INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Dominion Minerals Corp.

v.

Republic of Panama

(ICSID Case No. ARB/16/13)
Annulment Proceeding

DECISION ON THE RESPONDENT'S APPLICATIONS FOR THE STAY OF ENFORCEMENT OF THE AWARD AND UNDER ARBITRATION RULE 41(5)

Members of the ad hoc Committee
Mr. Toby Landau QC, President
Ms. Loretta Malintoppi, Member
Ms. Dyalá Jiménez, Member

Secretary of the ad hoc Committee
Mr. Marco Tulio Montañés-Rumayor

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21 July 2022

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I. INTRODUCTION

1. This Decision addresses applications by the Republic of Panama ("**Panama**" or the "**Respondent**") (i) to stay the enforcement of the award dated November 5, 2020, rendered by the Tribunal in *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13 ("**Award**"); and (ii) to dismiss under ICSID Arbitration Rule 41(5) the application for annulment made by Dominion Minerals Corp. ("**Dominion**" or "**Applicant**").

2. This Decision is structured as follows:

-- **Section II** outlines the procedural history of these proceedings to date.

-- **Section III** addresses Panama's application to stay enforcement of the Award.

-- **Section IV** addresses Panama's application under ICSID Arbitration Rule 41(5).

-- **Section V** briefly addresses the costs of this part of the process.

-- **Section VI** records the Committee's operative decision and orders.

3. Throughout this Decision, the Parties' positions on each issue are summarized briefly. Each such summary is not intended to be exhaustive, but rather to reflect the Parties' principal arguments. For the avoidance of doubt, the Committee has carefully considered the entirety of the Parties' submissions in arriving at its determination, and the absence of reference to any particular matter should not be taken as an indication that the Committee has not considered the same.

II. PROCEDURAL HISTORY

5. On November 5, 2020, the Tribunal rendered its Award, which included a dissenting opinion of Arbitrator Charles Poncet ("**Dissenting Opinion**") and an additional declaration of President Alfredo Bullard and Arbitrator Alexis Mourre.

6. In the Award, the Tribunal found that Panama had breached certain provisions of the Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments signed on 27th of October 1982 in Washington, D.C., as amended by a Protocol Between the Government of the United States of America and the Government of the Republic of Panama signed on the 1st of June 2000 (the "**BIT**" or "**Treaty**"). In particular, the Tribunal decided (*inter alia*) as follows:

> *b. Panama has violated Articles II and IV of the Treaty and international law with respect to the Claimant's investment, respectively, by failing to accord fair and equitable treatment, by impairing the management, operation, use and enjoyment by arbitrary measures; and by expropriating the Claimant's investment without prompt, adequate and effective compensation.*
>
> *c. Panama shall pay damages to Dominion in an amount of US$ 14,111,140.80, plus pre- and post-award annually compound interest at a rate of U.S. Dollar LIBOR + 4% from March 26, 2012 until the date of Panama's full and effective payment.*
>
> *d. Panama shall pay additional direct damages to Dominion in an amount of US$ 1,861,689.25, plus pre- and post-award annually compound interest at a rate of U.S. Dollar LIBOR + 4% from November 30, 2017 until the date of Panama's full and effective payment.*
>
> *[…]*
>
> *f. Respondent shall be responsible for (i) 25% of the Claimant's legal costs including attorney's fees and expenses, with the exclusion of any amount derived from the third party funding agreements, as well as (ii) 25% of the expended portion of the Claimant's advances to ICSID (as reflected in ICSID's final case account balance) plus post-award annually compound*

> *interest at a rate of U.S. Dollar LIBOR + 4% until the date of Panama's full and effective payment.*[1]

7. On March 4, 2021, Dominion filed its Application for Partial Annulment of the Award ("**Application for Annulment**") pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**" or "**Convention**") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**").

8. In the Application for Annulment, Dominion submits that:[2]

   (i) the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the Convention;

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

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

9. On the basis of these grounds, Dominion seeks annulment of (i) "*the majority's decision as to damages as set forth in paragraphs 780(c) and 780(d) of the Award, together with the relevant reasoning set forth in Title VII – Damages, found at pages 145 to 190*" (the "**Award on Damages**"); and (ii) "*the majority's decision as to costs as set forth in paragraph 780(f) of the Award, together with the relevant reasoning set forth in Title VIII – Costs, found at pages 191 to 204*" (the "**Award on Costs**").[3] Dominion also requests that Panama bear all of the costs of the annulment proceedings, including its legal fees, with interest, pursuant to Articles 61(2) and 52(4) of the ICSID Convention.[4]

10. On March 17, 2021, the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") registered the Application for Annulment.

[1] Award, ¶780.
[2] Application for Annulment, ¶10.
[3] Application for Annulment, ¶¶ 7 and 37.
[4] Application for Annulment, ¶ 37.

11. On April 15, 2021, ICSID submitted a proposal for the composition of the *ad hoc* committee and invited the Parties to comment on it by April 26, 2021. Dominion and Panama filed their observations on April 26 and April 30, 2021, respectively.

12. On May 25, 2021, the Secretary-General notified the Parties that the three members of the *ad hoc* committee ("**Committee**") had accepted their appointments. Accordingly, the Committee was deemed to have been constituted and the annulment proceeding to have begun as of that date pursuant to Arbitration Rules 6 and 53.

13. The Committee is composed of Mr. Toby Landau QC, a national of the United Kingdom, President of the Committee; Ms. Loretta Malintoppi, a national of Italy; and Ms. Dyalá Jiménez Figueres, a national of Costa Rica. Mr. Marco Tulio Montañés-Rumayor, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.

14. On May 27, 2021, the Committee wrote to the Parties regarding the arrangements for the first session to be held pursuant to Arbitration Rules 13(1) and 53 ("**First Session**"). The Committee proposed the following dates to hold the First Session by video conference: July 12, 13, 14, 15, 16, 2021.

15. Also on May 27, 2021, ICSID requested the Applicant to make an initial payment of USD 200,000 (the "**Advance Payment**") pursuant to ICSID Administrative and Financial Regulation 14(3)(e) by June 28, 2021.

16. On June 10, 2021, the Committee confirmed that the First Session would be held on July 16, 2021 by video conference.

17. On June 24, 2021, Panama submitted a *Request for the Stay of Enforcement of the Award and Application under ICSID Arbitration Rule 41(5)*, together with factual exhibits RA-1 to RA-18, and legal exhibits RLA-1 to RLA-43 ("**Panama's Stay Request**" and "**Panama's Rule 41(5) Request**").[5]

[5] Panama's June 24, 2021 submission comprises both applications.

18. On June 28, 2021, Dominion requested a two-week extension to make the Advance Payment, *i.e.*, by July 12, 2021.

19. On June 29, 2021, the Committee granted the request of June 28, 2021.

20. On June 30, 2021, ICSID transmitted a draft Procedural Order No. 1 ("**PO1**") and invited the Parties to confer concerning the items addressed in the draft PO1 and submit a joint proposal by July 12, 2021.

21. Also on June 30, 2021, the Committee invited Dominion to reply to Panama's Stay Request and Panama's Rule 41(5) Request by July 9, 2021, should it wish to do so.

22. On July 7, 2021, Dominion informed the Committee of its intention to respond to Panama's Stay Request and Panama's Rule 41(5) Request. It also provided an update regarding the Advance Payment, indicating that "*it would be unlikely to be in a position to transfer funds by 12 July as requested.*"

23. On July 9, 2021, Dominion submitted a *Reply to the Respondent's Request for the Stay of Enforcement of the Award*, along with factual exhibits CR-1 to CR-4 and legal exhibits CRL-1 to CRL-27 ("**Dominion's Response on Stay**").

24. On July 12, 2021, the Parties requested additional time to July 15, 2021 to submit joint comments on the draft PO1.

25. On July 13, 2021, not having received the Advance Payment, the Committee cancelled the First Session.

26. On July 15, 2021, Panama raised a concern that "*Claimant's silence concerning Panama's preliminary objections could be prolonged far beyond Panama's proposed date for Claimant's reply submission (i.e., 23 July 2021)*" and requested that the Committee "*consider taking a decision on the deadline for Claimant to respond on Panama's application pursuant to ICSID Arbitration Rule 41(5) prior to the first session.*"

27. On July 16, 2021, the Committee fixed August 4, 2021 as the new date for the First Session. The Committee also directed Dominion to file a substantive response to Panama's Rule 41(5) Request, by July 29, 2021.

28. On July 23, 2021, the Parties submitted their joint comments on draft PO1.

29. On July 27, 2021, ICSID requested an update regarding the status of the Advance Payment.

30. On July 29, 2021, Dominion filed its *Reply to the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules*, together with legal exhibits CRL-28 to CRL-35 ("**Dominion's Response on 41(5)**").

31. On July 31, 2021, ICSID informed the Parties that to hold the First Session on August 4, 2021, "*the Committee requires a partial payment of USD 100,000 to be made by Tuesday 3 August at 12 noon Washington DC time*."

32. On August 3, 2021, not having received the Advance Payment, ICSID informed the Parties of the default and invited either party to make such a payment by August 18, 2021.

33. On August 18, 2021, Dominion informed ICSID that "*it had been successful in raising the necessary funds*" and requested a 30-day extension to wire the Advance Payment.

34. No payment having been received, on October 5, 2021, the Committee decided to grant the Applicant "*a further and final extension of one month*", requesting that the Advance Payment be made by November 5, 2021. The Committee further indicated that "*[f]ailure to do so will leave the Applicant liable to a decision on the termination of this proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and (e).*"

35. On November 24, 2021, ICSID confirmed its receipt of the Advance Payment.

36. Following exchanges on scheduling, on January 12, 2022, the Committee confirmed that the First Session would be held on February 23, 2022 by video conference. It also fixed as agenda items for the session (i) the finalization of draft PO1 with the agreement of the Parties; and (ii) the procedural handling of Panama's two applications of June 24, 2021.

37. On February 23, 2022, the Committee held the First Session with the Parties by video conference.

38. On February 28, 2022, the Committee issued PO1, which recorded the Parties' agreements and the Committee's decisions on procedural matters. PO1 was accompanied by Annex A containing the procedural calendar.

39. Also on February 28, 2022, the Committee decided as follows regarding Panama's Stay Request and Panama's Rule 41(5) Request:

> *First, regarding the Respondent's Request for the Stay of the Enforcement of the Award, the Committee confirms that it does not require any further submissions and that a decision on this matter will be issued shortly.*
>
> *Second, as to the Respondent's Application under ICSID Arbitration Rule 41(5), the Committee requests further submissions by each Party on the following two points:*
>
> *(a) Paragraphs 8 & 9 of the Applicant's (Dominion Minerals Corp.) Reply dated July 29, 2021, and the authorities cited therein – and the submission that the test for dismissal under Arbitration Rule 41(5) at the annulment stage is more rigorous than at the arbitration stage.*
>
> *(b) Whether any further points require to be made on the basis of any authorities on Arbitration Rule 41(5) issued since the date of the Parties' submissions.*

40. On March 10, 2022, Panama filed its *Response to Claimant's Reply to Respondent's Objection under ICSID Arbitration Rule 41(5)*, with legal exhibits RAL-48 to RLA-60 ("**Panama's Reply on 41(5)**").

41. On March 16, 2022, Dominion requested that Part III of Panama's Reply on 41(5) be disregarded because it had gone beyond the Committee's directions of February 28, 2022. Alternatively, if the Committee considered Panama's Response on 41(5) in full, Dominion requested an opportunity to reply to Part III of such a submission.

42. Also on March 16, 2022, Panama objected to the above request by Dominion.

43. On March 17, 2022, the Committee decided to partially grant the Applicant's above request and directed Dominion to address in 15 pages all matters covered in Panama's Reply on 41(5) by March 25, 2022.

44. On March 25, 2022, Dominion submitted its *Rejoinder to the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules*, together with legal exhibits CRL-36 to CRL-40 ("**Dominion's Rejoinder on 41(5)**").

III. PANAMA'S APPLICATION TO STAY ENFORCEMENT OF THE AWARD

A. The Parties' Positions

1. Panama's Position

45. Panama contends that "*either party may at any time during the Annulment proceeding, request a stay of enforcement of all or part of the Tribunal Award*" pursuant to Article 52(5) of the ICSID Convention and Rule 54 of the Arbitration Rules.[6] It further asserts that the stay of enforcement may concern "*an award of damages, award of costs or some other form of relief ordered by the original Tribunal.*"[7]

46. It is Panama's case that the Committee may stay the enforcement of the Award "*if it considers that the circumstances require it.*"[8] In examining such circumstances, Panama maintains that the Committee has "broad discretion"[9] and "*is free to evaluate the arguments of the Parties in view of the particularities of each case.*"[10]

47. Panama's Stay Request is premised on the following grounds:

> *(A) The stay of enforcement is usually granted, with the exception of cases involving "very exceptional circumstances"; (B) There is no proof that Panama would not comply with the award; and (C) Requiring security for a stay of*

[6] Panama's Stay Request, ¶ 57.
[7] Panama's Stay Request, ¶ 57.
[8] Panama's Stay Request, ¶ 60.
[9] Panama's Stay Request, ¶ 60.
[10] Panama's Stay Request, ¶ 60, citing *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award (November 30, 2004), ¶ 23 [hereinafter: *Mitchell v. Congo*].

> *enforcement is not provided by ICSID Convention, would create an unjustified imbalance between the parties, and serious harm to Panama.*[11]

48. First, Panama argues that a stay of enforcement of an award is the "*common practice*"[12] in annulment cases, and "*shall be granted*" save for "*cases involving 'very' exceptional circumstances that may jeopardize the enforcement of the arbitral award.*"[13] Panama submits that there are no such "*exceptional circumstances*" here and thus that the Committee should grant its Stay Request.[14]

49. Second, Panama confirms that it will comply with the Award.[15] Panama notes that it has incorporated the ICSID Convention into its own legal system and compliance with an ICSID award is therefore a legal requirement under Panamanian law.[16] Moreover, Panama could have requested the "*full annulment of the Award*."[17] Instead, it "*preferred to comply with the Award and initiate conversations with Claimant to establish the form and timing of payment.*"[18] According to Panama, Dominion has rejected its payment proposal[19] and decided to file an Application for Annulment, "*profiting from additional interests to those already established by the Tribunal in the Award*."[20]

50. Panama further contends that the effect of a stay is to "*suspend the losing party's obligation to abide by and comply with the award,*"[21] thereby "*effectively freez[ing] all binding aspects of the award, including its res judicata effect*."[22] However, a stay "*does not 'affect the*

[11] Panama's Stay Request, ¶ 59.
[12] Panama's Stay Request, ¶ 60 citing (*inter alia*) *Mitchell v. Congo,* ¶28, and *Elsamex S.A. v. Republic of Honduras* (ICSID Case No. ARB/09/4)*,* Decision on continuation of the stay of enforcement of the award (January 7, 2014), ¶ 86 ("*La práctica en casos previos de anulación ha consistido en el otorgamiento de la continuación de la suspensión.*") [hereinafter: *Elsamex v. Honduras- Decision on Stay*].
[13] Panama's Stay Request, ¶ 63.
[14] Panama's Stay Request, ¶ 64.
[15] Panama's Stay Request, ¶¶ 65-70.
[16] Panama's Stay Request, ¶ 65.
[17] Panama's Stay Request, ¶ 66.
[18] Panama's Stay Request, ¶ 66.
[19] Panama's Stay Request, ¶ 68.
[20] Panama's Stay Request, ¶ 68.
[21] Panama's Stay Request, ¶ 69.
[22] Panama's Stay Request, ¶ 69.

intrinsic legal validity of the award'."[23] In sum, Panama concludes that "*there is no proof that [it] would not comply with the Award.*"[24]

51. Third, Panama argues that the ICSID Convention does not provide for security as a condition for the stay of enforcement of an award.[25] It further maintains that *ad hoc* committees have only ordered the posting of security as a condition for a stay in "*exceptional circumstances.*"[26]

52. Panama further asserts that if security is required for the granting of its Stay Request, "*an unjustified imbalance would be created between the parties.*"[27] Dominion would be placed in a more favourable position than that which prevailed before the Stay Request, given that it would then be entitled to more interest beyond the date of the Award, or in the alternative, beyond the date of its Application for Annulment (March 4, 2021).[28] By contrast, Panama would suffer "*serious harm*"[29] as "*interest[ ] [would] continue to accrue until the decision on partial annulment or until the decision of the resubmission Tribunal (although unjustified)*."[30] Moreover, Panama would be "*penalized for exercising its legitimate right of defence*"[31] under the ICSID Convention.

53. Accordingly, Panama requests that the Committee:

> *a.* ***Order*** *the stay of enforcement of the Award until a decision on annulment is rendered in these proceedings in accordance with Article 52 of the ICSID Convention and ICSID Arbitration Rule 54*.[32]

[23] Panama's Stay Request, ¶ 69 citing *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Interim Order N°1 on Guinea's application for stay of enforcement of the Award (August 12, 1988).
[24] Panama's Stay Request, ¶ 70.
[25] Panama's Stay Request, ¶ 72, citing *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentina Republic's Request for a Continued Stay of Enforcement of the Award (December 28, 2007), ¶ 34 [hereinafter: *Azurix v. Argentina*].
[26] Panama's Stay Request, ¶ 76, citing *e.g.*, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (November 4, 2008), ¶12.
[27] Panama's Stay Request, ¶ 78.
[28] Panama's Stay Request, ¶ 77.
[29] Panama's Stay Request, ¶¶ 77 and 80.
[30] Panama's Stay Request, ¶ 77.
[31] Panama's Stay Request, ¶ 78.
[32] Panama's Stay Request, ¶ 82.

2. Dominion's Position

54. Dominion states at the outset that it did not request a stay of the enforcement of the Award in its Application for Annulment "*for the simple reason that the Award had already limited itself to awarding the minimum of damages to Dominion*."[33] In its view, *"[g]iven that the Award's findings as to liability are not subject to the partial annulment application, if the application is successful and if there is a resubmission of the issue of damages to a new tribunal, the sums invested remain the baseline damages for Panama's liability*."[34]

55. Notwithstanding its opposition to the application to stay, Dominion confirms that it does not intend to enforce the Award until its Application for Annulment is decided.[35]

56. Dominion contends that Panama's Stay Request should be denied because (i) a stay is not presumed in ICSID proceedings, but rather is granted only in exceptional circumstances; and (ii) Panama will not comply with the Award. If the Committee decides to grant the Stay Request, Dominion argues that it should only do so on the provision of security by Panama.[36]

57. First, Dominion argues that a stay of enforcement is not to be presumed in proceedings such as these.[37] Rather, a stay is "*an exception in the context of the remedy of annulment that is itself limited and exceptional*."[38] Dominion asserts that when deciding whether or not to stay enforcement of an award, prior committees have considered a range of circumstances, including:[39] whether there is (i) a risk of prejudice or hardship; (ii) a risk of non-compliance with the Award; and (iii) post-award interest available to remedy any prejudice resulting from the delay in enforcing the award. Dominion alleges that Panama, as the party requesting the

[33] Dominion's Response on Stay, ¶ 2.
[34] Dominion's Response on Stay, ¶ 2.
[35] Dominion's Response on Stay, ¶ 2.
[36] Dominion's Response on Stay, ¶¶ 3, 4.
[37] Dominion's Response on Stay, ¶¶ 5 ("*Some* ad hoc *Committees have, either implicitly or explicitly, presumed that a Stay of Enforcement should be continued if requested, while others have rejected this presumption*").
[38] Dominion's Response on Stay, ¶ 6 citing *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Stay of Enforcement of the Award (August 31, 2017), ¶ 73.
[39] Dominion's Response on Stay, ¶¶ 12-14.

stay, bears "*the initial burden of pro[ving]*" such exceptional circumstances,[40] and that there is "*little doubt that a stay should not be issued here*."[41]

58. As to (i), Dominion argues that there is no evidence of any risk of financial prejudice or hardship to Panama such as to render the granting of the Stay Request appropriate.[42] To the contrary, "*the risk here in fact is fully imposed on Dominion in the form of Panama's non-compliance with the Award*."[43]

59. As to (ii), Dominion notes that Panama has not complied with the Award to date, notwithstanding Panama's stated intention to comply with it. Further, if the Stay Request is *"granted and the [Application for Annulment is] not successful, Dominion could be relegated behind others who in the interim may obtain awards against Panama for their own claims.*"[44]

60. As to (iii), Dominion observes that Panama's Stay Request is "*presumably intended to stop interest from accumulating on the Award, or at least create a question as to this effect*."[45] As to this, Dominion argues that there is no reason to stop the accumulation of interest or create any lack of clarity as to its accrual because any future award in Dominion's favour would include at least the same baseline amount in terms of damages as has been ordered in the Award.[46]

61. Second, as noted in paragraph 59 above, Dominion emphasises that Panama does not intend to comply with the Award.[47] Even after the Award was issued on November 5, 2020, "*Panama showed no inclination of paying*."[48] If it had any such inclination, so Dominion

[40] Dominion's Response on Stay, ¶ 10 citing *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No ARB/12/1), Decision on Stay of Enforcement of the Award (September 17, 2020), ¶ 135 [hereinafter: *Tethyan v. Paksitan*], and *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia* (ICSID Case No ARB/09/19), Decision on the Gambia's Request for a Continued Stay of Enforcement of the Award (October 18, 2018), ¶ 42 [hereinafter: *Carnegie v. Gambia*].
[41] Dominion's Response on Stay, ¶ 15.
[42] Dominion's Response on Stay, ¶ 15.
[43] Dominion's Response on Stay, ¶ 15.
[44] Dominion's Response on Stay, ¶ 15.
[45] Dominion's Response on Stay, ¶ 16.
[46] Dominion's Response on Stay, ¶ 16.
[47] Dominion's Response on Stay, Section B.
[48] Dominion's Response on Stay, ¶ 19.

argues, Panama would have submitted evidence in support of its application showing that it would do so, or that it had tried to do so. But it has not.[49]

62. Third, it is Dominion's position that in the event that the Committee grants Panama's Stay Request, it should do so only on the provision of security.[50] Dominion asserts that "*a common consideration*" in ICSID decisions is whether a stay should be granted subject to the satisfaction of certain conditions, namely, the posting of a bond, bank guarantee, letter of credit, or similar provision of security in the total amount of the award.[51] Here, Dominion contends that if the Committee is minded to grant the Stay Request, Panama should provide "*unconditional and irrevocable bank guarantees by reputable international banks, with no principal establishment in Panama in the current amount of the Award [*i.e., *US$ 29,676,554] plus 10% to reflect the enforcement effort should that be necessary*."[52]

63. Accordingly, on the basis of the foregoing grounds, Dominion requests the following relief:

> *(a) that Panama's application for a Stay of Enforcement be denied in full;*
>
> *(b) that Dominion be awarded the costs, fees and expenses of this application, inclusive of attorneys' fees;*
>
> *(c) in the alternative, that any Stay of Enforcement be conditioned upon Panama first having posted adequate security in the form of an unconditional and irrevocable bank guarantees by reputable international banks, with no principal establishment in Panama in the current amount of the Award plus 10%; and*
>
> *(d) any further relief as the Committee may deem appropriate*.[53]

[49] Dominion's Response on Stay, ¶¶ 18-22.
[50] Dominion's Response on Stay, ¶¶ 23-29.
[51] Dominion's Response on Stay, ¶ 23.
[52] Dominion's Response on Stay, ¶¶ 29.
[53] Dominion's Response on Stay, Section IV.

B. The Committee's Analysis

1. Applicable Legal Standard

64. The stay of enforcement of an award in the context of annulment proceedings is governed by Article 52(5) of the ICSID Convention and Rule 54 of the Arbitration Rules.

65. Article 52(5) of the ICSID Convention provides that:

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

66. As noted in the Updated Background Paper on Annulment for the Administrative Council of ICSID, a stay of enforcement may concern "*an award of damages, award of costs or some other form of relief ordered by the original Tribunal.*"[54]

67. Under Article 52(5), a committee's decision to stay the enforcement of an award depends on whether "*it considers that the circumstances so require*." The ICSID Convention neither prescribes nor proscribes the circumstances that may be relevant, and nor does it identify the relative weight to be given to any particular circumstances. Rather, as observed in numerous prior cases, the determination is left entirely to the discretion of the Committee.

68. Hence, as identified in the Parties' submissions, prior *ad hoc* committees have invoked a wide range of factors in determining whether or not grant a stay, including (by way of example): the existence of adverse economic consequences on either party; the risk of non-recovery of sums due under the award if the award is annulled; non-compliance with the award if the award is not annulled; any history of non-compliance with other awards or failure to pay advances to cover the costs of arbitration proceedings; and the balance of both parties' interests.[55]

[54] Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 54.
[55] See *e.g.*, the list of factors distilled in the Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ¶ 56.

69. Rule 54 of the Arbitration Rules ("*Stay of Enforcement of the Award*") does not confine the ambit of this discretion. Rather, it simply provides a procedural framework for stay applications, as follows:

> *(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.*
>
> *(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.*
>
> *(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3)*
>
> *(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.*
>
> *(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.*[56]

[56] In this case, no request for a stay was included in the Application for Annulment. Accordingly paragraph (2) and the first sentence of paragraph (3) have no application.

70. There has been some debate between the Parties as to whether there is a presumption in favour or against the grant of a stay, or whether a stay ought to be considered as an exceptional measure. This is a debate that is also reflected in prior decisions. Some *ad hoc* committees have suggested that the grant of a stay pending an annulment is "*common practice*",[57] and that a stay should ordinarily be continued or granted if requested.[58] On the other hand, there are some annulment committees that have proposed that a stay should be exceptional given the presumption of immediate enforceability of ICSID awards.[59] Lastly, there is a (arguably more substantial) body of prior decisions that suggests there is no presumption either way, given the absence of any wording to suggest otherwise in Article 52(5) of the ICSID Convention. Whilst Article 54(4) of the ICSID Convention requires that the applicant for a stay specify the circumstances said to require the stay, the instruction in Article 52(5) is simply that the committee "*consider[ ] [whether] .. the circumstances … require*" a stay. [60]

2. The Circumstances of the Present Case

71. In the Committee's view, there is one key circumstance in this application which is of critical significance, and which justifies a stay on whichever of the approaches identified in paragraph

[57] See *e.g.*, *Mitchell v. Congo*, ¶ 23; *Elsamex v Honduras-Decision on Stay*, ¶ 86.
[58] See, *e.g.*, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement on the Award (October 7, 2008), ¶ 43; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement on the Award (September 1, 2006), ¶ 38 [hereinafter: *CMS v. Argentina*]; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Respondent's Request for a Continued Stay of Execution (June 1, 2005), ¶ 29.
[59] See *e.g., SGS Société Générale de Surveillance S.A. v. Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award (March 22, 2013), ¶ 83; *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 the Continuation of the Provisional Stay of Enforcement of the Award (October 21, 2019), ¶¶ 65-66.
[60] See, *e.g.*, *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Decision on Annulment (February 26, 2016), ¶ 33; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on the Stay of Enforcement of the Award (September 30, 2013), ¶ 47; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36), Decision on the Request for the Continued Stay of Execution of the Award (November 16, 2020), ¶¶ 72 & 85; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Applicant's Request to Continue the Stay of Enforcement of the Award (November 2, 2020), ¶¶ 33, 35, 36; *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain* (ICSID Case No. ARB/14/12), Decision on the Continuation of the Stay of Enforcement of the Award (October 27, 2020), ¶ 139; *Tethyan v. Pakistan*, ¶¶ 131, 132.

70 above is adopted: namely the fact that it is Dominion, the award-creditor, that has applied for partial annulment of the Award, and it is Panama, not Dominion, that is seeking a stay. Further, the application is aimed at the monetary portions of the award.

72. This circumstance has a number of consequences.

73. *First*, it is readily understandable that Panama is reluctant to pay an Award which Dominion is challenging (and questioning the final amounts that are payable), unless and until the status of the Award is resolved.

74. Dominion's position in seeking partial annulment at the same time as resisting the stay is, in the Committee's view, problematic. On the one hand Dominion is asking that both the Award on Damages and the Award on Costs be overturned. Yet on the other hand, Dominion is also insisting that, in the meantime, Panama incur interest on both.

75. Dominion seeks to cure the apparent inconsistency by arguing that (i) the liability portion of the Award is not being challenged, so that Panama's liability to Dominion will remain as is, regardless of the outcome of the annulment proceedings;[61] and (ii) "*in its present form the Award provides for the minimum level of damages for any of the breaches of the treaty.*" [62]

76. In the Committee's view, neither point cures the inconsistency.

77. As to (i), the fact that Panama's *liability* is unchallenged is of no relevance, since, in and of itself, the Tribunal's finding on liability provides no indication as to the quantum of damages or costs that may be payable. A party may conceivably be liable for breach of a treaty but obliged to pay only nominal damages.

78. As to (ii), the assertion that the current award provides "*the minimum level of damages*" that will be payable in any event is, in the Committee's view, entirely speculative. It is to be recalled that Dominion is seeking annulment of both the Award on Damages and Award on Costs on the basis (*inter alia*) that the Tribunal took an approach to quantification of both that

[61] Dominion's Response on Stay, ¶ 17.
[62] Dominion's Response on Stay, ¶ 17. See similarly Dominion's Response on Stay, ¶ 27: "*The damages and interest which the Award assessed for this liability are essentially the minimum that could be assessed for this liability.*"

disregarded the proper law of the Treaty. For example, Dominion takes issue with the Tribunal's adoption of a "sunk costs" approach to damages.[63] Annulment, if granted, could therefore lead to a new assessment of both damages and costs on a different methodology. But in the absence of a determination of which methodology to employ, and the actual application of such methodology, there is no basis upon which the Committee can assess the level of damages or costs that would actually be payable.

79. Equally, the Committee considers that obliging Panama to pay damages or costs that have been awarded on what is said by Dominion to be a false basis would not only be wrong but also impractical since, in the end, adjustments to such payments may need to be made. This, in the Committee's view, strongly militates in favour of the grant of a stay.

80. *Second*, as emphasised by Panama, absent a stay of the Award, interest will continue to accrue during the pendency of these annulment proceedings (assuming that Panama does not make payment in the meantime). But, as already noted, Panama's reluctance to pay the Award pending the outcome of these proceedings is understandable since the Award is now subject to challenge.

81. Importantly, this is a situation brought about by Dominion's decision to seek partial annulment. Given that it is Dominion, not Panama, that is seeking partial annulment of the Award, it is difficult to see why Dominion should profit from this by the accumulation of additional interest while the Parties await the outcome. Dominion, in the end, could thereby be placed in a much better position than if it had not sought annulment.

82. In the Committee's view, the fairer approach would be to stop interest accruing by imposing a stay as of the date Dominion commenced the annulment proceedings, and for as long as it takes to reach a final outcome in these proceedings.

83. *Third*, unlike the usual case in which the party seeking to annul the award is the one also seeking a stay, there can be no issue here that the application to annul itself reflects an intention on the part of one side to avoid complying with the award.

[63] See *e.g.,* Application for Annulment, ¶ 15.

84. It is true that the question whether Panama intends to comply with the Award has been put in issue in this case by Dominion, but the Committee does not consider this a determinative matter, given (i) Panama's clear statements as to its intention to comply; (ii) the absence of anything to show that the pendency of these annulment proceedings will somehow render compliance with the Award less likely; and (ii) the fact that any criticism that Panama has not paid to date is difficult in circumstances when Dominion is seeking to overturn both the Award on Damages and the Award on Costs.

85. *Fourth*, there is then the question whether a stay should be granted on terms, such as the posting of security by Panama. Here again, the fact that it is Dominion, not Panama, that is seeking partial annulment, is significant.

86. Panama has submitted that there is no provision in the ICSID Convention providing for security as a condition for the stay of enforcement of an arbitral award, and cites the decision of the *ad hoc* committee in *Azurix v. Argentina* in support of the argument that imposing a requirement to provide security in this context would interfere with the regime in the ICSID Convention for the recognition and enforcement of awards. As stated by the committee in *Azurix*, it "*would effectively abrogate the scheme for security in Section 6 (particularly under Article 54 ['Recognition and Enforcement of the Award'] and substitute for those expressly qualified rights an entitlement to absolute security*."[64] Several other *ad hoc* committees have arrived at a similar conclusion.[65]

87. It is true that the ICSID Convention does not contain an express power for the imposition of conditions on the grant of a stay. This is in contrast, for example, to Article VI of the 1958 New York Convention on the Recognition of Foreign Arbitral Awards. It is also true that

[64] *Azurix. v. Argentina*, ¶ 34.
[65] See, *e.g.*, *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on the Stay of Enforcement of the Award (February 21, 2020), ¶ 69; *Carnegie v. Gambia*, ¶ 51; *El Paso Energy International Company v. Argentine Republic,* Decision on Argentina's Request for Stay of Enforcement of the Award (May 31, 2012), ¶¶ 52-55.

there are some indications in the history of the ICSID Convention that no such security mechanism was envisaged.[66]

88. But equally, there is nothing in the text of the Convention that limits the undoubtedly broad discretion of *ad hoc* committees in this regard, and the vast majority of *ad hoc* committees who have addressed the issue have determined that this broad discretion encompasses the power to impose conditions, and that there are many situations in which some form of security or other undertaking is required to justify the indulgence of a stay.[67]

89. For present purposes, the Committee proceeds on the basis that it has the power to impose conditions. But the same concern that has driven some committees to hold that there is no such power is of particular significance here as a matter of discretion – namely, the fact that the imposition of security will place Dominion in a better position than if there had been no application for partial annulment of the Award.

90. This concern was articulated by the *ad hoc* committee in *CMS v. Argentina* as follows:

> *It is true the provision of a bank guarantee puts a claimant in a better position that it would be if annulment had not been sought, since it converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids any issue of sovereign immunity from execution, which is expressly reserved by Article 55 of the Convention.*[68]

91. This was balanced, however, by the *ad hoc* committee in *CMS v. Argentina* in the following way:

> *On the other hand, a request for annulment causes significant delay to the claimant, with the consequent possibility of prejudice. Although this can be dealt with by an award of interest in the event that the annulment application fails,*

[66] See History of the ICSID Convention, Vol II-2, p.890. As stated by Chairman Broches with respect to the stay of enforcement: "*Article 56 ["Recognition and Enforcement of the Award" – what is now Article 53 of the ICSID Convention] would then establish exactly what was intended, which was that Contracting States and investors would be on the same footing, that a Contracting State would not become obliged in those cases to carry out the award pending the decision, nor would an investor.*"
[67] Indeed the number of such decisions is too extensive to list here.
[68] *CMS v. Argentina*, ¶ 39.

> *nonetheless there will have been a further delay in the award becoming enforceable and this is a factor entitled to some weight.* [69]

92. In the circumstances of this case, the concern about placing Dominion in a better position is all the more acute – because (as mentioned above) it is Dominion, not Panama, which is seeking partial annulment. The Committee considers it fundamentally unfair to give Dominion the advantage of security, by virtue of its own decision to challenge the Award.

93. Further, the countervailing considerations of delay and prejudice noted in *CMS v. Argentina* have no application here. Any such delay would be caused by Dominion, not Panama.

3. Decision on the Stay Request

94. For the reasons set out above, the Committee is of the view that it is entirely appropriate in the circumstances of this case to grant a stay of enforcement of the Award.

95. To be clear, the Committee's decision to stay enforcement of the Award means that no interest will continue to accrue upon any sums owing to Dominion under the Award, from the date of the Application for Annulment (March 4, 2021) until this Committee reaches its final determination.

IV. PANAMA'S APPLICATION UNDER ARBITRATION RULE 41(5)

A. The Parties' Positions

1. Panama's Position

(a) Standard and Burden of Proof

96. Panama argues that claims that are "*manifestly without legal merit*" can be dismissed at an early stage of the proceeding under Arbitration Rule 41(5),[70] and that for a claim to be considered without legal merit, this "*must be established clearly and obviously, with relative*

[69] *Ibid*.
[70] Panama's Rule 41(5) Request, ¶ 16.

ease and dispatch."[71] The preliminary objection "*must relate to a legal impediment and not a factual one*."[72] It is therefore "*not necessary to prove facts.*"[73]

97. Questions of fact, however, may still be discussed, according to Panama, but "*[t]he ultimate question is what balance to strike so that facts are sufficiently yet selectively discussed, not for their intrinsic truth, but to prove or disprove the legal claims which they support.*"[74]

98. Panama further notes that *ad hoc* committees have concluded that Arbitration Rule 41(5) applies to annulment proceedings, citing *Elsamex v. Honduras* [75] and *Venoklim v. Venezuela*.[76] According to Panama's Rule 41(5) Request:

> *As the tribunal in Elsamex v Republic of Honduras admits, Rule 41(5) may serve the purpose of avoiding a misconceived request for annulation [sic], for instance, when the applicant invokes grounds for nullity that simpl[y] do not exist under Article 52 of the ICSID Convention or attempts to re-litigate the merits of the matter…*[77]

99. As noted below, in its Response on Rule 41(5), Dominion argued that in the context of annulment proceedings, a more exacting test is to be applied under Rule 41(5), and that these two examples constitute the only available prongs.[78] In its Reply on 41(5), Panama refutes this contention, and the suggestion that the Rule 41(5) test has only "*two prongs*." Rather, it contends that the *Elsamex v. Honduras* decision stands for the following proposition:

> *…that Rule 41(5) may serve the purpose of avoiding a misconceived request for annulation[sic], and provided,* as an example*, the fact that the applicant invokes grounds for nullity that simpl[y] do not exist under Article 52 of the ICSID*

[71] Panama's Rule 41(5) Request, ¶ 16, citing *RSM Production Corporation and others v. Grenada* (ICSID Case No. ARB/10/6), Award (December 10, 2010), ¶ 6.1.1 [Hereafter: *RSM v. Grenada*].
[72] Panama's Rule 41(5) Request, ¶17.
[73] Panama's Rule 41(5) Request, ¶17.
[74] Panama's Rule 41(5) Request, ¶17, citing Aissatou Diop, Objection under Rule 41(5) of ICSID Arbitration Rules, p. 326.
[75] Panama's Rule 41(5) Request, ¶ 18, *Elsamex, S.A. v Republic of Honduras* (ICSID Case No. ARB/09/4), Decision on the preliminary objection of Elsamex S.A. against the Request for Annulment of the Award submitted by the Republic of Honduras (January 7, 2014), ¶¶ 124-125 [hereinafter: *Elsamex v. Honduras – Decision 41(5)*].
[76] Panama's Rule 41(5) Request, ¶ 18, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/22), Decision on the Respondent's Preliminary Objection under ICSID Arbitration Rule 41(5) (March 8, 2016), ¶¶ 80-82 [hereinafter: *Venoklim v. Venezuela – Decision 41(5)*].
[77] Panama's Rule 41(5) Request, ¶ 18, citing *Elsamex v. Honduras – Decision 41(5)*, ¶¶ 131.
[78] Dominion's Response on Rule 41(5), ¶¶ 2, 9.

> *Convention or attempts to re-litigate the merits of the matter. Likewise, the [c]ommittee provides other examples including when the annulment procedure is clearly used to file an appeal or, when it is manifestly without legal merit even if its factual elements were presumed as valid*.[79]

100. In light of the above, Panama concludes that the *Elsamex v. Honduras* committee "*merely provided some examples*" [80] or gave "*indications*" [81] as to when an application under Arbitration Rule 41(5) may succeed in the context of annulment proceedings.

101. According to Panama, the application of Arbitration Rule 41(5) to annulment proceedings (and other post-award remedy proceedings) serves the purpose of allowing for the early dismissal of unmeritorious and frivolous claims on an expedited basis, and that:

> *Even if one accepts that a higher standard should be applied to an objection under Rule 41(5) than at the arbitration stage, quod non, such a standard cannot deprive the provision from its objective and purpose*.[82]

(b) Application

102. Panama argues that for an application for annulment to have legal merit, "*it is not enough to plainly state existing grounds under Article 52 of the ICSID Convention*" [83] and that instead Dominion's Application for Annulment needs to be "*coupled with the analysis of the alleged grounds for annulment, as argued by Claimant in its petition for partial annulment*." [84]

103. At the heart of Panama's several objections is the assertion that once each of Dominion's grounds for annulment are so analysed, they constitute no more than an attempted review of the merits of the Award. Panama notes that annulment "*is not an appeal*"[85] nor "*a procedure aimed to interpret or revise arbitral awards.*"[86] Therefore, committees are "*not empowered*

[79] Panama's Reply on Rule 41(5), ¶ 2.
[80] Panama's Reply on Rule 41(5), ¶ 8.
[81] Panama's Reply on Rule 41(5), ¶ 8.
[82] Panama's Reply on Rule 41(5), ¶ 7.
[83] Panama's Reply on Rule 41(5), ¶ 8.
[84] Panama's Reply on Rule 41(5), ¶ 8.
[85] Panama's Rule 41(5) Request, ¶ 20.
[86] Panama's Rule 41(5) Request, ¶ 19. See also Panama's Reply on Rule 41(5), ¶ 2: "*Under this context, an* ad hoc *Committee would have to confirm that Claimant is not using the annulment proceeding as a tool for re-arguing its*

to amend or replace such awards, nor to review the merits of the dispute. Factual findings and weighing of the evidence made by tribunal are, as a general rule, outside the remit of ad hoc *committees*."[87] As such, annulment "*is not a remedy for a party dissatisfaction with the damages or the costs awarded by the Tribunal*."[88]

(1) Dominion's Application under Convention Article 52(1)(b)

104. Panama contends that Dominion's Application under Convention Article 52(1)(b) (*i.e.* that the Tribunal manifestly exceeded its powers "*by disregarding the proper law of the Treaty when assessing the Claimant's damages due to Panama's found breaches*") is manifestly without legal merit for a number of reasons.[89]

105. *First*, "ad hoc *[c]ommittees are not Courts of appeal*."[90] The drafting history of the ICSID Convention demonstrates that annulment is not a mechanism to appeal an alleged misapplication of law or an alleged mistake in fact.[91]

106. *Second*, even if it is accepted that an excess of powers exists where a tribunal disregards the applicable law, "*a distinction shall be made between the non-application of the applicable law (which may constitute a ground for annulment) and an incorrect application of the applicable law (which is not)*."[92]

107. *Third*, the excess of powers must be "*manifest*", such that "*a misapprehension (and still less mere disagreement), is not enough*" to annul an award.[93]

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case or, even worst, that it is not pretending to merely obtain more compensation of damages than the awarded by the Arbitral Tribunal in its decision."

[87] Panama´s Rule 41(5) Request, ¶ 22, citing *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11)*,* Decision on Annulment (November 2, 2015), ¶ 47.

[88] Panama's Rule 41(5) Request, ¶ 19, and also ¶¶ 20 – 23.

[89] Panama's Rule 41(5) Request, Section IV-A.

[90] Panama's Rule 41(5) Request, ¶ 24.

[91] Panama's Rule 41(5) Request, ¶ 24.

[92] Panama's Rule 41(5) Request, ¶ 25, citing *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), ¶ 42.

[93] Panama´s Rule 41(5) Request, ¶ 26, citing *Daimler Financial Services AG v. Argentine Republic (*ICSID Case No. ARB/05/1), Decision on Annulment (January 7, 2015), ¶ 189.

108. According to Panama, the Tribunal did not manifestly exceed its powers when awarding (i) damages or (ii) costs.

109. As to damages, Panama argues that the Tribunal did not ignore the standard of full compensation, and the Parties never contested the application of this standard. Rather, the Tribunal proceeded on the basis that Dominion "*... ha[d] not provided evidence of the specific losses that each of the[ ] events caused*", and that on the evidence, the "*sunk-costs*" approach offered the best valuation method.[94]

110. Accordingly, Panama contends that the complaint that "*the Majority manifestly exceeded its powers by disregarding the proper law of the Treaty,*" is "*nothing more than a disagreement*" with the Majority's analysis and with the amount awarded.[95]

111. Concerning costs, Panama argues that Dominion "*does not explain how the Tribunal manifestly exceed its powers when exercising its discretion to allocate costs*."[96] Panama rebuts Dominion's allegation that the Majority disregarded the proper law by stating that (i) there is no universal rule regarding the allocation of costs; (ii) the Parties did not agree to file substantive costs submissions but to submit "*identical template without legal arguments and with no room for a claim for the reimbursement of third-party funding costs;*" and (iii) the Applicant's "*corporate maintenance costs*" and the "*contingency fee*" are not recoverable under the ICSID Convention and are requested in addition to the US$12.5 million in legal fees and expenses.[97]

(2) Dominion's Application under Convention Article 52(1)(d)

112. Panama argues that Dominion's Application under Convention Article 52 (1)(d) (*i.e.* that the Tribunal denied Dominion its due process rights) is manifestly without legal merit.[98]

[94] Panama´s Rule 41(5) Request, ¶¶ 27-28.
[95] Panama´s Rule 41(5) Request, ¶ 30; Panama's Reply on Rule 41(5), ¶ 9.
[96] Panama's Reply on Rule 41(5), ¶ 9.
[97] Panama´s Rule 41(5) Request, ¶¶ 31-33.
[98] Panama's Rule 41(5) Request, Section IV-B.

113. At the outset, Panama contends that not every departure from a rule of procedure justifies annulment.[99] To meet the Article 52 (1)(d) standard, Panama asserts that (i) the procedural rule must be fundamental, *i.e.*, essential to the integrity and fairness of the arbitral process; (ii) the tribunal must have departed from it; and (iii) the departure must be serious, *i.e.,* producing a material impact on the award.[100]

114. Panama refutes the argument that the Majority denied Dominion its right to be heard on damages due for breach of Article II and the presentation of evidence on the value of the concession.

115. Panama contends that Dominion had numerous opportunities to present evidence on the value of the concession.[101] *First*, Dominion filed a Memorial on Merits and Quantum, together with the Valuation Report and Damages Assessment of Broadlands Mineral Advisory Services Ltd and the Expert Opinion on Value of Behre Dolbear. *Second*, Dominion filed a Reply on the Merits and Quantum, accompanied by a second Valuation Report and Damages Assessment of Broadlands Mineral Advisory Services and a second Expert Opinion on value of Behre Dolbear. *Third*, the Parties submitted post-hearing briefs addressing questions posed by the Tribunal. *Fourth*, a hearing on closing arguments was held, as agreed by the Parties.

116. Further, the Parties filed submissions on costs, and were able to file their comments on the other party's submissions on costs.[102]

117. Moreover, Panama contends that the Tribunal "*carefully reviewed the evidence presented by both Parties and the experts and has concluded that a sunk-costs approach offers the best valuation of the property as of the date of expropriation and absent the breaches to the FET standard.*" The Tribunal also noted the significant factors that lead it to decide that the other approaches - income, rule of thumb, or comparable transactions - were unsuitable.[103]

[99] Panama's Rule 41(5) Request, ¶ 37.
[100] Panama's Rule 41(5) Request, ¶ 36 and ¶¶ 38 - 39.
[101] Panama's Rule 41(5) Request, ¶ ¶ 41 – 42.
[102] Panama's Rule 41(5) Request, ¶ 42.
[103] Panama's Rule 41(5) Request, ¶ 40, citing the Award, ¶ 632.

118. Finally, Panama notes that Dominion did not complain about a serious breach of a procedural rule throughout the proceeding.[104]

(3) Dominion's Application under Convention Article 52(1)(e)

119. Panama argues that Dominion's Application under Convention Article 52(1)(e) (*i.e.* that the Tribunal failed to state the reasons on which the Award is based) is manifestly without merit.[105]

120. *First*, Panama asserts that the failure to state the reasons on which the award is based is "*strictly related to the requirement expressed in Article 48(3) of the ICSID Convention, namely, that the award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based.*" However, Panama alleges that while a Tribunal must deal with every question submitted to it, a failure to do so does not automatically result in annulment. According to Panama, "*the threshold to annul an award under this ground is high and should only take place when the point lacking reasoning is 'crucial or decisive', 'necessary for the Tribunal's decision', or 'essential for the outcome of the case.*'"[106]

121. *Second*, the Tribunal did provide reasons in its Award. It granted the sunk costs up to the amounts supported in the General Ledgers and *"[a]ll the concepts and the calculation of the amounts awarded by the Tribunal are included in Appendix I of the Award*."[107]

122. *Third*, Panama refutes Dominion's contention that the Majority's reasoning on damages is "*incoherent, contradictory and indeed inexplicable*" by noting that the Award cannot be annulled on these grounds - only unreasoned awards can be annulled. As such, "*an examination of the reasons presented by a Tribunal cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based.*"[108]

[104] Panama's Rule 41(5) Request, ¶ 43.
[105] Panama's Rule 41(5) Request, Section IV-C.
[106] Panama's Reply on Rule 41(5), ¶ 13.
[107] Panama's Rule 41(5) Request, ¶ 29.
[108] Panama's Rule 41(5) Request, ¶ 49.

123. *Fourth*, the Applicant's allegations are "*not only flawed but also part of a false premise*" [109] because the Tribunal considered all of the relevant evidence when assessing the damages and costs and "*clearly express[ed] the reasons*" [110] of its decision in the Award.

124. Accordingly, Panama requests that the Committee:

> ***Issue*** *a decision dismissing with prejudice all of Claimant's claims under the Treaty on the basis of Rule 41(5)*[111]

2. Dominion's Position

(a) Standard and Burden of Proof

125. It is Dominion's case that Arbitration Rule 41(5) sets up a "*two-part test*" pursuant to which an applicant must prove that the claim is (i) "*manifestly*" and (ii) "*without legal merit*." [112]

126. As to the first element, the ordinary meaning of "*manifestly*" requires the applicant to establish its objection "*clearly and obviously, with relative ease and despatch*."[113] In other words, Dominion contends that the applicant must show that its objection "*is obvious from the face of the initial pleadings, taking the facts as given, and that no further investigation is needed to establish that the claim is invalid*."[114]

127. Regarding the second element, "*without legal merit*," Dominion asserts that the objecting party must demonstrate that the grounds for dismissal are legal, "*without any need to consider the underlying facts and circumstances*" because the Committee is not in a position to adjudicate disputed facts in a summary procedure.[115]

[109] Panama's Reply on Rule 41(5), ¶ 12.
[110] Panama's Reply on Rule 41(5), ¶ 12.
[111] Panama's Rule 41(5) Request, ¶ 82.
[112] Dominion's Response on Rule 41(5), ¶ 4.
[113] Dominion's Response on Rule 41(5), ¶ 5.
[114] Dominion's Response on Rule 41(5), ¶ 5.
[115] Dominion's Response on Rule 41(5), ¶ 7.

128. In light of the above, Dominion emphasises that Arbitration Rule 41(5) therefore sets a "*high bar on dismissal*" and that the burden borne by Panama as the objecting party "*is a heavy one.*" [116]

129. Furthermore, Dominion argues that the test under Arbitration Rule 41(5) is more rigorous when applied at the annulment rather than at the arbitration stage because of the "*summary nature of this type of objection and the severe consequences that a summary dismissal would carry with it*."[117] As such, committees like *Elsamex v. Honduras* and *Venoklim v. Venezuela* have held that Arbitration Rule 41(5) sets "*an extremely high bar*" in an annulment proceeding.[118]

130. In *Elsamex v. Honduras*, the committee ruled that a Rule 41(5) objection could only succeed in two circumstances: namely, where the applicant "*invokes an annulment ground which simply [does] not exist under Article 52 of the [ICSID] Convention*" or is "*seeking to re-litigate the merits of the case.*"[119]

131. Likewise, in *Venoklim v. Venezuela*, the committee endorsed *Elsamex v. Honduras* and held that the test for granting a Rule 41(5) objection is stricter in an annulment context because of the lack of remedies against annulment decisions.[120]

132. Dominion argues that *Elsamex v. Honduras* and *Venoklim v. Venezuela* remain the authoritative cases on the test for dismissal of an annulment application under Arbitration Rule 41(5), and that in ICSID's history, Rule 41(5) has only been invoked and ruled upon in three annulment proceedings to date. In each of these cases, the Rule 41(5) objection was rejected by the committee.[121]

[116] Dominion's Response on Rule 41(5), ¶ 6.
[117] Dominion's Response on Rule 41(5), ¶¶ 2 and 8.
[118] Dominion's Response on Rule 41(5), ¶ 2.
[119] Dominion's Response on Rule 41(5), ¶ 9.
[120] Dominion's Response on Rule 41(5), ¶ 10.
[121] Dominion's Rejoinder on Rule 41(5), ¶ 9.

(b) Application

133. Applying the *Elsamex v. Honduras* test, Dominion argues that Panama has not shown that the Application for Annulment (i) invokes any ground for annulment that does not exist under Article 52 of the Convention, or (ii) "*amounts to nothing more than a simple disagreement with the reasoning contained in the Award*."[122]

134. *First*, Dominion has identified three grounds for annulment which exist under Convention Article 52:[123] (i) the Tribunal manifestly exceeded its powers under Article 52(1)(b); (ii) there has been a serious departure from a fundamental rule of procedure under Article 52(1)(d); and (iii) the Award has failed to state the reasons on which it is based under Article 52(1)(e). Dominion asserts that Panama "*does not seek to make out any case that the three grounds for annulment … do not exist under Article 52*"[124] and hence, "*accepts that it is not seeking dismissal of Dominion's Application for Annulment under the first prong*"[125] of the *Elsamex v. Honduras* test.

135. *Second*, Dominion confirms that it is not seeking to appeal or "*relitigate the merits of the case.*"[126] Instead, it has identified "*several serious problems with the majority's decision that meet the standard for annulment under Article 52 of the Convention*."[127]

(1) Dominion's Application Under Convention Article 52(1)(b)

136. Dominion argues that the Majority exceeded its powers under Convention Article 52(1)(b) when it failed to apply the proper law in its (i) Award on Damages and (ii) Award on Costs.[128]

[122] Dominion's Response on Rule 41(5), ¶ 13.
[123] See Application for Annulment, ¶10. Dominion's Response on Rule 41(5), ¶¶ 11-12. Dominion's Rejoinder on Rule 41(5), ¶ 10.
[124] Dominion's Response on Rule 41(5), ¶12 citing the following sections of Panama's brief: Section IV(A) ("*The Tribunal has not manifestly exceeded its powers*"; Section IV(B) ("*The Tribunal has not departed from a fundamental rule of procedure*"); Section IV(C) ("*The Tribunal has not failed to state the reasons on which the award was based*").
[125] Dominion's Response on Rule 41(5), ¶ 12.
[126] Dominion's Response on Rule 41(5), ¶ 13.
[127] Dominion's Response on Rule 41(5), ¶ 13.
[128] Dominion's Response on Rule 41(5), ¶ 16 and 19; Dominion's Rejoinder on Rule 41(5), ¶ 23.

137. As to the Award on Damages, the Majority disregarded the Treaty's full compensation standard which required the Tribunal to assess the fair market value of Dominion's investment prior to Panama's breaches [129] In particular, Dominion contends that the Majority's sunk costs approach "*disregarded the damage caused by Panama's breaches of Article II of the Treaty in 2008 and 2010 and instead focused solely on Panama's unlawful expropriation of Dominion's investment in 2012*."[130] In this regard, Dominion clarifies that it is not seeking to appeal the Majority's choice of a sunk cost's approach.[131]

138. As to costs, the Majority disregarded the proper law because it "*refused to reimburse the Claimant for the costs of the third-party funding it was forced to incur as a result of Panama's breaches*."[132]

(2) Dominion's Application under Convention Article 52(1)(d)

139. Dominion contends that the Majority departed from a fundamental rule of procedure under Convention Article 52(1)(d) when it was denied the right to be heard and to present evidence on the damages arising from Panama's breaches of Article II of the Treaty. Moreover, this denial was "*particularly serious*" [133] given the evidence the Tribunal already had before it.

140. Dominion states that it "*pleaded its damages on the basis that Panama's measures constituted both a breach of Article II and a breach of Article IV*."[134] Therefore, once the Majority found a breach of Article II but not Article IV, it should have invited the Parties to submit their respective positions on the damages caused by those breaches. Yet the Majority did not do so.[135]

141. Also, Dominion refutes Panama's argument that the Majority "*did evaluate the relevance of the Lebovits [t]ransaction but considered that the calculation presented could not serve as a*

[129] Dominion's Rejoinder on Rule 41(5), ¶ 26.
[130] Dominion's Response on Rule 41(5), ¶ 16.
[131] Dominion's Response on Rule 41(5), ¶ 17.
[132] Dominion's Rejoinder on Rule 41(5), ¶¶ 37 and 38.
[133] Dominion's Rejoinder on Rule 41(5), ¶ 14.
[134] Dominion's Rejoinder on Rule 41(5), ¶ 13.
[135] Dominion's Response on Rule 41(5), ¶ 22.

basis for assessing the FMV of the investment at hand."[136] According to Dominion, this argument "*misses the point*" because the Majority "*only considered the Lebovits transaction in the context of Dominion's claim for damages based upon Panama's expropriation of its investment in March of 2012, and not any claim for damages based solely upon Panama's breaches of Article II.*" [137]

142. Finally, Dominion rebuts the contention that this ground for annulment is without legal merit by stating that "*Panama's argument must be judged against the strict standard under Rule 41(5) which requires the Committee to accept Dominion's allegations and assess whether those allegations provide a* prima facie *basis to annul*."[138] According to Dominion, its Application under Article 52(1)(d) "*clearly satisfies this standard.*"[139]

(3) Dominion's Application under Convention Article 52(1)(e)

143. Dominion argues that the Majority failed to state reasons on which the Award was based under Convention Article 52(1)(e).

144. The Majority's reasoning on damages is "*self-contradictory and impossible to follow in numerous respects*."[140] According to Dominion, "*[t]o say that a reader cannot follow the Award is an understatement.*"[141]

145. Furthermore, a "*core problem*"[142] with the Majority's reasoning is that it only assessed damages for Panama's 2012 Article IV breach but not the earlier Article II breach in 2008 and 2010. Therefore, the valuation "*did not reflect everything that had happened in between which created uncertainty and lowered the project value.*"[143]

[136] Dominion's Rejoinder on Rule 41(5), ¶ 15.
[137] Dominion's Rejoinder on Rule 41(5), ¶ 15.
[138] Dominion's Rejoinder on Rule 41(5), ¶ 11.
[139] Dominion's Rejoinder on Rule 41(5), ¶ 11.
[140] Dominion's Rejoinder on Rule 41(5), ¶ 18.
[141] Dominion's Rejoinder on Rule 41(5), ¶ 18.
[142] Dominion's Rejoinder on Rule 41(5), ¶ 18.
[143] Dominion's Rejoinder on Rule 41(5), ¶ 18.

146. Accordingly, Dominion requests that the Committee "*deny in full*" Panama's Rule 41(5) Request.[144]

B. The Committee's Analysis

1. The Standard and Burden of Proof

147. Arbitration Rule 41(5) provides as follows:

> *Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.*

148. It is common ground between the Parties that, in its general application in ICSID arbitrations as distinct from annulment proceedings, this rule - and in particular the expression "*manifestly without legal merit*" - imposes a very high threshold, and places a heavy burden on the applicant.

149. *"Manifest":* As noted by Dominion, the legal deficiency that is relied upon for the application under this Rule must be "*manifest.*" As stated in *Trans-Global v. Jordan* (the first arbitration that applied Rule 41(5)):

> *... the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high.*[145]

[144] Dominion's Response on Rule 41(5), ¶ 31(a).
[145] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (ICSID Case No ARB/07/25), The Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules (May 12, 2008), ¶ 88 [hereinafter: *Trans-Global v. Jordan*]. See also *RSM v. Grenada*, ¶ 6.1.1.

150. This has been emphasized consistently by subsequent tribunals, both on the basis of (i) the word "*manifest*" and (ii) the severity of the consequences of a successful Rule 41(5) application for the claimant. The standard has been described as "*very demanding and rigorous*", reserved for claims that are "*clearly and unequivocally unmeritorious.*"[146] Hence the tribunal in *Lotus Holding v. Turkmenistan* held that an application cannot succeed if the claimant's case is "*arguable*":

> *The consequence of a summary dismissal under Rule 41(5) is that the claim set out in the request for arbitration proceeds no further. The tribunal rules, in effect, that there is no point in proceeding with the claim because it cannot succeed: no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal. The inevitability of dismissal must be manifest. It must be obvious from the submissions of the parties that there is some unavoidable and indisputable fact, or some legal objection in relation to which no possible counter-argument is identified. If the claimant, in its submissions under Rule 41(5), can point to an arguable case, the claim should proceed: but if the tribunal is satisfied than no such arguable case has been identified, it is in accordance with the sound administration of justice that the claim should be halted and dismissed at that point.*[147]

151. It follows that this Rule is intended to dispose of "*cases that are 'evident', 'clear' or 'obvious', not those which entail a greater degree of difficulty or which require a more thorough and extensive analysis of the legal and factual issues to dispose of the claim.*"[148]

152. *"Without Legal Merit":* Further, the deficiency must not only be "*manifest*", but also a legal, not factual, impediment. This follows from the words of the provision, as well as the severely truncated procedural framework within which applications under Arbitration Rule 41(5) are to be determined. A tribunal at this early stage, without the benefit of a full presentation by all parties, cannot resolve contentious factual issues. It follows that for the purposes of a Rule 41(5) application, the respondent to the application need not prove facts. Instead, as Panama

[146] *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea* (ICSID Case No ARB/13/33), The Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules (October 28, 2014), ¶ 88.
[147] *Lotus Holding Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/17/30), Award (April 6, 2020), ¶ 158.
[148] *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2), Decision on the Respondent's Preliminary Objection under Article 45(6) of the ICSID Arbitration (Additional Facility) Rules (December 12, 2016), ¶ 66.

has itself accepted here, a claim is to be treated as without legal merit "*[when the facts alleged], even if proven, are not capable of supporting a claim [...]*".[149]

153. It is correct, as noted by the tribunal in *Trans-Global v. Jordan* that: "*it is rarely possible to assess the legal merits of any claim without also examining the factual premise upon which that claim is advanced.*"[150] Thus, there may be occasions on a Rule 41(5) application in which a tribunal might have to explore the essential factual premises of a claim. But the Committee considers that this could only be a high-level enquiry, to establish whether the essential factual assertions could conceivably be susceptible of proof at all.

154. *Applicability in Annulment Proceedings:* It is common ground between the Parties that Arbitration Rule 41(5) applies in annulment proceedings. This follows from Arbitration Rule 53, which provides:

> *The provisions of these Rules shall apply mutatis mutandis to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.*

155. This has been confirmed in previous annulment decisions, notably *Elsamex v. Honduras*[151] and *Venoklim v. Venezuela*.[152]

156. But there is then the question whether the demanding threshold in Arbitration Rule 41(5) is elevated still further when it is applied in the context of annulment proceedings.

157. As noted by Dominion,[153] the two previous *ad hoc* committees that have applied Arbitration Rule 41(5) have done so applying even more rigour, or a stricter review. This has been for three reasons, namely: (i) that the ICSID Rules do not require petitioners to set out their case on annulment in any detail, and that it is expected that the parties will have a later opportunity to submit written arguments in support of their request after the *ad hoc* committee has been

[149] Panama's Rule 41(5) Request, ¶17, citing *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3), Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (February 2, 2009), ¶ 70.
[150] *Trans-Global v. Jordan*, ¶ 97.
[151] *Elsamex v. Honduras – Decision 41(5)*.
[152] *Venoklim v. Venezuela – Decision 41(5)*.
[153] Dominion's Rejoinder on Rule 41(5), ¶¶ 2-9.

constituted; (ii) that, unlike the original award (including a ruling under Rule 41(5) by the tribunal), a summary dismissal of an annulment petition is final and not subject to any recourse under the ICSID rules and procedures; and (iii) the words "*mutatis mutandis*" in Arbitration Rule 53.[154]

158. The Committee considers this a justified approach. The nature of the test itself remains the same (*i.e.* "*manifestly without legal merit*"), but its application at the annulment stage requires even more care and scrutiny, or as put in earlier decisions a "*higher standard of conviction*", for these three reasons.

159. The Committee does not agree, however, with Dominion's assertion[155] that when applied in annulment proceedings, Arbitration Rule 41(5) can only succeed in two circumstances, *i.e.* (i) where the applicant invokes an annulment ground which does not exist under Article 52 of the Convention, or (ii) where the applicant is in reality seeking simply to re-litigate the merits of the arbitration. There is nothing in the wording of either Arbitration Rule 41(5) or Arbitration Rule 53 to justify this limitation, or to reduce the scope of the test to these two specific "*prongs.*" Arbitration Rule 53 does use the expression "*mutatis mutandis*", but this is a general instruction which provides no identification of such specific restrictions. Further, the Committee reads the articulation of these grounds in *Elsamex* as by way of illustration only. The Committee considers that there will be other examples of legal impediments to an application for annulment that do not concern a non-existent ground, or an attempt to appeal. To this end, no further gloss or limitation on the test "*manifestly without legal merit*" is warranted.

2. Whether Dominion's Application under Convention Article 52(1)(d) Is Manifestly Without Legal Merit

160. For Panama to succeed in its Application under Rule 41(5) with regard to Dominion's application for partial annulment under Convention Article 52(1)(d), Panama must show that

[154] *Elsamex v. Honduras – Decision 41(5)*, ¶¶ 120-125; *Venoklim v.* Venezuela- *Decision 41(5)*,, ¶¶ 74 - 81.
[155] Dominion's Response on Rule 41(5), ¶¶ 9, 12-13.

even if the facts as alleged by Dominion are proven, Dominion's challenge is simply not viable as a matter of law.

161. There is no dispute that the ground for partial annulment invoked by Dominion exists. A denial of the right to be heard can constitute a serious departure from a fundamental rule of procedure for the purposes of Article 52(1)(d) of the Convention.[156] By way of one example, in *Victor Pey Casado v Chile*, Chile sought annulment on the ground that the tribunal had failed to afford it an opportunity to be heard on the calculation of damages, the discussion of damages having only been in the context of an unsuccessful claim for expropriation. The *ad hoc* committee ruled that:

> *[The tribunal] should have allowed each party the right to present its arguments and to contradict those of the other party. Having reviewed the entire record, including the parties' submissions, the Committee can only conclude that the parties never pleaded the damages claims arising from the breaches of Article 4 of the BIT. […].*
>
> *In the Committee's view, these post-hearing exchanges [relating to the expropriation claim] do not constitute a fair opportunity to discuss the remedy for breach of Article 4 of the BIT [on denial of justice]. Even though the Tribunal did use objective elements for the valuation of damages (the data provided and discussed by the parties), at no time did it refer to arguments pleaded by either party. As explained in their Counter-Memorial on Annulment, the Claimants, at the January 2007 Hearing, argued that the compensation due was equivalent to the one resulting from the confiscation as Chile's breach of the BIT had the consequence of preventing the Claimants from obtaining compensation for the confiscation. The Tribunal, however, adopted another standard.*[157]

162. The question, then, is whether it would be impossible as a matter of law for Dominion to make a case that, in this arbitration, the Tribunal departed from a fundamental rule of procedure by denying Dominion a right to be heard and to present evidence on the damages arising from Panama's breaches of Article II of the Treaty.

[156] See *e.g.* the numerous cases collated in the ICSID Secretariat Report - *Updated Background Paper on Annulment for the Administrative Council of ICSID* (ICSID 2016).
[157] *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No ARB/98/2), Decision on the Application for Annulment of the Republic of Chile (December 18, 2012), ¶¶ 262, 266.

163. To recall (as summarised earlier), Dominion argues that it pleaded its case on the basis that Panama acted in breach of both Articles II and IV of the BIT, but did not explicitly plead its damages claim solely upon a breach of Article II.[158] The Majority found that ANAM and MICI's actions in 2008 and 2010 constituted a breach of Article II but not Article IV, and Dominion maintains that the Tribunal should then have invited the Parties to submit their respective positions on the damages caused thereby.[159] Hence, for example, Dominion argues that the Tribunal only considered the Lebovits transaction in the context of a claim under Article IV (expropriation) in March of 2012, but not Article II (despite the fact that this transaction is said to have occurred immediately before the relevant breaches of Article II).[160]

164. Stated thus, and without expressing any view for now on the strength of Dominion's case, this is not an argument that is impossible as a matter of law. Equally, the Committee does not consider this a case in which the essential factual premises of Dominion's claim would be simply impossible to prove in any event.

165. If it can be shown that the Tribunal did in fact deprive Dominion of a right to be heard on the proper methodology for assessing damages, or deprived it of an opportunity of adducing evidence or other supporting materials, this could conceivably amount to a serious departure by the Tribunal from a fundamental rule of procedure. Whether or not this can be shown depends on a number of purely factual matters which the Committee cannot determine at this early stage.

166. For example, Panama's assertion that Dominion had numerous opportunities to put its case, and also to raise objections, depends upon the Committee considering each such opportunity as a matter of fact, together with the reasons advanced by Dominion as to why none could have cured the issue.

167. It follows that Panama's objections are not of a nature that can be resolved under the Arbitration Rule 41(5) mechanism. Rather, the Committee must consider the full factual

[158] Dominion's Rejoinder on Rule 41(5), ¶ 13.
[159] Dominion's Response on Rule 41(5), ¶ 22; Dominion's Rejoinder on Rule 41(5), ¶ 13.
[160] Dominion's Rejoinder on Rule 41(5), ¶¶ 14 and 15.

position, which in turn requires that Dominion be afforded a proper opportunity to present that position.

3. Whether Dominion's Application under Convention Article 52(1)(e) Is Manifestly Without Legal Merit

168. Similarly, for Panama to succeed in its Application under Rule 41(5) with regard to Dominion's application for partial annulment under Convention Article 52(1)(e), Panama must show that even if the facts as alleged by Dominion are proven, Dominion's challenge is simply not viable as a matter of law.

169. Whilst Panama has emphasised that the threshold to annul an award under this ground is high, and that it "…*should only take place when the point lacking reasoning is 'crucial or decisive', 'necessary for the Tribunal's decision', or 'essential for the outcome of the case*'",[161] there is no dispute that if such can be shown, this would be a ground for annulment under Article 52(1)(e) of the Convention. Further, it is not contested that inconsistent or contradictory reasons may qualify under this ground.[162]

170. Panama's key complaint (as detailed earlier) is that in advancing this ground, Dominion is merely disagreeing with the Majority's reasoning, and seeking a re-examination of the correctness of the factual and legal premises on which the Award is founded.[163]

171. But whether or not this is so must depend upon a detailed analysis of each of the instances where Dominion submits the Tribunal's reasoning is self-contradictory and impossible to follow. To date, Dominion has identified a number of such instances, mostly arising from the fact that the Tribunal only assessed damages for Panama's 2012 expropriation under Article IV of the BIT, and not the earlier breaches in 2008 and 2010 of Article II of the BIT. For example, Dominion asserts that:

- *The majority endorsed Panama's view that one should assess the fair market value of the investment at the last "clean" date preceding Panama's*

[161] Panama's Reply on Rule 41(5), ¶ 13.
[162] Panama's Rule 41(5) Request, ¶ 47.
[163] Panama's Rule 41(5) Request, Section IV-C.

breaches of the Treaty.[164] *The Tribunal found that Panama first breached the treaty on 14 August 2008. The last "clean" date preceding Panama's breaches of the Treaty would thus have been just before this date. The Lebovits transaction took place on 10 July 2008. Thus, the Tribunal had a fair market value on that date which was "clean". Yet, the Tribunal rejected that valuation because it did not reflect the information in the Updated NI 43-101 Report which was published in September 2008. The NI 43-101 Report is thus after the date of Panama's first breach of the Treaty on 14 August 2008, and thus how it could be relevant to the valuation of the preceding clean date is anyone's guess.*

- *The majority found that damages needed to reflect the "uncertainties" that the project faced which would need to be taken into account in order to determine the fair market value of Dominion's investment.*[165] *Yet the Lebovits transaction was inclusive of all the uncertainties at the time it was made. Even worse, the majority found that the 2008 and 2010 Article II violations created "uncertainty" for the future operations of the investment, yet it failed to award any damage related to these acts and only awarded damages on the Article IV violation in 2012 which reflected the lower value caused by the prior breaches.*[166]

- *The majority stated that it could not use the Lebovits transaction as it did not take into account the uncertainty created by the Panama Supreme Court's Provisional Suspension Order of 24 December 2009.* [167] *Yet the Lebovits transaction predated the Panama Supreme Court's Provisional Suspension Order by eighteen months. Moreover, the Article II violation by ANAM had already caused the cessation of all work on the concession area as of 14 August 2008. Thus, any alleged uncertainty created by the Court's Order already existed as a result of Panama's prior breach through the actions of ANAM.*

172. Each of these assertions requires the Committee to determine exactly what was put before the Tribunal in terms of evidence and submissions (including, e.g., the precise nature and significance of the Lebovits transaction), and to assess the Tribunal's reasoning in light of all

[164] Citing the Award, ¶ 686.
[165] Citing the Award, ¶¶ 633, 635, 643, 657, 671.
[166] Citing the Award, ¶ 629.
[167] Citing the Award, ¶ 687.

the factual circumstances of the arbitration proceedings. These are not matters that the Committee can resolve in the truncated process of a Rule 41(5) application.

173. Again without expressing any view for now on the strength of Dominion's case, if every fact asserted by Dominion were to be established, it cannot be said at this early stage that it would be impossible as a matter of law to establish a basis for annulment under Article 52(1)(e) of the Convention. Equally, the Committee does not consider this a case in which the essential factual premises of Dominion's claim could simply not be proven in any event.

174. Panama's assertions (as set out earlier) that the Tribunal did provide the reasons for the Award, and that Dominion is simply now seeking an appeal does not address the detail of the alleged inconsistencies.

175. It follows that in order to assess this ground for annulment, the Committee must consider the full factual position, which in turn requires that Dominion be afforded a proper opportunity to present that position.

4. Whether Dominion's Application under Convention Article 52(1)(b) Is Manifestly Without Legal Merit

176. Once again, for Panama to succeed in its Rule 41(5) Request with regard to Dominion's Application for Annulment under Convention Article 52(1)(b), Panama must show that even if the facts as alleged by Dominion are proven, Dominion's challenge is simply not viable as a matter of law.

177. As set out earlier, Dominion's core complaint under this ground is that the Tribunal manifestly exceeded its powers by failing to apply the proper law (public international law).

178. A failure to apply the proper law is capable of amounting to an excess of powers under Article 52(1)(b) of the Convention. For example, in *MINE v. Guinea*, the *ad hoc* committee sated as follows:

> *The Committee is of the view that the provision [of Article 42(1) of the Convention] is significant in two ways. It grants the parties to the dispute unlimited freedom*

> *to agree on the rules of law applicable to the substance of their dispute and requires the tribunal to respect the parties' autonomy and to apply those rules. From another perspective, the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. … If the derogation is manifest, it entails a manifest excess of power.*[168]

179. Dominion has set out in its Application for Annulment and in its responses to Panama's Rule 41(5) Request why it says the Tribunal failed to apply the proper law by disregarding what it says was the BIT's requirement for full compensation, which it says required the Tribunal (i) to assess the fair market value of its investment prior to Panama's breaches; and (ii) to accord full compensation for Dominion's third-party funding costs.

180. *Award on Damages:* As to (i), Dominion notes that it had put forward a claim for damages calculated by reference to the net cash flows which it said the project would have generated had it been allowed to go forward, and based upon an income approach using the "DCF" method, or, alternatively, by reference to the fair market value ("**FMV**") of the investment, derived using a market approach premised on other comparable projects.[169] Panama, on the other hand, had pleaded that Dominion's damages should be calculated by reference to the acquisition price of prior equity transactions involving Dominion, including a transaction with Bellhaven Copper & Gold Inc. in 2009 and a transaction Resource Capital Funds in 2010.[170]

181. Dominion contends that in its Post-Hearing Memorial, it submitted that if the Tribunal were to follow Panama's methodology, it would need to consider the investment made by the Lebovits Group which was concluded on July 10, 2008, shortly before Panama's first breach of Article II on August 14, 2008 (when ANAM ordered the cessation of all work on the concession site pending Dominion's submission of an Environmental Impact Assessment).

[168] *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment (December 14, 1989), ¶ 5.03. This does not appear to be contested by Panama – see: Panama's Rule 41(5) Request, ¶ 25.
[169] Dominion's Rejoinder on Rule 41(5), ¶ 27.
[170] Dominion's Rejoinder on Rule 41(5), ¶ 27.

Dominion notes that it submitted at Annex A to its Post-Hearing Memorial a calculation which took the details of the Lebovits Group's transaction, and derived a FMV of Dominion's investment using the same valuation methodology as advanced by Panama.[171]

182. Dominion complains that the Tribunal did not engage with this submission. In particular, the Tribunal acknowledged the validity of the valuation method proposed by Panama, but disregarded Dominion's calculation, despite the fact that Dominion had deployed the same method, and deployed what it says was undisputed evidence in the record.[172] This was to disregard the applicable law of damages under the BIT by disregarding the minimum damages that could be awarded based upon the host State's own FMV methodology. [173]

183. Dominion has detailed a number of points in this regard which it says amount to an overall manifest excess of powers, including (i) the majority's failure to assess the valuation of the project immediately prior to August 14, 2008, being the date on which Panama committed its first breach of the BIT, and its reliance on the Updated NI-43 101 Report which was only published a month after the breach, on September 23, 2008;[174] (ii) the Majority's disregard of Annex A as a "*mathematical exercise*", as well as undisputed evidence that the market for minerals had increased in the period between Panama's breaches of Article II in 2008 and 2010 and its final breach of Article IV in 2012;[175] and (iii) the Majority's disregard of the valuation based on the Lebovits transaction on the alleged basis that it did not reflect the Provisional Suspension Order of the Supreme Court, when that Order was issued on December 24, 2009, which was eighteen months after Panama's breach of Article II of the BIT. [176]

184. *Award on Costs:* As to (ii), Dominion argues that by disregarding Dominion's third-party funding costs, the Majority failed to apply the applicable legal principle of full reparation as set out in the *Chorzow Factory* case, by which compensation must "*as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all*

[171] Dominion's Rejoinder on Rule 41(5), ¶ 29.
[172] Dominion's Rejoinder on Rule 41(5), ¶ 29.
[173] Dominion's Rejoinder on Rule 41(5), ¶ 34.
[174] Dominion's Rejoinder on Rule 41(5), ¶ 30.
[175] Dominion's Rejoinder on Rule 41(5), ¶ 31.
[176] Dominion's Rejoinder on Rule 41(5), ¶ 32.

probably, have existed if that act had not been committed."[177] Dominion relies in particular on the alleged facts that (i) its requirement for third-party funding was the direct result of Panama's breaches which deprived Dominion of its sole asset; (ii) this alleged fact was never disputed by Panama, which expressly told the Tribunal that it was fully aware of the third-party funding costs that Dominion was being forced to incur due to the financial position in which Dominion found itself following the loss of the project (*e.g.* in Panama's Application for Security for Costs filed on November 27, 2017); and (iii) the Tribunal disregarded this evidence and held that Panama had not been informed of Dominion's third-party funding costs until the end of the arbitration.[178] Overall, so Dominion contends, the Tribunal proceeded in a manner that disregarded the applicable standard for reparation or compensation.

185. As detailed earlier, Panama emphasises (*inter alia*) that the annulment process is not an appeal, and that Dominion's case on the Award on Damages is simply a substantive disagreement with the Tribunal's application of an uncontested standard, rather than a failure to apply that standard itself. Similarly, again as detailed earlier, Panama contends that Dominion's case with respect to the Award on Costs is no more than a challenge to the Tribunal's undoubted and broad discretion on this issue.

186. But Dominion's cases on both the Award on Damages and the Award on Costs, as briefly outlined above, raises factual assertions that require a detailed investigation by the Committee. Once again without expressing any view for now on the strength of Dominion's case on either issue, if every fact asserted by Dominion were to be established, it cannot be said at this early stage that it would be impossible as a matter of law to conclude that the Tribunal disregarded the applicable standard for reparation or compensation (as opposed to incorrectly applying the correct standard), or to establish a basis for annulment under Article 52(1)(b) of the Convention.

[177] Dominion's Rejoinder on Rule 41(5), ¶ 36.
[178] Dominion's Rejoinder on Rule 41(5), ¶¶ 36-38.

187. Equally, the Committee does not consider this a case in which the essential factual premises of Dominion's claims could simply not be proven in any event.

188. It follows, once again, that in order to assess this ground for annulment, the Committee must consider the full factual position, which in turn requires that Dominion be afforded a proper opportunity to present that position.

189. Overall, the Committee does not consider that the type of objections raised by Panama in this preliminary application, albeit objections that are appropriate in response to an annulment application, are within the scope of what was contemplated by Arbitration Rule 41(5).

190. Accordingly, the Committee considers that Panama's Rule 41(5) Request must be dismissed.

V. COSTS

191. Panama has requested that the Committee:

> *Award Panama all of its costs and expenses associated with this phase of the proceeding.*[179]

192. Dominion has sought an order:

> *that Dominion be awarded the costs, fees and expenses of this application, inclusive of attorneys' fees;*[180]

193. The Committee is of the view that costs arising out of Panama's Stay Request and Panama's Rule 41(5) Request should be reserved for a subsequent stage of the proceedings.

[179] Panama's Stay Request, ¶ 82.
[180] Dominion's Response on Stay, Section IV.

VI. DECISION

194. For the reasons set out herein, the Committee decides that:

(i) Panama's application to stay the enforcement of the Award is granted.

(ii) Panama's application under Arbitration Rule 41(5) is dismissed.

(iii) The costs arising out of Panama's application to stay the enforcement of the Award and Panama's application under Arbitration Rule 41(5) are reserved for a subsequent stage of the proceedings.

Mr. Toby Landau QC
President of the Committee