the Treaty is that, *as a matter of law*, the claim submitted to arbitration is not one for which an award in favor of the claimant may be made. This requires an examination of “whether the facts as alleged by the [c]laimant are capable of constituting a breach of a legal right protected by the [t]reaty,”³¹⁰ and thus necessarily requires the tribunal to address the legal issues arising out of the preliminary objections. As the *Pac Rim* tribunal confirmed, Article 10.20.4 requires the tribunal to assess “all relevant questions of law.”³¹¹ In a similar vein, the *Corona v. Dominican Republic* tribunal reasoned under Articles 10.20.4 and 10.20.5 of the DR-CAFTA (which terms are identical to Articles 10.20.4 and 10.20.5 of the Treaty) that:

DR-CAFTA Article 10.20.4 refers to the Tribunal’s “authority to address other objections as a preliminary question.” Further, DR-CAFTA Article 10.20.5 directs that the Tribunal “shall decide on an expedited basis an objection under paragraph 4.” DR-CAFTA’s expedited procedure **does not preclude a tribunal from considering an issue going to the substance of a case if the tribunal finds that it is appropriate to consider such an issue based on the facts as pleaded by the Claimant.** In the present circumstances, the Tribunal considers that it is in a position to consider the

³⁰⁸ **Ex. RL-36**, *Pac Rim v. El Salvador*, ¶ 108.

³⁰⁹ Memorial on Annulment, ¶ 134.

³¹⁰ **Ex. CL-273**, *Renco v. Peru*, ¶ 92.

³¹¹ **Ex. RL-36**, *Pac Rim v. El Salvador*, ¶ 110 (emphasis added).

issue, which, in any event, turns on an interpretation of the DR-CAFTA and the rules of international law.³¹²

190. Deciding a preliminary objection as a matter of law equally requires that the tribunal make factual assessments. While Article 10.20.4(c) of the Treaty provides that the tribunal “shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration,”³¹³ that presumption does not extend to facts not alleged in the notice of arbitration, nor does it apply to conclusory allegations or legal characterizations clothed as factual allegations.³¹⁴ Under Article 10.20.4, tribunals are thus required to assess all the facts necessary to resolve the preliminary objections that fall outside the scope of that presumption.

191. In sum, Applicants fail to identify any rule of procedure — fundamental or otherwise — that required the Tribunal to conduct a full merits proceeding before ruling on Colombia’s Preliminary Objection. To the contrary, the applicable procedural framework under both the ICSID Convention and the Treaty expressly authorizes — and in the case of Article 10.20.4 of the Treaty *mandates* — the preliminary disposition of claims. Article 10.20.4 is not confined to manifestly unmeritorious claims; it requires the Tribunal to address and decide “as a matter of law” whether the claims submitted are ones for which an award in favor of the claimant may be made, including by assessing all relevant questions of law and fact arising from the preliminary objections. Accordingly, Applicants’ contention that the Tribunal departed from a fundamental rule of procedure by resolving Colombia’s Preliminary Objection without a full briefing on the merits is without basis.

³¹² **Ex. RL-41**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016 (“*Corona v. Dominican Republic*, Award”), ¶ 249 (emphasis added).

³¹³ **Ex. RL-1**, Treaty, Article 10.20.4(c).

³¹⁴ See ¶¶ 290-293, *infra*.

b. The Tribunal Did Not Depart from Any Rule of Procedure

192. Applicants fail to demonstrate that the Tribunal *departed* from any rule of procedure in the conduct of the Preliminary Questions Phase. Their challenge targets the substance of the Tribunal's findings on Colombia's Preliminary Objection — not any *procedural* departure. Indeed, Applicants cannot establish any such departure because, pursuant to Article 10.20.4 of the Treaty, conducting the Preliminary Questions Phase was mandatory upon the filing of Colombia's Preliminary Objection.

193. In their Memorial, Applicants do not allege a *procedural* violation but rather contend that the applicable legal standard should have led the Tribunal to dismiss Colombia's Preliminary Objection. By their own admission, their challenge on this ground exclusively concerns "findings by the Tribunal."³¹⁵ Applicants' attempt to appeal the Tribunal's legal and factual assessments is most apparent in their assertion that "claims that are at least colorable based on the facts asserted do not meet the dismissal threshold."³¹⁶ That assertion goes directly to the substance of the Tribunal's analysis under Article 10.20.4 of the Treaty, not to any procedural failing. Applicants' reliance on decisions rendered by other tribunals under ICSID Arbitration Rule 41(5) to argue that the Tribunal applied an incorrect *standard of review* under Article 10.20.4 of the Treaty further confirms that their challenge is one of legal error, which falls outside the scope of ICSID annulment review entirely.³¹⁷

194. As set forth above, Article 52(1)(d) of the ICSID Convention concerns *procedural* conduct exclusively — that is, the manner in which the Tribunal conducted the

³¹⁵ Memorial on Annulment, ¶ 137 (emphasis added).

³¹⁶ *Id.*, ¶ 133 (emphasis added).

³¹⁷ *Id.*

proceedings — not the correctness of the Award.³¹⁸ Whether the Tribunal applied the correct legal standard to uphold Colombia's Preliminary Objection under Article 10.20.4 of the Treaty is accordingly not subject to review by this Committee.

195. In fact, Applicants cannot demonstrate any *procedural* departure because conducting a Preliminary Questions Phase to address Colombia's Preliminary Objection was mandatory under Article 10.20.4 of the Treaty. Unlike a request for bifurcation, which a tribunal has discretion to grant or deny, Article 10.20.4 admits of no such discretion. It provides that “a tribunal *shall* address and decide” the objections raised by the respondent, and that the process is *automatic*:

[o]n receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.³¹⁹

196. Upon receiving Colombia's Preliminary Objection, the Tribunal was required to conduct a Preliminary Questions Phase. The Tribunal cannot be considered to have departed from any rule of procedure by conducting the very proceedings that Article 10.20.4 of the Treaty mandated. Therefore, Applicants' attempt to annul the Award on this basis fails.

³¹⁸ See ¶ 158, *supra*. See also **Ex. RALA-11**, R. D. Bishop and S. M. Marchili, ANNULMENT UNDER THE ICSID CONVENTION, pp. 133-134, ¶ 8.17 (“Committees and authors have emphasized that this ground is not related to the decision of the tribunal itself, but to the manner in which the tribunal proceeded.”) (internal citations omitted; emphasis added).

³¹⁹ **Ex. RL-1**, Treaty, Article 10.20.4(b) (emphasis added).

c. The Alleged Departure Is Not Serious Because Claimants' Claims Would Have Been Found Premature and Inadmissible Regardless of the Procedure Followed

197. Even assuming, *quod non*, that the Tribunal departed from a fundamental rule of procedure, Applicants would still bear the burden of demonstrating that such departure was *sufficiently serious* to warrant annulment of the Award under Article 52(1)(d) of the ICSID Convention.³²⁰ They make no effort to discharge that burden.³²¹ They fail to explain how the Tribunal might have reached a substantially different result had it conducted a “full arbitration proceeding” rather than ruling on Colombia’s Preliminary Objection during the Preliminary Questions Phase.³²² Nor do they identify what difference a “discovery phase” — presumably referring to a document production phase — would have made to their case. Those omissions are fatal to their claim.

198. The Tribunal’s conclusion rested on a simple undisputed fact, which would have remained the same after a “full arbitration proceeding.” The Tribunal noted that “there is no dispute between the Parties that, at the time the arbitration was initiated, only the Indictment Order had been issued,”³²³ and concluded that “the final administrative act had to be in existence at the time of the filing of the Request for Arbitration, and it was not.”³²⁴ On that basis, the Tribunal determined that “the absence of a measure capable of constituting a breach of a substantive obligation under the TPA by Respondent at the time the arbitration

³²⁰ See ¶¶ 160-164, *supra*.

³²¹ Memorial on Annulment, ¶¶ 129-137.

³²² *Id.*, ¶ 137.

³²³ **Ex. AA-7**, Award, ¶ 207.

³²⁴ *Id.*, ¶ 221.

was initiated makes Claimants' claim premature and inadmissible."³²⁵ No amount of additional proceedings, evidence or document production could have altered that conclusion.

199. The remaining issues addressed by the Tribunal — namely, the interpretation of the term “administrative adjudicatory proceedings” found in Article 10.5.2(a) of the Treaty, the requirement to exhaust local judicial remedies and the alleged futility or manifest ineffectiveness of such remedies in Colombia — formed part of the Tribunal's subsidiary analysis of whether the Ruling with Fiscal Liability was a measure capable of constituting a breach of the Treaty, and were not the primary basis for its decision to uphold Colombia's Preliminary Objection.³²⁶ Therefore, even assuming, *quod non*, that Applicants could demonstrate that a different procedure would have altered the Tribunal's analysis of those non-primary issues, that would have had no bearing on the outcome of the Award. Applicants accordingly cannot establish any *serious* departure, and their ground for annulment on this basis must fail.

3. The Committee Cannot Undertake a *De Novo* Review of the Tribunal's Decision to Conduct a Preliminary Questions Phase

200. Moreover, annulment on this ground should be rejected because it would necessarily entail a *de novo* review of the Tribunal's decision to conduct a Preliminary Questions Phase, thereby crossing the line that separates annulment from appeal. As set forth above, annulment is an exceptional remedy that excludes any *de novo* review of the

³²⁵ *Id.*, ¶ 219.

³²⁶ *Id.*, ¶¶ 207-224.

Tribunal's decisions.³²⁷ This Committee accordingly cannot second-guess how the Tribunal exercised its discretionary powers in the management of the proceedings.³²⁸

201. In the Arbitration, the Parties extensively argued the question of whether Colombia's Preliminary Objection under Article 10.20.4 of the Treaty — and the underlying legal and factual questions arising from it — should be decided through a Preliminary Question Phase, prior to a full briefing on the merits of the case. After written submissions and oral argument, the Tribunal heard the Parties' respective positions in full.³²⁹ Having done so, it took a reasoned decision to proceed through the Preliminary Questions Phase.³³⁰ That was a discretionary exercise of its procedural powers under the applicable rules. Applicants may disagree with that decision, but disagreement is not a ground for annulment, and this is not the forum in which to relitigate it.

202. Therefore, this Committee cannot undertake a *de novo* review of the Tribunal's decision to decide Colombia's Preliminary Objection through the Preliminary Questions Phase, and Applicants' ground should accordingly be rejected.

4. The Preliminary Questions Phase Was Not a Summary Proceeding

203. Beyond their failure to demonstrate that the Tribunal's decision to conduct the Preliminary Questions Phase — a supposed "summary proceeding" — satisfies the requirements for annulment under Article 52(1)(d) of the ICSID Convention, Applicants' characterization is factually wrong.

³²⁷ See ¶¶ 82-96, *supra*.

³²⁸ See ¶¶ 158-159, *supra*. See also **Ex. RALA-38**, *Azurix v. Argentina*, ¶ 210 ("A decision by a tribunal whether or not to exercise a discretionary power that it has under a rule of procedure is an *exercise* of that rule of procedure, and not a *departure from* that rule of procedure.") (emphasis in original).

³²⁹ See ¶¶ 34-38, *supra*.

³³⁰ See ¶¶ 34-38, *supra*.

204. The Preliminary Questions Phase was not a “summary proceeding” whatsoever. In addition to the factual presumption provided under Article 10.20.4(c) of the Treaty for the sole benefit of Claimants,³³¹ the Tribunal afforded both Parties a full and fair opportunity to present all arguments of fact and law arising from Colombia’s Objections. Over the course of more than two years of proceedings and with sufficient time allocated at each stage:

- the Parties exchanged two rounds of comprehensive written submissions, totaling nearly 600 pages of factual and legal briefings addressing Colombia’s Objections;³³²
- the Parties produced more than 150 factual exhibits and 600 legal authorities;³³³
- the Claimants submitted five witness statements;³³⁴
- the Parties presented their factual and legal arguments at a two-day hearing in Washington D.C. on 19 and 20 May, 2022, which included opening and rebuttal presentations and the opportunity to answer direct questions from the Tribunal;³³⁵ and
- following the hearing, the Claimants were further permitted to produce new documents, and the Parties exchanged additional written submissions addressing Colombia’s Objections.³³⁶

205. In Applicants’ own words, the Preliminary Questions Phase was a “full examination of the factual and legal merits of [Claimants’] claims.”³³⁷ It is therefore

³³¹ See ¶ 290, *infra*.

³³² Claimants and Respondent each were allocated 105 days to present their Memorial on Preliminary Objections and the Counter-Memorial on Preliminary Objections, respectively, and 60 days for the Reply on Preliminary Objections and Rejoinder on Preliminary Objections, respectively. See **Ex. AA-5**, Procedural Order No. 1, Revised Annex A, Procedural Calendar, October 7, 2021.

³³³ **Ex. AA-16**, Electronic Hearing Bundle, May 19-20, 2022.

³³⁴ **Ex. AA-7**, Award, ¶¶ 13, 22.

³³⁵ **Ex. AA-12**, Preliminary Objections Hearing Transcript, Volume 1, May 19, 2022; **Ex. AA-13**, Preliminary Objections Hearing Transcript, Volume 2, May 20, 2022.

³³⁶ See ¶¶ 48-50, *supra*.

³³⁷ Memorial on Annulment, ¶ 129.

undeniable that the Preliminary Questions Phase was not a mere summary proceeding but rather a comprehensive arbitration proceeding.

206. Applicants' reference to the lack of "the benefit of document disclosure or discovery"³³⁸ does not mean the Preliminary Questions Phase was "summary." As set forth above, Claimants had the procedural opportunity to seek document production during the Preliminary Questions Phase, had they wanted to do so.³³⁹ They simply chose not to. Applicants do not even attempt to identify which documents they would have sought to produce, what arguments those documents would have supported, or what procedural benefit they would have derived from document production.

207. More importantly, the manner in which the Preliminary Questions Phase was conducted was well suited to the nature of the legal and factual questions the Tribunal was called upon to resolve. Applicants cannot claim before the Committee that "[c]omplex questions of fact or mixed questions of law and fact can only be resolved after a full evidentiary record has been developed"³⁴⁰ while they acknowledged during the Preliminary Questions Phase that the issues at stake were fully briefed and that the record before the Tribunal was complete. Indeed, in their written submissions and at the hearing, the Parties addressed at length all the factual and legal issues Applicants now claim to be "too complex" for an expedited proceeding under the Treaty.³⁴¹ the legal interpretation of the term "administrative adjudicatory proceedings" found in Article 10.5.2(a) of the Treaty,³⁴² the

³³⁸ *Id.*, ¶ 137.

³³⁹ See ¶¶ 175-178, *supra*.

³⁴⁰ Memorial on Annulment, ¶ 135.

³⁴¹ *Id.*, ¶ 136.

³⁴² **Ex. AA-3**, Colombia's Memorial on Preliminary Objections, July 1, 2021, pp. 43-48, 110-121; **Ex. AA-9**, Foster Wheeler's Counter-Memorial on Preliminary Objections, October 14, 2021, pp. 6-13; **Ex. AA-10**, Colombia's Reply on Preliminary Objections, December 13, 2021, pp. 49-51; **Ex. AA-11**, Foster Wheeler's

requirement to exhaust local judicial remedies,³⁴³ and the alleged futility or manifest ineffectiveness of local judicial remedies in Colombia.³⁴⁴ With respect to these issues, Claimants explicitly confirmed at the end of the two-day hearing in Washington D.C. that “there is an extensive record here. The issues have been vetted” and that “the record is sufficiently developed on these questions at this point for the Tribunal to decide.”³⁴⁵ They cannot now claim before this Committee that the Tribunal departed from the applicable procedural rules by deciding these issues based on the record before it.³⁴⁶

* * *

208. In conclusion, Applicants’ ground under Article 52(1)(d) of the ICSID Convention that the Tribunal seriously departed from a fundamental rule of procedure by resolving Colombia’s Objections (and the factual and legal questions arising therefrom) through the Preliminary Questions Phase is inadmissible and fails at every level. Applicants fail to identify any fundamental rule of procedure, any procedural departure from that rule, or any serious consequence of the alleged departure. Moreover, this Committee should not

Rejoinder on Preliminary Objections, February 11, 2022, pp. 34-38; **Ex. AA-13**, Preliminary Objections Hearing Transcript, Volume 2, May 20, 2022, pp. 68-70, 193-197.

³⁴³ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, pp. 113-116; **Ex. AA-9**, Foster Wheeler’s Counter-Memorial on Preliminary Objections, October 14, 2021, pp. 6-13; **Ex. AA-10**, Colombia’s Reply on Preliminary Objections, December 13, 2021, pp. 52-53; **Ex. AA-11**, Foster Wheeler’s Rejoinder on Preliminary Objections, February 11, 2022, pp. 33-37; **Ex. AA-13**, Preliminary Objections Hearing Transcript, Volume 2, May 20, 2022, pp. 48-50, 193(11:16), 254(7:13).

³⁴⁴ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, pp. 116-118; **Ex. AA-9**, Foster Wheeler’s Counter-Memorial on Preliminary Objections, October 14, 2021, p. 7; **Ex. AA-10**, Colombia’s Reply on Preliminary Objections, December 13, 2021, p. 81; **Ex. AA-11**, Foster Wheeler’s Rejoinder on Preliminary Objections, February 11, 2022, p. 37; **Ex. AA-13**, Preliminary Objections Hearing Transcript, Volume 2, May 20, 2022, pp. 70(16:22)-71(1:8), 197(5:15), 254(7:13).

³⁴⁵ **Ex. AA-13**, Preliminary Objections Hearing Transcript, Volume 2, May 20, 2022, pp. 364:10-365:5 (emphasis added).

³⁴⁶ Memorial on Annulment, ¶ 136.

engage in a *de novo* review of the Tribunal's decision to rule on Colombia's Objections during the Preliminary Questions Phase, which was a comprehensive arbitration proceeding.

B. The Tribunal's Application of the Treaty's Provisions and Customary International Law

209. The Tribunal dismissed Claimants' claims pursuant to Article 10.20.4 of the Treaty on the ground that, at the time Claimants initiated the Arbitration, only the Indictment Order (*Auto de Imputación*) had been issued and, consequently, no "measure" capable of constituting a breach of the Treaty existed.³⁴⁷ In the words of the Tribunal, "the absence of a measure capable of constituting a breach of a substantive obligation under the TPA by Respondent at the time the arbitration was initiated makes Claimants' claim premature and inadmissible."³⁴⁸

210. Nevertheless, subsidiarily and out of an abundance of caution, the Tribunal decided to also analyze whether the Ruling with Fiscal Liability was a measure capable of constituting a breach of the Treaty.³⁴⁹ It was in this context that the Tribunal discussed the meaning of the term "administrative adjudicatory proceedings" and Claimants' denial of justice claim.

211. According to Applicants, in doing so the Tribunal (1) committed annulable errors in its interpretation of the term "administrative adjudicatory proceedings" under Article 10.5.2(a) of the Treaty,³⁵⁰ and (2) erroneously imposed an exhaustion of local

³⁴⁷ See ¶¶ 59-62, *supra*.

³⁴⁸ **Ex. AA-7**, Award, ¶ 219 (emphasis added).

³⁴⁹ See ¶ 70, *supra*.

³⁵⁰ Memorial on Annulment, ¶¶ 159-184, 195-197.

remedies requirement to their claims, other than their denial of justice claim.³⁵¹ As demonstrated below, neither ground is established.

1. The Tribunal's Interpretation of the Term “Administrative Adjudicatory Proceedings” Under Article 10.5.2(a) of the Treaty

212. The Tribunal determined that for Claimants' claims to be admissible “[a] final administrative act had to be in existence at the time of the filing of the Request for Arbitration, and it was not.”³⁵² The Indictment Order, issued *prior* to the initiation of the Arbitration, was not a final administrative act and therefore not a “measure” capable of constituting a breach of the Treaty.

213. Without endorsing that proposition – which it had already rejected³⁵³ – the Tribunal assumed for the sake of argument “that subsequent events could ripen a claim after the commencement of the arbitration,”³⁵⁴ and assessed whether the Ruling with Fiscal Liability — issued after Claimants filed their Request for Arbitration — could constitute a measure capable of constituting a breach of the Treaty. The Tribunal answered in the negative. While the Ruling with Fiscal Liability could arguably qualify as a “measure” (because, unlike the Indictment Order, it would constitute a final administrative act), it was

³⁵¹ *Id.*, ¶¶ 112-118.

³⁵² **Ex. AA-7**, Award, ¶ 221 (emphasis added).

³⁵³ *Id.*, ¶¶ 205-206 (“Even if the evidence associated with the claims may, in certain instances, be made available only after the filing of the appropriate request for arbitration, this shall not be deemed a blank check allowing a claimant to introduce documents periodically throughout the arbitration. Moreover, the submission of evidence after the initial procedural moment is also subject to a high standard of proof as to when the evidence became available. This possibility is limited by the due process of law and the right of defence of respondent which must be at all times preserved. In sum, even if the evidence is central for the admissibility of the claim and was only obtained after the relevant filing, the introduction of the same may not be considered in ascertaining the fulfilment of the prerequisites under the Treaty.”).

³⁵⁴ *Id.*, ¶ 216.

not a measure *capable of constituting a breach of the Treaty*, as it remained subject to judicial review.³⁵⁵

214. In reaching that conclusion, the Tribunal interpreted the term “administrative adjudicatory proceedings” used in Article 10.5.2(a) of the Treaty — which sets out the obligation not to deny justice —, considered that this term refers exclusively to “a judicial proceeding before the administrative adjudicatory jurisdiction,”³⁵⁶ and agreed with Colombia that purely administrative proceedings, such as the Fiscal Liability proceedings, did not fall under the scope of the Treaty’s denial of justice clause.³⁵⁷

215. Applicants raise two distinct annulment grounds against the Tribunal’s analysis on this point. They claim that the Tribunal (a) committed a manifest excess of power,³⁵⁸ and (b) failed to state the reasons for its finding.³⁵⁹ As demonstrated below, these grounds are meritless.

a. The Tribunal Did Not Exceed, Let Alone Manifestly Exceed, Its Powers

216. Applicants claim that the Award should be annulled because the Tribunal allegedly failed to apply the proper law to interpret Article 10.5.2(a) of the Treaty,³⁶⁰ and committed an *egregious* error of law in its finding that the term “administrative adjudicatory Proceedings” does not include the Fiscal Liability proceedings.³⁶¹ These assertions are meritless and do not warrant annulment of the Award under Article 52(1)(b) of the ICSID

³⁵⁵ *Id.*

³⁵⁶ *Id.*, ¶ 210.

³⁵⁷ *Id.*, ¶¶ 208-220.

³⁵⁸ Memorial on Annulment, ¶¶ 159-184.

³⁵⁹ *Id.*, ¶¶ 195-197.

³⁶⁰ *Id.*, ¶¶ 159-168.

³⁶¹ *Id.*, ¶¶ 169-184.

Convention. As demonstrated below, (i) the Tribunal carefully interpreted Article 10.5.2(a) of the Treaty based on customary rules of treaty interpretation and (ii) did not commit any *egregious* error of law, as it correctly interpreted the term “administrative adjudicatory proceedings.” In any event, (iii) the Tribunal’s interpretation of Article 10.5.2(a) was not material to the outcome of the Award.

i. The Tribunal Did Not Fail to Apply the Proper Law

217. Contrary to what Applicants assert, the Tribunal carefully interpreted Article 10.5.2(a) of the Treaty based on the customary rules of treaty interpretation.³⁶² In any event, had the Tribunal failed to apply such rules (*quod non*), that would not amount to a failure to apply the proper law.

218. Applicants suggest that the Tribunal should have undertaken a rigid step-by-step “Vienna Convention analysis”³⁶³ and criticize the Tribunal for not expressly citing the Vienna Convention or applying the customary rules of treaty interpretation in its reasoning.³⁶⁴ These assertions are without basis because, while not expressly referring to the Vienna Convention, the Tribunal interpreted Article 10.5.2(a) of the Treaty in accordance with the customary rules of treaty interpretation.

219. At the outset, it should be noted that the United States has never ratified the Vienna Convention on the Law of Treaties (the “Vienna Convention”),³⁶⁵ which accordingly applied only as a reflection of customary rules of treaty interpretation.³⁶⁶ Moreover,

³⁶² *Id.*, ¶¶ 159-168.

³⁶³ *Id.*, ¶ 166.

³⁶⁴ *Id.*, ¶¶ 165, 168.

³⁶⁵ **Ex. RA-23**, *International Legal Authorities*, U.S. DEPARTMENT OF STATE WEBSITE, January 2009 (“The United States has not ratified the VCLT and thus is not legally bound by its provisions”).

³⁶⁶ See for example, **Ex. RALA-57**, *Jadhav Case (India v. Pakistan)*, International Court of Justice, Judgment, July 17, 2019, ¶ 71.

customary rules of treaty interpretation are not an exact science and “[d]espite the existence of Articles 31-33 of the [Vienna Convention], to some extent, issues of interpretation still have to be resolved at the discretion of the law-applying agents themselves.”³⁶⁷

220. In the present case, even though the Tribunal did not expressly refer to it, the Tribunal interpreted the Treaty relying on customary rules of treaty interpretation encompassed in the Vienna Convention.

221. The Tribunal first considered the ordinary meaning of the term “administrative adjudicatory proceedings” under Article 10.5.2(a), finding it to be sufficiently clear in light of its context. It is well settled that “[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter” — and that resort to other means of interpretation is warranted only when the words are ambiguous or lead to an unreasonable result.³⁶⁸ In the Award, the Tribunal considered the term “administrative adjudicatory proceedings” to be unambiguously referring to judicial proceedings before an administrative jurisdiction:

The Tribunal notes Claimants’ argument that the Ruling with Fiscal Liability is the result of an administrative adjudicatory proceeding falling within the ambit of Article 10.5.2(a) of the Treaty, thus allowing a claim for denial of justice. However, the Arbitral Tribunal understands that the administrative

³⁶⁷ **Ex. RALA-58**, Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26(1) EUROPEAN JOURNAL OF INTERNATIONAL LAW 169 (2015), p. 175.

³⁶⁸ **Ex. RL-279**, *Competence of the General Assembly for the Admission of a State to the United Nations*, International Court of Justice, Advisory Opinion of March 3, 1950, I.C.J. REPORTS 4 (1950), p. 8 (“If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.”) (emphasis added). See also **Ex. RL-338**, International Law Commission, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1966), Vol. II, p. 221, ¶ 12. Also, in *Murphy*, the tribunal considered the term of a treaty provision debated between the parties to be sufficiently “clear and unambiguous” and therefore considered that it was not necessary to engage into any further interpretation exercise. See **Ex. RL-213**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010, ¶ 71.

adjudicatory proceeding referred to in Article 10.5.2(a) is a judicial proceeding before the administrative adjudicatory jurisdiction, and not an administrative proceeding as the Fiscal Liability Proceeding.³⁶⁹

222. Having reached a clear understanding of the term based on its ordinary meaning, the Tribunal was not required to undertake any further interpretative analysis.³⁷⁰ Yet, the Tribunal then relied on the Spanish version of the Treaty to confirm its prior understanding. Without explicitly referring to the Vienna Convention, tribunals have interpreted international treaties drafted in several equally authoritative languages by simply giving deference to the language that was the most precise,³⁷¹ or by assessing the most plausible reading of these texts.³⁷² Article 33(4) of the Vienna Convention commands a deeper interpretative analysis only “when a comparison of the authentic texts discloses a difference of meaning.”³⁷³ In the present case, the Tribunal found that the Spanish term *procedimiento contencioso administrativo* disclosed no such difference but rather “confirm[ed] such understanding” that Article 10.5.2(a) of the Treaty “unequivocally means a

³⁶⁹ **Ex. AA-7**, Award, ¶ 210 (emphasis added).

³⁷⁰ In addition, and as demonstrated bellow, the Tribunal’s interpretation of the Treaty was conducted in good faith and is consistent with the object and purpose of the term under Article 10.5.2(a) Treaty. See ¶¶ 229-247, *infra*. This further confirms that the Tribunal fully applied the rules of treaty interpretation reflected under Article 31(1) of the Vienna Convention.

³⁷¹ See for example **Ex. RALA-59**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (I)*, UNCITRAL, Award on Jurisdiction, April 22, 2010, ¶¶ 98, 100 (“In order to clarify this issue, the Tribunal finds that it is appropriate to consider not only the English language version of the Treaty, but also the Spanish and French texts, since each of these texts is equally authentic. . . . Comparing these three texts of Article XII(4), the Tribunal notes that the French text might be considered to be more precise, in the sense that it explicitly identifies three considerations, aspects of which may only be implicitly articulated in the Spanish and English versions . . .”).

³⁷² See for example **Ex. RL-39**, *United Parcel Service of America Inc v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, November 22, 2002, ¶¶ 65-66.

³⁷³ **Ex. RL-53**, Vienna Convention of the Law of Treaties, done at Vienna on May 23, 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331 (“Vienna Convention of the Law of Treaties”), Article 33(4).

proceeding initiated before a national court.”³⁷⁴ Doing so, the Tribunal applied customary rules of treaty interpretation.

223. The Tribunal also confirmed its understanding of the ordinary meaning of the term “administrative adjudicatory proceedings” by further interpreting Article 10.5.2(a) in its context. Under Article 31 of the Vienna Convention, “[t]he first role of the reference to context is an immediate qualifier of the ordinary meaning of the terms used in the treaty” and therefore “directs the interpreter to look to many factors ranging from those that are fairly immediate, such as the wording of surrounding provisions, headings of articles and punctuation, to more remote elements such as comparisons with other provisions on similar matters or using similar wording.”³⁷⁵ Other provisions of the same treaty accordingly constitute the primary and most direct form of context within the meaning of Article 31 of the Vienna Convention. While not referring explicitly to this article, the Tribunal applied precisely that method. It read the term “administrative adjudicatory proceeding” in the context of the same sentence, noting that it refers to “all of criminal, civil and administrative adjudicatory proceedings”³⁷⁶ and compared Article 10.5.2(a) in light of other provisions of the Treaty, concluding that:

When the Treaty refers specifically to purely administrative proceedings, as opposed to judicial proceedings, it makes reference to “administrative proceedings” and “administrative process.” The only instance in which the expression “administrative adjudicatory proceedings” is used is in

³⁷⁴ **Ex. AA-7**, Award, ¶ 211.

³⁷⁵ **Ex. RALA-60**, Richard Gardiner, *TREATY INTERPRETATION* (2nd ed., Oxford University Press 2015), p. 197 (emphasis added). See also **Ex. RALA-61**, *Eskosol S.P.A v. Italy*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, May 7, 2019, ¶ 80 (“[T]he relevant ‘context’ for construing any given passage in a treaty includes both the words and sentences found in close proximity to that passage, including definitional terms, and other provisions of the same treaty which help illuminate its object and purpose.”).

³⁷⁶ **Ex. AA-7**, Award, ¶ 212.

Article 10.5.2(a) which, when read in conjunction with “criminal, civil, or” must refer to judicial proceedings.³⁷⁷

224. The Tribunal accordingly did not fail to apply the proper law because it carefully applied the customary rules of treaty interpretation to interpret the Treaty.

225. In any event, and contrary to what Applicants suggest, the Tribunal's alleged failure to apply the customary rules of treaty interpretation reflected in the Vienna Convention cannot amount to a manifest excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention.³⁷⁸ In *Lucchetti v. Peru*, the committee was confronted with a tribunal that had neither identified nor described the rule of treaty interpretation it applied,³⁷⁹ and whose interpretation did not reflect all the relevant features of treaty interpretation according to the Vienna Convention.³⁸⁰ The committee noted that there were elements it would have expected to find in an award applying the Vienna Convention — including an examination of the “object and purpose” of the treaty and its negotiating history — that were absent from the award.³⁸¹ It however concluded that the tribunal's reasoning, “although summary and

³⁷⁷ *Id.*, ¶ 213.

³⁷⁸ Memorial on Annulment, ¶ 169.

³⁷⁹ **Ex. AALA-27**, *Lucchetti v. Peru*, ¶ 113 (“The *Ad hoc* Committee notes on this point first that the Tribunal did not identify or describe in its Award the rules of interpretation it proposed to apply.”).

³⁸⁰ *Id.*, ¶ 116 (“Although the Tribunal's interpretation of Article 2 of the BIT, as it appears in the Award, does not reflect all relevant aspects of treaty interpretation according to the Vienna Convention, the Committee has no basis for concluding that the Tribunal disregarded any significant element of the well-known and widely recognised international rules of treaty interpretation.”).

³⁸¹ *Id.*, ¶ 114 (“Indeed, there are some elements regarding the interpretation of Article 2 of the BIT which the *Ad hoc* Committee would have expected to find in an award applying international rules of treaty interpretation based on the Vienna Convention. It notes in this respect that the Award does not deal with the use of both ‘dispute’ and ‘difference’ in the second sentence of the Article and its significance for interpretation purposes. Nor is there in the Award an analysis of the two sentences in Article 2 and the relations between them (the first one having a retrospective reach and the second one being in the form of an exception) or any consideration of what might have been the joint intentions of the Contracting Parties. Further, the Award does not purport to examine the ‘object and purpose’ of the BIT or its negotiating history in order to illuminate, if possible, what the Contracting Parties actually intended by including the second sentence in Article 2, and what they had specifically in mind when using the term ‘dispute’ in that particular context.”).

somewhat simplified in relation to the Vienna Convention,” did not constitute “an excess — and even less a manifest excess — of the Tribunal’s powers.”³⁸²

226. Also in *Continental Casualty v. Argentina*, the applicants advanced precisely the argument advanced by Applicants here: that “the Tribunal failed to properly address the international law rules on treaty interpretation including the Vienna Convention.”³⁸³ The committee rejected that argument. It held that “erroneous application of principles of treaty interpretation is also in itself an error of law, rather than a manifest excess of powers”³⁸⁴ and that the tribunal had “nonetheless applied the investment treaty, which is the law that it was required to apply.”³⁸⁵

227. Thus, Applicants’ Vienna Convention argument is similar to arguments that two annulment committees have expressly rejected. Thus, even assuming, *quod non*, that the Tribunal’s interpretation of the Treaty failed to address every element of a proper “Vienna Convention analysis,” that would constitute an error of law at most, and not a failure to apply the law *in toto* warranting annulment under Article 52(1)(b) of the ICSID Convention.

ii. The Tribunal Did Not Commit Any Error of Law, Let Alone an Egregious Error of Law

228. Applicants attempt to relitigate their case, claiming that, in addition to failing to apply the customary rules of treaty interpretation, the Award should be annulled because the

³⁸² *Id.*, ¶ 116.

³⁸³ **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 90. In the present case, Applicants complain that “Articles 31 and 33 of the Vienna Convention . . . are not even mentioned, much less applied, in the Tribunal analysis of that term,” that the Tribunal reasoned “[w]ithout reference to the Vienna Convention,” that “[t]he Tribunal reached that conclusion without applying the elements of the general rule of treaty interpretation set forth in Article 31 of the Vienna Convention,” that it “did not undertake th[e] standard Vienna Convention analysis” and that “the Tribunal failed to apply the accepted rules of treaty interpretation set forth in the Vienna Convention when forming its ruling.” Memorial on Annulment, ¶¶ 164-165, 167-168.

³⁸⁴ **Ex. RALA-33**, *Continental Casualty v. Argentina*, ¶ 90.

³⁸⁵ *Id.*, ¶ 94.

Tribunal allegedly committed an egregious error of law in its interpretation and application of Article 10.5.2(a) of the Treaty.³⁸⁶ This argument is meritless. As explained above, under Article 52(1)(b) of the ICSID Convention, the Committee should limit itself to evaluating whether the Tribunal failed to apply the law *in toto*, not whether it misapplied the law.³⁸⁷ In any event, the Tribunal did not commit any error of law, let alone an *egregious* error in law that would warrant annulment of the Award under Article 52(1)(b) of the ICSID Convention. The Tribunal's interpretation is consistent with (a) the object and purpose of the Treaty; (b) the plain meaning of the term "administrative adjudicatory proceedings" under both its equally authentic versions; and (c) the other provisions of the Treaty.

(a) The Tribunal's Interpretation Is Consistent with the Object and Purpose of Article 10.5.2 of the Treaty

229. The Tribunal's interpretation is consistent with the object and purpose of Article 10.5.2 of the Treaty, contrary to what Applicants assert.³⁸⁸ In the Award, the Tribunal reasoned that the fair and equitable standard of treatment provided under Article 10.5.2(a) of the Treaty is limited to denial of justice during judicial proceedings of the civil, criminal or administrative jurisdictions, and not purely administrative proceedings such as the Fiscal Liability Proceedings.³⁸⁹

³⁸⁶ Memorial on Annulment, ¶¶ 169-184.

³⁸⁷ See ¶¶ 111-113, *supra*.

³⁸⁸ According to Applicants, "[t]he Tribunal's interpretation does not meet the TPA's stated purpose[]" because "[t]he TPA's object and purpose is best served by an interpretation under which the rights of foreign investors are protected in *all* adjudicatory proceedings, regardless of whether those proceedings are conducted by a court of competent jurisdiction or by an administrative body." See Memorial on Annulment, ¶ 176 (*italics in original*).

³⁸⁹ **Ex. AA-7**, Award, ¶ 210.

230. As explained by Colombia during the underlying Arbitration,³⁹⁰ Article 10.5.2 of the Treaty provides that the fair and equitable treatment standard — which encompasses the denial of justice obligation — is limited to the customary international law minimum standard of treatment and “do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights.”³⁹¹

231. Colombia further explained during the underlying Arbitration³⁹² that it is well settled under the customary international law minimum standard of treatment that the denial of justice standard is limited to failure of the “legal system as a whole,”³⁹³ and therefore does

³⁹⁰ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 201-203; **Ex. AA-10**, Colombia’s Reply on Preliminary Objections, December 13, 2021, ¶¶ 141-144.

³⁹¹ **Ex. RL-1**, Treaty, Article 10.5.2. The United States of America, as non-disputing party, has constantly confirmed before investment arbitral tribunals that the object and purpose of the denial of justice standard under Article 10.5.1 of the Treaty is accordingly confined to the customary international law minimum standard of treatment. See **Ex. RL-54**, *Angel Manuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, February 26, 2021, ¶ 46; **Ex. RL-64**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, March 11, 2016 (“*Submission of the U.S. in Corona*”), ¶¶ 11-13; **Ex. RL-66**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019 (“*Submission of the U.S. in Gramercy*”), ¶ 48; **Ex. RL-67**, *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Submission of the United States of America, September 11, 2017 (“*Submission of the U.S. in Italba*”), ¶¶ 18-20.

³⁹² **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 201-203; **Ex. AA-10**, Colombia’s Reply on Preliminary Objections, December 13, 2021, ¶¶ 141-144.

³⁹³ **Ex. RL-41**, *Corona v. Dominican Republic*, Award, ¶ 254 (“The international delict of denial of justice rests upon a specific predicate, namely, the systemic failure of the State’s justice system. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent’s legal system as a whole has failed to accord justice to the claimant.”) (italics in original; emphasis added); **Ex. RL-77**, *Liman Caspian Oil BV and NCL Dutch Investment v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, June 22, 2010, ¶ 279 (“Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process.”) (emphasis added); **Ex. RL-78**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, ¶ 8.36 (“To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.”) (emphasis added); **Ex. RL-79**, *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Award, February 22, 2021, ¶ 212 (“In order to succeed in a claim for denial of justice, the Claimant must go beyond a mere misapplication of domestic law and show that there was a failure of the national system as a whole.”) (emphasis added).

not extend to non-final judicial decisions — that is, decisions that remain subject to further review within the State's judicial system.³⁹⁴ Under the NAFTA, the *Apotex v. United States* tribunal reasoned as follows:

[A] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.³⁹⁵

232. In *Loewen v. The United States*, a NAFTA tribunal also reasoned as follows:

The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.³⁹⁶

³⁹⁴ See for example **Ex. RL-80**, *Phillip Morris Brands SARL, et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, ¶ 499 (“A denial of justice claim may be asserted only after all available means offered by the State's judiciary to redress the denial of justice have been exhausted.”) (emphasis added); **Ex. RL-83**, *Flughafen Zurich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014 (“*Flughafen v. Venezuela*, Award”), ¶ 392 (“There can be no international responsibility of a State for denial of justice if there is an effective domestic remedy against the domestic decision that is being challenged.”) (translation from Spanish); **Ex. CL-183**, Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 1 (2005), p. 14 (“The idea that a violation of substantive international standards has occurred only after redress has been sought exhaustively through the local courts, is hardly surprising in the context of an alleged denial of justice. Denial of justice is committed typically by the judiciary and is completed only if the incriminated decision has been appealed unsuccessfully.”) (emphasis added).

³⁹⁵ **Ex. RL-84**, *Apotex Inc. v. Government of the United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility, June 14, 2013 (“*Apotex v. United States*, Award on Jurisdiction”), ¶ 282 (emphasis added). See also **Ex. CL-91**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003 (“*Loewen v. United States*”), ¶ 156 (“The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.”); **Ex. AALA-45**, Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (Cambridge University Press 2009), p. 108 (“For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.”).

³⁹⁶ **Ex. CL-91**, *Loewen v. United States*, ¶ 156 (emphasis added).

233. Nothing in the Treaty suggests that the signatory States intended to depart from the limitation that the denial of justice can only concern final acts that were challenged through the whole judicial system of the State. It follows that Article 10.5.2(a) of the Treaty was never meant to cover acts from administrative proceedings that remain subject to review by the judicial administrative courts (*cortes contencioso administrativas*). Colombia emphasized the decision from the *Corona Materials* tribunal which, interpreting article 10.5.2 of the DR-CAFTA (the textual equivalent to Article 10.5.2 in the Treaty), ruled in a similar case that administrative acts cannot constitute a denial of justice and that no denial of justice can exist without the intervention of the highest judicial authority of the State:

[T]he Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decision-maker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law. . . . The Tribunal does not agree with this submission, because a finding of denial of justice under international law necessarily depends on the final product of the State's domestic legal system. Since, as the United States put it, the "responsibility [of a State] is engaged as the result of a definitive judicial decision by a court of last resort," there can be no denial of justice without a final decision of a State's highest judicial authority.³⁹⁷

234. Applicants' reference to the recent decision in *Finley v. Mexico* is unavailing.³⁹⁸ In this case, the claimant claimed various violations of the fair and equitable treatment standard, and the tribunal simply drew a distinction between the denial of justice standard, which is "a typical breach of the FET standard," and other violations of the minimum standard

³⁹⁷ **Ex. RL-41**, *Corona v. Dominican Republic*, Award, ¶¶ 248, 264 (emphasis added). See **Ex. AA-3**, Colombia's Memorial on Preliminary Objections, July 1, 2021, ¶¶ 177-178.

³⁹⁸ Memorial on Annulment, ¶ 180; **Ex. AALA-44**, *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Decision on Jurisdiction and Liability, November 4, 2024 ("*Finley v. Mexico*"), ¶¶ 515, 521.

of treatment by the actions of other public authorities.³⁹⁹ It did not consider, however, that actions of purely administrative proceedings could amount to a denial of justice. The claim in *Finley* concerned a decision of the Mexican *Tribunal Federal de Justicia Administrativa*,⁴⁰⁰ a *judicial court* of the administrative adjudicatory jurisdiction (*jurisdicción contencioso administrativa*) — not an administrative body. This case therefore does not support the idea that an administrative act that remains subject to judicial control, such as the Ruling with Fiscal Liability, could amount to a denial of justice under the Treaty.

235. Applicants' reliance on Decision No. 9 of the Free Trade Commission does not aid their case on annulment.⁴⁰¹ Because Decision No. 9 of the Free Trade Commission was issued *after* the Tribunal rendered its Award and therefore did not form part of the record before the Tribunal,⁴⁰² this Committee cannot rely on it in its analysis.

236. But even if it could, Applicants' argument is misleading. They assert that Decision No. 9 of the Free Trade Commission recognizes that administrative proceedings are subject to an international due process standard, that it is inconsistent with the Tribunal's interpretation, and that it contradicts Colombia's position in the Arbitration.⁴⁰³ These assertions are unfounded. To the contrary, Decision No. 9 of the Free Trade Commission confirms what Colombia argued before the Tribunal: that the term "administrative

³⁹⁹ **Ex. AALA-44**, *Finley v. Mexico*, ¶ 521.

⁴⁰⁰ *Id.*, ¶¶ 728-761.

⁴⁰¹ Memorial on Annulment, ¶¶ 182-183; **Ex. AALA-46**, Decision No. 9 of the Free Trade Commission of the United States-Colombia Trade Promotion Agreement.

⁴⁰² See ¶¶ 88-92, *supra*. See also **Ex. CL-98**, *MTD v. Chile*, ¶ 31 ("Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal.") (emphasis added).

⁴⁰³ More precisely, they claim that "the Tribunal's reasoning is inconsistent with Colombia's now official interpretation of the TPA" because Decision No. 9 of the Free Trade Commission allegedly "expressly recognizes that administrative proceedings are also subject to an international due process standard," and claim that "Colombia took a different position in the arbitration and, regrettably, the Tribunal wrongly adopted Colombia's former position." Memorial on Annulment, ¶¶ 182-183.

adjudicatory proceedings” under Article 10.5.2(a) of the Treaty refers to proceedings before the administrative adjudicatory jurisdiction (*jurisdicción contencioso administrativo*) and not to purely administrative proceedings such as the Fiscal Liability Proceedings.⁴⁰⁴

237. Decision No. 9 of the Free Trade Commission states that, under the minimum standard of treatment set forth in Article 10.5 of the Treaty, “the Parties affirm that Article 10.5 does not currently require States to provide the same level of due process rights in administrative decision-making as in judicial proceedings.”⁴⁰⁵ In line with what has been a consistent position by the United States that “claims based on judicial or administrative adjudicatory proceedings . . . may not be invoked with respect to non-final judicial acts,”⁴⁰⁶ Decision No. 9 of the Free Trade Commission goes on to clarify that, “with respect to the obligation at Article 10.5.2(a) ‘not to deny justice in criminal, civil, or administrative adjudicatory proceedings . . . ’ [t]he international responsibility of States may not be invoked

⁴⁰⁴ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶ 201, n. 398; **Ex. AA-10**, Colombia’s Reply on Preliminary Objections, December 13, 2021, ¶ 98, n. 163.

⁴⁰⁵ **Ex. AALA-46**, Decision No. 9 of the Free Trade Commission of the United States-Colombia Trade Promotion Agreement, ¶ 3(b) (emphasis added).

⁴⁰⁶ **Ex. RA-21**, Submission of the United States of America in the Underlying Arbitration, April 4, 2022, ¶ 5 (“***Claims Based on Judicial or Administrative Adjudicatory Proceedings***.” It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. As such, non-final judicial acts cannot be the basis for claims under Chapter Ten of the U.S.-Colombia TPA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Rather, an act of a domestic court (or administrative tribunal) that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless such recourse is obviously futile or manifestly ineffective.”) (bold and italic in the original; emphasis added). See also, in the same sense, **Ex. RL-64**, *Submission of the U.S. in Corona*, ¶ 13 (“There can be no denial of justice without a final decision of a State’s highest judicial authority, unless seeking appeal would be obviously futile or manifestly ineffective.”) (emphasis added); **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 47 (“[T]here will be a breach of Article 10.5.1 based on judicial acts (e.g., denial of justice) only if the justice system of the State as a whole (i.e., until there has been a decision of the court of last resort available) produces a denial of justice.”) (italics in original; emphasis added); **Ex. RL-67**, *Submission of the U.S. in Italba*, ¶ 20 (“[T]here can be no denial of justice based on a judicial act without a final decision of a State’s highest judicial authority . . .”) (emphasis added).

with respect to non-final judicial acts.”⁴⁰⁷ For the purposes of Article 10.5.2(a), the Contracting Parties thus drew a deliberate distinction between administrative proceedings and judicial proceedings. With this distinction, the Contracting Parties did not mean to create two separate levels of due process under the minimum standard of treatment. Rather, they intended to exclude purely administrative proceedings from the scope of Article 10.5.2(a) of the Treaty, which pertains exclusively to judicial proceedings, either before criminal, civil or administrative *courts*. This confirms not only Colombia’s argument before the Tribunal and in this case but also the fact that the Tribunal properly interpreted the term “administrative adjudicatory proceedings” under the Treaty.

238. Applicants further contend that the Tribunal’s interpretation of Article 10.5.2(a) of the Treaty leads to an absurd result — one under which a civil court ruling on a small claim could give way to a denial of justice claim, but a billion-dollar “CGR ruling” would not.⁴⁰⁸ That result is not absurd; it follows a clear and principled logic rooted not in the magnitude of the claim but in the nature of the act at issue. A civil court ruling, however small, is already a judicial act — it has already been rendered within the judicial system.⁴⁰⁹ The denial of justice standard may therefore apply because the judiciary has already intervened. The Ruling with Fiscal Liability, by contrast, regardless of its monetary value, is an administrative act issued by an administrative agency, that is, the CGR. It is not a judicial act and has not been subjected to judicial scrutiny. Before any international wrong can crystalize, the Ruling with Fiscal Liability must first be submitted to the legality control of the courts of the administrative adjudicatory jurisdiction (*jurisdicción contencioso administrativa*) — the very “proceedings”

⁴⁰⁷ **Ex. AALA-46**, Decision No. 9 of the Free Trade Commission of the United States-Colombia Trade Promotion Agreement, ¶ 3(c) (emphasis added).

⁴⁰⁸ Memorial on Annulment, ¶ 176.

⁴⁰⁹ See ¶ 231, *supra*.

covered by Article 10.5.2(a) of the Treaty. It is only once those judicial proceedings have run their course that the State's judicial system can be said to have had the opportunity to intervene and, if warranted, to correct the alleged wrong. Applicants' argument thus conflates the value of a claim with the legal character of the act from which it arises — a distinction that is fundamental to the denial of justice standard under customary international law.

(b) The Interpretation of the Term “Administrative Adjudicatory Proceedings” Is Consistent with the Plain Meaning of the Term

239. The Tribunal's interpretation of the term “administrative adjudicatory proceedings” is also consistent with the plain meaning of the term. In the Award, the Tribunal considered that this term unambiguously refers to proceedings before the administrative adjudicatory jurisdiction (*jurisdicción contencioso administrativa*) and relied on the Spanish version of the Treaty to confirm such understanding, reasoning that “*procedimiento contencioso administrativo*’ unequivocally means a proceeding initiated before a national court.”⁴¹⁰ To criticize the Tribunal's ruling, Applicants raise a number of linguistic arguments that do not withstand scrutiny.

240. Applicants allege that the term “is plain on its face” and that they provided the Tribunal with substantial legal authority in support of their interpretation of the term.⁴¹¹ They however did not provide any relevant legal authority supporting their position.⁴¹² Besides referring to domestic U.S. case law — which is irrelevant for the purpose of interpreting an international treaty — they only refer to the *Corona v. Dominican Republic* case,⁴¹³ which does not help Applicants' position, given that in that case, the tribunal decided that an

⁴¹⁰ **Ex. AA-7**, Award, ¶¶ 210-211.

⁴¹¹ Memorial on Annulment, ¶ 171.

⁴¹² *Id.*

⁴¹³ *Id.*, n. 270.

administrative act cannot constitute a denial of justice under CAFTA Article 10.5.2(a), which is identical to Article 10.5.2(a) of the Treaty.⁴¹⁴

241. Applicants also suggest that the Fiscal Liability Proceedings are comparable to criminal, civil or administrative adjudicatory proceedings before a court because they involve the filing of defensive briefs, documents, and oral testimony.⁴¹⁵ That assertion is unfounded. The procedural features of a proceeding do not determine its nature. Administrative authorities such as the CGR are not judicial administrative courts (*cortes contencioso administrativas*) (nor any type of court for that matter), and they are not equipped with the same institutional safeguards necessary to ensure due process to the same degree as courts. It is precisely for this reason that, in Colombia, rulings with fiscal liability are subject to a comprehensive two-tiered legality control, both through purely administrative remedies before the issuing agency itself (*i.e.*, the CGR) and through automatic judicial review before administrative courts (the *Consejo de Estado*) leading to a final judicial act with *res judicata effect*.⁴¹⁶

242. Moreover, to escape the plain meaning of *procedimiento contencioso administrativo* under the Spanish version of the Treaty, Applicants suggest that it should not have been considered relevant by the Tribunal “in light of the TPA’s context and history” because the Treaty comes from the “US Model BIT”⁴¹⁷ and that therefore the term cannot be

⁴¹⁴ See ¶ 233 *supra*. This case was extensively relied upon by Colombia in the underlying Arbitration. See **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶ 204; **Ex. AA-10**, Colombia’s Reply on Preliminary Objections, December 13, 2021, ¶ 99.

⁴¹⁵ Memorial on Annulment, ¶ 171.

⁴¹⁶ **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 109-114; p. 63, Figure 3 - Flowchart of the administrative and judicial process after a ruling with fiscal liability. See also **Ex. RL-12**, Law 2080 of 2021, which amends the Code of Administrative Procedure and Administrative Disputes — Law 1437 of 2011 — and establishes other provisions regarding decongestion in the proceedings that are carried out before the jurisdiction, Articles 23 and 45.

⁴¹⁷ Memorial on Annulment, ¶ 172.

a reference to “Colombia’s specialized administrative courts.”⁴¹⁸ However, this statement is wrong for several reasons.

243. As acknowledged by Applicants, the Treaty was concluded in two equally authoritative languages.⁴¹⁹ Under Article 33(4) of the Vienna Convention, the interpreter must adopt “the meaning which best reconciles the texts.”⁴²⁰ The Tribunal’s interpretation — that Article 10.5.2(a) refers to judicial proceedings before the judicial administrative courts (*cortes contencioso administrativas*) — satisfies that requirement. The English term “administrative adjudicatory proceedings” is capable of referring to judicial proceedings before a judicial administrative court (*corte contencioso administrativa*), and the Tribunal correctly concluded that it does. The Spanish term *procedimiento contencioso administrativo* is unambiguous: it refers exclusively to litigation proceedings before the administrative adjudicatory courts (*cortes contencioso administrativas*). The Tribunal’s interpretation is therefore consistent with both versions of the Treaty. Applicants’ interpretation, by contrast, cannot be reconciled with the Spanish text, because their reading that the denial of justice standard applies to purely administrative proceedings before administrative bodies such as the CGR finds no support whatsoever in the term *procedimiento contencioso administrativo*.

244. In addition, while the term “administrative adjudicatory proceedings” is not an express reference to Colombia’s specialized judicial administrative courts (*cortes contencioso administrativas*), the absence of a separate administrative court system in the United States does not mean that the drafters of the U.S. Model BIT intended to allow denial of justice claims based on administrative acts that remain subject to judicial review. To the

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*, ¶ 167. See also **Ex. AALA-41**, Chapter 23 of the US-Colombia Trade Promotion Agreement, Article 23.6.

⁴²⁰ **Ex. RL-53**, Vienna Convention of the Law of Treaties, Article 33(4).

contrary, in the United States, agency actions — which include both rulemaking and adjudication —⁴²¹ are subject to legality control by the ordinary federal courts under the Administrative Procedure Act 1946 (the “APA”).⁴²² The U.S. drafters of the U.S. Model BIT language accordingly understood “administrative adjudicatory proceedings” as referring to proceedings before the reviewing court — the federal courts that exercise legality control of administrative acts — and not the agency proceedings themselves.

(c) The Tribunal’s Interpretation Is Also Consistent With Other Provisions of the Treaty

245. The Tribunal’s interpretation is also consistent with other provisions of the Treaty. In the Award, the Tribunal confirmed its understanding of the meaning of Article 10.5.2(a) of the Treaty by referring to other provisions of the Treaty, agreeing with Colombia’s argument that:

When the Treaty refers specifically to purely administrative proceedings, as opposed to judicial proceedings, it makes reference to “administrative proceedings” and “administrative process.” The only instance in which the expression “administrative adjudicatory proceedings” is used is in

⁴²¹ See **Ex. RALA-62**, Administrative Procedure Act, 5 U.S.C., § 551 (1946) (“(5) ‘rule making’ means agency process for formulating, amending, or repealing a rule; . . . (7) ‘adjudication’ means agency process for the formulation of an order; . . . (12) ‘agency proceeding’ means an agency process as defined by paragraphs (5), (7), and (9) of this section; (13) ‘agency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to **act**.”) (bold in original).

⁴²² See **Ex. RALA-63**, Administrative Procedure Act, 5 U.S.C., § 704 (1946) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”). See also for example **Ex. RALA-64**, *Abbott Labs. v. Gardner*, Supreme Court of the United States, Majority Opinion, May 22, 1967, 387 U.S. 136 (1967), p. 6 [of the PDF]. The court held that the Administrative Procedure Act “embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,’ 5 U. S. C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U. S. C. § 701 (a). The Administrative Procedure Act provides specifically not only for review of ‘[a]gency action made reviewable by statute’ but also for review of ‘final agency action for which there is no other adequate remedy in a court’.”

Article 10.5.2(a) which, when read in conjunction with “criminal, civil, or” must refer to judicial proceedings.⁴²³

246. Applicants claim that the Tribunal’s reasoning is unavailing because the term “administrative process” referred to in other provisions of the Treaty is “a broad term that encompasses different functions, both rulemaking and adjudication” while the Treaty’s reference to “adjudicatory proceedings” necessarily refers to an administrative process involving adjudication.⁴²⁴ That argument misses the point. The Tribunal’s reasoning did not only rest on the uniqueness of the expression “administrative adjudicatory proceedings” under Article 10.5.2(a) of the Treaty, but also on the fact that this term is “read in conjunction with ‘criminal, civil, or’.”⁴²⁵ Because the words “criminal” and “civil” are unambiguously categories of judicial proceedings, the Tribunal correctly concluded that the term “must refer to judicial proceedings.”⁴²⁶

247. *Lastly, and more fundamentally*, even if the Tribunal’s interpretation was debatable, that would not warrant annulment. As detailed above,⁴²⁷ “[a] debatable solution is not amenable to annulment.”⁴²⁸ In the present case, Applicants’ own arguments are the most compelling proof that their ground fails under Article 52(1)(b) of the ICSID Convention. In their attempt to establish a manifest excess of power, Applicants had to engage in a creative *de novo* interpretation exercise to critique the Tribunal’s findings. Applicants’ arguments, even taken at their highest, do not establish that the Tribunal’s interpretation of Article 10.5.2(a) of the Treaty is wrong — let alone *egregious*. To use the words of the

⁴²³ Ex. AA-7, Award, ¶ 213 (emphasis added). See also Ex. AA-10, Colombia’s Reply on Preliminary Objections, December 13, 2021, ¶ 98, n°168.

⁴²⁴ Memorial on Annulment, ¶ 177.

⁴²⁵ Ex. AA-7, Award, ¶ 213.

⁴²⁶ *Id.*

⁴²⁷ See ¶ 106, *supra*.

⁴²⁸ Ex. AALA-32, *Duke v. Peru*, ¶ 99.

Lucchetti v. Peru committee, “treaty interpretation is not an exact science, and it is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several” and “[t]he Committee is not charged with the task of determining whether one interpretation is ‘better’ than another, or indeed which among several interpretations might be considered the ‘best’ one.”⁴²⁹

iii. In Any Event, the Tribunal’s Interpretation of Article 10.5.2(a) of the Treaty Is Not Material to the Outcome of the Award

248. Even assuming, *quod non*, that Applicants had established a manifest excess of power in the Tribunal’s interpretation of Article 10.5.2(a) of the Treaty, that would still not warrant annulment of the Award. As set out above,⁴³⁰ an excess of powers is only a ground for annulment where it has “substantively serious” consequences on the award,⁴³¹ and is “serious or material to the outcome of the case.”⁴³² Applicants cannot satisfy that requirement.

⁴²⁹ **Ex. RL-338**, International Law Commission, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1966), Vol. II, p. 218, ¶ 4; **Ex. RALA-65**, J. G. Merrills, *Two Approaches to Treaty Interpretation*, 4 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 55 (1968-1969), p. 57 (“The International Law Commission [recognized] that ‘the interpretation of documents is to some extent an art not an exact science’.”). See also **Ex. AALA-27**, *Lucchetti v. Peru*, ¶ 112 (“However, the *Ad hoc* Committee does not consider it to be its task to determine whether the test employed by the Tribunal and the weight given by the Tribunal to various elements were ‘right’ or ‘wrong’. In the Committee’s view, treaty interpretation is not an exact science, and it is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several. It is no part of the Committee’s function, as already indicated above, to purport to substitute its own view for that arrived at by the Tribunal. The interpretation of Article 2 adopted by the Tribunal is clearly a tenable one. Clearly also there are other tenable interpretations. The Committee is not charged with the task of determining whether one interpretation is ‘better’ than another, or indeed which among several interpretations might be considered the ‘best’ one. The Committee is concerned solely with the process by which the Tribunal moved from its premise to its conclusion.”) (emphasis added).

⁴³⁰ See ¶¶ 108-109, *supra*.

⁴³¹ **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 40 (“It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.”) (emphasis added). See also **Ex. RALA-30**, *Libananco v. Turkey*, ¶ 102.

⁴³² **Ex. RALA-12**, *Standard Chartered Bank v. Tanzania*, ¶ 181, n. 190.

249. Applicants' ground rests exclusively on the Tribunal's alleged error in interpreting the term "administrative adjudicatory proceedings" under Article 10.5.2(a) of the Treaty.⁴³³ It does not challenge the Tribunal's primary finding — that no measure capable of constituting a Treaty breach existed at the time the Arbitration was initiated.⁴³⁴ That finding is independent of the Tribunal's interpretation of Article 10.5.2(a), and alone is sufficient to sustain the dismissal of Applicants' ground.

250. In the Award, the Tribunal reasoned that the totality of Claimants' claims were inadmissible because "for a claim to be admissible, a measure capable of constituting a Treaty breach must have existed as of the date of the submission"⁴³⁵ and that "at the time the arbitration was initiated, only the Indictment Order had been issued and a final administrative decision was still pending."⁴³⁶ The Tribunal concluded that "the absence of a measure capable of constituting a breach of a substantive obligation under the TPA by Respondent at the time the arbitration was initiated makes Claimants' claim premature and inadmissible."⁴³⁷ This finding, which led to the dismissal of Claimants' entire claim, is completely independent from the Tribunal's interpretation of Article 10.5.2(a). Had it accepted Applicants' interpretation of that term, the Tribunal would still have found that the claim was therefore not ripe because at the time Claimants filed their Request for Arbitration, only the Indictment Order (*Auto de Imputación*), a mere procedural administrative act (*acto administrativo de trámite*), had been issued.

⁴³³ Memorial on Annulment, ¶ 184 ("In conclusion, to the extent the Tribunal offered any reasoning at all regarding its interpretation of the term 'administrative adjudicatory proceedings,' that reasoning is so egregiously wrong that it amounted to a failure to apply the proper law.") (emphasis added).

⁴³⁴ Ex. AA-7, Award, ¶ 219.

⁴³⁵ *Id.*, ¶ 204.

⁴³⁶ *Id.*, ¶ 207 (emphasis added).

⁴³⁷ *Id.*, ¶¶ 207, 219.

251. The Tribunal also engaged — for exhaustiveness only, and expressly on the assumption that “subsequent events could ripen a claim after the commencement of the arbitration”⁴³⁸ — in an analysis of whether the Ruling with Fiscal Liability (issued *after* the Request for Arbitration) was a measure capable of constituting a breach of the Treaty. It was only in that alternative and subsidiary analysis that the Tribunal interpreted the term “administrative adjudicatory proceedings” and concluded that, because the Ruling with Fiscal Liability was subject to judicial review, it could not trigger the application of Article 10.5.2(a) and, therefore, it was also not a measure capable of constituting a breach.⁴³⁹ Had the Tribunal interpreted “administrative adjudicatory proceedings” as proposed by Claimants, it would have reached the same conclusion: that the Ruling with Fiscal Liability was not a measure capable of constituting a breach of the Treaty — specifically, a denial of justice — because there were effective local remedies against it.⁴⁴⁰

252. Applicants’ challenge to the Tribunal’s interpretation of “administrative adjudicatory proceedings” is therefore immaterial to the outcome of the Award. Consequently, Applicants fail to establish that the Tribunal committed a *manifest* excess of powers that would warrant annulment of the Award under Article 52(1)(b) of the ICSID Convention.

⁴³⁸ *Id.*, ¶ 216. This possibility was expressly rejected by the Tribunal. See *id.*, ¶¶ 205-206 (“Even if the evidence associated with the claims may, in certain instances, be made available only after the filing of the appropriate request for arbitration, this shall not be deemed a blank check allowing a claimant to introduce documents periodically throughout the arbitration. Moreover, the submission of evidence after the initial procedural moment is also subject to a high standard of proof as to when the evidence became available. This possibility is limited by the due process of law and the right of defence of respondent which must be at all times preserved. In sum, even if the evidence is central for the admissibility of the claim and was only obtained after the relevant filing, the introduction of the same may not be considered in ascertaining the fulfilment of the prerequisites under the Treaty.”) (emphasis added).

⁴³⁹ *Id.*, ¶ 214.

⁴⁴⁰ *Id.*, ¶ 215 (“[t]here could be no . . . be denial of justice if there is still an effective local remedy against the local decision that is challenged”; citing **Ex. RL-83**, *Flughafen v. Venezuela*, Award, ¶ 392) (emphasis added).

b. The Tribunal Did Not Fail to State Reasons

253. Having failed to establish a manifest excess of powers, Applicants advance the same allegation — that the Tribunal egregiously misapplied the law in interpreting Article 10.5.2(a) of the Treaty — as an annulment ground for failure to state reasons.⁴⁴¹ The ground fails for two reasons. First, the Tribunal's reasoning is understandable and enables the reader to follow the Award from Point A to Point B. Second, even assuming, that egregiously erroneous reasons could amount to a failure to state reasons (*quod non*), the Tribunal correctly interpreted and applied Article 10.5.2(a) of the Treaty, as demonstrated above.

i. The Tribunal's Reasoning Is Understandable

254. As set forth above,⁴⁴² 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.” The Committee should not be concerned with the quality or persuasiveness of the reasoning — only with its existence.

255. In the present case, the Tribunal provided extensive reasoning for its conclusion that the term “administrative adjudicatory proceedings” under Article 10.5.2(a) of the Treaty does not cover the Fiscal Liability Proceedings. The proof of that is in Applicants’ own Memorial on Annulment. Having acknowledged that the Tribunal formed its interpretation on several direct points,⁴⁴³ Applicants then devoted fourteen paragraphs to a detailed critique of each of them.⁴⁴⁴ That critique is the most compelling evidence that the

⁴⁴¹ Memorial on Annulment, ¶¶ 195-197.

⁴⁴² See ¶¶ 123-127, *supra*.

⁴⁴³ Memorial on Annulment, ¶ 170.

⁴⁴⁴ *Id.*, ¶¶ 171-184.

Tribunal's reasoning was not only present but sufficiently developed to be engaged with, point by point, over multiple pages of submissions.

256. The line of reasoning is clear. The Tribunal first determined that the term administrative adjudicatory proceedings unambiguously referred to “judicial proceeding[s] before the administrative adjudicatory jurisdiction, and not an administrative proceeding as the Fiscal Liability Proceeding.”⁴⁴⁵ It then confirmed that understanding through a sequential interpretive analysis: it relied on the Spanish version of the Treaty to confirm its prior understanding;⁴⁴⁶ it considered the object and purpose of Article 10.5.2(a);⁴⁴⁷ it compared the term with similar expressions used in other provisions of the same Treaty;⁴⁴⁸ and it referred to *Flughafen v. Venezuela* to confirm that a ruling still subject to judicial review cannot constitute a denial of justice.⁴⁴⁹ That is a coherent, step-by-step reasoning that proceeds from premise to conclusion without interruption. Thus, the Tribunal did not fail to state reasons in interpreting Article 10.5.2(a) of the Treaty.

ii. The Tribunal's Reasoning Is Not Egregiously Erroneous

257. As explained above, the “failure to state reasons” annulment ground does not permit this Committee to review the adequacy or correctness of the Tribunal's reasoning.⁴⁵⁰ An erroneous decision — even an allegedly egregious one — is not a failure to state reasons. Applicants' reliance on *Soufraki v. United Arab Emirates*,⁴⁵¹ *Patrick Mitchell v. Congo*,⁴⁵² and

⁴⁴⁵ **Ex. AA-7**, Award, ¶ 210.

⁴⁴⁶ *Id.*, ¶ 211.

⁴⁴⁷ *Id.*, ¶ 212.

⁴⁴⁸ *Id.*, ¶ 213.

⁴⁴⁹ *Id.*, ¶¶ 215-216.

⁴⁵⁰ See ¶¶ 123-126, *supra*.

⁴⁵¹ **Ex. AALA-33**, *Soufraki v. United Arab Emirates*, ¶ 128.

⁴⁵² **Ex. RL-199**, *Patrick Mitchell v. Congo*, ¶ 21.

*Nachingwea v. Tanzania*⁴⁵³ is unavailing: those decisions confirm, rather than support their position, that egregiously erroneous reasons do not amount to a failure to state reasons.⁴⁵⁴

258. In any event, Applicants' failure to state reasons argument is, on its face, a repetition of their manifest of powers argument under a different label. Applicants do not articulate an independent reasoning deficiency — they simply direct the Committee to their excess of powers claim and assert that “the few reasons the Tribunal did offer in support of its findings are so insufficient and inadequate that they are tantamount to not offering any reasons at all.”⁴⁵⁵ That is pure speculation. Unable to establish a manifest excess of powers, Applicants have repackaged the same allegation as a failure to state reasons, hoping that the change of label will escape the exacting threshold that defeated their first ground. It will not. As demonstrated above, the Tribunal correctly interpreted and applied Article 10.5.2(a) of the Treaty.⁴⁵⁶ That conclusion is equally fatal to Applicants' failure to state reasons ground.

259. Lastly, even assuming, *quod non*, that Applicants had established a failure to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention — which they have not — that failure would still not warrant annulment unless it was determinative to the outcome of the Award.⁴⁵⁷ It was not. As demonstrated above, the Tribunal's interpretation of Article 10.5.2(a) of the Treaty and its finding on the CGR ruling was not material to the outcome of the case. The Tribunal dismissed Claimants' claims on the primary and independent ground that, at the time the Arbitration was initiated, no measure capable of constituting a Treaty breach existed. That finding stands unchallenged.

⁴⁵³ **Ex. AALA-53**, *Nachingwea v. Tanzania*, ¶ 60.

⁴⁵⁴ See ¶¶ 128-130, *supra*.

⁴⁵⁵ Memorial on Annulment, ¶ 197.

⁴⁵⁶ See ¶¶ 229-238, *supra*.

⁴⁵⁷ See ¶ 122, *supra*.

2. The Supposed Imposition of an Exhaustion of Local Remedies Requirement

260. As noted above, the Tribunal dismissed Claimants' claims as premature on the ground that no "measure" capable of constituting a breach of the Treaty existed at the time of submission of the Request for Arbitration. The Tribunal then proceeded to analyze, subsidiarily, whether the Ruling with Fiscal Liability — issued after the Request for Arbitration and therefore not relevant to the ripeness inquiry — could constitute such a measure. Applicants contend that, in doing so, the Tribunal imposed a non-existent requirement to exhaust local remedies for all Treaty claims, thereby exceeding its powers and departing from a fundamental rule of procedure.⁴⁵⁸

261. Applicants mischaracterize the Tribunal's reasoning. The Tribunal did not *impose* an exhaustion of local remedies requirement; rather, it assessed whether local remedies had been exhausted as a means of determining whether the Ruling with Fiscal Liability constituted a measure capable of giving rise to a breach of the Treaty — *that is*, whether Claimants' claims had ripened *after* the filing of the Request for Arbitration. Accordingly, the Tribunal's local remedies analysis is not a basis for annulment under either Article 52(1)(b) or Article 52(1)(d) of the ICSID Convention.

a. The Tribunal did not Exceed its Powers — Manifestly or Otherwise

262. Applicants contend that the Award rests on the "Tribunal's conclusion that . . . Foster Wheeler was required to exhaust local judicial remedies before proceeding in arbitration" — a conclusion that, in their view, "directly contradicts the express language of

⁴⁵⁸ Memorial on Annulment, ¶¶ 112-118. Respondent notes that while this discussion is included in Section IV(A) ("The Tribunal Seriously Departed from Several Fundamental Rules of Procedure"), the language of Applicants' discussion consistently refers to the Tribunal's alleged excess of powers in this respect.

the ICSID Convention and the TPA,⁴⁵⁹ thereby constituting an excess of powers for failure to apply the law. As set forth above, annulment under Article 52(1)(b) of the ICSID Convention requires Applicants to satisfy a two-step inquiry: they must first establish that the Tribunal acted in excess of its powers, and then demonstrate that such excess was “manifest” — that is, obvious, self-evident, and discernible without the need for an elaborate analysis of the Award.⁴⁶⁰ With respect to the applicable law, an excess of powers may only arise where the Tribunal failed to apply the proper law *in toto*; a wrong or mistaken application of the law does not constitute a manifest excess of powers and cannot lead to annulment.⁴⁶¹ Moreover, an excess of powers cannot be “manifest” if the solution adopted by the Tribunal — even if incorrect — is debatable or tenable.⁴⁶² Applicants cannot meet any of these requirements.

263. The Tribunal applied customary international law in determining whether the Ruling with Fiscal Liability constituted a measure capable of giving rise to a breach of the Treaty. The Treaty mandates the application of customary international law.⁴⁶³ Under that body of law, a State’s judicial system must be afforded a full opportunity to remedy the alleged wrong before it can ripen into an internationally wrongful act.⁴⁶⁴ The rationale underlying this principle is straightforward: the State must be given the opportunity to redress potential

⁴⁵⁹ *Id.*, ¶ 112.

⁴⁶⁰ See ¶¶ 105-107, *supra*.

⁴⁶¹ See ¶¶ 111-113, *supra*.

⁴⁶² See ¶¶ 105-107, *supra*.

⁴⁶³ **Ex. RL-1**, Treaty, Article 10.5 (limiting the obligations under that Article to the minimum standard of treatment under customary international law); n. 3 and Annex 10-A (defining “Customary International Law” as “a general and consistent practice of States that they follow from a sense of legal obligation.”). See **Ex. AA-3**, Colombia’s Memorial on Preliminary Objections, July 1, 2021, n. 384, ¶¶ 201-203.

⁴⁶⁴ **Ex. RL-82**, *Alps Finance v. Slovak Republic*, UNCITRAL, Award, March 5, 2011, ¶¶ 251-252; **Ex. RL-83**, *Flughafen v. Venezuela*, Award, ¶ 392; **Ex. RL-84**, *Apotex v. United States*, Award on Jurisdiction, ¶ 276; **Ex. RL-55**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Submission of the United States of America, June 21, 2019, ¶¶ 12-13.

wrongs through its own legal system before international responsibility can attach.⁴⁶⁵ The Tribunal faithfully applied this principle when it concluded that the Ruling with Fiscal Liability was not a measure capable of constituting a breach of the Treaty — specifically, a denial of justice under Article 10.5 — because Colombian courts had not yet had an opportunity to review the ruling. Claimants' claims therefore remained unripe even at the Award stage.

264. Applicants further contend that, by “imposing a requirement to exhaust local remedies,” the Tribunal misapplied Article 26 of the ICSID Convention, which — on their reading — provides that no exhaustion of local remedies is required unless a Contracting State expressly imposes it as a condition of its consent to arbitration. It is true that Colombia imposed no such condition.⁴⁶⁶ However, this argument conflates two analytically distinct questions. Article 26 of the ICSID Convention addresses the procedural prerequisites for access to ICSID arbitration; it does not purport to displace the substantive requirements of customary international law. As a matter of applicable substantive law, the exhaustion of local remedies is an inherent element of a denial of justice claim under customary international law — a requirement that exists independently of, and is not displaced by, Article 26 of the ICSID Convention.

265. Applicants also argue that the exhaustion requirement allegedly imposed by the Tribunal conflicts with the Treaty's fork-in-the-road provision.⁴⁶⁷ That provision requires claimants to elect between domestic and international forums, rendering their election final. However, the election of a forum does not, in and of itself, guarantee that a court or arbitral tribunal will admit the claims submitted to it. A claimant who elects international arbitration

⁴⁶⁵ **Ex. CL-91**, *Loewen v. United States*, ¶¶ 151-157, 217, 242.

⁴⁶⁶ Memorial on Annulment, ¶¶ 113-115.

⁴⁶⁷ *Id.*, ¶ 117.

must still satisfy the applicable admissibility requirements at the chosen forum. The Tribunal's finding that claims based on the Ruling with Fiscal Liability were not ripe — because the ruling remained subject to judicial review — derives directly from the admissibility requirements set forth in Article 10.16.1 of the Treaty, which demand the existence of a measure capable of constituting a breach *at the time a claim is submitted to arbitration*. The fork-in-the-road provision is therefore entirely irrelevant to the Tribunal's analysis.

266. Moreover, even if the Tribunal's analysis of the exhaustion of local remedies were considered incorrect — which it is not — Applicants' ground would still fail under the “manifest” requirement of Article 52(1)(b) of the ICSID Convention. As set forth above, an excess of powers cannot be “manifest” if the solution adopted by the Tribunal is debatable or if more than one interpretation is possible. The Tribunal's conclusion that the Ruling with Fiscal Liability had not crystallized into a measure capable of constituting a breach of the Treaty because it remained subject to judicial review is firmly grounded in customary international law and supported by established ICSID jurisprudence. Applicants' own extensive efforts to challenge that conclusion — spanning multiple pages of their Memorial and requiring elaborate interpretive arguments regarding Article 26 of the ICSID Convention and the Treaty's fork-in-the-road provision — are themselves the most compelling evidence that the Tribunal's approach is, at a minimum, tenable. When the resolution of an issue requires the kind of elaborate analysis Applicants have undertaken, the excess of powers is, by definition, no longer manifest. In addition, Applicants must demonstrate that the alleged excess of powers had “substantively serious” consequences on the outcome of the Award. They cannot do so. As demonstrated below, the Tribunal's analysis of the exhaustion of local

remedies was peripheral to its primary and independently dispositive finding, and therefore had no material effect on the outcome of the Award.

267. The Tribunal accordingly did not exceed its powers by failing to apply the law — let alone manifestly. The Tribunal applied the proper law — customary international law, as mandated by the Treaty — and reached a reasoned and tenable conclusion. In any event, the Tribunal's analysis on the exhaustion of local remedies formed part of its subsidiary reasoning and was peripheral to its primary and independently dispositive finding: that Claimants' claims were not ripe at the time they submitted their Request for Arbitration, because the Indictment Order was not a final administrative act and therefore not a measure capable of constituting a breach of the Treaty. That primary finding would remain undisturbed even if the Tribunal had never addressed the question of exhaustion of local remedies. The alleged excess of powers therefore had no substantively serious consequences on the outcome of the Award, and Applicants' ground under Article 52(1)(b) of the ICSID Convention must be rejected.

b. The Tribunal did not Seriously Depart from a Fundamental Rule of Procedure

268. Applicants also contend that the Tribunal's alleged imposition of an exhaustion of local remedies requirement constitutes a serious departure from a fundamental rule of procedure warranting annulment of the Award under Article 52(1)(d) of the ICSID Convention. This ground fails at every level. As set forth above, annulment under Article 52(1)(d) requires Applicants to satisfy three cumulative conditions: (i) identify a fundamental rule of procedure; (ii) demonstrate a departure from that rule; and (iii) establish that the departure was serious.⁴⁶⁸ Applicants satisfy none of them.

⁴⁶⁸ See ¶¶ 151-165, *supra*.

269. *First*, Applicants fail to identify any fundamental rule of procedure from which the Tribunal allegedly departed. As established above, fundamental rules of procedure within the meaning of Article 52(1)(d) of the ICSID Convention are confined to the principles of natural justice — guarantees concerned with the integrity and fairness of the arbitral process, such as the right to be heard and the right to an independent and impartial tribunal.⁴⁶⁹ They do not encompass ordinary procedural or substantive rules, let alone a tribunal's interpretation and application of the substantive law governing the dispute.⁴⁷⁰ Applicants' complaint is, in substance, that the Tribunal incorrectly interpreted the Treaty and customary international law by requiring exhaustion of local remedies as a precondition to the ripening of Claimants' claims. That is a challenge to the Tribunal's legal reasoning — not to the procedural framework within which the proceedings were conducted. An alleged error in the interpretation or application of the substantive law does not engage Article 52(1)(d) of the ICSID Convention; it falls, if anywhere, within the scope of Article 52(1)(b), which Applicants have separately and unsuccessfully invoked.

270. *Second*, even if Applicants could identify a fundamental rule of procedure — *quod non* — they fail to demonstrate any procedural departure from it. Article 52(1)(d) of the ICSID Convention is concerned exclusively with the manner in which the Tribunal conducted the proceedings, not with the substance of its decision.⁴⁷¹ The Tribunal afforded both Parties a full and fair opportunity to present their respective positions on the question of whether local remedies needed to be exhausted before Claimants' claims could ripen into an internationally wrongful act. The Parties briefed this issue extensively across two rounds of written

⁴⁶⁹ See ¶¶ 154-157, *supra*.

⁴⁷⁰ See ¶ 157, *supra*.

⁴⁷¹ See ¶ 158, *supra*.

submissions and at a two-day hearing. The Tribunal then weighed the Parties' arguments and reached a reasoned conclusion. That Applicants disagree with the conclusion does not transform a substantive determination into a procedural departure. As committees have consistently held, a decision by a tribunal on the substance of the dispute — including on questions of admissibility and the applicable law — is an exercise of the tribunal's adjudicative function, not a departure from a rule of procedure.⁴⁷²

271. *Third*, even assuming, *quod non*, that Applicants could establish both a fundamental rule and a departure from it, they cannot demonstrate that any such departure was serious within the meaning of Article 52(1)(d) of the ICSID Convention. A departure is serious only if it caused — or could have caused — the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed.⁴⁷³ The Tribunal's analysis of the exhaustion of local remedies formed part of its subsidiary reasoning concerning the Ruling with Fiscal Liability, which was issued after Claimants filed their Request for Arbitration. The Tribunal's primary and independently dispositive finding was that, at the time the Arbitration was initiated, only the Indictment Order had been issued — a mere procedural administrative act (*acto administrativo de trámite*) that was not a measure capable of constituting a breach of the Treaty.⁴⁷⁴ That finding alone was sufficient to render all of Claimants' claims premature and inadmissible, and it would remain undisturbed even if the Tribunal had never addressed the question of exhaustion of local remedies as part of its subsidiary analysis. The alleged departure therefore had no material effect on the outcome of the Award, and Applicants' ground under Article 52(1)(d) must be rejected.

* * *

⁴⁷² See ¶¶ 158-159, *supra*.

⁴⁷³ See ¶¶ 160-164, *supra*.

⁴⁷⁴ See ¶¶ 5-6, *supra*.

272. In conclusion, Applicants' request to annul the Award on the basis of an alleged egregious misinterpretation of Article 10.5.2(a) of the Treaty or a purported improper imposition of an exhaustion of local remedies requirement should be rejected. Neither argument constitutes a valid ground for annulment within the meaning of the ICSID Convention.

C. The Tribunal's Alleged Improper Decisions on Evidentiary Matters

273. As demonstrated above, the Tribunal dismissed Claimants' claims on the ground that Claimants failed to satisfy the requirements of Article 10.16.1 of the Treaty for the submission of a valid claim susceptible to be resolved through arbitration: given that, at the time Claimants filed the Request for Arbitration, no measure capable of constituting a breach of the Treaty existed, rendering their claims premature.⁴⁷⁵

274. Applicants do not challenge this primary finding. Instead, they take issue with certain aspects of the Tribunal's subsidiary analysis — conducted for the sake of argument and out of an abundance of caution — regarding whether the Ruling with Fiscal Liability constituted a measure capable of giving rise to breach of the Treaty.⁴⁷⁶

275. In conducting that subsidiary analysis, the Tribunal did not focus on whether the Ruling with Fiscal Liability actually gave rise to a breach of the Treaty, but on whether it was *capable* of constituting such a breach. The Tribunal's analysis was accordingly one of ripeness and admissibility, not one of liability.

⁴⁷⁵ See ¶¶ 71-73, *supra*.

⁴⁷⁶ See ¶ 70, *supra*.

276. The Tribunal concluded that the Ruling with Fiscal Liability was *not* capable of constituting a breach of the Treaty because it remained subject to judicial review and therefore had not crystallized to the point that it could give rise to an international wrongful act. That conclusion — that the availability and pendency of judicial remedies meant that the Ruling with Fiscal Liability was not a measure capable of giving rise to a breach of the Treaty — might have been different had Claimants proved that domestic remedies would obviously be futile or manifestly ineffective, which Claimants failed to demonstrate.⁴⁷⁷

277. On annulment, Applicants challenge two evidentiary aspects of the Tribunal's subsidiary analysis. They argue that the Tribunal (1) seriously departed from a fundamental rule of procedure by improperly requiring Claimants to prove the futility of local remedies in Colombia, and (2) failed to properly consider the Torrente Witness Statements in reaching its finding on that same question, allegedly amounting to a failure to state reasons. As demonstrated below, both grounds are meritless.

1. The Tribunal Did Not Seriously Depart from Any Fundamental Rule of Procedure by Requiring Claimants to Prove Their Allegations Regarding the Futility and Ineffectiveness of Local Remedies in Colombia

278. Applicants assert that the Tribunal imposed on Claimants a burden of proving that local remedies in Colombia were futile or inefficient, and that such imposition amounts to a serious departure from a fundamental rule of procedure because the Tribunal ignored the factual presumption provided under Article 10.20.4(c) of the Treaty.⁴⁷⁸

279. This contention fails at every level. Indeed, (a) the factual presumption under Article 10.20.4(c) of the Treaty is not a *fundamental* rule of procedure within the meaning of

⁴⁷⁷ See ¶ 238, *supra*.

⁴⁷⁸ Memorial on Annulment, ¶¶ 119-128.

Article 52(1)(d) of the ICSID Convention and its alleged misapplication accordingly cannot constitute a serious departure from such a rule. Also, (b) the Tribunal did not depart from Article 10.20.4(c) of the Treaty. Lastly, and in any event, (c) the alleged departure is not *serious* because it had no material effect on the outcome of the Award.

a. Article 10.20.4(c) of the Treaty Is Not a *Fundamental* Rule of Procedure within the Meaning of Article 52(1)(d) of the ICSID Convention

280. Applicants' allegation that the Tribunal seriously departed from a fundamental rule of procedure relies exclusively on Article 10.20.4(c) of the Treaty, which provides as follows:

In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.⁴⁷⁹

281. While Colombia acknowledged that the limited factual presumption of facts encompassed in this Article is an important rule, it does not constitute a *fundamental* rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention. Under Article 52(1)(d), fundamental rules of procedure are principles of "natural justice"⁴⁸⁰ — guarantees "concerned with the integrity and fairness of the arbitral process."⁴⁸¹ It follows that "ordinary rules which are not concerned with the integrity and fairness of the arbitral process" are not fundamental rules of procedure.⁴⁸² Despite their importance, rules and

⁴⁷⁹ **Ex. RL-1**, Treaty, Article 10.20.4(c).

⁴⁸⁰ **Ex. RL-252**, HISTORY OF THE ICSID CONVENTION, VOL II-1, p. 480.

⁴⁸¹ **Ex. RALA-1**, Updated Background Paper on Annulment, ¶ 104. See also ¶¶ 154-157, *supra*.

⁴⁸² **Ex. RALA-26**, *OI European Group v. Venezuela*, ¶ 246.

principles that govern how a tribunal assesses the substantive viability of a claim, and which do not concern procedural integrity, like Article 10.20.4(c) of the Treaty, are excluded from the scope of Article 52(1)(d) of the ICSID Convention.

282. Applicants contend that Article 10.20.4(c) embodies a principle governing the burden of proof, and that the reversal of that burden constitutes a serious departure from a fundamental rule of procedure warranting annulment.⁴⁸³ That contention fails for two reasons, as demonstrated below.

283. *First*, burden of proof principles are — despite their importance — not fundamental rules of procedure within the meaning of Article 52(1)(d) of the ICSID Convention. Multiple committees have expressly held that rules on the burden of proof do not constitute fundamental rules of procedure within the meaning of Article 52(1)(d) of the ICSID Convention. In *Tenaris v. Venezuela (II)*, the committee considered that “the burden of proof is not part of the minimal standards and the fundamental rules of procedure” and therefore “whether the principle or a law on the burden of proof has been applied or not [does not come under the realm of] a serious departure from a fundamental rule of procedure.”⁴⁸⁴ The *Cube v. Spain* committee made a similar observation, noting that although the rules about the allocation or application of the burden of proof may in certain circumstances lead

⁴⁸³ Memorial on Annulment, ¶¶ 120-121.

⁴⁸⁴ **Ex. RALA-18**, *Tenaris v. Venezuela (II)*, ¶ 96 (emphasis added). See also *id.*, ¶¶ 93-95 (“[T]he Committee is unable to identify the principle as an unshakeable and invariable minimum standard of procedure, as compared, for instance, to the right to be heard and rebut evidence, due process, neutrality and impartiality of tribunals and the equality of parties. . . . Firstly, the principle is less a rule of procedure than a rule to determine the requirements of substantive law. Although mostly relevant in court and arbitral proceedings, it does not necessarily guide the process before the court or tribunal and does not define the parties’ fundamental rights and duties. Rather, it provides an instrument to judges and arbitrators that allows them to ascertain or reject a claim in situations of *non liquet*. . . . Secondly, to the extent that the principle is considered a procedural rule, it cannot be considered a basic, invariable, and ‘absolute’ element of the corpus of due process and minimal standards of procedure.”) (emphasis added).

to a violation of a principle of natural justice, these rules “are less obviously a fundamental rule of procedure as such.”⁴⁸⁵

284. Applicants’ reference to the *Agility v. Iraq* case is unavailing.⁴⁸⁶ In that case, the committee’s sole reference to “burden of proof” appears exclusively in its recitation of the general legal standard under Article 52(1)(d), listing potential examples of fundamental rules of procedure. However, the burden of proof was never part of that committee’s reasoning.⁴⁸⁷ The ground actually examined and dismissed under Article 52(1)(d) concerned the *Agility* tribunal’s rejection of 16 document production requests, a question of access of evidence and the right to be heard, not the allocation or the reversal of burden of proof.⁴⁸⁸ In dismissing that ground, the *Agility* committee distinguished between the procedural right to submit evidence and the tribunal’s substantive power to evaluate it, holding that “it is within the Tribunal’s powers to assess and evaluate the evidence before it” pursuant to ICSID Arbitration Rule 34(1).⁴⁸⁹

285. *Second*, and in any event, Article 10.20.4(c) of the Treaty cannot be qualified as a fundamental rule of procedure because it is not really a burden of proof principle — but

⁴⁸⁵ **Ex. RALA-19**, *Cube v. Spain*, ¶ 448. Moreover, *ad hoc* committees have recognized that an applicant’s complaint regarding an alleged departure from a fundamental rule of procedure through an improper shifting of the burden of proof is, in reality, a disagreement with the tribunal’s assessment of the evidence — which does not constitute a fundamental procedural violation. See for example **Ex. RALA-66**, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, February 21, 2023, ¶ 296 (“Spain’s complaint is with the manner in which the Tribunal assessed the evidence placed before it, as compared to what it had expected or desired. However, that is not the standard by which a breach of or a reversal of the burden of proof is measured and does not constitute a departure from a fundamental rule of procedure, much less a serious one.”).

⁴⁸⁶ Memorial on Annulment, ¶ 120.

⁴⁸⁷ **Ex. AALA-15**, *Agility Public Warehouse Company K.S.C.P. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment, February 8, 2024, ¶ 69.

⁴⁸⁸ *Id.*, ¶¶ 188-194.

⁴⁸⁹ *Id.*, ¶ 191. That distinction is decisive in the present case: Applicants’ challenge to the alleged shifting of the burden of proof is, in substance, a challenge to how the Tribunal weighed the evidence, not to whether the parties were afforded a fair opportunity to present their case.

rather a rebuttable factual presumption. Factual presumptions do not shift the burden of proof; they only *facilitate* the discharge of that burden by establishing a standard of proof.⁴⁹⁰ As such, factual presumptions govern *how* factual allegations are to be evaluated by tribunals, not *who* bears the obligation to prove them.⁴⁹¹

286. During the Preliminary Questions Phase, Claimants bore the burden of proving their claims were ripe — that there was a measure capable of constituting a breach of the Treaty at the time of submission to arbitration. To discharge that burden with respect to the Ruling with Fiscal Liability — given that it was subject to judicial review — Claimants needed to prove that remedies in Colombia were futile or ineffective. Article 10.20.4(c) only facilitated the standard of proof to discharge of that burden by the instauration of a rebuttable factual presumption.⁴⁹² It however did not shift the burden of proof away from Claimants, because it is not a principle dealing directly with the burden of proof. Therefore, even assuming that burden of proof principles could amount to fundamental rules of procedure within the meaning of Article 52(1)(d) of the ICSID Convention (*quod non*), Article 10.20.4(c) could not be considered a fundamental rule of procedure because it is not a burden of proof principle.

⁴⁹⁰ **Ex. RALA-67**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶ 178 (“[T]he burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party’s case as a whole.”).

⁴⁹¹ **Ex. RALA-68**, Frédéric G. Sourgens, Kabir A.N. Duggal and Ian A. Laird, *EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION* (Oxford University Press 2018), p. 33, ¶ 2.25 (“The combination of burdens of proof and presumptions of the ordinary meet the function of establishing a firm factual starting point that nothing extraordinary occurred between the claimant and the respondent. Failure to adduce evidence that discharges a burden of proof would thus mean that the tribunal would make a finding that what occurred between the parties coincided with the ordinary course that it presumed.”).

⁴⁹² Several authorities explicitly held that Article 10.20.4(c) of the TPA is a mere standard of proof. *See for example Ex. RA-21*, Submission of the United States of America in the Underlying Arbitration, April 4, 2022, ¶ 25 (Article 10.20.4(c) “facilitates an efficient and expeditious process for eliminating claims that lack legal merit.”). *See also Ex. CL-273*, *Renco v. Peru*, ¶ 189(c) (the tribunal held, in interpreting the identical provision of the U.S.-Peru TPA, that it was only “required to adopt an evidentiary standard which assumes that all of claimant’s factual allegations in support of its claim as set out in the pleadings are true.”) (emphasis added).

287. Applicants accordingly fail to establish that Article 10.20.4(c) is a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention. That failure is sufficient to defeat this ground for annulment.

b. The Tribunal Did Not Depart from Article 10.20.4(c) of the Treaty

288. Even assuming that Article 10.20.4(c) is a fundamental rule of procedure (*quod non*), Applicants' annulment ground fails because the Tribunal did not depart from that rule. As demonstrated below, Claimants' allegations regarding the futility and ineffectiveness of local remedies in Colombia did not fall under the limited scope of Article 10.20.4(c) of the Treaty. Moreover, Applicants do not allege any *procedural departure*, but critique in reality the Tribunal's evidentiary finding, which falls outside the scope of Article 52(1)(d) of the ICSID Convention.

289. *First*, Claimants' allegations regarding the futility and ineffectiveness of local remedies in Colombia did not fall under the limited scope of Article 10.20.4(c) of the Treaty, and thus the Tribunal was not required to assume those allegations as true.

290. Article 10.20.4(c) of the Treaty is not, as Applicants infer, a *chèque en blanc* mandating that the Tribunal will take each and every one of Claimants' allegations as true. The scope of this rebuttable factual presumption is restricted and subject to various limitations. Tribunals addressing preliminary objections under Article 10.20.4(c) of the TPA "shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)..."⁴⁹³ Thus, this presumption is narrowly circumscribed: it only applies to factual allegations contained in the request for arbitration.

⁴⁹³ **Ex. RL-1**, Treaty, Article 10.20.4(c) (emphasis added).

291. The Parties argued extensively on this issue in the course of the Arbitration,⁴⁹⁴ and the Award shows that the Tribunal was persuaded by Respondent's arguments. As Respondent successfully established, Article 10.20.4(c) of the Treaty does not cover legal allegations clothed as factual allegations and mere conclusions that are unsupported by facts. In *Pac Rim v. El Salvador*, the tribunal strictly interpreted Article 10.20.4(c) of the DR-CAFTA (the exact equivalent of Article 10.20.4(c) under Treaty)⁴⁹⁵ and reasoned as follows:

It is also only "factual allegations" that are assumed to be true under this procedure. The phrase does not include any legal allegations. It could not therefore include a legal allegation clothed as a factual allegation. Nor could it include a mere conclusion unsupported by any relevant factual allegation without depriving the procedure of any practical application.⁴⁹⁶

292. Article 10.20.4 of the Treaty operates similarly to a "motion to dismiss" and, under this procedure, "the court is not obliged to accept every allegation made by the claimant as being true and will disregard conclusory allegations if they do not reasonably follow from the pleader's description of what happened."⁴⁹⁷

⁴⁹⁴ **Ex. AA-3**, Colombia's Memorial on Preliminary Objections, July 1, 2021, ¶¶ 183-185; **Ex. AA-10**, Colombia's Reply on Preliminary Objections, December 13, 2021, ¶¶ 79-81, 110-111; **Ex. AA-9**, Foster Wheeler's Counter-Memorial on Preliminary Objections, October 14, 2021, ¶ 32; **Ex. AA-11**, Foster Wheeler's Rejoinder on Preliminary Objections, February 11, 2022, ¶¶ 49-58.

⁴⁹⁵ **Ex. RL-291**, DR-CAFTA, Article. 10.20.4(c) ("In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) The tribunal may also consider any relevant facts not in dispute.").

⁴⁹⁶ **Ex. RL-36**, *Pac Rim v. El Salvador*, ¶ 91 (emphasis added). See also **Ex. RALA-69**, Andrea Menaker and Vee Vian Thien, *Towards a More Efficient System: The Expedited Dismissal of Investment Arbitration Claims*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: ESSAYS IN HONOUR OF FALI NARIMAN 171 (Gourab Banerji, Promod Nair, et al. eds, Wolters Kluwer 2021), p. 185 (referring to the *Pac Rim* decision: "Further, although the tribunal declined to rely upon ICSID Rule 41(5) decisions and procedure, it echoed the *Trans-Global* tribunal in finding that it was not required to extend such assumptions to 'legal allegation clothed as factual allegation'." (emphasis added)).

⁴⁹⁷ **Ex. RL-38**, Audley Sheppard, *The Jurisdictional Threshold of a Prima Facie Case*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 933 (P. Muchlinski and others (eds.), Oxford University Press 2008), pp. 957-959.

293. In addition to that, the rebuttable factual presumption provided under Article 10.20.4(c) does not either cover factual allegations that are incredible, frivolous, or inaccurate. Even ICSID Arbitration Rule 41(5), on which Applicants rely to support their claims, encompasses a similar rebuttable factual presumption, the *Trans Global v. Jordan* tribunal held that tribunals need not accept “legal conclusions that are couched as factual allegations,” nor must they “accept at face value any factual allegation which [they regard] as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith.”⁴⁹⁸

294. In the present case, the Tribunal was not “required to assume [Claimants’] assertions [as to the futility of judicial remedies in Colombia] to be true,”⁴⁹⁹ and therefore, the Tribunal did not depart from the rule in Article 10.20.4(c) of the Treaty. Claimants’ allegations regarding the futility and ineffectiveness of local remedies in Colombia were purely legal conclusions or conclusory statements and cannot possibly fall under the limited scope of the factual rebuttable presumption provided Article 10.20.4(c) of the Treaty. Moreover, the Request for Arbitration (which is the only brief benefiting from the factual presumption in Article 10.20.4(c)) contained only one paragraph dealing with the alleged futility and ineffectiveness of local remedies in Colombia, and is limited to the following statement:

To the extent Colombia were to claim that any meaningful local remedies are still available, which they are not, FPJVC is not required to pursue them because any such remedies would be: (1) ineffective (see *Chevron v. Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, §§ 7.133 & 7.144 (Aug. 30, 2018)); (2) futile or improbable (*Ambiente*

⁴⁹⁸ **Ex. AALA-60**, *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules, May 2, 2008 (“*Trans-Global v. Jordan*”), ¶¶ 96, 105. While the tribunal in this case was addressing a preliminary objection under ICSID Arbitration Rule 41(5) rather than Article 10.20.4 of the TPA, this standard is directly relevant here, as Applicants themselves have invoked this rule in support of their position, thereby implicitly acknowledging the analogous nature of the factual presumptions applicable under the Treaty and Rule 41(5). See Memorial on Annulment, ¶¶ 121, 126.

⁴⁹⁹ Memorial on Annulment, ¶ 125.

Ufficio v. Argentina, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 599 & 610 (Feb. 8, 2013); and/or (3) unavailable (*Chevron*, PCA Case No. 2009-23, Second Partial Award on Track II, § 7.122).⁵⁰⁰

295. This paragraph does not contain factual allegations but legal conclusions. The words “ineffective,” “futile,” “improbable” or “unavailable”⁵⁰¹ are adjectives that describe Claimants’ *subjective* views of judicial remedies in Colombia. By definition, a subjective belief is not a fact.

296. Even if these allegations were deemed factual in nature (*quod non*), they are extraordinarily vague, vexatious, and incredible on their face, to the point that the Tribunal could not properly take them as true within the meaning of Article 10.20.4(c).⁵⁰² Claimants dismiss Colombia’s entire judicial system without any basis. Article 10.20.4(c) requires tribunals to assume *facts*, not accept unsubstantiated legal conclusions amounting to a blanket indictment of an entire national judiciary.⁵⁰³

297. Article 10.20.4(c) of the Treaty also does not, as Applicants suggest, operate as an exemption from submitting evidence in support of their allegations. Applicants assert that “the submission of proof was not supposed to be part of [the Preliminary Questions

⁵⁰⁰ **Ex. AA-1**, Foster Wheeler’s Request for Arbitration, December 6, 2019, ¶ 110.

⁵⁰¹ *Id.* (internal references omitted).

⁵⁰² Applicants attempt to extrapolate their claim by asserting that the Tribunal ignored the Torrente Witness Statements on this issue. However, the analysis on this issue in the Torrente Witness Statements rested on a single sentence. In any case, Applicants do not claim that this amounts to a serious departure from a fundamental rule of procedure. See Memorial on Annulment, ¶ 127. Colombia has already addressed Applicants’ assertions regarding the Torrente Witness Statements, which rested on a single sentence on this issue. See ¶¶ 317-318, *supra*.

⁵⁰³ See **Ex. RL-36**, *Pac Rim v. El Salvador*, ¶ 91; **Ex. RALA-69**, A. Menaker and V. V. Thien, *Towards a More Efficient System: The Expedited Dismissal of Investment Arbitration Claims*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: ESSAYS IN HONOUR OF FALI NARIMAN 171, p. 185 (referring to the *Pac Rim* decision: “Further, although the tribunal declined to rely upon ICSID Rule 41(5) decisions and procedure, it echoed the *Trans-Global* tribunal in finding that it was not required to extend such assumptions to ‘legal allegation clothed as factual allegation’.”) (emphasis added); **Ex. AALA-60**, *Trans-Global v. Jordan*, ¶¶ 96, 105; **Ex. RL-38**, A. Sheppard, *The Jurisdictional Threshold of a Prima Facie Case*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 933, pp. 957-959.

Phase] of the arbitration,” and that the absence of a “disclosure process for preliminary questions” confirms as much.⁵⁰⁴ The implication of this argument is that the factual presumption provided under Article 10.20.4(c) of the Treaty was Claimants’ only means of discharging their burden of proving that local remedies in Colombia were futile or ineffective. That is incorrect. The Preliminary Questions Phase was a comprehensive arbitration proceeding in which the Parties exchanged multiple rounds of written submissions, filed hundreds of legal authorities and exhibits, and argued their positions at a two-day hearing.⁵⁰⁵ Claimants therefore had a full and genuine opportunity to substantiate their conclusory allegations through concrete evidence — yet they chose, mistakenly, to rely exclusively on a limited and rebuttable factual presumption rather than adduce such evidence. Moreover, Applicants’ suggestion that the procedural framework precluded the submission of evidence is factually wrong: while the procedural schedule did not include a formal document production phase, Procedural Order No. 1 expressly provided the Parties with a right to request the production of documents.⁵⁰⁶

298. *Second*, Applicants’ annulment ground should be rejected because they do not challenge a *procedural departure*, but the Tribunal’s evidentiary finding, which falls outside of the scope of Article 52(1)(d) of the ICSID Convention. As set forth above, for annulment under this ground to succeed, an applicant must not merely prove that a *fundamental* rule exists, but that a *procedural departure* from that rule occurred.⁵⁰⁷ The relevant inquiry is whether the tribunal’s conduct of the proceedings was deficient, not

⁵⁰⁴ Memorial on Annulment ¶ 126.

⁵⁰⁵ See ¶¶ 42-47, *supra*.

⁵⁰⁶ See ¶ 38, *supra*.

⁵⁰⁷ See ¶¶ 158-159, *supra*.

whether the substance of its decision was correct. A complaint directed at the Tribunal's reasoning or conclusions on the merits, however framed, cannot satisfy this requirement.

299. Committees consistently reject claims that the tribunal seriously departed from a fundamental rule of procedure which are based on an alleged failure to apply the burden of proof.⁵⁰⁸ As stated by the committee in *Pey Casado v. Chile*, "the [applicant] may disagree with the [tribunal's] conclusion but, by no stretch of the imagination, can it be said that there was an improper allocation of the burden of proof which could be characterized as a serious departure from a fundamental rule of procedure."⁵⁰⁹

300. A straightforward examination of Applicants' submission reveals that their grievance is not truly procedural in nature, but rather a challenge to the Tribunal's substantive assessment of the evidence submitted to it in support of Claimants' contention that local remedies in Colombia were futile and/or ineffective. Absent the identification of an actual procedural deficiency in this regard, there is no *procedural departure* to assess.

c. In Any Event, The Tribunal's Alleged Failure to Apply Article 10.20.4(c) of the Treaty Was Not Material to The Outcome of the Award

301. Even assuming (*quod non*), that the Tribunal departed from a fundamental rule of procedure by misapplying the factual presumption under Article 10.20.4(c) of the TPA, that

⁵⁰⁸ See for example **Ex. RALA-43**, *Kılıç v. Turkmenistan*, ¶ 183 ("It is not a question of reversing the burden of proof but of whether the evidence presented by Applicant in the arbitration proceeding was sufficient. The Tribunal considered that evidence and found it insufficient to prove the futility of recourse to the local courts as against the test set by the Tribunal.") (emphasis added); **Ex. RALA-70**, *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision on Annulment, May 11, 2010, ¶ 106 ("The Tribunal concluded that the parties did not exceed their rights when considering Transgabonais as a national of another Contracting State due to foreign control, because more than half of the company's shares were owned indirectly by foreign entities. It reached such a conclusion assessing the documents presented by both Parties, according to the powers granted by Article 34(1) of the Arbitration Rules and, interpreting the notion of control within the limits of its jurisdiction. This process does not amount to a departure from a rule of procedure.") (translation from French).

⁵⁰⁹ **Ex. AALA-9**, *Pey Casado v. Chile*, First Decision on Annulment, ¶ 199.

departure cannot be characterized as *serious* within the meaning of Article 52(1)(d) of the ICSID Convention because it had no bearing on the outcome of the Award.

302. The Tribunal's dismissal of Claimants' claims resulted from its finding that Claimants failed to satisfy the requirements of Article 10.16.1 of the Treaty for the submission of a valid claim to arbitration: at the time Claimants filed the Request for Arbitration, only the Indictment Order had been issued (that fact was not in dispute between the Parties, as the Tribunal rightly noted),⁵¹⁰ which was not a measure capable of constituting a breach of the Treaty, rendering the claims premature. That conclusion would have been the same even had the Tribunal assumed as true Claimants' allegation that local remedies in Colombia were futile and/or ineffective. The dispositive fact remains that, at the time of filing, the only act in existence was the Indictment Order — a mere procedural administrative act (*acto administrativo de trámite*) — which, irrespective of any assumption regarding the futility of local remedies, was incapable of constituting a measure giving rise to a breach of the Treaty.

303. Consequently, the alleged procedural departure from Article 10.20.4(c) of the Treaty was not serious within the meaning of Article 52(1)(d) of the ICSID Convention. Applicants' ground additionally fails for this reason.

2. The Tribunal Did Not Fail to Give Reasons in Its Finding That Local Remedies Were Not Obviously Futile or Manifestly Ineffective

304. Applicants contend that the Award must be annulled under Article 52(1)(e) of the ICSID Convention because the Tribunal failed to state reasons by not expressly addressing evidence regarding the futility and ineffectiveness of local remedies in Colombia,

⁵¹⁰ **Ex. AA-7**, Award, ¶ 207. See also **Ex. RALA-69**, A. Menaker and V. V. Thien, *Towards a More Efficient System: The Expedited Dismissal of Investment Arbitration Claims*, in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: ESSAYS IN HONOUR OF FALI NARIMAN 171, p. 185 (“[T]he tribunal ‘may also consider any relevant facts not in dispute’ includ[ing] facts alleged by the respondent.”).

specifically, the Torrente Witness Statements.⁵¹¹ Applicants' ground is untenable, and their reliance on the Torrente Witness Statements is misplaced. As demonstrated below, (a) the Tribunal considered all the evidence adduced by the Parties, and properly reasoned its finding that local remedies were not futile or manifestly ineffective in Colombia. Moreover, (b) the lack of explicit reference to the Torrente Witness Statements does not warrant annulment under Article 52(1)(e) of the ICSID Convention.

a. The Tribunal Provided an Intelligible Reasoning in Light of the Record Before It

305. As set forth above, under Article 52(1)(e) of the ICSID Convention, committees are concerned with the existence of a reasoning, not about its quality or persuasiveness.⁵¹² The requirement to state reasons is satisfied so long as the award enables the Committee “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.”⁵¹³ As the committee held in *Wena v. Egypt*, Article 52(1)(e) “does not allow any review of the challenged Award which would lead the . . . Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not,” and ultimately held that if the “sequence of reasons has been given by the Tribunal, there is no room left for a request for annulment under Article 52(1)(e).”⁵¹⁴ The reasoning supporting a tribunal's decision may moreover be implicit rather than express.⁵¹⁵

⁵¹¹ Memorial on Annulment, ¶¶ 198-204.

⁵¹² See ¶¶ 123-127, *supra*.

⁵¹³ **Ex. AALA-57**, *MINE v. Guinea*, ¶ 5.09.

⁵¹⁴ **Ex. AALA-7**, *Wena v. Egypt*, ¶ 79. See also **Ex. AALA-54**, *Suez v. Argentina*, ¶ 153; **Ex. RALA-71**, *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Decision on Annulment, August 21, 2025, ¶ 259.

⁵¹⁵ **Ex. RALA-15**, *Perenco v. Ecuador*, ¶ 166.

306. The Committee’s mandate under Article 52(1)(e) is accordingly confined to a single question: whether reasons were stated. It does not extend to whether better reasons could have been stated, or whether the Tribunal evaluated the evidence in the manner Applicants would have preferred. The Committee “cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties.”⁵¹⁶ ICSID Arbitration Rule 34(1) reinforces this by vesting the Tribunal with exclusive discretion to be “the judge of the admissibility of any evidence adduced and of its probative value.”⁵¹⁷ Even assuming Applicants could establish some deficiency in the Tribunal’s reasoning on the local remedies question — which they cannot — their challenge would still fail, because a review of factual findings and the weighing of evidence falls outside the mandate of an annulment committee.

307. On the issue of whether an annulment action before the administrative adjudicatory courts (*cortes contencioso administrativas*) against the Ruling with Fiscal Liability was unavailable, obviously futile or manifestly ineffective, the evidentiary record before the Tribunal was clear and unequivocal. On one side, Claimants adduced no concrete evidence.⁵¹⁸ Their entire case rested on a single generic sentence from the Torrente Witness Statements — that nullity actions “historically take five years to twelve years to conclude.”⁵¹⁹ On the other side, Colombia adduced concrete evidence of specific cases in which fiscal

⁵¹⁶ **Ex. AALA-32**, *Duke v. Peru*, ¶ 214.

⁵¹⁷ **Ex. AALA-2**, ICSID, Rules of Procedure for Arbitration Proceedings (2006), Rule 34(1).

⁵¹⁸ **Ex. AA-9**, Foster Wheeler’s Counter-Memorial on Preliminary Objections, October 14, 2021, ¶¶ 17-18; **Ex. AA-11**, Foster Wheeler’s Rejoinder on Preliminary Objections, February 11, 2022, ¶¶ 45, 88.

⁵¹⁹ **CWS-1**, Witness Statement of César Torrente, ¶ 20.

liability rulings issued by the CGR had been rendered ineffective or reversed in whole or in part following judicial review.⁵²⁰

308. In its Award, the Tribunal implemented the applicable legal standard, weighed the evidentiary record before it, and reached its conclusion, finding Colombia's evidentiary record more persuasive:

Claimants, however, have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability. On the other hand, Respondent has provided the Tribunal with several examples of rulings with fiscal liability issued by the Deputy Comptroller that have been rendered ineffective or reversed, in whole or in part, following a prosecution of judicial remedies.⁵²¹

309. The Award's reasoning is intelligible, internally coherent, and firmly grounded in the record. The line of reasoning from Point A to Point B is clear. What Applicants present

⁵²⁰ **Ex. AA-3**, Colombia's Memorial on Preliminary Objections, July 1, 2021, ¶¶ 207-209, n. 417; **Ex. AA-10**, Colombia's Reply on Preliminary Objections, December 13, 2021, ¶¶ 144-145, n. 248. See for example **Ex. RL-87**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, November 20, 2014 (*Condor S.A. Compañía de Seguros v. Comptroller of Bogotá D.C.*), pp. 11-12, 33 (confirming the decision of the Administrative Adjudicatory Proceedings Court of Cundinamarca annulling the actions of the Comptroller's office of Bogotá, D.C., which declared fiscal liability on an insurance company, Condor S.A., as a civilly liable third party); **Ex. RL-88**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, October 22, 2015 (*Marta Inés Martínez Arias v. Municipality of Armenia-Municipal Comptroller of Armenia*), pp. 9-10; 22-23 (confirming the decision of the Administrative Adjudicatory Proceedings Court of Quindío annulling the administrative acts issued by the Municipal Comptroller's Office of Armenia which declared fiscal liability on Mrs. Marta Inés Martínez Arias); **Ex. RL-89**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, July 5, 2018 (*Ezequiel Paladines Cuellar v. Office of the Departmental Comptroller of the Atlantic*), pp. 27-28 (confirming the decision rendered by the Administrative Adjudicatory Proceedings Court of Atlántico which declared that acts identifying Ezequiel Paladines Cuellar as an individual liable for tax were null and void); **Ex. RL-90**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, November 12, 2020 (*Ana María Piñeros Ricardo v. Comptroller General of the Republic*), pp. 108-109 (confirming the decision of the Administrative Adjudicatory Proceedings Court of Cundinamarca which declared that administrative acts charging Ana María Piñeros with fiscal liability to be partially null and void); **Ex. RL-91**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, First Section, Judgment, February 18, 2021 (*Aseguradora Colseguros S.A. v. Comptroller General of the Republic*), pp. 36-37 (upholding the validity of arguments upon which the Administrative Adjudicatory Proceedings Court of Santander declared the decisions of the Office of the Comptroller General of the Republic, by which Colseguros S.A. was attached as a civilly liable third party to a ruling with fiscal liability, to be null).

⁵²¹ **Ex. AA-7**, Award, ¶ 217 (emphasis added).

as a failure to state reasons is, in substance, disagreement with the Tribunal's assessment of the evidence. That disagreement — however firmly held — is not a ground for annulment under Article 52(1)(e) of the ICSID Convention, as such, Applicants' argument must be dismissed.

b. The Lack of Explicit Reference to the Torrente Witness Statements Does Not Amount to a Failure to State Reasons

310. Applicants also argue that the Tribunal failed to state reasons because it allegedly “did not consider highly relevant evidence that was part of the record” establishing that local remedies in Colombia are futile and ineffective.⁵²² More particularly, they assert that the Tribunal “completely ignored” the Torrente Witness Statements, and that “[t]his amounts to a failure to state reasons and is thus a ground for annulling the Award.”⁵²³ As discussed below, this contention is meritless because the Tribunal's alleged failure to explicitly address every evidence adduced by the Parties is not a ground for annulment under Article 52(1)(e) of the ICSID Convention. And in any event, the Torrente Witness Statements were not relevant to the outcome of the Award.

311. *First*, the Tribunal was under no obligation to cite or discuss the Torrente Witness Statements in its Award. It is well settled that a failure to address every piece of evidence does not amount to a failure to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention.⁵²⁴ The omission of an express reference to a particular piece of

⁵²² Memorial on Annulment, ¶ 201.

⁵²³ *Id.*, ¶¶ 202, 204.

⁵²⁴ See ¶¶ 135-138, *supra*. See also **Ex. RALA-13**, *Rumeli v. Kazakhstan*, ¶ 104 (“The purpose of the reasons requirement under Article 52(1)(e) of the ICSID Convention is not to require the tribunal to explain its consideration and treatment of each piece of evidence adduced by either party.”) (emphasis added); **Ex. RALA-48**, C. Schreuer *et al.*, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, p. 1342, ¶ 453 (“The failure of a tribunal to address each and every piece of evidence before it does not amount to a failure to state reasons.”).

evidence is not a gap in reasoning — it is, at most, an implicit determination that the evidence was immaterial to the Tribunal's analysis.⁵²⁵

312. In total, the record was composed of five witness statements and more than 150 factual exhibits and 600 legal authorities. Having to expressly engage with every and all of the evidence adduced by the Parties would have placed an unbearable burden upon the Tribunal. The Tribunal correctly held that Claimants — which bore the burden of proving that local remedies were futile or ineffective⁵²⁶ — “ha[d] not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability.”⁵²⁷ The Tribunal's finding that Claimants had not presented “any evidence” to substantiate their allegations is not an oversight of the Torrente Witness Statements. It is a determination that they did not meet the standard of substantiation the allegation demanded. Stated otherwise, it is an implicit exercise of the Tribunal's discretion under ICSID Arbitration Rule 34(1) to assess the weight and probative value of the evidence before it.

313. *Second*, the Torrente Witness Statements were not relevant — let alone *highly relevant* — evidence on the issue of futility of local remedies. As discussed above,⁵²⁸ Applicants rely on an isolated annulment decision which considered, in exceptional circumstances, that a tribunal's failure to address a specific piece of evidence could amount to a failure to state reasons, but only where the tribunal had “gloss[ed] over” evidence upon which the parties had “placed significant emphasis” and that was “highly relevant to their

⁵²⁵ **Ex. RALA-50**, *Pawłowski v. Czech Republic*, ¶ 159.

⁵²⁶ See ¶ 286, *supra*.

⁵²⁷ **Ex. AA-7**, Award, ¶ 217 (emphasis added).

⁵²⁸ See ¶¶ 139-144, *supra*.

case.”⁵²⁹ While Colombia does not accept that this decision reflects the proper standard under Article 52(1)(e) of the ICSID Convention, it is in any event inapposite to the present dispute because Claimants did not treat the Torrente Witness Statements as “highly relevant evidence.”

314. Applicants are attempting to overstate before this Committee the importance Claimants placed on those witness statements.⁵³⁰ Claimants filed the Torrente Witness Statements in support of their Application for Provisional Measures and Emergency Temporary Relief on September 2 and October 12, 2021.⁵³¹ They did not however, materially rely on them in their written memorials on Colombia's Objections.

315. Across their two principal briefs, Claimants cited the Torrente Witness Statements *on only two occasions* — each time as a peripheral reference confined to footnotes, and neither time in connection with the alleged futility or ineffectiveness of local remedies in Colombia. In Claimants' Counter-Memorial on Preliminary Objections, the sole reference to the Torrente Witness Statements appeared in a footnote appended to a sentence asserting that Claimants had exhausted administrative appeals before the CGR.⁵³² The second and final reference appeared in Claimants' Rejoinder on Preliminary Objections, again, relegated to a single footnote. There, too, the reference was not invoked in support of any argument regarding the futility or ineffectiveness of local remedies, but solely to

⁵²⁹ Memorial on Annulment, ¶ 200, citing **Ex. AALA-55**, *TECO v. Guatemala*, ¶ 131.

⁵³⁰ *Id.*, ¶ 201.

⁵³¹ **Ex. AA-7**, Award, ¶ 13 (“On September 2, 2021, Claimants submitted an Application for Provisional Measures and Emergency Temporary Relief, together with Exhibits C-001 through C-010, Legal Authorities CL-001 through CL-038, and the Witness Statements of César Torrente (CWS-1), Steve Conway (CWS-2), Thomas Grell (CWS-3), and Colin Johnson (CWS-4).”).

⁵³² **Ex. AA-9**, Foster Wheeler's Counter-Memorial on Preliminary Objections, October 14, 2021, ¶ 15, n. 26; **Ex. RA-24**, Screenshots of Claimants' citations of CWS-1 in Counter-Memorial and Rejoinder on Preliminary Objections, p. 1.

support the contention that Claimants were not required to post a bond in order to request precautionary measures.⁵³³

316. Applicants cannot fault the Tribunal for not explicitly referring to the Torrente Witness Statements if they themselves failed to rely on them to support their futility contention. It was not for the Tribunal to elevate evidence that Applicants themselves failed to deploy in support of their futility argument. Having treated this evidence as peripheral throughout the proceedings, Applicants cannot now recast it as central simply because the Tribunal declined to address it expressly.

317. In reality, the Torrente Witness Statements were irrelevant on the question of futility and ineffectiveness of local remedies, which explains Claimants' lack of reliance on these statements while discussing this issue in its written submissions. As Applicants acknowledged,⁵³⁴ the Torrente Witness Statements addressed this issue in a single sentence:

Based on my experience, a Nullity Action historically take five years to twelve years to conclude (but in some cases, it can take longer).⁵³⁵

318. This sentence cannot bear the weight Applicants place upon it before the Committee. The statement does not assert — even remotely — that local remedies are manifestly futile or ineffective. It states only that nullity actions historically take between five and twelve years to conclude.⁵³⁶ That observation was made in the context of Claimants'

⁵³³ **Ex. AA-11**, Foster Wheeler's Rejoinder on Preliminary Objections, February 11, 2022, ¶ 45, n. 91; **Ex. RA-24**, Screenshots of Claimants' citations of CWS-1 in Counter-Memorial and Rejoinder on Preliminary Objections, p. 2.

⁵³⁴ Memorial on Annulment, ¶ 201.

⁵³⁵ **CWS-1**, Witness Statement of César Torrente, ¶ 20.

⁵³⁶ *Id.*

application for interim relief, to demonstrate urgency, not to address, let alone substantiate, any allegation of futility or ineffectiveness of local remedies before Colombian administrative adjudicatory courts (*cortes contencioso administrativas*).

319. A duration of five to twelve years is not inherently exceptional in judicial systems with a two-instance judicial review process. It establishes no objective basis on which the Committee could assess whether the Colombian administrative adjudicatory jurisdiction (*jurisdicción contencioso administrativa*) is manifestly ineffective. The duration of proceedings, standing alone, is not evidence of systemic futility or ineffectiveness.

320. This statement was in no way comparable to the 1200 pages of expert analysis on damages on which the party placed significant emphasis and yet was ignored by the tribunal in *TECO v. Guatemala*.⁵³⁷ Nothing in the Torrente Witness Statements could have altered the Tribunal's conclusion that Claimants had failed to substantiate their allegation. Thus, the Torrente Witness Statements were irrelevant and the Tribunal's failure to cite this evidence expressly in its reasoning cannot amount to a failure to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention, as such, this argument must be dismissed.

* * *

321. Applicants therefore fail to demonstrate that the Tribunal's evidentiary finding on the futility of local remedies in Colombia amounts to an annulable error, whether under the ground of serious departure from a fundamental rule of procedure or failure to state reasons. In any event, the Tribunal's findings regarding the futility of local remedies in Colombia were immaterial to the outcome of the case, as the Tribunal dismissed the entirety

⁵³⁷ See ¶ 140, *supra*.

of Claimants' claims on the independent and primary ground that, at the time of the Request for Arbitration, no measure capable of constituting a breach of the Treaty existed.

D. The Tribunal's Allegedly Contradictory Reasoning on the Status of the Fiscal Liability Proceedings

322. Applicants argue that the Tribunal's reasoning on the status of the Fiscal Liability Proceedings (which Applicants call the "CGR proceedings") is contradictory and that the Award should therefore be annulled for failure to state reasons. Applicants argue it was inconsistent for the Tribunal to simultaneously hold that (i) no final administrative act existed at the time the Request for Arbitration was filed, making their claims premature; and that (ii) Claimants had exhausted their administrative remedies by July 6, 2021, when the Fiscal Chamber (*sala fiscal sancionatoria*) affirmed the CGR's decision.⁵³⁸

323. The Tribunal's reasoning contains no contradiction. The Tribunal made two analytically distinct findings, each addressing a different moment in time and serving a different purpose.

324. *First*, the Tribunal determined that whether Claimants' claims were ripe and admissible was a function of whether "a measure capable of constituting a Treaty breach existed" at the time Claimants submitted their Request for Arbitration.⁵³⁹ The Tribunal found — and that finding was dispositive of all of Claimants' claims — that as of December 6, 2019, when Claimants filed their Request for Arbitration, only the Indictment Order (*Auto de Imputación*) had been issued.⁵⁴⁰ The fact was undisputed between the Parties; and it was

⁵³⁸ Memorial on Annulment, ¶¶ 205-209.

⁵³⁹ **Ex. AA-7**, Award, ¶ 204.

⁵⁴⁰ *Id.*, ¶ 207.

equally undisputed that the Indictment Order (*Auto de Imputación*) was a mere procedural administrative act (*acto administrativo de trámite*) and therefore had not crystalized into a “measure capable of constituting a Treaty breach.” The Treaty, as the Tribunal correctly determined, requires that a claim be ripe at the time it is filed; claimants cannot preemptively submit claims to arbitration in the hope that they will mature thereafter.

325. *Second*, in its subsidiary analysis, the Tribunal examined what occurred after the filing of the Request for Arbitration. It found that the July 6, 2021 decision by the Fiscal Chamber (*sala fiscal sancionatoria*) resulted in Claimants exhausting their administrative remedies against the Ruling with Fiscal Liability, nearly two years after the filing of the Request for Arbitration.⁵⁴¹ However, the Tribunal further found that the claim remained unripe even at that later stage because, notwithstanding the exhaustion of *administrative* remedies, *judicial* remedies before the administrative adjudicatory courts remained available.⁵⁴²

326. These findings are entirely consistent. They address two analytically distinct moments in time and reinforce, rather than contradict, one another: at the time of filing, no measure capable of constituting a breach existed because only a procedural act had been issued (the Indictment Order); and even when a substantive administrative decision was subsequently rendered (the Ruling with Fiscal Liability), it still did not constitute such a measure because it remained subject to judicial control. Far from being contradictory, the Tribunal’s reasoning reflects a coherent application of the Treaty’s temporal requirement at each relevant stage of the proceedings.

⁵⁴¹ *Id.*, ¶ 208 (“the Tribunal accepts that when the Fiscal Chamber formally rejected FPJVC’s appeal on 6 July 2021 and affirmed the Ruling with Fiscal Liability in its entirety, Claimants had exhausted their administrative appeals.”).

⁵⁴² Memorial on Annulment, ¶¶ 209-216.

327. Applicants cite to the *Tidewater v. Venezuela* annulment decision as an example of an award that was annulled for relying on contradictory reasons,⁵⁴³ but that decision does not help their case. In the *Tidewater* award, the tribunal held that the claimant's expert's country risk premium was unreasonable and then relied on that same unreasonable premium to calculate damages.⁵⁴⁴ The problem in *Tidewater* was that the tribunal rejected certain data, and then built its damages calculation on that very data. Nothing comparable occurred here. The Tribunal's acknowledgment that Claimants eventually exhausted their administrative remedies in July 2021 does not negate the separate finding that no final administrative act existed at the time of filing the Request for Arbitration in December 2019. These findings describe different moments in time and support, rather than undermine, the Tribunal's conclusion.

328. Under the strict legal standard applicable to contradictory reasons as a ground for annulment, Applicants' claim fails. For a contradiction to warrant annulment under Article 52(1)(e) of the ICSID Convention, the reasons must be "genuinely contradictory in that they cancel each other out so as to amount to no reasons at all" and must be "serious enough to vitiate the Tribunal's reasoning . . . as a whole."⁵⁴⁵ The contradiction must concern an outcome-determinative issue that is "necessary for the tribunal's decision."⁵⁴⁶ Applicants have met none of these stringent requirements.

⁵⁴³ *Id.*, ¶ 206.

⁵⁴⁴ **Ex. AALA-59**, *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, December 27, 2016, ¶¶ 185-186.

⁵⁴⁵ **Ex. AALA-58**, *Daimler v. Argentina*, ¶ 77; **Ex. RALA-32**, *Mobil v. Venezuela*, ¶ 119.

⁵⁴⁶ **Ex. AALA-58**, *Daimler v. Argentina*, ¶ 77 (citing *Vivendi v. Argentina (I)*, Decision on Annulment, ¶ 65).

329. Additionally, committees must construe award language in a manner that results in consistency rather than seeking to find inner contradictions.⁵⁴⁷ Applicants' parsing of the Award to extract supposed contradictions ignores the Tribunal's logical approach: it separately addressed (i) the factual state of the record on December 6, 2019; (ii) the development of the proceedings thereafter; and (iii) the legal requirements for admissibility under the Treaty tied to the filing date of the Notice of Arbitration.

* * *

330. The Tribunal's reasoning can easily be followed "from Point A to Point B,"⁵⁴⁸ which is precisely what Article 52(1)(e) requires. For the foregoing reasons, Applicants' claim under Article 52(1)(e) fails.

E. The Tribunal's Alleged Failure to Rule on All of Claimants' Claims, Including the Amended Request for Arbitration

331. Applicants advance a single underlying complaint repackaged under three different grounds of annulment. Their core grievance is that the Tribunal disposed of the case on a threshold ripeness ruling under Article 10.16.1 of the Treaty and therefore did not separately adjudicate the substance of each individual claim or the alleged ancillary claims contained in the Amended Request for Arbitration.⁵⁴⁹ Applicants then reframe this single complaint as three distinct annulment grounds: (1) manifest excess of powers, claiming the Tribunal failed to rule on the substance of most of Claimants' claims;⁵⁵⁰ (2) failure to state

⁵⁴⁷ **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 81 ("In construing awards, as in construing statutes and legal instruments generally, one necessarily should construe the language in issue, whenever possible, in a way that results in consistency").

⁵⁴⁸ See **Ex. AALA-7**, *Wena v. Egypt*, ¶ 77.

⁵⁴⁹ Memorial on Annulment, ¶¶ 142-158.

⁵⁵⁰ *Id.*

reasons, contending the Tribunal failed to explain why administrative acts taken before issuance of the Ruling with Fiscal Liability could not constitute breaches;⁵⁵¹ and (3) serious departure from fundamental procedure, arguing the Tribunal violated Claimants' right to be heard.⁵⁵²

332. This repackaging strategy fails because the underlying premise is incorrect. Regardless of the annulment ground under which Applicants frame their complaint, the substance of their grievance is identical: the Tribunal upheld a dispositive preliminary objection and, consequently, declined to separately adjudicate claims rendered moot by that determination. This does not constitute an excess of powers, a failure to state reasons, or a departure from a fundamental procedure under any applicable standard. To the contrary, it reflects the ordinary and well-established practice of ICSID tribunals.

1. No Manifest Excess of Powers Under Article 52(1)(b) of the ICSID Convention

333. An “excess of powers” occurs when a tribunal acts beyond the scope of the parties’ arbitration agreement.⁵⁵³ Tribunals routinely dispose of cases on the basis of dispositive preliminary objections without separately adjudicating every claim. Applicants confuse a Tribunal’s exercise of discretion with an excess of authority. Even if the Tribunal’s approach could be characterized as excessive, *quod non*, it would not constitute a manifest excess of powers. The “manifest” requirement sets an extraordinarily high threshold: the excess must be “clear,” “obvious,” “plain on its face,” and discernible “without the need for an elaborate analysis of the award.”⁵⁵⁴

⁵⁵¹ *Id.*, ¶¶ 186-194.

⁵⁵² *Id.*, ¶¶ 101-111.

⁵⁵³ See ¶ 102, *supra*.

⁵⁵⁴ See ¶ 105, *supra*.

334. The Tribunal's determination that Claimants' claims were premature represents a tenable interpretation of Article 10.16.1 of the Treaty. The Tribunal grounded this conclusion in established principles of international law, citing *Flughafen v. Venezuela* for the proposition that a claim cannot ripen while local remedies remain available.⁵⁵⁵ Because the Tribunal's approach is reasonable and tenable — even if Applicants believe it to be incorrect — any excess of powers cannot be manifest.

335. Applicants have failed to demonstrate that any alleged excess of powers had “substantively serious consequences on the award.”⁵⁵⁶ The Tribunal's decision not to separately address individual claims flowed directly from its finding that all claims failed to meet the threshold jurisdictional requirement of Article 10.16.1. This ripeness requirement was dispositive to the entire Arbitration; without satisfying it, no claim could proceed to adjudication. Therefore, the Tribunal's decision not to separately adjudicate claims already found inadmissible had no additional bearing on the outcome.

2. No Failure to State Reasons Under Article 52(1)(e) of the ICSID Convention

336. Annulment under Article 52(1)(e) requires demonstrating a complete failure to explain a dispositive issue, not merely disagreeing with the tribunal's reasoning.⁵⁵⁷ The standard is met only when there is “a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point.”⁵⁵⁸ This high threshold exists for good reason. An examination of reasons cannot be transformed into a re-examination of

⁵⁵⁵ **Ex. AA-7**, Award, ¶ 215.

⁵⁵⁶ See ¶ 109, *supra*.

⁵⁵⁷ See ¶¶ 125-127, *supra*.

⁵⁵⁸ **Ex. RALA-9**, *Sempra v. Argentina*, ¶ 167.

correctness, because this would clearly amount to an appeal in violation of Article 53(1) of the ICSID Convention.⁵⁵⁹

337. In the Award, the Tribunal provided comprehensive reasoning on the ripeness issue that ultimately determined the entire case. It traced Claimants' claims through the sequence of Colombian administrative proceedings, identified the temporal gap between the filing of the Notice of Arbitration on December 6, 2019 and the issuance of the Ruling with Fiscal Liability on April 26, 2021, analyzed the language of Article 10.5.2(a) of the Treaty in both English and Spanish versions, and applied established international law principles regarding admissibility and ripeness.⁵⁶⁰ Any reader of the Award can follow this progression from the initial jurisdictional requirements, through the factual timeline, to the Tribunal's legal conclusion.

338. Applicants' attempt to annul the Award for an alleged failure to state reasons cannot stand. While tribunals must deal with the parties' "heads of claim" under Article 48(3) of the ICSID Convention, they are not obligated to address every single argument or claim when a threshold determination, such as a jurisdictional ruling, makes further adjudication unnecessary.

339. By finding Claimants' claims premature under Article 10.16.1 of the TPA because the Indictment Order (*Auto de Imputación*) was not a measure capable of constituting a breach of the Treaty, the Tribunal dealt with all substantive claims by ruling them inadmissible.⁵⁶¹ In doing so, the Tribunal addressed each head of claim and resolved it on dispositive grounds.

⁵⁵⁹ See ¶ 125, *supra*.

⁵⁶⁰ **Ex. AA-7**, Award, ¶¶ 203-220.

⁵⁶¹ *Id.*, ¶¶ 221-222.

340. The Tribunal similarly was not required to address every piece of evidence or argument submitted by Claimants regarding claims that had already been found inadmissible. As the case law establishes,⁵⁶² tribunals have broad discretion in the assessment of evidence and are not required to cite or address all evidence in support of their reasons. Under ICSID Arbitration Rule 34(1), tribunals are “the judge of the admissibility of any evidence adduced and of its probative value.”

341. That Applicants disagree with the Tribunal's reasoning does not establish a failure to state reasons. Applicants are simply restating their disagreement with the Tribunal's legal conclusions, and this is exactly the type of appellate review that Article 52(1)(e) of the ICSID Convention is designed to prevent.

3. No Departure from a Fundamental Rule of Procedure Under Article 52(1)(d) of the ICSID Convention

342. A “serious departure” from fundamental procedure requires conduct that amounts to a fundamental denial of the right to be heard or a violation of an essential procedural requirement established by the ICSID Convention or the Arbitration Rules.⁵⁶³ Applicants have identified no such violation. As shown below, the Tribunal followed all applicable procedural rules, provided ample opportunity for both Parties to present their cases, and disposed of the matter on a dispositive legal issue in accordance with standard practice. Accordingly, Applicants cannot establish grounds for annulment on the basis of a serious departure from a fundamental rule of procedure.

⁵⁶² See ¶¶ 135-138, *supra*.

⁵⁶³ See ¶¶ 151-165, *supra*.

a. Applicants Received a Full and Fair Hearing

343. Applicants claim the Tribunal violated their right to be heard by declining to separately adjudicate each claim.⁵⁶⁴ This confuses procedural fairness with the right to prevail on the merits. The right to be heard requires that a party have a fair opportunity to present its position and that a tribunal consider it. It does not require that a tribunal address every allegation or separately rule on every claim when a threshold determination makes such consideration unnecessary.

344. Claimants received extensive procedural protection, demonstrating that they received a full and fair hearing. Both Parties submitted detailed written pleadings on the Colombia's Objections, including memorials, counter-memorials, and rejoinders spanning hundreds of pages.⁵⁶⁵ Claimants were afforded the opportunity to request modifications to the procedural calendar, which the Tribunal granted on multiple occasions.⁵⁶⁶ Claimants were even permitted to introduce additional evidence and documents throughout the proceedings, which the Tribunal admitted.⁵⁶⁷ Both Parties participated in a two-day hearing at which they presented comprehensive oral arguments and responded to questions from the Tribunal members.⁵⁶⁸

345. Claimants admitted as much during the Hearing, stating:

MR. SILLS: Mr. President, I think, as your comment suggests, there is an extensive record here. The issues have been vetted. Of course, if there is a particular question that the Tribunal feels has not been sufficiently aired, we would be pleased to respond to it in writing.

⁵⁶⁴ Memorial on Annulment, ¶¶ 101-111.

⁵⁶⁵ **Ex. AA-7**, Award, ¶¶ 12-36.

⁵⁶⁶ *Id.*, ¶¶ 9-49.

⁵⁶⁷ *Id.*, ¶¶ 31-58.

⁵⁶⁸ *Id.*, ¶ 50.

But I have to say, from Claimants' perspective, we think that these preliminary questions — and they are only preliminary questions — are ripe for a decision at this point. And if the Tribunal is of that view, we would certainly not insist on yet another round of written submissions, perhaps to be followed by a further argument. Much that we enjoy meeting with the Tribunal and with our colleagues across the table, I think **the record is sufficiently developed on these questions at this point for the Tribunal to decide.**⁵⁶⁹

346. Accordingly, Applicants cannot credibly maintain that the Tribunal departed from a fundamental rule of procedure by failing to afford them a full and fair hearing. The procedural record demonstrates that Claimants were afforded every opportunity to present their case, and their own counsel expressly confirmed the sufficiency of that record. This ground for annulment under Article 52(1)(d) of the ICSID Convention must therefore be rejected.

b. The Tribunal's Approach Reflects Standard ICSID Practice, Not a Procedural Departure

347. The Tribunal's decision to dispose of the case on a threshold jurisdictional issue is not a departure from fundamental procedure; it is standard ICSID practice. When a tribunal finds that a claim is inadmissible or that the tribunal lacks jurisdiction, it is neither required nor customary for it to issue separate rulings on alternative grounds or to address merits claims rendered unnecessary by the jurisdictional or admissibility determination.⁵⁷⁰

⁵⁶⁹ **Ex. AA-13**, Preliminary Objections Hearing Transcript, Volume 2, May 20, 2022, pp. 364:10-365:5 (emphasis added).

⁵⁷⁰ A tribunal's authority to forgo alternative grounds once a dispositive issue is resolved is well-established in ICSID cases. See for example **Ex. RALA-72**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013, ¶ 374 ("Having reached the conclusion that it lacks jurisdiction over the treaty claims, the Tribunal can dispense with the analysis of the Respondent's other objections to jurisdiction and admissibility in respect of these claims, including the objections based on the violation of international public policy and transnational principles as well as on fraud."); **Ex. RALA-73**, *Camuzzi International S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, May 11, 2005, ¶ 98 ("The second question is the one relating to the meaning of admissibility. This aspect was also considered by the tribunal in *Enron* when holding that acceptance of an objection to admissibility would normally result in rejection of the claim on the merits."). This general principle of

348. The Tribunal properly ordered the issues before it by addressing the Preliminary Objection under Article 10.20.4 of the Treaty first. Having determined that Claimants failed to satisfy the requirements of Article 10.16.1 of the Treaty for the submission of a valid claim to arbitration because their claims were premature, the Tribunal's threshold finding was necessarily dispositive of all remaining claims. The determination of admissibility constituted a prerequisite to any further adjudication; once the Tribunal concluded that this prerequisite had not been met, no claim could survive. The Tribunal was therefore neither required nor expected to proceed to a separate analysis of each individual claim.

c. The Amended Request for Arbitration Presented No Independent Procedural Right and Was Not Brought Properly Before the Tribunal for Decision

349. Applicants argue that the Tribunal's failure to rule on its Amended Request for Arbitration constitutes a procedural departure and a failure to state reasons.⁵⁷¹ This argument misconstrues both the conditional nature of that amendment and the procedural reality of when the Tribunal was seized with the supposedly ancillary claims contained therein.

350. Claimants submitted their Amended Request for Arbitration more than two years after the Hearing, deep into the Tribunal's deliberations.⁵⁷² Despite Respondent's objections, the Tribunal admitted the Amended Request for Arbitration as part of the record, but it did so conditionally: "without prejudice to any eventual assessment that the Tribunal might make of the Amended and Restated Request for Arbitration."⁵⁷³ The Tribunal also

procedural economy is further supported by ICSID Rule 41, which allows tribunals to bifurcate proceedings and decide jurisdictional and admissibility questions separate from the merits.

⁵⁷¹ Memorial on Annulment, ¶¶ 152-158.

⁵⁷² See ¶¶ 51-53, *supra*.

⁵⁷³ **Ex. AA-7**, Award, ¶ 63.

stated it would not entertain a discussion of the Amended and Restated Request for Arbitration “until after [it had] issu[ed] its ruling on the Respondent’s Preliminary Objections, if appropriate,”⁵⁷⁴ recognizing the threshold issue of admissibility and ripeness before it during the Preliminary Questions Phase.

351. Applicants themselves recognized the correctness of this approach. After Claimants filed a new ICSID case containing the same claims set out in the Amended Request for Arbitration and the Tribunal asked for an explanation, Claimants stated in a July 16, 2024 communication that they “appreciate[d] why the Tribunal declined to rule or provide any further clarification at this time [and] that it will turn to the Amended RFA once the [Colombia’s Objections] [are] resolved, because that might indicate a view on the merits of the [Colombia’s Objections] in advance of the Tribunal’s ruling.”⁵⁷⁵ This acknowledgment demonstrates that Claimants understood and accepted the Tribunal’s proper refusal to address the alleged ancillary claims while Colombia’s Objections remained pending.

352. Under ICSID Arbitration Rule 40(2), ancillary claims must be presented within specified time limits “unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.” The Tribunal granted Claimants’ late submission of the supposed ancillary claims by permitting the Amended Request for Arbitration to be placed on the record. However, the Tribunal did not simultaneously authorize itself to be seized with those claims for purposes of adjudication. Instead, it clearly conditioned any future consideration on the outcome of the Preliminary Questions Phase.

⁵⁷⁴ **Ex. RA-20**, Email from the ICSID Secretariat to the Parties, July 3, 2024.

⁵⁷⁵ **Ex. RA-25**, Claimants’ email to the Tribunal, July 16, 2024, p. 1.

353. When the Tribunal found Claimants' original claims to be inadmissible, the Amended Request for Arbitration became moot. The entire Arbitration could not proceed beyond the Preliminary Questions Phase. Therefore, the Tribunal had no obligation to rule on claims that had become legally irrelevant. Applicants cannot now claim that a conditional admission of the Amended Request for Arbitration, which never became operative due to the disposition on Colombia's Objections, created an independent obligation on the Tribunal to adjudicate claims under the Amended Request for Arbitration.

* * *

354. In conclusion, Applicants' request to annul the Award on the basis that the Tribunal failed to rule on all of Claimants' claims, including the Amended Request for Arbitration, should be rejected. Applicants have repackaged a single complaint — that the Tribunal disposed of the case on a threshold admissibility ruling without separately adjudicating each individual claim — under three distinct annulment grounds, none of which is established. The Tribunal did not manifestly exceed its powers under Article 52(1)(b) of the ICSID Convention: it exercised its authority to determine Colombia's Preliminary Objection and reached a tenable conclusion grounded in the requirements of Article 10.16.1 of the Treaty. The Tribunal did not fail to state reasons under Article 52(1)(e): it provided comprehensive and intelligible reasoning on the dispositive admissibility issue and was not required to address separately claims rendered moot by that determination. Nor did the Tribunal seriously depart from a fundamental rule of procedure under Article 52(1)(d): Claimants received a full and fair hearing, as their own counsel expressly acknowledged. As to the Amended Request for Arbitration, the Tribunal's conditional admission of that filing into the record of the Arbitration created no independent obligation to adjudicate supposed

ancillary claims that were contingent on the original claims surviving the Preliminary Questions Phase.

F. The Tribunal's Alleged Delay in Rendering the Award

355. In an obvious contradiction, Applicants complain simultaneously that the Tribunal resorted to “summary” proceedings to decide on “complex” issues of law and fact, and that the Tribunal took too long to decide on Colombia’s Objections. According to Applicants, the length of deliberation and issuance of the Award “is nothing short of astounding for a preliminary objections decision” and amounts to a serious departure from a fundamental rule of procedure provided under ICSID Arbitration Rule 41(5), warranting annulment of the Award.⁵⁷⁶ As further detailed below, this ground is both (1) inadmissible and (2) without merit, as the Tribunal did not seriously depart from a fundamental rule of procedure.

1. Applicants' Ground Is Inadmissible

356. Applicants’ ground is inadmissible because Claimants raised no concern before the Tribunal regarding the length of their deliberations. As set out above, pursuant to ICSID Arbitration Rule 27, applicants cannot invoke before the annulment committee the procedural irregularities they failed to properly invoke before the arbitral tribunal.⁵⁷⁷

357. In the present case, while the Parties were awaiting the Tribunal’s decision or Award on Colombia’s Objections, Applicants never inquired to the ICSID Secretariat or the Tribunal as to when it would issue its decision or Award. They never raised either any

⁵⁷⁶ Memorial on Annulment, ¶¶ 138-140.

⁵⁷⁷ See ¶¶ 166-168, *supra*.

objection before the Tribunal that, by not issuing the Award pursuant to any allegedly applicable time limit, it was violating a fundamental rule of procedure. In fact, Colombia was the only party who ever inquired as to the status of the Tribunal's decision or Award on Colombia's Objections.⁵⁷⁸

358. Applicants also compounded the delay caused by the serious illness of the President of the Tribunal by filing an Application to Introduce New Documents and the Amended Request for Arbitration, six months and more than two years after the Hearing, respectively⁵⁷⁹ forcing the Tribunal to suspend deliberations to deal with these requests and Colombia's corresponding objections.

359. Applicants have not established before the Committee that they made a timely protest of the alleged procedural irregularity they now claim as a basis to seek annulment of the Award. Consequently, having failed to protest before the Tribunal that it was violating any time limit for the issuance of its decision or award, Applicants waived their rights with respect to these perceived procedural irregularities. Consequently, Applicants' ground that the Tribunal seriously departed from a fundamental rule of procedure by delaying the issuance of the Award is inadmissible before this Committee pursuant to ICSID Arbitration Rule 27.

2. The Tribunal Did Not Seriously Depart from a Fundamental Rule of Procedure

360. Applicants argue that the "Tribunal seriously departed from a fundamental rule of procedure by not complying with the time limits applicable to summary proceedings [under

⁵⁷⁸ **Ex. RA-15**, Colombia's email to the ICSID Secretariat, July 24, 2023.

⁵⁷⁹ See ¶¶ 48-53, *supra*.

ICSID Arbitration Rule 41(5)].”⁵⁸⁰ However, (a) the Tribunal was never subject to any rule of procedure, let alone a *fundamental* rule of procedure, imposing a time limit to issue its decision or Award on Colombia’s Objections. Even if it had been, (b) the Award was delayed by circumstances beyond the Tribunal’s control, and (c) such delays had no material effect on the outcome of the case. This alleged procedural departure therefore cannot warrant annulment under Article 52(1)(d) of the ICSID Convention.

a. No Rule of Procedure, Let Alone a *Fundamental* Rule of Procedure, Required the Tribunal to Issue Its Award Within a Certain Time Limit

361. Applicants claim the Tribunal departed from a fundamental rule of procedure set forth in ICSID Arbitration Rule 41(5), asserting that “[r]ule 41(5) requires a decision at the Tribunal’s first session or ‘promptly thereafter’.”⁵⁸¹ Applicants are wrong. In any event, any such rule would not be a *fundamental* rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.

362. *First*, the Tribunal was not subject to the time limitation provided under Rule 41(5) because the Preliminary Questions Phase was subject to a different procedural framework: that of Article 10.20.4 of the Treaty, not ICSID Arbitration Rule 41(5).⁵⁸² Article 10.20.4 of the Treaty does not impose a time limitation on tribunals for the issuance of their decisions or awards.⁵⁸³ In stark contrast, when a preliminary objection is raised under the expedited procedure set forth in Article 10.20.5 of the Treaty, the tribunal is under the obligation to issue a decision or award “no later than 150 days after the date of the

⁵⁸⁰ Memorial on Annulment, p. 74.

⁵⁸¹ *Id.*, ¶ 138.

⁵⁸² See ¶¶ 185-187, *supra*.

⁵⁸³ **Ex. RL-1**, Treaty, Article 10.20.4.

request.”⁵⁸⁴ In the present case, Colombia raised its Preliminary Objection under Article 10.20.4 of the Treaty — not under ICSID Arbitration Rule 41(5) or Article 10.20.5 of the Treaty. Consequently, the Tribunal was under no time limitation for the issuance of its Award.

363. *Second*, a timing requirement does not qualify as a *fundamental* rule of procedure.⁵⁸⁵ On the contrary, it is well established that an alleged violation of a time limitation imposed upon an arbitral tribunal is not a valid ground for annulment of an award under Article 52 of the ICSID Convention. As explained in the ICSID Convention’s commentary from Professor Schreuer:

Failure to issue an award in a timely manner has been held not to amount to a serious departure from a fundamental rule of procedure for the purposes of an application for annulment under Art. 52(1)(d).⁵⁸⁶

364. In *CDC v. Seychelles*, the annulment committee rejected the argument that the untimely issuance of an ICSID award in violation of time limits amounted to a serious departure from a fundamental rule of procedure (under ICSID Arbitration Rule 46), noting that “[e]ven had the Tribunal erred in issuing the Award when it did, the Committee would see no basis for annulling the Award as a result.”⁵⁸⁷

⁵⁸⁴ *Id.*, Article 10.20.5.

⁵⁸⁵ Applicants’ only argument to the contrary is that “[i]f a Tribunal fails to comply with this strict temporal limitation, its powers to issue an award based on the preliminary objections lapse.” Memorial on Annulment, ¶ 138. Their sole supporting authority on this assertion is a blog post suggesting that time limitations affect the “tribunal’s *powers* to render an award.” Memorial on Annulment, ¶ 138 (emphasis added). They do not proffer *any* legal authorities in support of this argument.

⁵⁸⁶ **Ex. RALA-48**, C. Schreuer *et al.*, SCHREUER’S COMMENTARY ON THE ICSID CONVENTION, p. 1160, ¶ 14 (citing to the annulment committee’s decision in *CDC v. Seychelles*) (emphasis added).

⁵⁸⁷ **Ex. RALA-4**, *CDC v. Seychelles*, ¶ 65.

365. After this decision, the ICSID Working Paper #2 for the 2022 ICSID Arbitration Rules later confirmed that the drafters' intent behind all time limits applicable to ICSID arbitral tribunals, including for a decision or award on a preliminary objection, is that:

Compliance with time limits for Tribunals and the Chair are "best efforts" obligations and non-compliance is not a basis to challenge the validity of an Award or the Tribunal's jurisdiction.⁵⁸⁸

366. Likewise, the official commentary of ICSID on "Time Limits and Extension of Time Limits" explains that "[t]he failure to meet a time limit would not constitute a ground for challenging the validity of an Award."⁵⁸⁹ Therefore, a time limit is not a fundamental rule of procedure pursuant to Article 52(1)(d) of the ICSID Convention, and the Award cannot be annulled on this ground.

b. The Award Was Delayed by Circumstances Beyond the Tribunal's Control

367. The Tribunal had good reasons for not issuing the Award before December 2024. As explained above, the deliberation process and drafting of the Award were disrupted by two circumstances beyond its control: the Parties exchanged further written submissions on the Newly Introduced Documents and the Amended Request for Arbitration many months after the Hearing, and the President of the Tribunal suffered from serious health issues.⁵⁹⁰

368. Claimants filed their Application to Introduce New Documents six months after the Hearing (*i.e.*, December, 2022), prompting a further round of written submissions between the Parties on the relevance and probative value of the Newly Introduced

⁵⁸⁸ **Ex. RALA-74**, ICSID, Proposals for Amendment of the ICSID Rules, Working Paper No. 2, Vol. I (2019), p. 111, ¶ 113 (emphasis added).

⁵⁸⁹ **Ex. RALA-75**, *Time Limits and Extension of Time Limits - ICSID Convention Arbitration (2022)*, ICSID, p. 4 [of the PDF] (emphasis added).

⁵⁹⁰ See ¶¶ 48-53, *supra*.

Documents, which continued until March 31, 2023.⁵⁹¹ They then filed their Amended Request for Arbitration on June 21, 2024, prompting additional exchanges between the Parties. The Tribunal was consequently required to consider and assess these additional submissions and documents, further delaying the issuance of the Award.

369. In addition, the President of the Tribunal contracted a COVID-19 infection and underwent surgery, which incapacitated the Tribunal for approximately five months.⁵⁹² The Award was issued in December 2024, only ten months after the President was finally able to resume his functions in late February 2024.

370. Applicants' statement that "the last submission on Colombia's preliminary objections was after the oral hearing in Washington D.C. on May 20, 2022"⁵⁹³ is utterly false. Claimants' repeated requests and unrequested submissions to the Tribunal meant that there was activity in the docket of the Arbitration until July 2024, mere months before the issuance of the Award. Seen from that perspective, it can hardly be said that the Award was "delayed."

371. Accordingly, the delay in the issuance of the Award was attributable to circumstances entirely beyond the Tribunal's control — namely, the serious health condition of the President of the Tribunal and Claimants' own post-Hearing filings, which required the Tribunal to suspend its deliberations and address additional submissions and requests. Applicants cannot credibly invoke as a ground for annulment a delay to which they materially contributed.

⁵⁹¹ See ¶¶ 48-49, *supra*.

⁵⁹² See ¶ 50, *supra*.

⁵⁹³ Memorial on Annulment, ¶ 139.

c. No *Serious* Departure Capable of Materially Affecting the Outcome of the Award Has Been Established by Applicants

372. Finally, Applicants have not even attempted to justify how any departure from the alleged time limits imposed upon the Tribunal to issue a decision would be sufficiently *serious* as to affect the outcome of the Award. This confirms that this ground is purely formalistic in nature.

373. Had the Tribunal issued its Award within any allegedly applicable time limit, it would still have found that, in the absence of any measure capable of constituting a breach of the Treaty at the time the Arbitration was initiated, Claimants' claims were premature and inadmissible.⁵⁹⁴ The alleged violation of any applicable time limit therefore had no material effect whatsoever on the outcome of the Award, and Applicants cannot establish a *serious* departure from a fundamental rule of procedure.

374. Thus, the alleged procedural departure had no material effect on the outcome of the case, and this ground therefore cannot justify annulment of the Award under Article 52(1)(d) of the ICSID Convention.

* * *

375. In conclusion, in addition to being inadmissible, Applicants' request to annul the Award based on an alleged violation of time limitations should be rejected because their underlying assertions are meritless as to both the occurrence and the significance of a serious departure from a fundamental rule of procedure. In any event, annulment is not a proper remedy for an award that was allegedly issued with delays, because "annulment of an award produces further delays and costs, which is the opposite of what both arbitration

⁵⁹⁴ **Ex. AA-7**, Award, ¶ 219.

agreements and contractual time limits for awards seek to achieve.”⁵⁹⁵ Thus, “annulment of a delayed award (which has no other defects and whose annulment will produce yet further delays) is not an appropriate or proper remedy for delays in the arbitral process.”⁵⁹⁶

⁵⁹⁵ **Ex. RALA-76**, Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION (3rd ed., Kluwer Law International 2021), p. 3316.

⁵⁹⁶ *Id.*, pp. 3316-3317.

V. COSTS

376. Under Article 61(2) of the ICSID Convention (applicable to annulment proceedings pursuant to Article 52(4) of the same convention), the Committee has discretion to allocate, as between the Parties, the costs of the annulment proceeding including the expenses incurred by the Parties.

377. Annulment committees typically award a responding party all, or the majority of the annulment proceeding costs it incurs if the applicant's application for annulment is unsuccessful,⁵⁹⁷ with committees often also awarding the successful responding party all or some of its legal fees and expenses.⁵⁹⁸ At the same time, they generally do not make an award of costs to a successful annulment applicant, beyond requiring the responding party to cover its share of the annulment costs as the applicant is responsible for all of the advances of those costs.

378. The reason for that approach is that a decision to annul an award will typically be based on a finding that the tribunal did not properly perform its functions in some manner. Outside of an unusual circumstance such as if the responding party was found to have

⁵⁹⁷ Ex. RALA-48, C. Schreuer *et al.*, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, p. 1639; Ex. AALA-11, *M.C.I. v. Ecuador*, ¶¶ 88-89; Ex. RALA-77, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Annulment, July 8, 2013, ¶¶ 292-293; Ex. RALA-2, *Impregilo v. Argentina*, ¶ 221; Ex. RALA-53, *Caratube v. Kazakhstan*, ¶ 307; Ex. RALA-5, *Tulip v. Turkey*, ¶ 230; Ex. RALA-78, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Annulment, December 19, 2016, ¶¶ 339-341; Ex. RALA-21, *Pey Casado v. Chile*, Second Decision on Annulment, ¶ 812.

⁵⁹⁸ Ex. RALA-48, C. Schreuer *et al.*, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, p. 1639; Ex. RALA-25, *AES v. Hungary*, ¶¶ 181-182; Ex. RALA-24, *Alapli v. Turkey*, ¶¶ 263-264; Ex. RALA-79, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment, April 13, 2020, ¶ 338; Ex. RALA-80, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Decision on Annulment, November 16, 2021, ¶ 141; Ex. RALA-81, *Cementos La Unión S.A. and Áridos Jativa S.L.U. v. Arab Republic of Egypt*, ICSID Case No. ARB/13/29, Decision on Annulment, July 31, 2023, ¶ 269; Ex. RALA-34, *RREEF v. Spain*, ¶ 163.

corrupted a member of the tribunal, it is considered unfair to require the responding party to solely bear the annulment costs and expenses that resulted from the tribunal's error.⁵⁹⁹

379. There is no reason for the Committee to depart from that practice. In this case, it would be particularly appropriate for Respondent to be awarded its full costs and expenses. As demonstrated above, Applicants' annulment grounds are either concealed challenges to the correctness of the Tribunal's holdings or rely on misrepresentations in the hope of manufacturing a tenable ground.

⁵⁹⁹ **Ex. RALA-48**, C. Schreuer *et al.*, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, p. 1638 ("The annulment procedure is a unique feature of the ICSID system, which addresses unlawful behavior not by the other party, but by the tribunal. If the request is successful, equal sharing of the costs of the proceeding could be argued on the basis that the parties are ultimately responsible for nominating the arbitrators."). See also **Ex. AALA-55**, *TECO v. Guatemala*, ¶ 377 ("[T]he errors which led to the partial annulment of the Award were not made by Guatemala, but by the Tribunal. Considering that both Parties participated equally in the appointment of the Arbitral Tribunal, the Committee considers that the burden of the Tribunal having committed annulable errors should be borne by the Parties equally.").

VI. RESERVATION OF RIGHTS

380. Respondent reserves the right to submit such additional evidence and arguments as it deems appropriate to supplement this Counter-Memorial, and to raise additional arguments, as well as to respond to any evidence or arguments submitted by Applicants.

VII. CONCLUSION AND REQUEST FOR RELIEF

381. For the reasons set out above, Respondent respectfully requests that the Committee:

- (i) REJECT** Applicants' request for annulment in its entirety; and
- (ii) ORDER** that Applicants bear all ICSID administrative costs, as well as the Committee's costs and fees, and the legal costs and fees incurred by Respondent in this annulment proceeding, plus interest.

Respectfully,





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