BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Freeport McMoRan Inc. on its Own Behalf and on Behalf of Sociedad Minera Cerro Verde S.A.A.,
Applicant (Claimant),

v.

Republic of Perú,
Respondent.

ICSID Case No. ARB/20/8
Annulment Proceeding

Respondent's Rejoinder on Partial Annulment

February 24, 2026

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LIST OF DEFINED TERMS

"1996 Feasibility Study"	Revised version of the 1995 Fluor Canada Ltd. feasibility study for improvements, upgrades, and further development of the existing leaching facility and infrastructure
"2004 Feasibility Study"	Feasibility study conducted by Fluor Canada Ltd., for the Cerro Verde Primary Sulfide Project dated May 2004
"2006-2007 Royalty Assessments"	Assessments issued by SUNAT on August 17, 2009 against SMCV for royalties on the minerals processed in the Concentrator from October 2006 to December 2007
"2008 Royalty Assessments"	Additional royalty assessments issued by SUNAT on June 1, 2010 against SMCV for minerals processed in the Concentrator from January 2008 to December 2008
"2009 Royalty Assessments"	Royalty assessments issued by SUNAT on June 27, 2011 against SMCV for the minerals processed in the Concentrator from January 2009 to December 2009
"2010-2011 Royalty Assessments"	Royalty assessments issued by SUNAT on April 13, 2016 against SMCV for the minerals processed in the Concentrator in 2010 and the first three quarters of 2011
"2012 Royalty Assessment"	Royalty assessments issued by SUNAT on March 28, 2018 against SMCV for the minerals processed in the Concentrator in 2012
"2013 Royalty Assessment"	Royalty assessments issued by SUNAT on September 28, 2018 against SMCV for the minerals processed in the Concentrator in 2013
"Application or Application for Partial Annulment"	Claimant's Application for Partial Annulment dated September 16, 2024
"Award"	Award issued in Freeport-McMoRan Inc. v. Republic of Perú, ICSID Case No. ARB/20/8 dated May 17, 2024
"Applicant," "Claimant," or "Freeport"	Freeport-McMoRan Inc.
"Beneficiation Concession"	The beneficiation concession for processing the minerals extracted from the Cerro Verde mine
"Claimant's Memorial"	Claimant's Memorial on the Merits dated October 19, 2021

"Claimant's Reply"	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated September 13, 2022
"Claimant's Rejoinder"	Claimant's Rejoinder on Jurisdiction dated December 16, 2022
"Committee"	*Ad hoc* Committee in this partial annulment proceeding
"Concentrator," "Concentrator Project," "Concentrator Plant"	The mining project set out in the 2004 Feasibility Study and its update destined to treat primary sulfide ore at Cerro Verde
"Counter-Memorial on Partial Annulment"	Respondent's Counter-Memorial on Partial Annulment, September 16, 2025
"DGM"	Directorate General of Mining of Perú's Ministry of Energy and Mines
"GEM"	*Gravamen Especial a la Minería* – Special Mining Contribution
"EAU"	Economic Administrative Unit
"ICSID"	International Centre for Settlement of Investment Disputes
"ICSID Convention"	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
"ICSID Arbitration Rules"	ICSID Arbitration Rules, entered in force as of April 10, 2006
"ILC"	International Law Commission
"Leaching Project"	The mining project set out in the 1996 Feasibility Study destined to produce 105 million pounds of cathode copper from the heap leaching of copper ore at Cerro Verde
"Memorial on Partial Annulment"	Memorial on Partial Annulment submitted by Freeport-McMoRan Inc. on its own behalf and on behalf of Sociedad Minera Cerro Verde S.A.A on May 23, 2025
"MINEM"	Perú's Ministry of Energy and Mines
"Mining Law"	Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (as amended) dated June 3, 1992
"Mining Concession"	The mining concession for the exploration and extraction of mineral resources in the areas known as Cerro Verde No. 1, No. 2, and No. 3
"Perú" or "Respondent"	Republic of Perú

"Phelps Dodge"	Phelps Dodge Mining Corporation
"Regulations"	Mining Regulations, Supreme Decree No. 024-93-EM dated June 7, 1993
"Reply on Partial Annulment"	Applicant's Reply on Partial Annulment, December 12, 2025
"Royalty Law"	Mining Royalty Law No. 28258 dated June 24, 2004
"Q4 2011 Royalty Assessment"	Royalty assessment issued by SUNAT on December 29, 2017 against SMCV for the minerals processed in the Concentrator for the fourth quarter of 2011
"SMCV"	Sociedad Minera Cerro Verde S.A.A., a company constituted under the laws of Perú
"Stabilization Agreement"	Stabilization Agreement signed between SMCV and the Republic of Perú on February 26, 1998
"SUNAT"	National Superintendence of Customs and Tax Administration
"Treaty" or "TPA"	United States-Peru Trade Promotion Agreement
"VCLT"	Vienna Convention on the Law of Treaties

1. The Republic of Perú, Respondent in the arbitration and in this annulment proceeding, submits this Rejoinder on Partial Annulment pursuant to the updated procedural timetable established by the *ad hoc* Committee in Annex B of Procedural Order No. 1, in response to the Reply on Partial Annulment submitted by Freeport-McMoRan Inc. on its own behalf and on behalf of Sociedad Minera Cerro Verde S.A.A. ("Freeport" or "Claimant").

I. INTRODUCTION

2. Claimant's application for partial annulment remains what it has been from the outset: an appeal in disguise, where Claimant seeks to relitigate issues that the Tribunal decided in the Award. In its Reply on Partial Annulment, far from discharging its burden under Article 52 of the ICSID Convention, Claimant merely reiterates the same arguments advanced in its Memorial on Partial Annulment, while (i) selectively disregarding the jurisprudence cited by Respondent in its Counter-Memorial on Partial Annulment that does not support Claimant's position, and (ii) ignoring the express terms of the Award, which confirm that no ground for annulment exists. Claimant's partial annulment application should, for these reasons alone, be dismissed in its entirety.

3. As Respondent explained in its Counter-Memorial on Partial Annulment, the Award, read as a whole—as *ad hoc* committees consistently require—makes clear that claims relating to penalties and interest, including those concerning Royalty Assessments, fell within the TPA's "taxation measures" exclusion in Article 22.3.1 and, therefore, were outside the Tribunal's jurisdiction. There was nothing left to decide on the merits regarding Claimant's penalties and interest claims. Paragraph 986 of the Award expressly memorializes that jurisdictional conclusion. Claimant's disagreement with that conclusion does not transform it into an annullable defect.

4. In its Reply on Partial Annulment, Claimant's three argued grounds for annulment once again fall short. *First*, there was no "manifest excess of powers" under Article 52(1)(b): the

Tribunal exercised its *competence-competence* by interpreting and applying the TPA's tax carve-out and declining jurisdiction over Claimant's penalties and interest claims. This is exactly the kind of jurisdictional judgment annulment committees may not and do not second-guess. Claimant's Article 52(1)(b) argument is built on a fundamental misreading of the Award. Plainly and properly understood, the Tribunal did not affirm jurisdiction over penalties and interest on Royalty Assessments and then omit a merits decision; it concluded that Claimant's penalties and interest claims were excluded from the Tribunal's jurisdiction as "taxation measures."

5. *Second*, there was no "failure to state reasons" within the meaning of Article 52(1)(e). As *ad hoc* committees have consistently held, in assessing an alleged breach of Article 52(1)(e), an *ad hoc* committee should read the award as a whole; determine whether it can follow the tribunal's chain of reasoning (even if, at certain points, that reasoning must be explained or supplemented); and recognize that annulment is not warranted where the alleged deficiency neither affected nor could have affected the outcome of the dispute. In the present case, there can be no doubt that, when the Award is read as a whole, the Tribunal's reasoning with respect to Claimant's penalties and interest claims on Royalty Assessments can readily be followed. In any event, even assuming *arguendo* that the reasoning was somehow incomplete (it was not), it is apparent from the Award that those claims would necessarily have been dismissed in any event.

6. *Third*, there was no "serious departure" from a fundamental rule of procedure under Article 52(1)(d): the Tribunal did not violate Claimant's right to be heard and thus did not depart from a fundamental rule of procedure, and, in any event, the alleged departure did not rise to the level of "seriousness" mandated by Article 52(1)(d) of the ICSID Convention.

7. In essence, Claimant cannot satisfy the demanding thresholds embedded in Article 52(1) of the ICSID Convention. The terms "manifest," "serious," and "fundamental" are not

surplusage; they reflect the ICSID Convention's object and purpose and the finality it protects. Annulment is reserved for outcome-determinative defects—not for incidental disagreements with a tribunal's reasoning or conclusions.

8. Indeed, even assuming *arguendo* that an annullable error existed (it does not), the Committee should preserve the Award's finality. Article 52(3) of the ICSID Convention and ICSID jurisprudence confirm that *ad hoc* committees have discretion to decide whether or not to annul an award, taking into consideration other factors that may weigh against annulment in a particular case—such as whether the alleged defect was outcome-determinative. Had the Tribunal proceeded to address the merits of Claimant's penalties and interest claims relating to Royalty Assessments, it would necessarily have rejected them. The record demonstrates that Respondent was under no obligation to waive penalties and interest on the basis of alleged "reasonable doubt" and therefore did not breach its obligations under the TPA for failing to do so.

9. To annul the Award under these circumstances would serve no corrective purpose; it would merely prolong a dispute that has already been fully litigated and definitively resolved. The Award was issued by a distinguished Tribunal after almost four years of exchanges of extensive submissions and a two-week hearing. This is not the sort of case the drafters contemplated should be annulled when they created Article 52's exceptional remedy. Granting annulment on Claimant's theory would undermine the finality that the ICSID system is designed to protect and would impermissibly transform annulment into an appeal process—precisely the outcome that ICSID jurisprudence consistently cautions against.

10. Furthermore, Claimant's decision not to seek clarification or supplementation of the Award under Article 49(2) of the ICSID Convention instead of seeking annulment further confirms the absence of any genuine omission by the Tribunal. While Article 49(2) is not a formal

prerequisite, it is the specific remedy for alleged omissions. Claimant's decision to bypass that mechanism and proceed directly to annulment was strategic and underscores that what it seeks is not a correction of the Award but, rather, its reconsideration by a new tribunal.

11. Finally, in its Reply on Partial Annulment, Claimant no longer pursues the so-called "other errors" it had advanced in Section IV of its Memorial on Partial Annulment as independent, stand-alone grounds for annulment, such as, allegedly, the Tribunal ignoring evidence, misapplying Peruvian law, or failing to properly treat SUNAT materials, among other allegations. Presented as distinct annullable defects, those allegations required a full response by Respondent in its Counter-Memorial on Partial Annulment. Freeport has now retreated from those heads of annulment, stating instead that it does not seek annulment on the basis of those alleged additional errors—even while suggesting that they could themselves constitute annulment grounds—and invokes them only as background. This reversal confirms that Claimant's auxiliary theories were unsubstantiated and misplaced, and it further supports an adverse decision on costs.

12. For these reasons, and those further developed below, the Committee should reject Claimant's application in its entirety and award Respondent its costs in this proceeding. Such a result would uphold the integrity of the arbitral process and give effect to the principle of finality that lies at the core of the ICSID system.

13. In the sections that follow, Perú addresses the arguments made by Claimant in its Reply on Partial Annulment. **Sections II, III, and IV** rebut Claimant's three annulment arguments under Articles 52(1)(b) (manifest excess of powers), 52(1)(e) (failure to state reasons), and 52(1)(d) (serious departure from a fundamental rule of procedure) of the ICSID Convention, respectively, and demonstrate why partial annulment should not be granted in this case. **Section V** explains why, even assuming an annullable error existed (it does not), the Committee should

nevertheless preserve the Award's finality and deny annulment. **Section VI** shows that Claimant should bear all costs of this annulment proceeding. **Section VII** states Perú's request for relief.

II. CLAIMANT HAS FAILED TO SHOW THAT THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS UNDER ARTICLE 52(1)(B) OF THE ICSID CONVENTION

14. As Respondent explained in its Counter-Memorial on Partial Annulment, the Tribunal did not manifestly exceed its powers when it dismissed Claimant's penalties and interest claims on Royalty Assessments, because: (i) the Tribunal dismissed such claims on jurisdictional grounds, and (ii) in any event, even assuming *arguendo* that the Tribunal failed to exercise jurisdiction over the penalties and interest claims on Royalty Assessments (which it did not), Claimant has not demonstrated that any excess of powers was "manifest."[1]

15. In its Reply on Partial Annulment, Claimant insists that because the Tribunal purportedly upheld jurisdiction over Claimant's claims on penalties and interest on Royalty Assessments but then allegedly failed to decide them on the merits, the Tribunal's purported failure constitutes a manifest excess of powers.[2] Claimant essentially restates in its Reply on Partial Annulment its position in its Memorial on Partial Annulment and adds that Respondent has supposedly misstated the "manifest" standard and that even if Respondent's interpretation were correct, that standard would be met in this case.[3] Claimant's arguments are without merit.

16. In the sections that follow, Respondent demonstrates, first, that Claimant's articulation of the applicable standard for "manifest excess of powers" is still inaccurate and incomplete (**Section II.A**). Second, Respondent shows that Claimant has failed, once again, to

[1] *See generally* Respondent's Counter-Memorial on Partial Annulment, September 16, 2025 ("Counter-Memorial on Partial Annulment") at Section IV.B.

[2] *See* Applicant's Reply on Partial Annulment, December 12, 2025 ("Reply on Partial Annulment") at Section II.A.

[3] *See* Reply on Partial Annulment at Section II.B.

demonstrate that the Tribunal exceeded its powers, much less manifestly, with respect to its treatment of Claimant's claims on penalties and interest on Royalty Assessments (**Section II.B**).

A. CLAIMANT'S ACCOUNT OF THE APPLICABLE STANDARD FOR ESTABLISHING A MANIFEST EXCESS OF POWERS UNDER ARTICLE 52(1)(B) IS STILL INACCURATE AND INCOMPLETE

17. Claimant's Reply on Partial Annulment does not meaningfully engage with the applicable standard for a manifest excess of powers under Article 52(1)(b). Instead, Claimant advances a selective and incomplete account of the case law, while leaving decisive aspects of Respondent's position unanswered and, therefore, undisputed.

18. As Respondent explained in its Counter-Memorial on Partial Annulment, the adjective "manifest" was included in Article 52(1)(b) of the ICSID Convention to preserve the finality of ICSID awards.[4] An excess of powers cannot be "manifest" if the alleged excess is discernible only through elaborate argument or interpretation.[5] In other words, where the underlying issue admits more than one reasonable reading, there can, by definition, be no "manifest" excess of powers.

19. In its Counter-Memorial on Partial Annulment, Respondent showed that with respect to jurisdiction, the *Fraport ad hoc* committee confirmed that "where the jurisdiction of the Tribunal is reasonably open to more than one interpretation, the *ad hoc* Committee will give special weight to the Arbitral Tribunal's interpretation of the jurisdictional instrument."[6] Put simply, *ad hoc* committees should refrain from second-guessing a tribunal's decision on jurisdiction where

[4] *See* Counter-Memorial on Partial Annulment at Section IV.A. *See also* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at paras. 15, 20-21.

[5] *See* **RALA-4**, *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 41 ("[E]ven if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy.").

[6] **AALA-9**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, December 23, 2010, at para. 44 (emphasis added). *See also* Counter-Memorial on Partial Annulment at para. 144.

more than one reasonable interpretation exists (as, even on the Claimant's position, occurs in this case). Claimant's Reply on Partial Annulment fails to address this key language in the *Fraport* decision.

20. Nor does Claimant engage with other annulment decisions cited by Respondent—including *Perenco*, *Niko Resources*, *RREEF*, and *Enron*[7]—which, in the context of alleged manifest excess of powers, consistently confirm that annulment does not permit a *de novo* review of a tribunal's jurisdictional determinations and that, under the principle of *competence-competence,* tribunals are empowered to rule on their own jurisdiction—based on the jurisdictional requirements of the ICSID Convention and the parties' arbitration agreement—irrespective of the parties' submissions.[8] In this case, the Tribunal reasonably concluded that it lacked jurisdiction to decide Claimant's claims relating to penalties and interest on Royalty Assessments.

21. Claimant's omission appears to be deliberate. Having adopted the premise—incorrect in Respondent's view—that the Tribunal affirmed jurisdiction over Claimant's claims relating to penalties and interest on the Royalty Assessments, Claimant decides not to engage with

[7] *See* Counter-Memorial on Partial Annulment at para. 146. *See also* **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 94; **RALA-16**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX)*, ICSID Case No. ARB/10/18, Decision on Annulment, October 12, 2023, at para. 71; **RALA-17**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment Application, June 10, 2022, at para. 26; **RALA-31**, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Decision on the Application for Annulment of the Argentine Republic, July 30, 2010 ("*Enron v. Argentina*, Decision on Annulment"), at para. 69.

[8] *See* Counter-Memorial on Partial Annulment at para. 146. *See also* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, para. 86 ("At the same time, ad hoc Committees have acknowledged the principle specifically provided by the ICSID Convention that the Tribunal is the judge of its own competence. This means that the Tribunal has the power to decide whether it has jurisdiction to hear the parties' dispute based on the parties' arbitration agreement and the jurisdictional requirements in the ICSID Convention."); **RALA-42**, *Fisheries Jurisdiction (Spain v. Canada)*, Judgment - Jurisdiction of the Court, 1998 I.C.J. (4 December), at para. 37 ("The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it [ ], this has no relevance for the establishment of the Court's jurisdiction, which is a 'question of law to be resolved in the light of the relevant facts'[ ]."") (internal citations omitted).

the jurisprudence that would become relevant if the Committee were to acknowledge, as Respondent submits, that the Tribunal dismissed those claims for lack of jurisdiction. Claimant's selectivity is all the more notable because elsewhere in its Reply on Partial Annulment—specifically in its discussion of an alleged departure from a fundamental rule of procedure—Claimant does advance arguments related to the scenario in which the Tribunal did dismiss the claims on jurisdictional grounds.[9] Claimant's silence is telling. As a result, the conclusions in the decisions in *Fraport, Perenco, Niko Resources, RREEF,* and *Enron,* relied upon by Respondent in its Counter-Memorial on Partial Annulment,[10] remain unchallenged.

22. Claimant instead focuses its arguments on the meaning of the "manifest" standard. In particular, Claimant alleges (i) that "[t]he 'manifest' standard under Article 52(1)(b) requires only that the excess of powers be *obvious*, not that it be 'serious,'"[11] for there to be an annullable error, and (ii) that Respondent's position is purportedly inconsistent with the ICSID Convention's plain text and rejected by multiple *ad hoc* committees and by Professor Schreuer.[12] Claimant's position overstates the jurisprudence and misrepresents Respondent's position.

23. *First,* while some *ad hoc* committees have only required that the excess of powers be obvious for it to be manifest, numerous other committees have confirmed that for the excess of powers to be "manifest," it must be both obvious and serious.

24. As Respondent explained in its Counter-Memorial on Partial Annulment, the *ad hoc* committees in *Impregilo*, *Soufraki*, *Cyprus Popular Bank*, *Malicorp*, and *SGS Société Générale*, all concluded that a manifest excess of powers must be not only "obvious or clear" but

[9] *See* Reply on Partial Annulment at para. 57 ("even if the Tribunal had dismissed these claims for lack of jurisdiction, it would still have committed a serious departure from a fundamental rule of procedure").

[10] *See* Counter-Memorial on Partial Annulment at para. 146.

[11] Reply on Partial Annulment at para. 29 (emphasis in the original).

[12] *See* Reply on Partial Annulment at para. 30.

also "serious" or "substantially serious."[13] These decisions show that an excess is "manifest" only where it reaches a level of seriousness or substantial consequences in a case consistent with the exceptional nature of annulment under Article 52.

25. *Second*, contrary to Claimant's allegations,[14] requiring the excess of powers to be serious is in accordance with the Convention's plain text. Claimant's allegation that Respondent's interpretation is contrary to the ICSID Convention is misleading and disingenuous.

26. The ICSID background paper on Annulment, cited by Claimant itself, acknowledges that a number of *ad hoc* committees have understood "manifest" to require that the alleged excess of powers be serious or material to the outcome of the case.[15] None of those decisions has been criticized as being contrary to the ICSID Convention. Respondent's position, thus, reflects a well-established line of authority that is not contrary to the Convention's language and that this Committee is entitled to follow.

27. Even if not all committees have articulated the standard in the same way, this Committee—like others—retains the discretion to adopt the standard as described by Respondent, particularly in the circumstances of this case. Here, the arbitration constituted Claimant's sixth

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[13] Counter-Memorial on Partial Annulment at para. 145. *See also* **RALA-10**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment, January 24, 2014, at para. 128 ("This means that the excess of power has to be obvious, self-evident, clear, flagrant and substantially serious"); **RALA-6**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007 ("*Soufraki v. UAE*, Decision on Annulment"), at para. 40; **RALA-15**, *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, November 30, 2022, at para. 203 (*citing Soufraki v. UAE*); **RALA-49**, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, May 19, 2014, at para. 122 ("textually obvious and substantively serious"); **RALA-27**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited, July 3, 2013, at para. 56 ("both obvious and serious").

[14] *See* Reply on Partial Annulment at para. 30.

[15] **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, para. 89 ("Some ad hoc Committees have interpreted "manifest" to require that the excess be serious or material to the outcome of the case."). *See also* **RALA-67**, ICSID Secretariat, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 2016, para. 83; **RALA-57**, ICSID Secretariat, *Background Paper on Annulment for the Administrative Council of ICSID*, August 2012, para. 84.

attempt to overturn SUNAT's Tax and Royalty Assessments on the basis that the Stabilization Agreement covered the Concentrator.[16] As Respondent explained in its Counter-Memorial on Partial Annulment, Claimant sought to overturn SUNAT's assessments before (i) SUNAT; (ii) the Tax Tribunal; (iii) first instance administrative courts; (iv) administrative appellate courts; and, ultimately, (v) Perú's Supreme Court.[17] Annulling an award that rejects Claimant's sixth attempt to overturn SUNAT's Tax and Royalty Assessments for an alleged error that is not substantially serious (*i.e.*, not outcome-determinative) would be unwarranted.

28. *Third,* Claimant's reliance on Professor Schreuer to support its definition of manifest as only "obvious" or "self-evident" is not relevant in the broader context of what manifest excess of powers means. While Professor Schreuer does explain that "manifest" refers to how readily apparent an excess of powers is, he does not suggest that annulment under Article 52(1)(b) must follow automatically, regardless of the seriousness or impact of the alleged error.[18] To the contrary, Professor Schreuer and several *ad hoc* committees emphasize the discretion of *ad hoc* committees to refrain from annulling an award (*e.g.*, when the annulment error has no serious impact in the case) in order to preserve the finality of ICSID awards.[19]

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[16] *See* **AA-1**, *Freeport-McMoRan Inc. v. Republic of Perú*, ICSID Case No. ARB/20/8, Award, May 17, 2024 ("**AA-1**, *Freeport* Award"), at Annex A to Respondent's Rejoinder on the Merits and Reply on Jurisdiction, at pp. 339-48 (PDF) (listing all of the individual instances in which Claimant sought to set aside SUNAT's assessments). The first instance court's ruling in the 2008 Royalty Assessment Case stands as the sole instance in which SMCV's legal challenges prevailed. *See also* **AA-1**, *Freeport* Award, at para. 31 and cover page, p. 1 (PDF).

[17] *See* Counter-Memorial on Partial Annulment at para. 64.

[18] *See* Reply on Partial Annulment at para. 30.

[19] *See* **RALA-18**, Christoph H. Schreuer, *et al.*, *The ICSID Convention: A Commentary*, Cambridge University Press (2nd ed. 2009) (excerpt), Art. 52, at paras. 37-38. *See also* **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 37 (*citing* Christopher Schreuer, *Three Generations of ICSID Annulment Proceedings*, p. 19); **RALA-23**, *Pawlowski AG and Projekt Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Decision on Annulment, March 7, 2025 ("*Pawlowski v. Czech Republic*, Decision on Annulment"), at para. 38.

29. *Finally,* Claimant's focus on alleging that some *ad hoc* committees have concluded that the excess only needs to be obvious and not serious for it to be manifest misses a critical point. Multiple *ad hoc* committees have concluded that any excess of powers capable of justifying annulment must, by its nature, be serious or have substantial consequences in the case. This conclusion exists regardless of whether the committee found that the "manifest" standard includes or not the "serious" component. For example, the *Kiliç ad hoc* committee held that Article 52(1)(b) "should not be invoked unless the tribunal's excess had serious consequences for a party."[20] The same principle has been articulated by several other *ad hoc* committees, including in the following cases:

- In *UP and C.D. Holding Internationale v. Hungary*, the committee emphasized that a manifest excess of powers must be "obvious by itself," while explaining that, by the very nature of annulment under Article 52(1), any excess capable of justifying annulment must in any event be "serious or substantial."[21]

- In *Vivendi I*, the *ad hoc* committee held—when assessing whether a manifest excess of powers existed—that "it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power."[22]

- In *Khudyan v. Armenia*—on which Claimant relies as an allegedly analogous case in the context of manifest excess of powers[23]—the *ad hoc* committee emphasized that, in determining whether annulment under Article 52(1)(b) is warranted, it must assess "whether the excess of power was sufficiently grave that it could have made a difference to the outcome of the case."[24]

[20] **RALA-11**, *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, at para. 53 (emphasis added).

[21] **RALA-55**, *UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, Decision on Annulment, August 11, 2021, at para. 164 (emphasis added).

[22] **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 86 (emphasis added).

[23] *See* Reply on Partial Annulment at para. 34.

[24] **RALA-20**, *Edmond Khudyan v. Republic of Armenia*, ICSID Case No. ARB/17/36, Decision on Annulment, July 21, 2023, at para. 226 (emphasis added).

- In *Libananco v. Turkey*, the *ad hoc* committee—expressly following the *Soufraki* committee—held that annulment under Article 52(1)(b) is warranted only where a tribunal has exceeded its powers in a manner that is both "clear" and accompanied by "serious consequences," emphasizing that, given the "exceptional nature of annulment," an excess of powers must have had, or at least be capable of having had, "serious consequences for a party."[25]

- In *CEAC Holdings Limited v. Montenegro*, the *ad hoc* committee explained that, even where a ground for annulment is established, Article 52(3) affords the committee "discretion whether to annul the award."[26] That discretion must be exercised by reference to the "the gravity of the circumstances which constitute the ground for annulment and whether they had—or could have had—a material effect upon the outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both Parties."[27]

30. These decisions confirm that even when *ad hoc* committees have not specified that for the excess to be manifest, it needs to be serious, an alleged excess of powers must nonetheless be outcome-determinative. In other words, the excess needs to be sufficiently serious to warrant annulment.

31. In any case, as Respondent explains below, Claimant's annulment bid fails even if the Committee believes that "manifest" simply means "obvious." In the case at hand, the alleged excess of powers is not obvious, because the Tribunal found that it had no jurisdiction to decide on Claimant's penalties and interest claims, including those related to Royalty Assessments.

[25] **AALA-21**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment, May 22, 2013, at para. 102 (emphasis added).

[26] **RALA-56**, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, May 1, 2018, at para. 84.

[27] **RALA-56**, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, May 1, 2018, at para. 84 (emphasis added).

B. THE TRIBUNAL DID NOT MANIFESTLY EXCEED ITS POWERS WHEN IT DISMISSED, FOR LACK OF JURISDICTION, CLAIMANT'S PENALTIES AND INTEREST CLAIMS ON ROYALTY ASSESSMENTS

1. Claimant's Argument that the Tribunal Upheld Jurisdiction Over Its Penalties and Interest Claims on Royalty Assessments Is Incorrect

32. As Respondent explained in its Counter-Memorial on Partial Annulment, the Tribunal did not manifestly exceed its powers: the Tribunal determined that it lacked jurisdiction to decide Claimant's claims regarding penalties and interest on Tax and Royalty Assessments on the basis that they constitute "taxation measures" excluded under Article 22.3.1 of the TPA.[28] In its Reply on Partial Annulment, Claimant continues to base its arguments of manifest excess of power on the premise that the Tribunal upheld jurisdiction over the penalties and interest claims on the Royalty Assessments.[29] As Respondent explains in this Section, Claimant's position is incorrect.

33. *First*, Claimant alleges that Respondent is wrong to assert that the Tribunal concluded that penalties and interest constitute taxation measures under Article 22.3.1 of the TPA as a general concept.[30] This reading of the Award is incorrect on its face.

34. As Respondent explained in Sections II.C.2.a and V.B.1 of its Counter-Memorial on Partial Annulment, a reading of the Award *in toto* leaves no doubt that the Tribunal did not affirm jurisdiction over Claimant's claims relating to penalties and interest on Royalty Assessments. Claimant improperly equates the reference to "penalties and interest" in paragraph 986 of the Award exclusively with taxes,[31] disregarding the Tribunal's express conclusion that "penalties and interests" qualify as "taxation measures" within the meaning of the TPA even where

[28] *See* Counter-Memorial on Partial Annulment at Section IV.B.

[29] *See* Reply on Partial Annulment at paras. 15-19.

[30] *See* Reply on Partial Annulment at paras. 20-26.

[31] *See* Reply on Partial Annulment at para. 18.

they are not levied on taxes[32]—including where they arise in connection with royalties. For the benefit of the Committee, Respondent summarizes below the key elements of the Tribunal's reasoning, supporting this conclusion, with a more detailed explanation set out in the Section III.B.1 below:[33]

- The Tribunal conducted a detailed analysis beginning in paragraph 540 of the Award.[34] The Tribunal addressed jurisdiction over penalties and interest as a threshold issue, asking whether claims based on penalties and interest fall within the scope of the TPA or are excluded as "taxation measures" under Article 22.3.1.[35]

- The Tribunal concluded that penalties and interest—though not classified as taxes under Peruvian law—are nonetheless integral components of Perú's domestic tax regime and qualify as "taxation measures" under the TPA.[36] Based on the aforementioned analysis, the Tribunal determined in paragraph 553 of the Award that Claimant's claims under Article 10.5 of the TPA concerning penalties and interest on SMCV's Tax Assessments were excluded from its jurisdiction pursuant to the carve-out in Article 22.3.1.[37]

- This jurisdictional ruling, however, was not confined to Tax Assessments alone. The Tribunal reaffirmed in paragraph 986 that penalties and interest, in general, qualify as "taxation measures," and thus fall outside its jurisdiction.[38] Crucially, the Tribunal made no distinction between Tax and Royalty Assessments.[39] Thus, it concluded that penalties and interest arising from either type of assessment are "taxation measures" under Article 22.3.1 of the TPA.

35. In sum, applying a broad, treaty-based definition of "taxation measures," the Tribunal concluded that penalties and interest imposed on both Tax and Royalty Assessments are excluded from the Tribunal's jurisdiction. Although Respondent's jurisdictional objection was

[32] *See* **AA-1**, *Freeport* Award, at para. 986.

[33] *See infra* at Section III.B.1.

[34] *See* **AA-1**, *Freeport* Award, at paras. 540 *et seq*.

[35] *See* **AA-1**, *Freeport* Award, at paras. 540 *et seq*.

[36] *See* **AA-1**, *Freeport* Award, at para. 548. *See also* Counter-Memorial on Partial Annulment at para. 194.

[37] *See* **AA-1**, *Freeport* Award, at para. 553. *See also* Counter-Memorial on Partial Annulment at para. 191.

[38] *See* **AA-1**, *Freeport* Award, at para. 986. *See also* Counter-Memorial on Partial Annulment at paras. 192-93.

[39] *See* **AA-1**, *Freeport* Award, at para. 986. *See also* Counter-Memorial on Partial Annulment at paras. 192-93.

formally directed at penalties and interest arising from the Tax Assessments, the Tribunal—acting pursuant to the *compétence-compétence* principle enshrined in Article 41(1) of the ICSID Convention and the *iura novit arbiter* principle[40]—reasonably determined the scope of its jurisdiction independently of the precise framing of the objection.

36. *Second*, Claimant's assertion that the Award contains no paragraph in which the Tribunal rejected jurisdiction over Claimant's penalties and interest claims on Royalty Assessments[41] is incorrect. In substance, Claimant's argument—properly understood—relates to an alleged failure to state reasons, not to an alleged excess of powers. As Respondent demonstrates in Section III below, there has been no failure to state reasons. In any event, the Tribunal expressly addressed this issue in paragraph 986 of the Award, where it held that it had "no jurisdiction to decide on the merits of the Claimant's claim based on the Respondent's alleged violation of Article 10.5 of the TPA in relation to the Respondent's assessment of penalties and interest"[42]—making no distinction between Tax and Royalty Assessments. Moreover, contrary to Claimant's characterization, the Tribunal's jurisdictional conclusion necessarily extended to penalties and interest on Royalty Assessments: read together, Section IV.B of the Award and paragraph 986 confirm that the Tribunal found that penalties and interest constitute "taxation measures" under Article 22.3.1 of the TPA and, therefore, fell outside its jurisdiction without drawing any distinction between penalties and interest arising from Tax Assessments and those arising from Royalty Assessments.

[40] *See* Counter-Memorial on Partial Annulment at paras. 230-31.

[41] *See* Reply on Partial Annulment at para. 14.

[42] *See* **AA-1**, *Freeport* Award, at para. 986.

37. The fact that this explanation appears in the merits section of the Award is of no consequence, contrary to Claimant's contention.[43] This integral reading of the Award accords with well-established annulment jurisprudence, which requires that an award be read as a whole, rather than by isolating individual paragraphs or sections, as Claimant seeks to do. As the *ad hoc* committees in *Hydro v. Republic of Albania* and *Pawlowski* held, an annulment committee must "look to the totality of an award to understand the motivation of the decision, and not just particular parts."[44] Numerous *ad hoc* committees—including those in *Teinver*, *Continental*, and *Azurix*—have consistently adopted that same approach.[45] That standard is plainly met here: when read as a whole, the Tribunal's reasoning is coherent and traceable in the Award, as detailed in Section II.C.2 of Respondent's Counter-Memorial on Partial Annulment and further explained *infra* in Section III.B.1.

38. *Third,* Claimant alleges that Respondent's distinctions of the annulment decisions in *Vivendi I*, *Malaysian Historical Salvors*, and *Khudyan* from this case fail because (i) they rest on the allegedly erroneous premise that the Tribunal declined jurisdiction over Claimant's penalties and interest claims on Royalty Assessments, and (ii) Respondent purportedly fails to

[43] *See* Reply on Partial Annulment at para. 32.

[44] **RALA-58**, *Hydro S.r.l. and others v. Republic of Albania (I)*, ICSID Case No. ARB/15/28, Decision on Annulment, April 2, 2021, at para. 115; *see also* **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 301.

[45] *See* **RALA-37**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, May 29, 2019, at para. 209 ("In assessing whether that is the case, the award must be considered in its entirety. The mere fact that reasons are unclear or imperfectly expressed is therefore insufficient to annul an award."); **RALA-28**, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, September 16, 2011 ("*Continental Casualty v. Argentina*, Decision on Annulment"), at para. 261 ("[I]n determining whether the reasons for a given conclusion on a particular question are sufficient, it is necessary not to look in isolation at the particular paragraphs of the award dealing specifically with that question. Those paragraphs must always be read together with the award as a whole."); **RALA-30**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, at para. 360 (reconstructing the tribunal's reasoning after identifying the tribunal's implicit findings); **RALA-6**, *Soufraki v. UAE*, Decision on Annulment, at paras. 63-64 (reconstructing the tribunal's decision after finding that "the principle on which the Award is based [did] exist").

rebut what Claimant characterizes as a settled rule that a tribunal's failure to decide claims within its jurisdiction necessarily constitutes a manifest excess of power,[46] warranting annulment or partial annulment. Neither assertion withstands scrutiny.

39. Claimant relies primarily on *Vivendi I* and *Helnan* for the proposition that a tribunal manifestly exceeds its powers if it fails to decide claims within its jurisdiction.[47] As Respondent has explained, unlike in *Vivendi I* or *Helnan*, the Tribunal in this case did not find that it had jurisdiction over Claimant's penalties and interest claims on Royalty Assessments. Where a tribunal finds it lacks jurisdiction over certain claims, it has no obligation to decide those claims on the merits, and no excess of powers for failing to decide those claims on the merits can, therefore, arise.

40. However, even under Claimant's alternative premise that the Tribunal upheld jurisdiction over Claimant's penalties and interest claims relating to Royalty Assessments (it did not), the decisions cited by Claimant do not support Claimant's position for the reasons set out below:

- First, the paragraph of *Vivendi I* invoked by Claimant makes clear that "it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power."[48] That condition is not satisfied here. As explained in Section VIII.B of Respondent's Counter-Memorial on Partial Annulment and Sections IV and V *infra*, there is no question that, had the Tribunal expressly assumed jurisdiction over Freeport's penalties and interest claims on Royalty Assessments and ruled on the merits, it would have rejected those claims. Claimants have failed to show otherwise.

- Second, *Helnan* concerned a fundamentally different type of manifest excess of powers than the one Claimant alleges exists in this case. There, the *ad hoc*

[46] *See* Reply on Partial Annulment at paras. 27-28.

[47] *See* Reply on Partial Annulment at para. 27.

[48] **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 86 (emphasis added).

committee found that the tribunal had impermissibly reintroduced a jurisdictional requirement to pursue local remedies to access arbitration, thereby modifying the scope of the parties' consent and erecting a decisive bar to treaty liability.[49] No comparable error exists here. The Tribunal in this case did not impose any extraneous requirement, nor did it alter the scope of consent under the TPA; it acted squarely within its mandate in determining the consequences of its jurisdictional analysis.

41. Claimant's reliance on *Malaysian Historical Salvors* and *Khudyan* is likewise misplaced. Both decisions arose in materially different circumstances to this case, involving tribunals that failed to address threshold jurisdictional requirements—specifically, whether the claimant qualified as an "investor" or whether the alleged investment satisfied the treaty definition of an "investment."[50] The present case bears no resemblance to that scenario. Here, the Tribunal squarely exercised its jurisdictional function: it interpreted Article 22.3.1 of the TPA, applied the VCLT, and concluded—on the basis of a reasoned analysis—that the penalties and interest which Claimant claimed constituted "taxation measures" excluded from the TPA's scope.

42. In any event, as with the *Vivendi I* and *Helnan* decisions, even under Claimant's erroneous premise that the Tribunal upheld jurisdiction over the penalties and interest claims relating to the Royalty Assessments (it did not), the decisions do not support Claimant's case:

- The *ad hoc* committee in *Khudyan* confirms—rather than undermines—Respondent's position that a finding of excess of powers does not automatically warrant annulment. *Khudyan* makes clear that annulment under Article 52(1)(b) of the ICSID Convention is discretionary and requires an assessment of "whether the excess of power was sufficiently grave that it could have made a difference to the outcome of the case."[51] That approach is directly applicable here. As explained in Respondent's Counter-Memorial on Partial Annulment and Section IV below, had the tribunal upheld jurisdiction and ruled on the merits of Claimant's penalties and interest claims on Royalty Assessments, it would have ruled in favor of Perú—namely that Perú was under no obligation

[49] *See* **AALA-8**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, June 14, 2010, at paras. 46-55.

[50] *See* Counter-Memorial on Partial Annulment at para. 159.

[51] **RALA-20**, *Edmond Khudyan v. Republic of Armenia*, ICSID Case No. ARB/17/36, Decision on Annulment, July 21, 2023, at para. 226 (emphasis added).

to waive penalties and interest based on alleged "reasonable doubt" including because the language of the applicable law and regulation was clear and, therefore, Perú did not breach the TPA.[52]

- As regards *Malaysian Historical Salvors*, the circumstances that led the *ad hoc* committee to annul the award in that case are fundamentally different from those presented here. In *Malaysian Historical Salvors*, the tribunal rendered a jurisdiction-only award and declined jurisdiction based on its interpretation of the treaty definition of "investment," without any consideration of the merits.[53] Annulment therefore necessarily affected the entirety of the claimant's case, because jurisdiction was the sole basis for dismissal and no alternative or independent merits reasoning existed. The situation in this case is the opposite. The Tribunal rendered a final award dismissing all of Claimant's claims on jurisdiction or on the merits, and its reasoning on the merits demonstrates that the claims relating to penalties and interest—whether arising from Tax or Royalty Assessments—would, in any event, have failed on the merits.[54] The Award therefore contains an independent and sufficient basis for dismissal of Claimant's penalties and interest claims on Royalty Assessments that would remain unaffected by any hypothetical annulment.

43. *Finally*, Claimant suggests that Respondent's reliance on decisions such as *Duke Energy*, *Sodexo*, and *(DS)2* is misplaced because Claimant does not challenge the correctness of the Tribunal's jurisdictional reasoning.[55] That argument misses the point. The parties plainly disagree as to the Tribunal's conclusions on jurisdiction over the penalties and interest claims relating to Royalty Assessments, and that disagreement itself reflects opposing interpretations of the Award. As *Sodexo*, *Duke Energy*, and *(DS)2* make clear, such debatable interpretations of a tribunal's jurisdictional findings are not susceptible to annulment.[56] Where a jurisdictional

[52] *See* Counter-Memorial on Partial Annulment at Section VIII.B.

[53] *See generally* **AALA-7**, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, April 16, 2009.

[54] *See infra* at Section V.B.

[55] *See generally* Reply on Partial Annulment at para. 27(d).

[56] *See* Counter-Memorial on Partial Annulment at paras. 143, 161. *See also* **RALA-19**, *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment, May 7, 2021, at para. 93 ("An *ad hoc* committee must be mindful of and, therefore, respect the tribunal's margin of appreciation, rather than undertake a *de novo* evaluation of the facts and law supporting the tribunal's jurisdiction. It need only be satisfied that the decision on jurisdiction is clearly neither unreasonable nor untenable. A debatable solution is not subject to annulment since the excess of powers would not then be "manifest.") (emphasis added); **RALA-14**, *Duke Energy International Peru*

decision is reasonably open to more than one interpretation, any alleged excess of powers cannot be "manifest" (*i.e.*, a debatable solution cannot justify annulment). Accordingly, if the Committee were to conclude—as Respondent submits it should—that the Tribunal's jurisdictional determination admits more than one plausible interpretation, Claimant's request for annulment must fail.

2. In Any Event, Any Alleged Excess of Powers Was Not Manifest and Cannot Justify Annulment

44. Claimant contends that Article 52(1)(b) requires only that an excess of powers be obvious, not "serious," and asserts that the alleged excess needs to be apparent on the face of the Award.[57] Claimant further argues that, even under Respondent's articulation of the standard, the Tribunal's purported excess of powers would in any event be sufficiently serious and that the Committee should disregard whether the alleged defect had any impact on the outcome of the case.[58] Claimant's position is untenable. As explained in Respondent's Counter-Memorial on Partial Annulment,[59] and as further explained below, even if an excess of powers had occurred (*quod non*), it would not be "manifest" within the meaning of Article 52(1)(b), and, in particular, it would not justify annulment since it could not have affected the outcome of the case.

45. As explained in Section II.A *supra*, Respondent's position is that an excess of powers must be manifest, *i.e.*, be clear or obvious and substantially serious (*i.e.*, have material or outcome-determinative consequences in the case, consistent with the object and purpose of annulment). This position is well grounded in ICSID jurisprudence and commentary as detailed

Investments No. 1, Limited v. Republic of Peru, ICSID Case No. ARB/03/28, Decision of the *Ad Hoc* Committee, March 1, 2011, at para. 99; **RALA-50**, *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Decision on the Annulment Application, October 14, 2022, at para. 130.

[57] *See generally* Reply on Partial Annulment at Section II.B.

[58] *See generally* Reply on Partial Annulment at Section II.B.

[59] *See* Counter-Memorial on Partial Annulment at paras. 163-66.

in Section II.A.[60] It reflects the settled understanding that annulment is an exceptional remedy and that *ad hoc* committees retain discretion in determining whether an established excess of powers warrants annulment, particularly where the alleged error had no impact on the tribunal's dispositive reasoning.[61]

46. Contrary to Claimant's allegations,[62] assessing whether any alleged excess of powers was serious or outcome-determinative in this case does not require the Committee to speculate about hypothetical scenarios or to substitute its own judgment for that of the Tribunal. Instead, the fact that the alleged excess of powers Claimant alleges was not serious or outcome-determinative follows directly from the Award itself, not from conjecture. The Tribunal's reasoning demonstrates that, even assuming *arguendo* that it had jurisdiction over Claimant's claims concerning penalties and interest on Royalty Assessments (it did not), those claims could and indeed would in any event have failed on the merits, for the reasons set out in detail in Respondent's Counter-Memorial on Partial Annulment and summarized briefly below for the sake of convenience:

- The language in the Mining Law and its Regulations was clear: mining stabilization agreements provided stability guarantees only to the investment project for which the agreement was entered into.[63]
- The Stabilization Agreement likewise unambiguously granted stability only to the Leaching Project and did not extend to the Mining or Beneficiation Concessions as a whole.[64]

[60] *See supra* at Section II.A.

[61] *See infra* at Section V.

[62] *See* Reply on Partial Annulment at paras. 34-35.

[63] *See* **AA-1**, *Freeport* Award, at para. 717. *See also* Counter-Memorial on Partial Annulment at para. 283.

[64] *See* **AA-1**, *Freeport* Award, at paras. 813-14. *See also* Counter-Memorial on Partial Annulment at para. 283.

- The scope of mining stabilization agreements was already defined under the original Mining Law, and the 2014 amendment did not modify that rule.[65]
- SUNAT consistently treated mining stabilization agreements as limited to the investment project for which the agreement was entered into.[66]

47. The Tribunal's findings summarized above confirm that the Tribunal had no doubt that the Stabilization Agreement did not cover the Concentrator Project. Accordingly, the Tribunal has already decided, on the merits, the very issue on which Claimant's annulment argument is based: there was no reasonable doubt about the scope of the Stabilization Agreement that would justify the waiver of penalties and interest on Royalty Assessments. The Tribunal already explained why Freeport's position failed, and nothing in the Award suggests that a different result could have followed had the Tribunal articulated its jurisdictional conclusions differently.

48. More critically, Claimant's claim that SMCV was entitled to a waiver of interest and penalties under the "reasonable doubt" doctrine in Article 170 of the Peruvian Tax Code has no merit. As Respondent explained in its Counter-Memorial on Partial Annulment,[67] according to the Peruvian Tax Code, taxpayers could request the non-application of interest and penalties in cases of "reasonable doubt" or conflicting criteria in accordance with the provisions of Article 170.[68] Article 170 circumscribes the possibility of a waiver to two specific situations.[69] First, a waiver based on "reasonable doubt" is available only where: (i) there has been a misinterpretation of a law or regulation such that the underlying assessment would not have been issued but for that misinterpretation; (ii) the Government subsequently issues a clarification correcting that

[65] *See* **AA-1**, *Freeport* Award, at para. 707. *See also* Counter-Memorial on Partial Annulment at para. 283.

[66] *See* **AA-1**, *Freeport* Award, at para. 716.

[67] *See* Counter-Memorial on Partial Annulment at para. 57.

[68] **AA-1**, *Freeport* Award, at para. 976.

[69] *See* Counter-Memorial on Partial Annulment at para. 57. *See also* **AA-1**, *Freeport* Award, at para. 976.

misinterpretation; and (iii) the clarification explicitly states it is issued under Article 170 of the Tax Code and is published in *El Peruano* (the official gazette) (Article 170.1).[70] Second, a waiver may apply where SUNAT has applied or interpreted a rule inconsistently over time (Article 170.2).[71] None of these criteria is met in this case. Furthermore, any suggestion of "reasonable doubt" regarding the interpretation of the scope of the Mining Law and its Regulations is untenable in light of the fact that multiple courts and tribunals have examined and rejected Freeport's position on the same issue.[72]

49. Even if one were to accept Claimant's contention that "manifest" in Article 52(1)(b) means only "obvious" or "clear" and not "substantially serious" or outcome determinative, that does not assist Claimant's position.

50. *First*, Claimant defines "manifest" as meaning "obvious on the face of the Award,"[73] but the Award, read as a whole, reveals no such obvious excess of powers. The Award expressly holds that penalties and interest constitute "taxation measures" excluded by Article 22.3.1 of the TPA, and paragraph 986 confirms the Tribunal's lack of jurisdiction over claims "in relation to the Respondent's assessment of penalties and interest"[74]—without making any distinction between penalties and interest derived from Tax Assessments or Royalty Assessments. At a minimum, Claimant's position requires cherry-picking selected passages over others and

[70] *See* **AA-1**, *Freeport* Award, at para. 976.

[71] *See* **AA-1**, *Freeport* Award, at para. 976.

[72] *See* **AA-1**, *Freeport* Award, at Annex A Respondents Rejoinder on the Merits and Reply on Jurisdiction, at pp. 339-48 (PDF) (listing all of the individual instances in which Claimant sought to set aside SUNAT's assessments). The first instance court's ruling in the 2008 Royalty Assessment Case stands as the sole instance in which SMCV's legal challenges prevailed, and that decision was later overturned.

[73] Reply on Partial Annulment at para. 10.

[74] **AA-1**, *Freeport* Award, at para. 986.

disregarding the Tribunal's own characterization of its jurisdiction—an approach that is the very opposite of identifying an obvious or self-evident excess of powers.

51. *Second,* in any event, the authorities cited by Claimant itself, together with numerous other annulment decisions, confirm that, when considering whether to annul or partially annul an award for a manifest excess of powers, *ad hoc* committees must assess whether the alleged excess had a material impact on the outcome of the case. Some committees treat this inquiry as inherent in the requirement that the excess be "manifest;"[75] while others address it as a distinct step, including the *ad hoc* committee in *Khudyan,* on which Claimant itself relies.[76] The same approach was articulated by the *ad hoc* committee in *Vivendi I,* also cited by Claimant, which held that "it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power."[77] That condition is not met here. For the reasons explained above and in Respondent's Counter-Memorial on Partial Annulment, any alleged excess of powers—however framed—could not have affected the Tribunal's dismissal of Claimant's claims concerning penalties and interest on Royalty Assessments and, therefore, cannot justify annulment.[78]

52. In conclusion, Article 52(1)(b) of the ICSID Convention provides no basis for annulment in this case. Claimant has, once again, failed to demonstrate that the Tribunal exceeded its powers, much less that the Tribunal did so manifestly and, thus, Claimant's Article 52(1)(b) claim must be dismissed.

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[75] *See supra* Section II.A.

[76] *See supra* at para. 42. *See also* Reply on Partial Annulment at para. 27(c).

[77] **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 86.

[78] *See supra* at para. 46.

III. CLAIMANT HAS NOT SHOWN THAT THE TRIBUNAL FAILED TO STATE REASONS IN ITS AWARD IN ACCORDANCE WITH ARTICLE 52(1)(E) OF THE ICSID CONVENTION

53. In its Counter-Memorial on Partial Annulment, Respondent demonstrated that Claimant's claims under Article 52(1)(e) fail because, when reading the Award as a whole, the Tribunal's decision regarding Freeport's penalties and interest claims on Royalty Assessments is reasoned, and any implicit steps in the Tribunal's reasoning can readily be inferred and, where necessary, reconstructed by the Committee.[79]

54. In its Reply on Partial Annulment, Claimant continues to allege that the Award purportedly failed to provide any reasoning for dismissing Freeport's claims based on penalties and interest on Royalty Assessments and that even if the Tribunal's reference in paragraph 986 could be treated as reasoning with respect to Claimant's penalties and interest claims on Royalty Assessments, that reasoning is allegedly contradictory and, thus, insufficient.[80] Claimant's claims are without merit.

55. As set out below, Respondent demonstrates, first, that Article 52(1)(e) establishes a more rigorous standard for what constitutes a "failure to state reasons" than Claimant submits (**Section III.A**); and, second, that Freeport's factual allegations under Article 52(1)(e) do not withstand scrutiny (**Section III.B**).

A. CLAIMANT CONTINUES TO MISSTATE KEY ASPECTS OF THE STANDARD UNDER ARTICLE 52(1)(E)

56. Both parties agree that the duty to state reasons is satisfied when the reader can follow how the tribunal proceeded from "point A to point B."[81] Claimant also accepts that reasons

[79] *See* Counter-Memorial on Partial Annulment at Section V.

[80] *See* Reply on Partial Annulment at Section III.

[81] Reply on Partial Annulment at para. 38. *See also* Counter-Memorial on Partial Annulment at paras. 172, 181, 195.

may be implicit but contends that such reasons are permissible only where they can be "inferred from the terms used in the decision" and not "reconstructed after the fact."[82] That formulation mischaracterizes the applicable standard. In addition, as explained below, Claimant offers a selective and incomplete characterization of the *Wena* decision and overlooks important nuances of the standard under Article 52(1)(e).

57. *First*, while Respondent agrees that any inference drawn by an *ad hoc* committee to discern a tribunal's reasoning should ordinarily be grounded in the award, *ad hoc* committees have also recognized that, where appropriate, such inferences can be drawn from the record. In this respect, the *Rumeli ad hoc* committee held that "[t]he Committee is not limited in its review of the Award under Article 52(1)(e) of the ICSID Convention to the text of the Award alone, but rather should seek to understand the motivation of the Award in the light of the record before the Tribunal,"[83] adding that "in appropriate cases, it should do so."[84] In this case, even if certain aspects of the Tribunal's reasoning were implicit, the Tribunal's reasons can be inferred both from the Award and the record as discussed in Section V.B below.

58. *Second,* it is also incorrect to suggest that an annulment committee may not "reconstruct" a tribunal's reasoning; the applicable standard is more nuanced than Claimant portrays it to be. As some of the annulment decisions relied upon by Claimant—including *Vivendi II*, *Soufraki*, and *Wena*[85]—make clear, *ad hoc* committees have discretion to explain, clarify, or supplement a tribunal's reasoning, rather than annul an award, where that reasoning is discernible

[82] Reply on Partial Annulment at para. 47.

[83] **RALA-32**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, March 25, 2010, at para. 179(1) (emphasis added).

[84] **RALA-32**, *Rumeli v. Kazakhstan*, Decision on Annulment, at para. 138 (emphasis added). *See also* **RALA-14**, *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *Ad Hoc* Committee, March 1, 2011, at para. 205.

[85] *See* Reply on Partial Annulment at para. 47 n. 97.

from the award when read as a whole.[86] In that sense, an *ad hoc* committee may, where appropriate, "reconstruct" the tribunal's reasoning.

59. Numerous *ad hoc* committees have reached similar conclusions.[87] For example, the *ad hoc* committee in *Micula v. Romania* confirmed that "[e]ven where reasons on a particular point are missing, a committee may, in certain circumstances, reconstruct the reasons."[88] Along the same lines, the annulment committee in *Cortec Mining v. Kenya* considered its role to be to "interpret an award in a manner that validates its reasoning," and if necessary to "explain the reasons supporting the tribunal's conclusion."[89]

60. *Third*, with respect to the *Wena* annulment decision, Claimant contends that Respondent's reliance on the decision is misplaced, because paragraph 81 of that decision states that implied reasons are acceptable only if they can be inferred from the terms of the decision.[90]

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[86] *See* **RALA-6**, *Soufraki v. UAE*, Decision on Annulment, at para. 24 ("For example, as regards the ground that the award has failed to state the reasons on which it is based, if the *ad hoc* Committee can **'explain'** the Award by clarifying reasons that seemed absent because they were only implicit, it should do so.") (emphasis added); **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, at para. 248 (It is "understood that in the matter of adequate reasoning, upon a hearing, an ICSID *ad hoc* Committee may, if it deems it necessary, further **explain, clarify, or supplement** the reasoning given by the Tribunal rather than annul the decision.") (emphasis added); **RALA-8**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award, February 5, 2002, at para. 83 ("If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the ad *hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions **can be explained by the *ad hoc* Committee itself**.") (emphasis added).

[87] *See, e.g.*, **RALA-32**, *Rumeli v. Kazakhstan*, Decision on Annulment, at paras. 83, 138, 179(1). *See also* **RALA-12**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (Tanesco)*, ICSID Case No. ARB/10/20, Decision on the Application for Annulment, August 22, 2018, at paras. 157-58; **RALA-5**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015 ("*Tulip v. Turkey*, Decision on Annulment"), at para. 108.

[88] **RALA-63**, *Ioan Micula, Viorel Micula, and Others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016, at para. 138 (emphasis added).

[89] **RALA-64**, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Application for Annulment, March 19, 2021 ("*Cortec Mining v. Kenya*, Decision on Application for Annulment"), at para. 228(d) (emphases added).

[90] *See* Reply on Partial Annulment at para. 49.

Claimant attempts to distinguish the *Wena* decision by asserting that no inference is possible in this case with respect to the claims concerning penalties and interest on Royalty Assessments.[91] Claimant's distinction fails. Contrary to Claimant's assertions, as explained in Respondent's Counter-Memorial on Partial Annulment and in Section III.B below, the Tribunal's reasoning is plainly discernible when the Award is read as a whole.[92]

61. In any event, Claimant conveniently omits a critical aspect of the *Wena* decision. In paragraph 83—a passage Claimant conspicuously ignores despite Respondent's express reliance on it in its Counter-Memorial on Partial Annulment[93]—the *ad hoc* committee made clear that even where a deficiency in reasoning is present, annulment is not automatic. Specifically, the committee emphasized that "[i]t is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award . . . [if] . . . the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself."[94] That passage confirms precisely the point that Respondent advances: *ad hoc* committees enjoy discretion to clarify, explain, infer or reconstruct a tribunal's reasoning where it is reasonably ascertainable, rather than annul the award. Claimant's selective reading of *Wena* does not undermine this settled principle.

62. *Finally*, Claimant overlooks another important aspect of the applicable standard under Article 52(1)(e). Numerous *ad hoc* committees—including *Cortec*, *Hydro Energy*, and *CDC Group*—have emphasized that, where possible, annulment committees should interpret an award

[91] *See* Reply on Partial Annulment at para. 49.

[92] *See* Counter-Memorial on Partial Annulment at Section II.C.2 and *infra* Section III.B.

[93] *See* Counter-Memorial on Partial Annulment at para. 174.

[94] **RALA-8**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award, February 5, 2002, at para. 83 (emphases added).

in a manner that upholds and validates the tribunal's reasoning.[95] That principle is equally applicable in the present case, as Respondent further explains in the following section.

B. THE TRIBUNAL DID NOT FAIL TO STATE REASONS WHEN IT REJECTED, FOR LACK OF JURISDICTION, CLAIMANT'S CLAIMS ON PENALTIES AND INTEREST ON ROYALTY ASSESSMENTS

1. The Tribunal Stated Its Reasons for Rejecting Claimant's Claims Concerning Penalties and Interest for Lack of Jurisdiction

63. *First,* Claimant argues that the Award must be annulled under Article 52(1)(e) because, after allegedly affirming jurisdiction over Freeport's penalties and interest claims on Royalty Assessments, the Tribunal failed to decide them on the merits and purportedly failed to state reasons for their dismissal.[96] Claimant also argues that Respondent "concedes that the Award contains no reasoning for the Tribunal's failure to decide the Royalty penalties and interest claims on the merits."[97] Claimant's arguments do not withstand scrutiny and misstate Respondent's position.

64. The Tribunal expressly explained why it did not analyze Claimant's penalties and interest claims on Royalty Assessments on the merits: because it concluded that it lacked jurisdiction over claims relating to penalties and interest, which it found to constitute "taxation measures" within the meaning of Article 22.3.1 of the TPA.[98]

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[95] *See* **RALA-64**, *Cortec Mining v. Kenya*, Decision on Application for Annulment, at para. 228(d) ("Where possible, an annulment committee should interpret an award in a manner that validates its reasoning.") (emphasis added); **RALA-65**, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on the Kingdom of Spain's Application for Annulment, March 20, 2023, at para. 399 (*citing Cortec Mining v. Kenya*, "The committee's role is 'to interpret an award in a manner that validates its reasoning,' and, if necessary, 'to explain the reasons supporting the tribunal's conclusion.'") (emphasis added); **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 81 (Committees should "construe the language in issue, whenever possible, in a way that results in consistency.") (emphasis added).

[96] *See* Reply on Partial Annulment at para. 41.

[97] Reply on Partial Annulment at para. 38.

[98] *See infra* at para. 69.

65. That conclusion is plainly stated in paragraph 986 of the Award, where the Tribunal, (i) in addressing Claimant's allegation that "Respondent violated Article 10.5 of the TPA each time it failed to waive the penalties and interest assessments against SMCV for the Royalty and Tax Assessments,"[99] (ii) recalled its earlier jurisdictional finding and confirmed that "[t]he Tribunal has therefore no jurisdiction to decide on the merits of the Claimant's claim based on the Respondent's alleged violation of Article 10.5 of the TPA in relation to the Respondent's assessment of penalties and interest."[100] Importantly, the Tribunal made no distinction between Tax and Royalty Assessments. The absence of a separate merits analysis is not a lacuna in the Award, as Claimant asserts,[101] but, rather, the direct and logical consequence of the Tribunal's jurisdictional determination.

66. Also, contrary to Claimant's assertion,[102] paragraph 986 of the Award is not a mere cross-reference to the jurisdictional section of the Award. Rather, it reflects the Tribunal's legal conclusion—reached following its interpretation of Article 22.3.1 of the TPA—that penalties and interest fall outside the scope of its jurisdiction, with the result that no analysis on the merits was required. Whether Claimant agrees with that conclusion is immaterial for purposes of annulment. What is relevant is that following the standard under Article 52(1)(e), as explained *supra*, annulment committees should interpret an award in a manner that upholds and validates the tribunal's reasoning.[103]

[99] **AA-1**, *Freeport* Award, at para. 967 (emphasis added).

[100] **AA-1**, *Freeport* Award, at para. 986 (emphasis added).

[101] *See* Reply on Partial Annulment at para. 18.

[102] *See* Reply on Partial Annulment at para. 41.

[103] *See supra* at paras. 58-62.

67. *Second*, Claimant asserts that Respondent's position—that the Award dismissed jurisdiction over Claimant's penalties and interest claims on Royalty Assessments—fails, and further contends that, even if the Tribunal did decline jurisdiction over those claims, the Award contains no reasoning to support such a conclusion. Both contentions are incorrect.[104]

68. As Respondent has explained,[105] the Award—when read as a whole as required[106]—should be understood as dismissing jurisdiction over claims concerning penalties and interest related to the Royalty Assessments. Contrary to Claimant's characterization,[107] the Tribunal's reasoning concerning penalties and interest claims on Royalty Assessments is not confined to the jurisdictional section addressing penalties and interest claims on the Tax Assessments in isolation. That analysis must be read together with other sections of the Award as a whole, including the relevant passages discussed in Section II.C.2 of Respondent's Counter-Memorial on Partial Annulment, and in light of the record before the Tribunal.[108] When the Award is read in its entirety, the Tribunal's reasoning and conclusions are clear and coherent.

69. Claimant seeks to confine its criticism of the Tribunal's reasoning to a single paragraph of Respondent's Counter-Memorial on Partial Annulment that summarizes the Tribunal's analysis,[109] selectively engaging with that brief summary while disregarding the Tribunal's fuller and more detailed reasoning set out in the Award, as well as the more extensive

[104] *See* Reply on Partial Annulment at para. 42.

[105] *See supra* at Section II.A.

[106] *See* Counter-Memorial on Partial Annulment at paras. 174, 181, 203. *See also* **RALA-9**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, March 28, 2022, at para. 325; **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 76 ("In undertaking its review, a committee must look to the totality of an award to understand the motivation of the decision, and not just particular parts.").

[107] *See* Reply on Partial Annulment at para. 43.

[108] *See supra* at para. 57.

[109] *See* Reply on Partial Annulment at paras. 44-45.

explanations and summaries provided elsewhere in Respondent's Counter-Memorial on Partial Annulment—all of which squarely contradict Claimant's allegations. The Award enables the reader to follow the Tribunal's reasoning step by step—from its interpretation of the tax carve-out to its decision not to engage with the merits of Claimant's penalties and interest claims. For the Committee's convenience, Respondent summarizes that reasoning below:

- In the jurisdictional section of the Award, the Tribunal framed the issue as follows: "Are Claimant's claims based on penalties and interest outside of the Tribunal's jurisdiction because they constitute '*taxation measures*' which are excluded from the scope of the TPA under Article 22.3.1 of the TPA?"[110] In posing that question, the Tribunal did not distinguish between penalties and interest arising from Tax Assessments and those arising from Royalty Assessments.

- The Tribunal then conducted a detailed analysis beginning in paragraph 540 of the Award examining the ordinary meaning of "taxation measures," the context of Article 22.3.1, and the object and purpose of the TPA.[111]

- Applying the VCLT, the Tribunal interpreted the term "taxation measures" and concluded that "taxation" is broader than "tax."[112] Relying on comparative investment treaty jurisprudence and the purpose of the TPA, the Tribunal found that "taxation" could encompass not only taxes *stricto sensu*, but it could broadly encompass laws, regulations, procedures, requirements, or other practices related to revenue-generating actions within a State's authority—including enforcement mechanisms such as penalties and interest.[113]

- Thus, the Tribunal concluded that penalties and interest—though not classified as taxes under Peruvian law—are nonetheless integral components of Perú's domestic tax regime and qualify as "taxation measures" under the TPA.[114] Based on the aforementioned analysis, the Tribunal determined in paragraph 553 of the Award that Claimant's claims under Article 10.5 of the TPA concerning penalties and interest on SMCV's Tax Assessments were excluded from its jurisdiction pursuant to the carve-out in Article 22.3.1.

[110] **AA-1**, *Freeport* Award, at para. 455.b (emphasis added).

[111] *See* **AA-1**, *Freeport* Award, at paras. 540 *et seq*.

[112] **AA-1**, *Freeport* Award, at paras. 545-47. *See also* Counter-Memorial on Partial Annulment at para. 184.

[113] *See* **AA-1**, *Freeport* Award, at para. 547. *See also* Counter-Memorial on Partial Annulment at para. 185.

[114] *See* **AA-1**, *Freeport* Award, at para. 548. *See also* Counter-Memorial on Partial Annulment at para. 194.

- This jurisdictional ruling, however, was not confined to Tax Assessments alone. The Tribunal reaffirmed in paragraph 986 that penalties and interest, in general, qualify as "taxation measures," and thus fall outside its jurisdiction.[115] Crucially, when so doing, the Tribunal made no distinction between Tax and Royalty Assessments.[116] Paragraph 986 serves as the conclusion to a section addressing Claimant's "claims that the Respondent violated Article 10.5 of the TPA each time it failed to waive the penalties and interest assessments against SMCV for the Royalty and Tax Assessments."[117] Thus, there is no question that the Tribunal was reaffirming in this section its conclusion on jurisdiction—*i.e.*, that penalties and interest as a general matter (whether based on Tax or Royalty Assessments) were outside the Tribunal's jurisdiction.

70. In its Reply on Partial Annulment, Claimant suggests that if it were true that the Tribunal adopted a broad definition of "taxation measures" as any "revenue-generating mechanism under the authority of the State" then the Tribunal would necessarily have required the dismissal of all royalty-related claims.[118] Claimant's allegation is misleading, mischaracterizes Respondent's arguments, and cannot be reconciled with the Tribunal's reasoning.

71. The Tribunal's jurisdictional analysis was expressly confined to analyzing whether the imposition of penalties and interest could be considered a "taxation measure" under the TPA.[119] In that context, the Tribunal explained that "taxation measures" under Article 22.3.1 encompass not only the imposition of taxes, but also the regime for the imposition and enforcement of a tax.[120] It was on that basis—namely, that penalties and interest operate as enforcement measures imposed by SUNAT, rather than merely because they may generate revenue in the abstract—that the Tribunal concluded they fall within the scope of the tax carve-out under the TPA.

[115] *See* **AA-1**, *Freeport* Award, at para. 986. *See also* Counter-Memorial on Partial Annulment at paras. 192-93.

[116] *See* **AA-1**, *Freeport* Award, at para. 986. *See also* Counter-Memorial on Partial Annulment at paras. 192-93.

[117] **AA-1**, *Freeport* Award, at para. 967 (emphasis added).

[118] Reply on Partial Annulment at para. 44.

[119] *See* **AA-1**, *Freeport* Award, at paras. 540 et seq.

[120] *See* **AA-1**, *Freeport* Award, at para. 548.

72. Royalties, in contrast, were neither analyzed by the Tribunal as falling within the Article 22.3.1 carve-out nor characterized as enforcement mechanisms. While the Tribunal noted that the tribunal in *Link Trading v. Moldova* considered the term "taxation" to encompass "other forms of raising revenue that are within the State's powers,"[121] that observation does not extend to "all" forms of State revenue, nor did the Tribunal in this case conclude that royalties themselves are taxation measures.

73. The Tribunal's Article 22.3.1 analysis rested instead on the enforcement character of penalties and interest, which it found to be inseparable from the State's fiscal enforcement framework under international law. That analysis does not depend on royalties being "taxation measures" under the TPA. This distinction explains why the Tribunal both (i) exercised jurisdiction over Freeport's royalty-based claims under Article 10.5 and addressed them on the merits, and (ii) simultaneously declined jurisdiction over claims concerning penalties and interest, which it found fell within the tax carve-out.

74. *Third*, Claimant argues that, even if the Tribunal's reasoning concerning Freeport's penalties and interest claims regarding Royalty Assessments may be implicit, no such reasoning can be discerned in this case, and that an *ad hoc* committee may not "reconstruct" the Tribunal's reasoning.[122] That position is incorrect. As explained in detail in Respondent's Counter-Memorial on Partial Annulment and as set out at the beginning of this Section, the Award contains a clear and coherent chain of reasoning addressing the claims at issue, which, in any event, the Committee

[121] **AA-1**, *Freeport* Award, at para. 547 (emphasis added).

[122] *See* Reply on Partial Annulment at para. 47.

can explain, supplement, and reconstruct,[123] prioritizing and validating when possible the reasoning of the Tribunal.[124]

75. *Finally,* contrary to Claimant's allegations in its Reply on Partial Annulment, the decisions in *Perenco* and *CMS* are not relevant for this case and do not concern "similar circumstances" as Claimant suggests.[125] In those cases, the *ad hoc* committees annulled the awards, because the tribunals had failed to provide any reasoning at all. Here, in contrast, the Tribunal's reasoning is apparent when the Award is read as a whole and can, in any event, be inferred and reconstructed, as explained in Section III.A above.

2. The Tribunal's Decision to Reject, for Lack of Jurisdiction, Claimant's Claims on Penalties and Interest on Royalty Assessments Is Not Contradictory

76. Claimant alleges in its Reply on Partial Annulment that, even on Respondent's theory, treating the Award as dismissing Claimant's Royalty penalties and interest claims would purportedly still result in annulment, because the reasoning of the Award would be contradictory.[126] That is incorrect.

77. *First*, Claimant alleges that "treating paragraph 986 as 'reasoning' would put the Award in direct conflict with its jurisdictional findings in the *dispositif*."[127] As Respondent explained in its Counter-Memorial on Partial Annulment,[128] the Tribunal's statement in the *dispositif* that "[it] [had] jurisdiction over the Claimant's claims except for the Claimant's claims

[123] *See supra* at paras. 58-59.

[124] *See supra* at para. 62.

[125] *See* Reply on Partial Annulment at para. 48.

[126] *See* Reply on Partial Annulment at para. 47.

[127] Reply on Partial Annulment at para. 52.

[128] *See* Counter-Memorial on Partial Annulment at paras. 201-03.

based on the disputed Tax Assessments' penalties and interest"[129] does not reflect any contradiction but is a mere typographical or clerical error, not an error of substance. The absence of an explicit reference in the *dispositif* to the Tribunal's lack of jurisdiction over claims concerning penalties and interest on Royalty Assessments does not negate or cancel out the conclusions reached in the jurisdiction and merits sections of the Award.

78. *Second*, Claimant argues that Respondent's reliance on the principle that the Award must be read "as a whole" is misplaced, asserting that—even on Respondent's own case—the Award's jurisdictional and merits reasoning cannot be reconciled without what it characterizes as impermissible reconstruction.[130] That contention is unfounded. As Respondent has explained in Sections II.B and III.B.1 above, the Tribunal's reasoning can be followed coherently across the Award, and, as further set out in Section III.A, reconstruction, explanation, or supplementation of the Award by an *ad hoc* committee is both permissible and, where appropriate, required to give effect to the meaning adopted by the Tribunal.[131] In this case, deciding in favor of annulment would allow ClaBimant to resubmit for the seventh time its claims to a new tribunal.[132] In light of this, and in order to preserve the finality of ICSID awards, the Committee should favor an interpretation of the Award that preserves its internal coherence and gives effect to the Tribunal's reasoning as a whole.

79. *Third*, Claimant fails, once again, to show that *ad hoc* committees have confirmed that annulment is appropriate where the tribunal's reasoning is contradictory in circumstances

[129] **AA-1**, *Freeport* Award, at para. 1047.a.

[130] *See* Reply on Partial Annulment at para. 53.

[131] *See supra* at Section III.A.

[132] *See* **AA-1**, *Freeport* Award, at Annex A to Respondents Rejoinder on the Merits and Reply on Jurisdiction, at pp. 339-48 (PDF) (listing all of the individual instances in which Claimant sought to set aside SUNAT's assessments). The first instance court's ruling in the 2008 Royalty Assessment Case stands as the sole instance in which SMCV's legal challenges prevailed.

allegedly similar to those in this case.[133] The authorities on which Claimant relies—*Pey Casado*, *Tidewater*, and *MINE II*—are inapposite. In each of those cases, the tribunal expressly rejected a legal position and then adopted that very same position elsewhere in the award.[134] That is not what occurred here. The Tribunal never stated that it had jurisdiction over the claims concerning penalties and interest on Royalty Assessments and then negated that conclusion in its reasoning. To the contrary, the Tribunal expressly affirmed its lack of jurisdiction in paragraph 986 of the Award. As explained above, the inconsistency alleged by Claimant stems solely from a clerical error in the *dispositif*, not from any contradiction in the Tribunal's reasoning.

3. Even If the Committee Were to Find that the Tribunal Failed to Expressly State Reasons (It Should Not), the Committee Should Deny Claimant's Request to Partially Annul the Award

80. In any event, as Respondent explained in its Counter-Memorial on Partial Annulment,[135] and as explained in Section V.B below, even assuming *arguendo* that the Tribunal had jurisdiction and did not expressly address the penalties and interest claims on Royalty Assessments on the merits, annulment would still be unwarranted, because the Tribunal rejected the factual and legal premises of those claims, thereby implicitly disposing of them.[136]

81. In sum, the Tribunal's decision was reasoned, and no ground for annulment arises on this basis.

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[133] *See* Reply on Partial Annulment at para. 54.

[134] *See* **AALA-10**, *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, December 18, 2012, at para. 285; *see also* **AALA-13**, *Tidewater Investment Srl and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, December 27, 2016, at paras. 193-197; **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 6.107.

[135] *See* Counter-Memorial on Partial Annulment at para. 204.

[136] *See infra* at Section V.B.

IV. CLAIMANT CANNOT DEMONSTRATE THAT THE TRIBUNAL SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE UNDER ARTICLE 52(1)(D) OF THE ICSID CONVENTION WHEN IT REJECTED FREEPORT'S CLAIMS REGARDING PENALTIES AND INTEREST ON ROYALTY ASSESSMENTS

82. In its Reply on Partial Annulment, Claimant insists on alleging that the Tribunal seriously departed from a fundamental rule of procedure by failing to rule on the merits of Freeport's claims regarding penalties and interest on Royalty Assessments, despite allegedly affirming jurisdiction over those claims.[137] Similarly, Claimant maintains that even if the Tribunal dismissed those claims for lack of jurisdiction, it did so without affording Freeport an opportunity to be heard, thereby allegedly committing a serious departure from a fundamental rule of procedure.[138] Despite its repeated assertions, Claimant's contention remains without merit.

83. The Tribunal did not depart from a fundamental rule of procedure. Perú demonstrated in its Counter-Memorial on Partial Annulment that the Tribunal resolved all claims within its jurisdiction, acted fully within the governing legal framework of the case when it dismissed for lack of jurisdiction Claimant's penalties and interest claims regarding both Tax and Royalty Assessments, and afforded both parties a full opportunity to be heard.[139] Claimant's attempt to recast its disagreement with the Tribunal's reasoning as a procedural violation is unfounded and falls outside the permissible scope of annulment. Moreover, even assuming *arguendo* that such a departure occurred—which it did not—Claimant has failed to demonstrate that any such departure was serious.

84. In the sections that follow, Respondent demonstrates that (i) the Tribunal did not violate Claimant's right to be heard by adopting its own reasoning and, thus, did not depart from

[137] *See* Reply on Partial Annulment at para. 57.

[138] *See* Reply on Partial Annulment at para. 57.

[139] *See* Counter-Memorial on Partial Annulment at Section VI.

a fundamental rule of procedure (**Section A**); and (ii) any departure by the Tribunal from a fundamental rule of procedure was not serious (**Section B**).

A. THE TRIBUNAL DID NOT VIOLATE CLAIMANT'S RIGHT TO BE HEARD BY ADOPTING ITS OWN REASONING

85. The Tribunal did not violate Claimant's right to be heard in this case. As Respondent demonstrates below, *first*, the Tribunal dismissed all of Claimant's penalties and interest claims on jurisdictional grounds. The Tribunal, therefore, did not fail to decide a claim put before it—an omission that annulment jurisprudence, including the decisions cited by Perú, recognizes as potentially justifying annulment. By contrast, a tribunal's failure to engage with every argument or item of evidence is not an annullable error, and Claimant's attempt to characterize the Tribunal's decision as anything more is unsupported by the record (**Subsection A.1**).

86. *Second*, the Tribunal's decision to reject Claimant's claims related to penalties and interest on Royalty Assessments on the basis that it lacked jurisdiction to hear such claims fell squarely within the legal framework governing the dispute. In reaching that conclusion, the Tribunal did not breach Claimant's right to be heard merely because it relied on legal reasoning that was not expressly argued by the parties. Contrary to Claimant's misleading assertions, annulment jurisprudence—including the decisions cited by Perú in its Counter-Memorial on Partial Annulment—makes clear that the legal framework governing a dispute is not defined, let alone constrained, by the particular arguments pleaded by the parties. In exercising its authority under the principle of *iura novit arbiter*, the Tribunal's reasoning remained within the dispute's legal framework and, consequently, did not infringe the parties' right to be heard (**Subsection A.2**).

87. *Third*, because the interpretation of Article 22.3.1 of the TPA formed an integral part of the dispute's legal framework, the parties could not only reasonably have been expected to address that issue, but in fact were given repeated and ample opportunity to do so over the course of the arbitration. The Tribunal expressly questioned both sides' experts during the hearing, and the parties had the opportunity to address it in closing arguments and post-hearing submissions. Claimant's attempt to gloss over the parties' full opportunity to be heard on this issue is plainly contradicted by the record (**Subsection A.3**).

1. The Tribunal Dismissed All of Claimant's Penalties-and Interest-Related Claims on Jurisdictional Grounds

88. In its Reply on Partial Annulment, Claimant alleges that Perú concedes that "a tribunal's failure to decide a claim before it may, in principle, amount to a departure from a fundamental rule of procedure"[140] and that by allegedly failing to decide Freeport's claims for penalties and interest on Royalty Assessments, the Tribunal failed to determine a claim it was obligated to decide under Article 48(3) of the Convention.[141] Claimant mischaracterizes Respondent's position, and its assertions are without merit.

89. As Respondent explained in its Counter-Memorial on Partial Annulment, not every failure of a tribunal to decide a claim before it amounts to a basis for annulling an award.[142] While some failures may, in principle, constitute a departure from a fundamental rule of procedure, not every failure is annullable. This essential qualification—recognized by annulment committees and

[140] Reply on Partial Annulment at para. 60 (*quoting* Counter-Memorial on Partial Annulment at para. 214).

[141] *See* Reply on Partial Annulment at paras. 60-61.

[142] *See* Counter-Memorial on Partial Annulment at para. 208.

noted by Perú in its Counter-Memorial on Partial Annulment—is one Claimant continues to omit, including in its Reply on Partial Annulment.[143]

90. As Perú noted, *ad hoc* committees have distinguished between a tribunal's failure to resolve a claim, which may justify annulment in certain circumstances, and a tribunal's choice not to address a specific argument put forward in support of that claim, which does not.[144] Claimant does not dispute this distinction.[145] Claimant expressly contends, however, that this is not a case where the Tribunal merely failed to address a particular argument or piece of evidence, but rather one in which it entirely failed to decide claims that were before it; in particular, Claimant's claims stemming from penalties and interest on Royalty Assessments.[146] The Award's text plainly contradicts Claimant's assertion.

91. As Perú demonstrated in its Counter-Memorial on Partial Annulment, the Tribunal did not fail to decide any claim in the Award.[147] The Tribunal concluded in paragraph 986 of the Award that penalties and interest constitute "taxation measures" under the meaning of Article 22.3.1 of the TPA.[148] The Tribunal reached this conclusion through its interpretation of the Treaty under the VCLT in determining the meaning of "taxation measures."[149] Accordingly, it found that

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[143] *See* Counter-Memorial on Partial Annulment at para. 214 (*citing* **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125); **RALA-24**, Stephan W. Schill, Loretta Malintoppi, *et al.* (eds), *Schreuer's Commentary on the ICSID Convention* (Third Edition), Kluwer Law International (2022) (excerpt), at para. 384 (p. 1326).

[144] *See* Counter-Memorial on Partial Annulment at para. 215.

[145] *See* Reply on Partial Annulment at para. 61; *see also id*. para. 62 ("*Third*, the decisions Peru cites for the irrelevant proposition that failing to address a particular argument does not warrant annulment in fact *confirm* that the Tribunal committed an annullable error here.139 Each of those decisions distinguishes between (*i*) a failure to address *every* argument—which may not result in annulment, and (*ii*) a failure to address a *claim*—which does.") (emphasis added).

[146] *See* Reply on Partial Annulment at para. 61.

[147] *See* Counter-Memorial on Partial Annulment at Sections II.C.2 and V.B.1.

[148] *See*, *e.g.*, Counter-Memorial on Partial Annulment at paras. 92-94 (*citing* **AA-1**, *Freeport* Award, at paras. 455.b., 986, 544-53), 153, 181-89.

[149] *See* **AA-1**, *Freeport* Award, at para. 547.

it lacked jurisdiction over Freeport's claims on penalties and interest stemming from both Tax and Royalty Assessments.[150] The Tribunal, therefore, ruled on the claims arising from penalties and interest on Royalty Assessments, dismissing them for lack of jurisdiction, and was consequently not required to examine those claims on the merits. Accordingly, Claimant's allegations are without merit.

92. In its attempt to argue that the Tribunal failed to decide a claim warranting partial annulment of the Award, Claimant also asserts that the decisions cited by Perú in its Counter-Memorial on Partial Annulment to support its claim that failing to address a particular argument does not warrant annulment "*confirm* that the Tribunal committed an annullable error."[151] Claimant's assertion is unfounded.

93. The authorities on which Perú relies set out the test for annullable errors based on a tribunal's failure to address an issue and squarely support Perú's position that no such omission occurred here. This test distinguishes between a tribunal's failure to decide a claim submitted before it and its decision not to address certain arguments or evidence raised or submitted by the parties.[152] The former may result in an annullable error, while the latter does not. Claimant recognizes that the *ad hoc* committee decisions cited by Perú in its Counter-Memorial on Partial Annulment draw this important distinction.[153]

94. Claimant correctly states that in *Pawlowski v. Czech Republic*, the annulment committee "affirmed that '[t]he tribunal is required to deal with all claims and/or defenses

[150] *See, e.g.*, Counter-Memorial on Partial Annulment at paras. 92-94 (*citing* **AA-1**, *Freeport* Award, at paras. 455.b., 986, 544-53), 153, 181-89, 192-93.

[151] Reply on Partial Annulment at para. 62 (emphasis in the original).

[152] *See* Counter-Memorial on Partial Annulment at para. 215.

[153] *See* Reply on Partial Annulment at para. 62 ("Each of those decisions distinguishes between (i) a failure to address *every* argument—which may not result in annulment, and (ii) a failure to address a claim—which does.") (italics in the original).

specifically raised for the tribunal's determination.'"[154] Claimant, however, omits the rest of the relevant quote from that decision, where the *Pawlowski* committee, relying on the decision by the *ad hoc* committee in *Continental Casualty v. Argentina,* stated:

> The tribunal is required to deal with all claims and/or defenses specifically raised for the tribunal's determination. It is the tribunal's prerogative to assess the relevance and importance of the issues at stake and evidence submitted. That does not, however, imply a requirement that "*a tribunal [ ] give express consideration to every argument or issue advanced by a party in support of its position in relation to a particular question*." The arbiter of relevance is the tribunal, not the parties.[155]

95. The *Pawlowski* committee confirmed not only that a tribunal must address the claims raised before it, but also clarified that a tribunal is under no obligation to consider every argument or piece of evidence the parties choose to submit. As the committee explained, the test ultimately requires "distinguish[ing] between a genuine 'question' or claim submitted to the tribunal, as opposed to a mere argument, or reference to a particular piece of evidence."[156] Therefore, contrary to Claimant's suggestion, the proposition that a tribunal's failure to address a specific argument does not justify annulment is central to the instant ground of annulment.[157] It is essential for an *ad hoc* committee considering an Article 52(1)(d) claim—such as the one advanced by Claimant in this annulment proceeding—to determine whether the tribunal failed to engage

[154] Reply on Partial Annulment at para. 62(a).

[155] **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 55 (italics in the original) (emphasis added) (*citing Continental Casualty v. Argentina*, Decision on Annulment, at para. 97 ("As observed above, a failure by a tribunal to consider one of the *questions* submitted to it for decision, such as a specific defence raised by the respondent, may in certain circumstances amount to a serious departure from a fundamental rule of procedure. However, no fundamental rule of procedure requires a tribunal to give express consideration to *every* argument or issue advanced by a party in support of its position in relation to a particular question.") (emphasis in original)).

[156] **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 59.

[157] *See* Reply on Partial Annulment at para. 62.

with a specific claim or, instead, with an argument or defense put forward by the parties in support of a claim.

96. Claimant concedes that in the annulment decisions cited by Perú, the *ad hoc* committees rejected the notion that tribunals must explicitly address or mention every argument or piece of evidence, but instead held that their obligation is to address the claims before them.[158] For example, the *ad hoc* committee in *Rumeli v. Kazakhstan* found that "[i]f the arguments of the parties have been correctly summarized and all the claims have been addressed, there is no need explicitly to address each and every one of the arguments raised in support of the particular claims, and it is in the discretion of the tribunal not to do so."[159] Similarly, the committee in *Tulip v. Turkey* established that "absence in an award of a discussion of an argument or piece of evidence put forward by a party does not mean that a tribunal has violated the right to be heard."[160] Further, in the *Perenco v. Ecuador* annulment proceedings, the committee held that Article 48(3) of the ICSID Convention, "does not envisage that the Award shall address every argument, piece of evidence, or fact presented by the Parties."[161]

97. Claimant, however, fundamentally misconstrues the alleged fact that these decisions support its request for partial annulment of the Award. They do not. As Perú has already demonstrated in detail in its Counter-Memorial on Partial Annulment and reiterated above, the Tribunal did address Freeport's claims stemming from penalties and interest on Royalty Assessments. The Tribunal: (i) identified the issue to be determined (*i.e.*, whether Perú had violated Article 10.5 of the BIT "each time it failed to waive the assessment of penalties and

[158] *See* Reply on Partial Annulment at para. 62(b).

[159] **RALA-32**, *Rumeli v. Kazakhstan*, Decision on Annulment, at para. 84.

[160] **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 82.

[161] **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125. *See also* **RALA-31**, *Enron v. Argentina*, Decision on Annulment, at para. 222.

interest against SMCV"[162]); (ii) dedicated seventeen paragraphs to outlining the parties' positions on this issue;[163] and (iii) decided that because penalties and interest constitute taxation measures under the TPA, it did not have jurisdiction to hear claims related to penalties and interest on the merits.[164] These decisions therefore undermine Claimant's position and confirm that annulment is not warranted in this case. Ultimately, Claimant's complaint concerns the Tribunal's treatment of the parties' arguments, not an alleged failure to address a claim left unresolved.

2. The Tribunal's Decision to Reject, for Lack of Jurisdiction, Claimant's Claims Related to Penalties and Interest on Royalty Assessments Fell Within the Dispute's Legal Framework

98. Claimant insists on advancing its alternative argument that, even if the Tribunal had dismissed Freeport's claims stemming from penalties and interest on Royalty Assessments on jurisdictional grounds, this would have still constituted a departure from a fundamental rule of procedure.[165] According to Claimant, Freeport had no opportunity to respond to any jurisdictional arguments related to the penalties and interest on Royalty Assessments, because the parties never raised the issue during the arbitration.[166] Therefore, Claimant maintains that the Tribunal decided this issue outside of the legal framework submitted by the parties, without affording them an opportunity to be heard.[167] Claimant's argument is untenable. As demonstrated below, (i) Claimant adopts an overly narrow conception of the right to be heard, which does not reflect the breadth of its scope as recognized by annulment jurisprudence; and (ii) in exercising its authority

[162] **AA-1**, *Freeport* Award, at paras. 830-31. *See also id.*, at para. 832.

[163] *See* **AA-1**, *Freeport* Award, at paras. 967-84.

[164] *See supra* at paras. 34, 36, 69.

[165] *See* Reply on Partial Annulment at para. 65. *See also* Applicant's Memorial on Partial Annulment, May 23, 2025 ("Memorial on Partial Annulment") at para. 65.

[166] *See* Reply on Partial Annulment at para. 65.

[167] *See* Reply on Partial Annulment at para. 65.

under the principle of *iura novit arbiter*, the Tribunal remained within the legal framework of the dispute and, therefore, did not infringe the parties' right to be heard.

a. Claimant's characterization of the right to be heard is overly narrow and fails to reflect the breadth of its scope as recognized by annulment jurisprudence

99. In its Reply on Partial Annulment, Claimant alleges that Respondent concedes that a violation of the right to be heard can result in annulment and that the right to be heard guarantees each party an opportunity to state its claims or defenses and to submit all supporting arguments and evidence.[168] While Perú does not dispute that the right to be heard constitutes a fundamental rule of procedure, Claimant is once more misrepresenting Perú's position. The right to be heard is more nuanced than Claimant asserts, and Claimant's description of that right is, at best, incomplete.

100. As Respondent explained in its Counter-Memorial on Partial Annulment, the right to be heard is not absolute.[169] Contrary to Claimant's allegations, tribunals do not violate that right when they rely on legal reasoning not advanced by the parties. Indeed, annulment jurisprudence has consistently rejected the notion that a tribunal violates the right to be heard merely because it bases its decision on legal reasoning not expressly pleaded by the parties.[170] As Perú demonstrated

[168] *See* Reply on Partial Annulment at para. 67.

[169] *See* Counter-Memorial on Partial Annulment at para. 225.

[170] *See* **RALA-34**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, May 3, 1985 (Unofficial English Translation) ("*Klöckner*, Decision of the ad hoc Committee"), at para. 91; **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at paras. 66-70; **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 84; **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, at paras. 254-57; **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at paras. 90-94; **RALA-41**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee

in its Counter-Memorial on Partial Annulment, *ad hoc* committees have affirmed that tribunals may base their decisions on legal reasoning that does not originate from the parties' submissions, as long as that reasoning remains within the legal framework of the dispute.[171]

101. Claimant, nonetheless, alleges that Perú's assertions are without support. According to Claimant, the relevant "'legal framework' is established by the *arguments the parties actually presented* during the arbitration."[172] Claimant's assertion is unfounded.

102. To advance its claims, Claimant relies primarily on incomplete excerpts taken from selected paragraphs of annulment decisions.[173] This is misleading. Annulment jurisprudence, and, in particular, the decisions cited by Perú in its Counter-Memorial on Partial Annulment, confirms that the legal framework of the dispute is not confined to the specific arguments raised by the parties in the arbitration.[174] Respondent highlights several of those decisions below.[175]

103. In *Klöckner*, the *ad hoc* committee held that a tribunal is not, in principle, prohibited from adopting a line of arguments different from those advanced by the parties, and that, whether to reopen the proceedings to hear the parties on such reasoning, is a matter of procedural

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on the Application for Annulment of the Argentine Republic, September 22, 2014, at para. 284; **RALA-25**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision on the Application for Annulment, February 2, 2018, at para. 218; **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125; **RALA-26**, *Orascom v. Algeria*, Decision on Annulment, at paras. 145-48; **RALA-16**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX)*, ICSID Case No. ARB/10/18, Decision on Annulment, October 12, 2023 ("*Niko Resources v. Bangladesh Oil Gas*, Decision on Annulment"), at para. 77.

[171] *See* Counter-Memorial on Partial Annulment at paras. 227-29.

[172] Reply on Partial Annulment at para. 68 (emphasis in the original).

[173] *See* Reply on Partial Annulment at n. 156.

[174] *See* Counter-Memorial on Partial Annulment at paras. 227-30.

[175] For the convenience of the Committee, and to present a more complete overview of what was stated by *ad hoc* committees in the decisions cited by Respondent in its Counter-Memorial on Partial Annulment, Respondent includes in Appendix A of this Rejoinder a table containing pertinent excerpts from each of those decisions. *See* Appendix A.

discretion.[176] As the excerpt quoted in Claimant's Reply on Partial Annulment shows, the *Klöckner* committee clarified that the only constraint is the tribunal's duty to remain within the '"legal framework' established by the Claimant and the Respondent."[177] However, the committee did not stop there—it went on to explain that a tribunal would exceed that framework, for example, by deciding a claim in tort when the parties had pleaded only under a contract.[178] The *ad hoc* committee then concluded that, within that framework "the dispute's 'legal framework', arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been)," and that doing so, does not constitute a serious departure from a fundamental rule of procedure.[179]

104. In the *Wena Hotels v. Egypt* annulment proceedings, the applicant argued that it "was not offered the opportunity to address the issue of the appropriate rule of interest and thus it was deprived of its right to be heard."[180] In the committee's view, however, the record showed that Wena had repeatedly requested interest at an "appropriate" rate and the applicant had been invited to respond.[181] According to the *ad hoc* committee, the real question was whether the applicant had grounds to object to the compound interest awarded, "which was not specifically claimed by Wena nor addressed by the Applicant and, to the committee's knowledge, not discussed at the hearings before the Tribunal."[182] The committee concluded that the tribunal was within its discretion to apply compound interest, because both parties had adopted broad and undetermined

[176] *See* **RALA-34**, *Klöckner v. Cameroon*, Decision of the ad hoc Committee, at para. 91.

[177] **RALA-34**, *Klöckner v. Cameroon*, Decision of the ad hoc Committee, at para. 91.

[178] *See* **RALA-34**, *Klöckner v. Cameroon*, Decision of the ad hoc Committee, at para. 91.

[179] **RALA-34**, *Klöckner v. Cameroon*, Decision of the ad hoc Committee, at para. 91 (emphasis added).

[180] **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, para. 66.

[181] **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, para. 67.

[182] **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, para. 68 (emphasis added).

positions on the appropriate interest rate to be applied and had acknowledged that compound interest was an accepted method followed by arbitration tribunals, making it reasonable to expect that the tribunal might adopt that approach.[183] The committee, therefore, found there was no basis to conclude that there had been a departure from a fundamental rule of procedure.

105. In *Vivendi I*, the *ad hoc* committee found that although the tribunal's decision to reject the claimants' claim on the merits by relying on Article 16(4) of the Concession Contract may have surprised the parties, "this would by no means be unprecedented in judicial decision making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d)."[184] The committee further noted that "in its questioning and especially its request for post-hearing briefs, the Tribunal clearly indicated that it had concerns as to how to reconcile Article 8 of the BIT and Article 16(4) of the Concession Contract,"[185] and that "[t]he Tribunal's analysis of issues was clearly based on the materials presented by the parties and was in no sense *ultra petita*."[186] Hence, although the parties did not advance specific arguments on whether the claimants' claim could be dismissed under Article 16(4) of the Concession Contract, the committee concluded that there had been no departure—and certainly no serious departure—from any fundamental rule of procedure.[187]

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[183] *See* **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, para. 70.

[184] **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 84.

[185] **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 84.

[186] **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 85.

[187] *See* **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, at para. 85.

106. In *Vivendi II*, the *ad hoc* committee found that no *ultra petita* issue arose regarding the determination of the starting date for calculating the interest owed to the claimants, because "the allocation of interest, like the evaluation of damages, falls within the discretionary power of the Tribunal in the light of all relevant circumstances of the case."[188] Thus, although the specific date ultimately used by the tribunal for interest accrual was not argued by either party, the Committee found no departure from a fundamental rule of procedure.[189]

107. As Respondent explained in its Counter-Memorial on Partial Annulment, in the same vein, the *ad hoc* committee maintained the tribunal's decision on damages, even though the tribunal in the underlying case rejected both parties' valuation methods and applied its own.[190] However, in its Reply on Partial Annulment, Claimant maintains that Respondent's explanation of this point is a mischaracterization of the annulment committee's decision in *Vivendi II*.[191] Claimant's assertion is incorrect.

108. In the annulment proceeding, Argentina argued that the tribunal had not accepted the valuation methods proposed by the parties[192] and had used, instead, "a third method of its choice, the investment value of the concession, which, according to the Tribunal, seemed to offer

[188] **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, para. 256.

[189] *See* **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, paras. 256-57.

[190] *See* Counter-Memorial on Partial Annulment at para. 233.

[191] *See* Reply on Partial Annulment, at para. 68(b).

[192] *See* **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, para. 80 (*citing Vivendi v. Argentina*, (Resubmission Proceeding), Award of August 20, 2007, paras. 8.3.11 and 8.3.14).

the closest proxy of the compensation it wished to award."[193] This is confirmed in the award that was reviewed in the *Vivendi II* annulment proceedings. As the *Vivendi II* tribunal explained, claimants' principal claim for compensation was based on "fair market value"—which the tribunal accepted as an appropriate standard to assess the value of the concession.[194] Vivendi argued that the discounted cash flow ("DCF") method was the proper valuation method for determining the "fair market value," asserting it is the modern preferred approach where future cash flows can be reliably forecast.[195] The tribunal also found that Vivendi had belatedly invoked options such as book value, investment value, replacement value, and liquidation value—for which the tribunal declined to accept new evidence.[196] Argentina, in contrast, rejected the DCF method outright and instead endorsed book value.[197] The tribunal, consequently, rejected both the DCF and book value methods as the appropriate methods to calculate "fair market value" and ultimately found that the investment value approach provided the closest acceptable proxy under the circumstances, fixing the concession's value on that basis.[198]

109. Thus, even though the *ad hoc* committee in *Vivendi II* stated that the method adopted by the tribunal was "originally the method proposed by Respondent,"[199] Argentina never

[193] **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, para. 80 (*citing Vivendi v. Argentina*, (Resubmission Proceeding), Award of August 20, 2007, at para. 8.3.13).

[194] *See* **RALA-59**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award II, August 20, 2007 ("*Vivendi v. Argentina (I)*, Award"), at paras. 8.2.9, 8.2.11.

[195] *See* **RALA-59**, *Vivendi v. Argentina (I)*, Award II, at para. 8.3.1.

[196] *See* **RALA-59**, *Vivendi v. Argentina (I)*, Award II, at paras. 8.1.5-8.1.9, 8.3.12.

[197] *See* **RALA-59**, *Vivendi v. Argentina (I)*, Award II, at para. 8.3.2; *see also id.* at para. 8.1.5.

[198] *See* **RALA-59**, *Vivendi v. Argentina (I)*, Award II, at paras. 8.3.2; *see also id.* at paras. 8.3.14-8.3.17.

[199] **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, para. 255.

argued that the fair market value should be determined based on the investment value approach. What is clear from the language of the award is that the tribunal considered that Argentina had "conceded in the event of finding of liability" that "'[a]lternatively, the Claimants may seek to be put in the position in which they would have been had they never agreed to enter into the Concession Agreement: the return to them of their investment in the Concession.'"[200] Therefore, Argentina did not, *per se*, argue for the investment value approach to determine the "fair market value" of the concession. However, given that the valuation of "fair market value" was part of the legal framework in the underlying arbitration, the tribunal did not depart from a fundamental rule of procedure when it applied a third method of its choice to assess that value.

110. In *Caratube v. Kazakhstan (I)*, the *ad hoc* committee recalled that annulment committees have consistently rejected the notion that tribunals are confined to the specific arguments pleaded by the parties when crafting their legal reasoning.[201] The committee further noted that this freedom is conditioned on the tribunal remaining within the legal framework invoked in the proceedings and that only if the tribunal intends to rely on a different legal framework than that established by the parties, must it give the parties an opportunity to comment.[202] The committee illustrated this limitation by referring to the *Klöckner I* decision, which clarified that a tribunal would step outside the parties' established legal framework if, for

[200] **RALA-59**, *Vivendi v. Argentina (I)*, Award II, at para. 8.3.15 (*citing* Counter-Memorial at para. 671).

[201] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, para. 92.

[202] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, para. 93.

example, it were to decide the case on the basis of tort when the parties had argued solely in contract.[203]

111. In line with that reasoning, the *ad hoc* Committee in *Caratube v. Kazakhstan (I)* concluded that even though the tribunal had determined that it lacked jurisdiction on grounds different from those invoked by the respondent in the underlying proceedings,[204] the tribunal had not infringed on the parties' right to be heard given that the tribunal's reasoning remained squarely within the legal framework of the dispute—the ICSID Convention and the investment treaty.[205] To recall, Kazakhstan had objected to jurisdiction solely on the basis of Article 25 of the ICSID Convention.[206] Accordingly, as noted by the *ad hoc* committee, "the debate between the parties essentially concerned the issue whether the Tribunal had jurisdiction under Article 25 of the Convention."[207]

112. The tribunal's reasoning in the award, nevertheless, was mainly based on Article VI(8) of the investment treaty.[208] The *ad hoc* committee considered that even though the claimant did not raise arguments with respect to Article VI(8) of the investment treaty in the context of

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[203] *See* **RRALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, para. 93 (*citing Klöckner v. Cameroon*, Decision of the ad hoc Committee, at para. 91).

[204] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, paras. 113-16.

[205] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at paras. 177-79.

[206] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at paras. 113-16.

[207] **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at para. 177.

[208] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at para. 179.

Kazakhstan's jurisdictional objection, Article 25(2)(b) of the Convention and Article VI(8) of the treaty were "both part of the legal framework on the basis of which the jurisdictional issue would be examined and decided by the Tribunal."[209]

113. Thus, contrary to what Claimant suggests, the *Caratube v. Kazakhstan (I) ad hoc* committee did not state that the legal framework was limited to the arguments advanced expressly by the parties—rather, it affirmed that tribunals may develop their own reasoning so long as it fits within the broader legal framework argued during the arbitration, "on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal."[210]

b. In exercising its authority under the principle of *iura novit arbiter* the Tribunal remained within the legal framework of the dispute and, therefore, did not infringe the parties' right to be heard

114. As Respondent explained in its Counter-Memorial on Partial Annulment, the understanding that a tribunal can base its decision on legal reasoning not expressly pleaded by the parties without violating their right to be heard is closely linked to the application of the principle of *iura novit curia*—referred to in arbitration as *iura novit arbiter*.[211] Under this principle, an arbitral tribunal may gather and assess evidence—whether of fact or law—independently of the parties' submissions in order to reach its own conclusions on the applicable law.[212] The *Discovery*

[209] **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at para. 178.

[210] **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at para. 94. *See also id*. at para. 178.

[211] *See* Counter-Memorial on Partial Annulment at para. 230.

[212] *See* **RALA-43**, Giuditta Cordero-Moss, Chapter 6: *Iura Novit Curia*, in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues*, Kluwer Law International (April 2022), at p. 122.

Global v. Slovakia tribunal clearly articulated the application of this principle in its award, holding that

> [w]hen applying the law, the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. In accordance with the principle *iura novit curia* a tribunal may form its own opinion about the meaning of the law, provided it does not surprise the Parties with a legal theory that they could not anticipate.[213]

115. Thus, in exercising its authority under the principle of *iura novit arbiter*, a tribunal does not infringe the parties' right to be heard, provided it remains within the legal framework of the dispute.

116. This understanding is further affirmed by Article 41 of the ICSID Convention, which codifies the principle of *competence-competence*,[214] and by ICSID Arbitration Rule 41(2), which expressly empowers tribunals to examine jurisdictional matters on their own initiative.[215]

117. Accordingly, the fact that Perú did not explicitly invoke the "taxation measures" exemption under Article 22.3.1 of the TPA in relation to claims stemming from penalties and interest on Royalty Assessments is of no consequence. Both under the principles of *iura novit arbiter* and *competence-competence*, the Tribunal had the authority to interpret the Treaty, in

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[213] *See* **RALA-60**, *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award, January 17, 2025, at para. 299. *See also* **RALA-61**, *Carlos Ríos and Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, January 11, 2021, at para. 130.

[214] *See* **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), Article 41(1) ("The Tribunal shall be the judge of its own competence"); *see also* **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 94; **RALA-42**, *Fisheries Jurisdiction (Spain v. Canada)*, Judgment - Jurisdiction of the Court, 1998 I.C.J. (4 December), at para. 37 ("The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it [ ], this has no relevance for the establishment of the Court's jurisdiction, which is a 'question of law to be resolved in the light of the relevant facts'[ ].") (internal citations omitted).

[215] *See* **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), Rule 41(2) ("The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.").

particular, the concept of "taxation measures" under the meaning of Article 22.3.1 of the TPA, and to ascertain its jurisdiction independently.

118. Notwithstanding the consistent body of jurisprudence on the right to be heard cited by Perú in its Counter-Memorial on Partial Annulment, Claimant argues that the authorities on which it relies—namely *TECO and Pey Casado I*—remain unrefuted and, thus, allegedly demonstrate that annulment is warranted in this case.[216] Claimant argues that these decisions contradict Perú's position, as the annulment committees in those cases identified a serious departure from a fundamental procedural rule when tribunals base their reasoning on theories not raised during the proceedings.[217] Claimant's assertion is misplaced.

119. Claimant conveniently overlooks that neither *TECO* nor *Pey Casado I* concerned a tribunal's determination on jurisdiction—unlike the case presently before this Committee. Claimant itself acknowledges this. In its Reply on Partial Annulment, Claimant explains that the *Pey Casado I ad hoc* committee's assessment of whether the tribunal had departed from a fundamental rule of procedure was grounded in the tribunal's determination of damages for a denial-of-justice breach. With respect to *TECO*, Claimant explains that the committee's finding stemmed from the tribunal's decision to award interest on the claimant's historical damages based on an "unjust enrichment" theory.[218] Those cases therefore do not support Claimant's contention that a tribunal's resolution of jurisdictional issues, pursuant to its *competence-competence* authority, violates the parties' right to be heard merely because the tribunal's reasoning was not framed in the precise terms pleaded by the parties.

[216] *See* Reply on Partial Annulment at para. 69.

[217] *See* Reply on Partial Annulment at para. 69.

[218] *See* Reply on Partial Annulment at para. 69.

120. In any event, both the *TECO* and *Pey Casado I* decisions are outweighed by the authorities cited by Perú, whose reasoning on the right to be heard remain fully applicable to the present case. As Perú demonstrated in its Counter-Memorial on Partial Annulment, the Tribunal declined jurisdiction on the basis of its own interpretation of Article 22.3.1 of the TPA's "taxation measures" exclusion.[219] That provision had been invoked by both parties in connection with penalties and interest arising from the Tax Assessments, and Perú and Claimant each had ample opportunity to brief and argue its scope during the proceedings.[220] Therefore, the Tribunal's analysis of Article 22.3.1 of the TPA and its determination that the claims related to penalties and interest on Royalty Assessments fell within the taxation measures exclusion under that provision of the TPA, was based on the legal framework established in the dispute and, thus, fell squarely within the Tribunal's authority.

121. The circumstances in this case are analogous to those discussed in the annulment decisions cited by Perú. For example, as in *Caratube v. Kazakhstan (I)*—where Kazakhstan challenged the tribunal's jurisdiction solely under Article 25 of the ICSID Convention—Perú likewise expressly raised a jurisdictional objection to Claimant's claims arising from penalties and interest on Tax Assessments, but not those relating to Royalty Assessments.[221] In a similar manner to the tribunal in *Caratube v. Kazakhstan (I)*—which relied primarily on its interpretation of Article VI(8) of the investment treaty to deny jurisdiction even though that argument had not been invoked by the parties—the Tribunal in the underlying arbitration concluded that it lacked jurisdiction over claims relating to penalties and interest on Royalty Assessments by applying its own interpretation of Article 22.3.1 of the TPA's taxation measures exclusion clause.

[219] *See* Counter-Memorial on Partial Annulment at paras. 235-45.

[220] *See* Counter-Memorial on Partial Annulment at paras. 235-45.

[221] *See supra* at para. 35.

Article 22.3.1 of the TPA—like Article VI(8) of the investment treaty applied by the tribunal in *Caratube v. Kazakhstan (I)* to reach its jurisdictional determination—formed part of the legal framework of the dispute and had, moreover, been raised and addressed by both parties during the arbitration. Thus, as in *Caratube v. Kazakhstan (I)*, the Tribunal in the underlying arbitration did not violate Claimant's right to be heard.

122. Likewise, the same observation applies to other decisions cited by Perú, such as *Wena* and *Vivendi II*, which Claimant asserts do not support Perú's position in these proceedings. As explained in detail above, in *Vivendi II*, the tribunal declined to adopt either the DCF method proposed by Claimant or the book-value figures endorsed by Respondent as the appropriate valuation method for "fair market value."[222] Instead, it applied a third valuation method—investment value—to determine the concession's "fair market value," which the *ad hoc* committee confirmed did not amount to a departure of a fundamental rule of procedure.[223]

123. In *Wena*, the tribunal awarded compound interest, which neither *Wena* specifically claimed nor Egypt addressed, and which, to the committee's knowledge, was not discussed at the hearings before the tribunal.[224] As explained above, the *ad hoc* committee found no basis to conclude that there had been a departure from a fundamental rule of procedure in that case.[225]

124. Therefore, just as the reasoning of the tribunals in *Vivendi II* and *Wena* remained within the legal framework of those disputes (*i.e.*, valuation of "fair market value" in *Vivendi II* and the determination of interest calculation methods in *Wena)*, the definition of "taxation measures" under Article 22.3.1 of the TPA likewise fell within the governing legal framework of

[222] *See supra* at paras. 108-09.

[223] *See supra* at paras. 108-09.

[224] *See supra* at para. 104.

[225] *See supra* at para. 104.

the dispute in the underlying arbitration. Accordingly, the Tribunal did not deprive Claimant of its right to be heard.-calculation methods in

3. The Parties Could Reasonably Have Been Expected to Address the Interpretation of "Taxation Measures" Under Article 22.3.1 of the TPA and, Indeed, Were Given an Opportunity to Do So During the Proceedings

125. Given that the interpretation of Article 22.3.1 of the TPA formed part of the legal framework argued throughout the proceedings, the parties could reasonably have anticipated the need to comment on that provision—which, in fact, they did. Both parties invoked Article 22.3.1 of the TPA in connection with penalties and interest stemming from Tax Assessments, and both were afforded full opportunity to present submissions and arguments concerning its scope throughout the proceedings.[226]

126. In an attempt to deflect from this undeniable reality, Claimant contends in its Reply on Partial Annulment that "Perú acknowledges that here, if the Tribunal dismissed the Royalty penalties and interest claims under Article 22.3.1's tax exclusion, it would have done so without the Parties ever raising, briefing, or arguing the issue during the arbitration."[227] This contention is incorrect.

127. Freeport had ample opportunity to brief the Tribunal and raise arguments on the scope of Article 22.3.1 of the TPA during the proceedings. For example, during the hearing, the Tribunal questioned both parties' Peruvian tax-law experts on whether interest and penalties, in general, constitute taxation measures under Peruvian law.[228] As Respondent showed in its Counter-Memorial on Partial Annulment, both Claimant's expert and Perú's expert were given full

[226] *See* Counter-Memorial on Partial Annulment at paras. 235-45.

[227] Reply on Partial Annulment at para. 67.

[228] *See* Counter-Memorial on Partial Annulment at para. 235.

opportunity to present their views. For the sake of convenience, Respondent reproduces again the exchange between the Tribunal and the experts during the hearing in the following paragraphs.

128. The Tribunal first posed detailed questions to Claimant's expert, Mr. Hernández, seeking clarity on his assertion that, although Article 28 of the Peruvian Tax Code groups taxes, penalties, and interest under the single concept of "tax debt," this grouping reflects a legislative technique, rather than an indication that all such items share the same legal nature.[229] In response, Mr. Hernández explained that the Peruvian tax framework relies on a legislative fiction that groups distinct elements—penalties, interest, and the tax itself—into the single concept of a "tax debt."[230] He also explained that this system was designed to simplify administration and avoid the need for separate procedures, including for royalties, which are also incorporated into the "tax debt" concept for legislative efficiency.[231] He further explained that Peruvian law contains no defined

[229] *See* **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023 ("**AA-8**, Transcr. Day 9") (President Hanefeld) at 2592:10-2593:8 ("PRESIDENT HANEFELD: And so, I have one really important thing to better understand, which concerns the question whether Penalties or Interest constitute taxation measures. This Penalties and Interest Claim is 662 million [the value of Claimant's claims for both Royalty and Tax Assessments], so, for us, it's really important to understand the Peruvian law concept on these Penalties and Interest. And I understand your colleagues, the Respondent's Experts, Mr. Bravo and Mr. Picón, saying in their Second Report, in Paragraphs 259 and 260, that they say Penalties and Interest are clearly taxation measures under the Peruvian Tax Code. They quote there Article 28 of the Tax Code, which states that: 'Components of the tax debt are Tax, Penalties, and Interest.' And I see now on your Slide 18 of today that you say, no, there is no definition of taxation measures, and this is more a legislative technique rather than a qualification. Can you please explain again now what you mean with this 'legislative technique' rather than qualification of the nature?").

[230] *See* **AA-8**, Transcr. Day 9 (Mr. Hernández) at 2595:10-18 ("Article 28 of the Tax Code simply and plainly as a matter of legislative technique fundamentally adopts a legal fiction, under which the concept--under the term 'debt'--under the expression 'tax debt' groups elements, or components, that clearly do not all refer to the tax itself. It's distinguishing between Tax, Penalty, and Interest, and then it groups them together under the concept of 'tax debt.'").

[231] *See* **AA-8**, Transcr. Day 9 (Mr. Hernández) at 2598:11-22 ("Then, the fact that the Royalty was incorporated under the idea of a tax debt is clearly a legal fiction. This does not respond to the nature of things. This is a legislative technique that has allowed them to simplify, to avoid, for example, the existence of dispersed regulations. Because of the legal fiction it was not necessary to say, for example, 'that this is the process to challenge royalties' and to issue a whole regulation about it. One goes straight to the Tax Code. So, this has been a way, a legal fiction that has allowed to simplify the legislation.").

concept of "tax measures," noting that references to this term in certain laws (such as Laws 30230 and 30506) lack substantive meaning.[232]

129. The Tribunal then posed similar questions to Perú's experts, Mr. Bravo and Mr. Picón, testing their position on whether penalties and interest (as a general matter) qualify as taxation measures:

> PRESIDENT HANEFELD: And I start, and I know you will not be surprised by my questions, they are very similar to the ones I had for Mr. Hernández. So, my first question relates to the question whether the Penalties and Interest constitute Taxation Measures. And just to better understand, if one takes the position and this is undisputed. You just confirmed it that Royalties are not taxes, one could arguably think, okay, Penalties and Interest, which are also a civil law, whatever, in our concept, are separate, and like an Annex only to this nontax. So, there can be no Taxation Measures if one imposes Penalties and Interest. And I understand you saying, oh, no. They are, nevertheless, taxation measures. Do I understand correctly that you base this on Article 3 of the Mining Royalty Law? Because you say and now on your last slide, this is the term "Tax Measures refers to decisions of the State that may hand it down through its legal or regulatory provisions," and Article 3 of the Royalty Law exactly constitutes such legal provisions?[233]

130. Mr. Bravo acknowledged that royalties themselves are not taxes but emphasized that Article 3 of Law No. 28969 (Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Mining Royalties) expressly applies certain tax-code rules to royalties.[234] Then, in response to a follow-up question from the President, Mr. Bravo opined that,

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[232] *See* **AA-8**, Transcr. Day 9 (Mr. Hernández) at 2599:10-2600:5 ("I don't know if I am answering your question, but, at any rate, this also leads me to say, how about Tax Measures? While the concept of tax debt that, once again, is a legal fiction, is part of the code as to Tax Code; as to Tax Measures, there is nothing like that. Keep in mind, that the Tax Code in Perú is the one that gathers the main concepts to be applied to tax issues for all sorts of levies. When someone would like to introduce a key issue in connection with taxes, they introduce an amendment to the Tax Code by inserting whatever is relevant. Neither the Tax Code, nor any other rule, includes this concept of 'tax measures.' And we are going to find some regulations, such as the 30230, cited by Bravo, and the 30506, also cited by Bravo, which is a delegation rule, that refer to Taxation Measures, but without it having a specific significance.").

[233] **AA-8**, Transcr. Day 9 (President Hanefeld) at 2686:17-2687:15.

[234] *See* **AA-8**, Transcr. Day 9 (Mr. Bravo) at 2687:16-2688:8 ("Yes, Madam President, indeed. What we said is that one must not confuse a 'tax' with Taxation Measures. There's something that needs to be clear, first and foremost.

although penalties and interest are not taxes *per se*, they still constitute taxation measures, because taxes cannot operate without ancillary rules—such as enforcement mechanisms and penalties—which give them their practical effect:

> PRESIDENT HANEFELD: My apologies. Now, I think you said they are not taxes, the Penalties and Interest, but, nevertheless, they qualify as Taxation Measures. Is my understanding correct?
>
> THE WITNESS: Yes, you understood that correctly. That is what I was saying. Although they are not taxes, taxes may not exist by themselves. They need, for example, procedural rules, a penalty regime. They need also other kinds of rules so that the tax may be complied with. And formalities may comply with. And they had that nature as taxation norms.[235]

131. In its Reply on Partial Annulment, Claimant seeks to dismiss the substantive exchange between the Tribunal and both sides' experts. However, the record makes clear that the Tribunal was actively evaluating whether penalties and interest—regardless of whether they stemmed from royalty or tax assessments—could qualify as taxation measures for purposes of assessing Claimant's alternative claims. The Tribunal underscored the significance of this inquiry when it noted to Mr. Hernández that Claimant's penalties-and-interest claim reached US $662 million (which includes the amount claimed by Claimant for penalties and interest on both Tax Assessments and Royalty Assessments).[236]

132. On that basis, the parties could (and Claimant should) reasonably have anticipated the relevance of further addressing the scope of Article 22.3.1 and the application of the TPA's taxation measures' exemption to all penalties and interest—not only those arising from Tax

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Royalties, in principle, are not taxes. That's true. They're not taxes. Does that mean that there are no tax regulations that govern certain aspects of Royalties? No, because they exist. And you made mention of them. Article 3 of that Law indicates, expressly, what the tax rules of the Tax Code are that are applicable to the Royalties, and that transforms the Royalties in taxes. Of course not. But there are certain tax rules that apply to Royalties, and that is the explanation.").

[235] **AA-8**, Transcr. Day 9 (President Hanefeld and Mr. Bravo) at 2689:2-13.

[236] *See* **AA-8**, Transcr. Day 9 (Mr. Hernández) at 2592:6-15; *see also* Memorial on Partial Annulment at para. 3.

Assessments—as among the issues discussed at the hearing. Indeed, after the hearing Claimant had the opportunity to address the President's questions to the experts regarding the nature of penalties and interests in their post-hearing brief. The fact that it chose not to add anything in response to those questions does not mean the parties were not afforded an opportunity to be heard on the matter. To the contrary, the parties were indeed afforded an opportunity to be heard on this issue when the Tribunal questioned both sides' experts during the hearing and, in addition, through their closing arguments and post-hearing submissions. The Tribunal, however, had no obligation to invite focused submissions in closing arguments or post-hearing briefs, as Claimant suggests.[237] Claimant could have addressed on its own accord the Article 22.3.1 tax-exemption issue in those instances, once it became clear at the hearing that the Tribunal was exploring it.

133. Claimant, therefore, cannot plausibly maintain that it could not have reasonably anticipated that the Tribunal would adopt the argument that penalties and interest generally constitute "taxation measures." As the *ad hoc* committee in *Tza Yap Shum v. Republic of Perú* affirmed in its decision "[a]n interpreter is not limited by the arguments made by the parties when its interpretation, unlikely to be surprising to either party, is drawn from the terms of the provision which have been discussed by the parties . . . ."[238] In the *Tza Yap Shum* decision, the *ad hoc* committee held that there was no serious departure from a fundamental rule of procedure because, although the tribunal relied on a legal argument concerning the treaty's fork-in-the-road clause that had not been expressly articulated during the arbitration, Perú had not shown that it could not

[237] *See* Reply on Partial Annulment at para. 70(d).

[238] **RALA-62**, *Tza Yap Shum v. Republic of Perú*, ICSID Case No. ARB/07/6, Decision on Annulment, February 12, 2015, at para. 141.

have reasonably anticipated that the arbitrators might consider such an argument.[239] Like the *Tza Yap Shum* committee, this Committee should likewise conclude that even though Perú did not raise an express jurisdictional objection to Claimant's claims related to penalties and interest on Royalty Assessments under Article 22.3.1 of the TPA, Claimant has not demonstrated that it could not have reasonably anticipated that such an argument would be considered by the Tribunal.

134. In sum, the foregoing confirms that the Tribunal's reasoning adhered to the parties' submissions and the dispute's applicable legal framework. Therefore, no violation of Claimant's right to be heard occurred, nor any serious departure from a fundamental procedural rule.

B. ANY DEPARTURE FROM A FUNDAMENTAL RULE WAS NOT SERIOUS

135. Respondent has already demonstrated that Claimant's annulment request fails on its own terms. Even if the Committee were to accept (it should not) that a departure from a fundamental procedural rule occurred, Claimant has not established the essential element of seriousness demanded by Article 52(1)(d) of the ICSID Convention.

136. *First*, as Respondent set out in its Counter-Memorial on Partial Annulment, "[t]o satisfy this requirement, Claimant would need to prove that, had the Tribunal expressly addressed Claimant's arguments on the merits, this could have potentially altered the outcome of the Award."[240] In its Reply on Partial Annulment, Claimant misguidedly contends that Respondent's position is "that a 'serious' departure requires Freeport to prove that it 'would have prevailed' on

[239] *See* **RALA-62**, *Tza Yap Shum v. Republic of Perú*, ICSID Case No. ARB/07/6, Decision on Annulment, February 12, 2015, at para. 141 ("The Committee finds that the interpretation of Article 8(3) of the Peru-China BIT was at all times within the debate between the Parties. An interpreter is not limited by the arguments made by the parties when its interpretation, unlikely to be surprising to either party, is drawn from the terms of the provision which have been discussed by the parties and rests on a description of the mechanism of the arbitration provision. Therefore, the Committee concludes that, while the Republic of Peru has demonstrated that the legal argument on the fork-in-the-road provision in Article 8(3) relied upon by the Arbitral Tribunal was not explicitly articulated in the arbitration, it has not demonstrated that it could not have reasonably anticipated that such argument would be taken into consideration by the arbitrators.").

[240] Counter-Memorial on Partial Annulment at para. 247.

its claims absent the procedural failure," asserting that this standard is unsupported and contrary to established annulment jurisprudence.[241] Claimant misrepresents Respondent's position.

137. As Perú explained, annulment committees have taken different views on how the "seriousness" standard is to be satisfied.[242] Claimant asserts that the consistent approach is that a departure is "serious" if "there is a distinct possibility (a 'chance') that it may have made a difference on a critical issue."[243] Respondent agrees that this is one of the approaches annulment committees have applied in assessing the seriousness requirement—one that sets a lower threshold for applicants by requiring only a showing that the departure could have potentially affected the outcome.[244] However, as Perú noted in its Counter-Memorial on Partial Annulment, *ad hoc* committees have also applied a stricter formulation of the standard, requiring a showing that the departure had an actual material effect on the outcome of the award.[245]

138. Contrary to Claimant's allegations, the decisions Respondent cites in its Counter-Memorial on Partial Annulment support the proposition that a line of annulment jurisprudence requires the applicant to show an "actual material effect on the award."[246] For example, the annulment committee in *Wena* held that "[i]n order to be a 'serious' departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed."[247] Relying on the holding in *Wena*, the *ad hoc* committees in *Continental Casualty v.*

[241] Reply on Partial Annulment at para. 74.

[242] *See* Counter-Memorial on Partial Annulment at para. 249.

[243] Reply on Partial Annulment at para. 74.

[244] *See* Counter-Memorial on Partial Annulment at para. 249.

[245] *See* Counter-Memorial on Partial Annulment at para. 249.

[246] Reply on Partial Annulment at para. 76.

[247] **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 58 (emphasis added).

Argentina,[248] *CDC Group plc v. Republic of Seychelles*,[249] *Malicorp Limited v. Arab Republic of Egypt*,[250] and *El Paso Energy v. Argentine Republic*,[251] affirmed this interpretation of the "seriousness" requirement.

139. In the same vein, the annulment committee in *OI European Group B.V. v. Bolivarian Republic of Venezuela* acknowledged that *ad hoc* committees had held that "'seriousness' should be interpreted as requiring a showing that the violation did in fact materially change the outcome of the award."[252] The committee then went on to opine that "[a]nnulling an award based on a lesser showing would amount to excessive formalism, speculation and second-guessing of decisions taken in the original arbitration in a manner that is improper for an annulment proceeding, thus frustrating the purpose of the arbitration."[253] Finally, the *ad hoc* committee in *Azurix* noted that "in order to be a 'serious' departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from

[248] *See* **RALA-28**, *Continental Casualty v. Argentina*, Decision on Annulment, at para. 96 (*quoting Wena Hotels v. Egypt*, Decision on Annulment, at para. 58).

[249] *See* **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 49 (*quoting Wena Hotels v. Egypt*, Decision on Annulment, at para. 58).

[250] *See* **RALA-27**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited, July 3, 2013, at paras. 33-35 (*quoting Wena Hotels v. Egypt*, Decision on Annulment, at para. 58).

[251] *See* **RALA-41**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, September 22, 2014, at para. 269 (*citing Wena Hotels v. Egypt*, Decision on Annulment, at para. 58) ("Furthermore, this Committee agrees with what other committees have stated that in order to be grounds for annulment, the departure has to have a material impact on the outcome of the award.").

[252] **RALA-29**, *OI European Group B.V. (OIEG) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela, December 6, 2018, at para. 248 (emphasis added).

[253] **RALA-29**, *OI European Group B.V. (OIEG) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela, December 6, 2018, at para. 248 (emphasis added).

what it would have awarded had such a rule been observed,"[254] and held that there was no serious departure from a fundamental rule of procedure in that case given that the committee was not satisfied that there was a basis for concluding that it was reasonably likely that the alleged departure "would have caused the Tribunal to reach a substantially different result."[255]

140. *Second*, irrespective of which test this *ad hoc* Committee applies to assess seriousness, Claimant's challenge fails. Claimant has not shown that the outcome of the arbitration could have—or would have—been different absent the alleged departures from a fundamental rule of procedure. This is true with respect to the Tribunal's alleged failure to address Freeport's claims related to penalties and interest on Royalty Assessments, and the (alternative) scenario in which the Tribunal dismissed those claims for lack of jurisdiction, without allegedly affording an opportunity to be heard.

141. The Award makes clear that, had the Tribunal ruled on Claimant's penalties and interest claims on Royalty Assessments on the merits, it would have rejected those claims.[256] Claimant's alternative claims depended entirely on the success of its argument that Perú had failed to apply Article 170 of the Peruvian Tax Code—*i.e.*, the provision that allows for the resolution of doubt in favor of the taxpayer where there is reasonable ambiguity in the applicable provision.[257] As noted in Section II above, pursuant to Article 170 of the Peruvian Tax Code, the waiver of penalties and interest based on "reasonable doubt" requires misinterpretation of the law or

[254] **RALA-30**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, at para. 234 (emphasis added).

[255] **RALA-30**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, at para. 238 ("On the basis of the material before it, the Committee is therefore not satisfied that there is any basis for concluding that it was reasonably likely that the documents requested by Argentina, had they been available in the proceedings, would have caused the Tribunal to reach a substantially different result.") (emphasis added).

[256] *See* Counter-Memorial on Partial Annulment at para. 250.

[257] *See* Counter-Memorial on Partial Annulment at para. 250. *See also* **AA-1**, *Freeport* Award, at paras. 969-70.

regulation that would have resulted in the underlying assessment not being issued, a subsequent official clarification by the Government correcting that misinterpretation and expressly stating that the clarification is issued under Article 170 of the Tax Code, and publication of that clarification in *El Peruano* (Article 170.1).[258] A tax-payer may also seek a waiver of interest and penalties when SUNAT has interpreted a rule inconsistently over the course of time (Article 170.2).[259] Claimant argued that the lack of clarity in the Mining Law and its Regulations justified the non-payment of the Tax and Royalty Assessments.[260] Claimant also argued that SUNAT should have waived the associated penalties and interest pursuant to Article 170, contending that SUNAT's refusal to do so was incorrect.[261]

142. The Tribunal, however, concluded that the Mining Law and its Regulations left no doubt about the scope of stabilization agreements.[262] The Tribunal found that the language of the Mining Law and its Regulations was clear: stability protections afforded by the legal framework were limited to the defined investment projects described in the feasibility study for which the agreement was entered into and did not apply broadly to the entire concessions or mining units.[263] Consequently, the Tribunal concluded that Cerro Verde was obligated to pay taxes and royalties assessed on the Concentrator's production—as it found that the Concentrator was not covered

[258] *See supra* at para. 48. *See also* **AA-1**, *Freeport* Award, at para. 976.

[259] *See supra* at para. 48. *See* **AA-1**, *Freeport* Award, at para. 976.

[260] *See* Counter-Memorial on Partial Annulment at paras. 62-64. *See also* **AA-1**, *Freeport* Award, at para. 364.

[261] *See* Counter-Memorial on Partial Annulment at para. 59. *See also* Applicant's Memorial on Annulment, May 23, 2025 ("Memorial on Partial Annulment") at paras. 21-23.

[262] *See* Counter-Memorial on Partial Annulment at paras. 96-122; *see also* **AA-1**, *Freeport* Award, at paras. 706-11; 716-18.

[263] *See* **AA-1**, *Freeport* Award, at paras. 701-03.

under the Stabilization Agreement, because it was not part of the investment project described in the feasibility study related thereto.[264]

143. Given the Tribunal's unequivocal interpretation, Claimant's alternative claim could have and would have failed on the merits. There was, therefore, no possibility for the Tribunal to reach a different outcome, even if it had addressed and decided on Freeport's claims stemming from penalties and interest on Royalty Assessments on the merits.

144. As Perú demonstrated in its Counter-Memorial on Partial Annulment, the hypothetical questions posed by the President to Claimant's tax expert during the hearing confirm that the Tribunal understood the law to be clear and unambiguous.[265] To recall, President Hanefeld specifically asked Claimant's tax expert:

> PRESIDENT HANEFELD: My hypothetical that I put to you is: If the Tribunal came to the conclusion that the Concentrator did not enjoy stability, and clearly did not enjoy stability, but Royalties were to be paid, is there, nevertheless, still room for this reasonable doubt rule under Article 170 and 92 of the Tax Code that Penalties and Interest should be waived?[266]

145. In response to the President's hypothetical, Claimant's expert explained that "[t]he waiver of penalties and interest takes as its assumption that there is an imprecise rule. So first we have to determine whether or not there is actually an imprecise rule, because, if there is an imprecise or vague rule, if there's a rule that allows for more than one reasonable interpretation, then it's not clear."[267] This exchange leads to a single, inescapable conclusion: where the law is clear, Article 170 did not apply. Therefore, under Claimant's expert own admission, there was no room to apply the "reasonable doubt" rule under Article 170 once the Tribunal reached the

[264] *See*, *e.g.*, **AA-1**, *Freeport* Award, at para. 816.

[265] *See* Counter-Memorial on Partial Annulment at para. 251.

[266] **AA-8**, Transcr. Day 9 (President Hanefeld) at 2605:10-16.

[267] **AA-8**, Transcr. Day 9 (Mr. Hernández) at 2605:17-2606:2.

conclusion that the Mining Law and its Regulation provided that mining stabilization agreements apply solely to the specific investment project identified in the feasibility study.[268] Moreover, as explained above, Claimant's case failed to pass the three prong test set out in Article 170 for the waiver to apply based on a "reasonable doubt."[269]

146. Thus, even assuming that a departure from a fundamental rule of procedure had occurred (*quod non*), the outcome of the arbitration would have remained unchanged. Accordingly, under any formulation of the applicable standard, no serious departure from a fundamental rule of procedure occurred.

147. *Third*, Claimant argues that the Tribunal's alleged procedural departures were unquestionably serious under Article 52(1)(d) because they resulted in the unexplained dismissal of US $417 million in claims and deprived Freeport of the opportunity to be heard on a "critical issue" that could have affected the outcome.[270] Claimant's argument cannot stand: it confuses alleged procedural defects with actual prejudice and misrepresents the record.

148. As Respondent has demonstrated at length, the Tribunal did not "fail to address" Claimant's claims related to penalties and interest on Royalty Assessments; it expressly concluded—pursuant to its jurisdictional analysis under Article 22.3.1 of the TPA—that claims relating to penalties and interest constituted "taxation measures" and therefore fell outside its jurisdiction.[271] Thus, there was no departure from a fundamental rule of procedure, as Claimant asserts, on the ground that the Tribunal failed to address those claims.

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[268] *See* **AA-1**, *Freeport* Award, at paras. 701-03.

[269] *See supra* at paras. 48, 141-43.

[270] *See* Reply on Partial Annulment at paras. 77-79.

[271] *See supra* at paras. 34, 26, 64-69.

149. Furthermore, Claimant has fallen short of establishing the "seriousness" required under Article 52(1)(d), choosing instead to argue that the alleged departure was serious merely because it involved claims valued at US $417 million. Claimant's argument is entirely misplaced. Annulment committees do not presume prejudice merely because a claim involves significant quantum; as explained above, what an applicant must prove, at a minimum, is that the alleged departure could have altered the outcome of the arbitration.

150. Claimant further contends that the Tribunal's alleged failure to give the parties an opportunity to brief the issue—namely, whether Claimant's alternative claims were excluded from the Tribunal's jurisdiction—could have affected the outcome.[272] Instead of actually showing how this alleged departure could have affected the outcome of the case, Claimant relies on the *ad hoc* committee's decision in *TECO* to argue that violations of the right to be heard on dispositive issues are consistently regarded as serious.[273] Claimant's argument misses the point.

151. Unlike cases such as *TECO*, which concerned a true surprise merits theory adopted by the tribunal which was never raised or foreshadowed to the parties,[274] this case involves a jurisdictional qualification inherent in the Tribunal's mandate and grounded in issues that were fully heard in substance.[275] As demonstrated above, the Tribunal declined jurisdiction based on its own interpretation of Article 22.3.1 of the TPA, the "taxation measures" carve-out that both parties had repeatedly invoked with respect to Claimant's claims stemming from penalties and interest on Tax Assessments.[276] Perú and Claimant alike had ample opportunity to brief the issue,

[272] *See* Reply on Partial Annulment at para. 78.

[273] *See* Reply on Partial Annulment at para. 78.

[274] *See* **AALA-12**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016, at para. 189.

[275] *See supr*a at Section IV.A.2-3.

[276] *See supr*a at Section IV.A.3.

and Claimant, in particular, could (and did) address the scope of Article 22.3.1 during the proceedings.[277] Moreover, at the hearing, the Tribunal directly questioned both parties' Peruvian tax experts on whether penalties and interest qualify as "taxation measures" under Peruvian law, and both experts were given a full opportunity to elaborate on their positions. Therefore, this case bears no resemblance to *TECO*: there was no violation of the right to be heard.

152. In sum, Claimant has failed to show that the alleged departure from a fundamental rule of procedure rises to the level of "seriousness" mandated by Article 52(1)(d) of the ICSID Convention. Claimant's challenge merely reflects its disagreement with the Tribunal's interpretation of Peruvian law and the TPA—nothing more. It is thus not a valid reason to partially annul the Award.

V. EVEN IF THERE WERE AN ANNULLABLE ERROR (THERE WAS NOT), THE FINALITY OF THE AWARD SHOULD BE PRESERVED

153. As Perú demonstrated in its Counter-Memorial on Partial Annulment, and as further confirmed in the preceding sections, none of the grounds advanced by Claimant justifies annulment in this case. The *ad hoc* Committee should therefore uphold the Award. Nonetheless, even assuming *arguendo* that the Committee were to identify an annullable error (which it should not), annulment would still be unjustified because, as Respondent has shown, (i) Claimant abused the annulment mechanism by pursuing annulment rather than seeking a supplementary decision under Article 49(2) of the ICSID Convention—an appropriate and efficient remedy that was readily available to it; and (ii) the Committee has discretion to preserve the Award, and, in this case, finality must prevail.[278]

[277] *See supr*a at Section IV.A.3.

[278] *See* Counter-Memorial on Partial Annulment at Section VIII.

154. In its Reply on Partial Annulment, Claimant argues that a request for a supplementary decision under Article 49(2) was not the appropriate remedy given the alleged seriousness of the Tribunal's errors and that, in any event, it was not required to submit such a request before seeking partial annulment of the Award.[279] Claimant further asserts that Perú has provided no basis for why the Committee should exercise its discretion to uphold the Award even if it were to identify an annullable error.[280] Claimant's arguments are without merit.

155. *First*, contrary to Claimant's assertions, Claimant has abused the annulment process. Claimant mischaracterizes the scope of the remedy available under Article 49(2) of the ICSID Convention—a remedy Claimant could have pursued instead of jumping to seek partial annulment of the Award in an attempt to get yet another bite at the apple before a new tribunal (**Section V.A**). *Second*, the Committee's discretion is an integral component of the annulment framework and should be exercised here to maintain the Award (**Section V.B**).

A. CLAIMANT MISCHARACTERIZES THE SCOPE OF ARTICLE 49(2) AND RESPONDENT'S POSITION ON ABUSE OF PROCESS

156. In its Counter-Memorial on Partial Annulment, Perú submitted that even assuming, *arguendo*, that the Committee were to conclude that the Tribunal failed to address an issue within its jurisdiction as Claimant alleges, partial annulment would still be unwarranted, because Claimant failed to seek supplementation of the Award under Article 49(2) of the ICSID Convention—a remedy available at the time the Award was rendered to address omissions.[281] Article 49(2) expressly provides that a tribunal may "decide any question which it had omitted to

[279] *See* Reply on Partial Annulment at para. 82.

[280] *See* Reply on Partial Annulment at para 82.

[281] *See* Counter-Memorial on Partial Annulment at para. 258.

decide in the award, and shall rectify any clerical, arithmetical or similar error in the award," upon the request of any party made "within 45 days after the date on which the award was rendered."[282]

157. In its Reply on Partial Annulment, Claimant first asserts that Article 49(2) of the ICSID Convention was inapplicable to this case, because that provision addresses only minor or clerical-type errors.[283] Claimant's reading of Article 49(2) is incorrect.

158. As is evident from the cited text, Claimant conveniently omits that pursuant to Article 49(2), upon a party's request, a tribunal "may decide any question which it had omitted to decide in the award," in addition to rectifying any clerical, arithmetical, or similar error.[284] The drafting history of the ICSID Convention confirms that drafters considered that the proper recourse to address a tribunal's failure to rule on every issue presented was not annulment but a different remedy similar to a supplemental review.[285] That remedy was enshrined in Article 49(2) of the Convention.[286] Nowhere in the drafting history of the ICSID Convention does it indicate that the

[282] **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), at Art. 49(2) ("(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.") (emphasis added).

[283] *See* Reply on Partial Annulment at para. 84.

[284] **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), at Art. 49(2) (emphasis added).

[285] *See* **RALA-7**, ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-2 (1968) (excerpt), at p. 849 ("Mr. BROCHES (Chairman) . . . Whereupon a vote was taken on the question whether arbitrators should be required to rule on every issue presented, with 32 delegates voting in the affirmative and none against. The meeting then voted on the question whether a failure to comply with this duty would give the parties the right to seek annulment and the motion was defeated by 8 to 6. Thirty delegations, however, then voted in favor of there being some kind of remedy where the Tribunal has failed to discharge its duty. A majority of 32 to none then indicated that the remedy should be in the nature of a supplemental review which was not identical with the revision of the award, and the Chairman announced that the Secretariat would try and prepare a draft provision giving effect to the sense of the meeting.").

[286] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, para. 109, n. 216 (*citing* ICSID Convention Article 49(2) ("ICSID Convention Article 49(2). The request must be made within 45 days of the

drafters intended Article 49(2) to serve only as a remedy for "minor errors," as Claimant erroneously asserts.[287]

159. The ICSID Secretariat's *Updated Background Paper on Annulment* confirms that the proper remedy to address a tribunal's failure to rule on a specific issue is Article 49(2). When discussing Article 49(2), the Background Paper states: "[T]he ICSID Convention provides another remedy where a Tribunal fails to address a question: the dissatisfied party may request that the same Tribunal issue a supplementary decision concerning the question not addressed."[288]

160. Thus, neither the plain text nor the drafting history of Article 49(2) lends any support to Claimant's assertion that the provision is meant to address only "minor" errors in an award. Article 49(2) affords parties a procedural avenue to request the tribunal to decide a question it failed to address in the award—a remedy Claimant never invoked after the Award was rendered, because it knew the Tribunal would rule against Claimant as it did on all other issues, as the Award makes clear.

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dispatch of the award. The supplementary decision becomes part of the award and is thus subject to the remedy of annulment.").

[287] *See* Reply on Partial Annulment at para. 85. Claimant asserts that in its Counter-Memorial, "Peru notes [that] the drafters excluded a tribunal's failure to 'rule on *every* issue submitted' as an annullable error and instead provided Article 49(2) as a remedy for such minor errors." (emphasis added). Claimant mischaracterizes Perú's position. In its Counter-Memorial on Partial Annulment, Perú explained that the drafting history of the ICSID Convention confirms that a tribunal's failure to address every issue does not, in and of itself, justify annulment and that the ICSID Convention contemplates that such omissions may be cured through a supplementary decision issued by the same tribunal at the request of the aggrieved party. It did not assert that the ICSID Convention's drafters included Article 49(2) "as a remedy for [] minor errors" as Claimant asserts ("As discussed in Section III, the drafting history of the ICSID Convention confirms that a tribunal's failure to address every issue presented does not, in and of itself, constitute grounds for annulment. Indeed, the ICSID Secretariat acknowledges that the Convention expressly provides that such omissions may be remedied by a supplementary decision issued by the same tribunal, indicating that a dissatisfied party may request such a decision concerning a question not previously addressed."). *See* Counter-Memorial on Partial Annulment at para. 269.

[288] **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 109 ("While a Tribunal must deal with every question submitted to it, the drafting history indicates that a failure to do so should not result in annulment. Instead, the ICSID Convention provides another remedy where a Tribunal fails to address a question: the dissatisfied party may request that the same Tribunal issue a supplementary decision concerning the question not addressed.") (emphasis added).

161. To advance its contention that Article 49(2) was inapplicable, Claimant also asserts that the Tribunal's purported failure to resolve Claimant's claims concerning penalties and interest on the Royalty Assessments constituted an alleged substantive error that could not have been addressed through Article 49(2). According to Claimant, it could only be remedied through an annulment application under Article 52 of the ICSID Convention.[289] Claimant's reasoning is flawed.

162. The Tribunal's alleged failure does not constitute a substantive omission beyond the scope of Article 49(2). The Tribunal's alleged omission is precisely the type of omission contemplated by Article 49(2).[290] In the *MINE v. Guinea (II)* decision, for example, the *ad hoc* committee explained that the only explicit provision dealing with a tribunal's failure to rule on every issue is Article 49(2) of the ICSID Convention and concluded that it "provides a satisfactory remedy for the case of a tribunal having failed to exercise its jurisdiction in full."[291]

163. To support its claim that the Tribunal's alleged omission was substantive and thus, according to Claimant, beyond the reach of Article 49(2), Claimant notes that the *ad hoc* committee in *MINE v. Guinea (II)* held that Article 49(2) was not the appropriate remedy for complaints that "would have required in effect that [the award] . . . be reconsidered in the light of the Tribunal's decision on the 'omitted' question.'"[292] Claimant's argument is misleading. The *MINE v. Guinea (II) ad hoc* committee explained that the remedy contemplated in Article 49(2) may not be

[289] *See* Reply on Partial Annulment at para. 86.

[290] *See, e.g.*, **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 80. *See also* **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 70.

[291] **AALA-4**, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, December 22, 1989 ("*MINE v. Guinea*, Decision on Annulment"), at para. 5.12 (emphasis added).

[292] Reply on Partial Annulment at para. 86 (*citing* **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.13).

adequate when the reasoning supporting the Award may be affected by the supplemental decision.[293] However, that situation is not applicable in present case.

164. As Perú has demonstrated throughout these proceedings, the Tribunal articulated its interpretation of the Stabilization Agreement and the relevant Peruvian legal framework in unequivocal terms. It determined that the Agreement extended solely to the specific project for which the Stabilization Agreement had been entered into—a conclusion that aligned fully with the determinations reached by the competent Peruvian administrative and judicial authorities. Therefore, as Claimant was, and is, well aware, any supplementary decision issued by the Tribunal could not and would not have altered the core reasoning underpinning the Award.

165. In fact, even assuming *arguendo* that the Tribunal had agreed with Claimant that it had inadvertently failed to rule on the merits of Claimant's claim regarding the waiver of penalties and interest on the Royalty Assessments, any supplemental decision would have inevitably mirrored the Tribunal's reasoning in the rest of the Award. In particular, the Tribunal would have issued a supplemental decision finding that there was no "reasonable doubt" regarding the interpretation of the Stabilization Agreement, the Mining Law, or its Regulation, and that Freeport, Phelps Dodge, and SMCV had no basis to believe otherwise.

166. It therefore follows that even under Claimant's interpretation of the Award, had Claimant sought to remedy the alleged omission through Article 49(2), the Tribunal would have rejected Claimant's alternative claim under Article 170 of the Tax Code—precisely why Claimant declined to pursue the remedy available to it under Article 49(2). Thus, contrary to Claimant's

[293] *See* **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.13.

allegations, any supplementary decision by the Tribunal would neither affect the Award's main reasoning nor necessitate a reconsideration of the Tribunal's analysis.[294]

167. In its Counter-Memorial on Partial Annulment, Respondent also underscored that by seeking annulment from a new committee instead of requesting supplementation under Article 49(2) from the Tribunal whose views it already knew, Claimant abused the annulment process under the ICSID Convention.[295] In its Reply on Partial Annulment, Claimant alleges that, contrary to Perú's position, the ICSID Convention does not require a party to seek clarification or supplementation under Article 49(2) before applying for annulment under Article 52, as the available post-award remedies operate independently.[296] Claimant mischaracterizes Respondent's arguments in this regard.

168. Respondent did not and does not argue that Article 49(2) is a formal prerequisite to annulment under Article 52 of the ICSID Convention. Rather, Respondent relies on Claimant's deliberate decision not to seek clarification or supplementation from the Tribunal—an omission that is telling in itself—as contextual evidence that no genuine omission existed and that no procedural unfairness could plausibly justify annulment in this case.

169. Additionally, annulling an award on the basis of an ambiguity or omission that could have been readily resolved through an Article 49(2) application would cast serious doubt on the integrity of the ICSID system. Accepting Claimant's approach would create a perverse incentive: parties would be encouraged to bypass the straightforward and expedited mechanism expressly provided for alleged omissions—Article 49(2)—and instead file annulment applications whenever they perceive, or strategically assert, that a tribunal failed to address a point. Such a

[294] *See* Reply on Partial Annulment at para 86.

[295] *See* Counter-Memorial on Partial Annulment at paras. 277-78.

[296] *See* Reply on Partial Annulment at para. 87.

practice would fundamentally distort the ICSID framework. Article 49(2) was designed precisely to avoid overburdening annulment committees with matters that the original tribunal is uniquely positioned to clarify or supplement. Jumping to resolve an alleged omission through annulment rather than through supplementation as the drafters of the ICSID Convention intended would undermine the exceptional nature of annulment under Article 52, transforming it into a routine remedy for alleged oversights—contrary to the Convention's design and drafting history.

170. The fact that Claimant was not strictly required to seek supplementation under Article 49(2) does not imply that it was barred from doing so. Claimant's complete failure even to attempt such an application is telling, and this Committee should take that deliberate choice into account and exercise its discretion to uphold the Award in full.

B. THE COMMITTEE'S DISCRETION IS AN INTEGRAL PART OF THE ANNULMENT FRAMEWORK

171. In its Counter-Memorial on Partial Annulment, Perú explained that even if the Committee were to conclude (it should not) that the Tribunal committed an error justifying annulment, it should nevertheless exercise its discretion to decline any partial annulment of the Award.[297] Respondent demonstrated that annulment committees have consistently stressed that this discretion must be applied in a manner that preserves the purpose of the annulment mechanism and upholds the binding and final nature of arbitral awards.[298] Annulment jurisprudence and the ILC have indeed recognized that annulment remains an exceptional remedy that must be approached with due regard for an award's finality.[299]

[297] *See* Counter-Memorial on Partial Annulment at Section VI.B.

[298] *See* Counter-Memorial on Partial Annulment at para. 278.

[299] *See* Counter-Memorial on Partial Annulment at para. 278.

172. Claimant alleges that Respondent's reliance on an *ad hoc* committee's discretion is misplaced because, although committees acknowledge having discretion, there is no instance in which a committee has declined to annul an award after finding that an Article 52 ground was satisfied.[300] Claimant's position is misleading.

173. *First*, Claimant cannot deny that annulment is not automatic and that annulment committees retain discretion when applying Article 52 of the ICSID Convention consistent with its object and purpose, including the preservation of finality.[301]

174. It is undisputed that annulment committees have consistently recognized that they have discretion to uphold an award even where an annulment ground is met.[302] Some committees have gone even further. For example, in *Azurix v. Republic of Argentina*, the committee noted that although it ultimately found no real contradiction in the Tribunal's reasoning, even if such a contradiction had existed, it would not have annulled the Award on that basis:

> Furthermore, even if step (4) was in genuine contradiction with the previous steps, in the Committee's view this contradiction would not justify annulment of the entire portion of the Award dealing with quantum of damages. The Committee considers it clear that steps (1) to (3) were the fundamental basis of the Tribunal's assessment of damages. If the last step in the Tribunal's reasoning contradicted this fundamental basis, it was a contradiction that was very much in Argentina's favour. The Committee has *"a certain measure of discretion as to whether to annul an award, even if an annullable error is found"*. Even if step (4) was contradictory, and for the reasons given the Committee does not think that it was, the Committee would in the circumstances of this case not be minded to annul the decision on quantum of damages on the basis of a

[300] *See* Reply on Partial Annulment at para. 91.

[301] *See*, *e.g.*, Counter-Memorial on Partial Annulment at paras. 278-79.

[302] *See* Counter-Memorial on Partial Annulment at paras. 280-81. *See also* **RALA-66**, *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Decision on Annulment, August 21, 2025, at paras. 119-20 ("Article 52(3) does not say that an *ad hoc* committee 'must' or 'shall' annul the Award, or any part thereof, when a ground specified in paragraph (1) has been established. *Ad hoc* committees have considered their discretion under Article 52(3) to require that they take account of relevant circumstances, including the gravity of the annullable error and whether or not there had been, or could have been, a material effect upon the outcome of the case. Other factors that may be taken into account include the importance of the finality of awards and fairness to both parties.").

> contradiction that was to the advantage of the party requesting annulment. The Committee therefore rejects Argentina's request for annulment under Article 52(1)(e).[303]

175. Hence, annulment jurisprudence shows that the discretion to uphold an award despite an annullable error remains fully available to committees.

176. *Second*, although committees accept that their discretion has limits, they emphasize that it turns on the seriousness and materiality of the error. As summarized by the *ad hoc* committee in *Orascom v. Algeria*: "Decisions on applications for annulment confirm that even if a ground listed in Article 52(1) exists, annulment will ensue only if the flaw has had a serious adverse impact on one of the parties."[304] The *ad hoc* committee in *Soufraki* likewise established that an annullable error that had no impact on the tribunal's decision-making process therefore will not lead to annulment, holding that "if the Committee can make clear . . . that inadequate statements have no consequence on the solution, or that succinct reasoning does not actually overlook pertinent facts, the Committee should not annul the initial award."[305] Likewise, the committee in *CEAC Holdings Limited v. Montenegro* stated that in exercising their discretion, annulment committees should consider "the gravity of the circumstances which constitute the ground for annulment and whether they had – or could have had – a material effect upon the outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both parties."[306] Thus, it is a well-established and widely applied approach amongst annulment

[303] **RALA-30**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, at para. 365 (emphasis added).

[304] *See* **RALA-26**, *Orascom v. Algeria*, Decision on Annulment, at para. 125.

[305] **RALA-6**, *Soufraki v. UAE*, Decision on Annulment, at para. 24.

[306] **RALA-56**, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, May 1, 2018, at para. 84.

committees that only material violations would justify annulment and that discretion must be exercised with regard to the gravity and material effect of the error on the outcome of the case.

177. As Perú has demonstrated, the alleged annullable errors in this case have no material impact on the Tribunal's decision and do not warrant partial annulment. The Tribunal's findings, which were consistent with the those of the relevant Peruvian agencies and courts, made clear that there was no doubt—let alone reasonable doubt—that the Stabilization Agreement did not extend to the Concentrator Project.[307] The Tribunal found that it was "convinced that the Mining Law and Regulations limit the scope of stability guarantees to specific mining projects set out in the investment program in the feasibility study."[308] It also concluded that "nothing in the Mining Law and its Regulations" provided for a reading that "stabilization agreements should apply to entire 'concessions' or 'mining units.'"[309] Thus, contrary to Claimant's contention,[310] the Tribunal already resolved the merits of whether any reasonable doubt existed regarding the correct application of the Mining Law and its Regulation—and found that none does. It is immaterial that the Award does not expressly address, in the Tribunal's analysis on the merits, either the concept of "reasonable doubt" or the specific legal test under Peruvian law required for the waiver of Claimants' claims for penalties and interest on their Royalty Assessments.

178. As explained in Sections II and IV above, Article 170 of the Peruvian Tax Code narrowly limits the waiver of penalties and interest to cases of "reasonable doubt" or conflicting administrative interpretations.[311] A waiver based on "reasonable doubt" requires a

[307] *See* Counter-Memorial on Partial Annulment at paras. 283-84. *See also supra* at paras. 141-146.

[308] **AA-1**, *Freeport* Award, at para. 717.

[309] **AA-1**, *Freeport* Award, at para. 698; *see also id*. at paras. 694, 697-814. *See also* Counter-Memorial on Partial Annulment at para. 283.

[310] *See* Reply on Partial Annulment at paras. 97-98.

[311] *See supra* at paras. 48, 141.

misinterpretation of the law or regulation that would have prevented the assessment to be issued, a subsequent official clarification by the Government correcting that misinterpretation and expressly stating that it is issued under Article 170 of the Tax Code, and publication of that clarification in *El Peruano* (Article 170.1).[312] Alternatively, a tax-payer may seek a waiver of penalties and interest where SUNAT has applied a rule inconsistently over time (Article 170.2).[313] SMCV claimed that ambiguity in the Mining Law and its Regulations excused its non-payment of the Tax and Royalty Assessments and argued in the arbitration that SUNAT should therefore have waived the related interest and penalties under Article 170.[314]

179. The Tribunal concluded that (i) Perú's interpretation and application of the Stabilization Agreement were consistent with the language of the Mining Law and its Regulations, as well as with the text of the Agreement itself (*i.e.,* limiting the scope of stability guarantees to specific mining projects described in the feasibility study); and (ii) that Perú's interpretation of the Stabilization Agreement had been consistent over time and publicly known.[315] The Tribunal also found that (iii) the scope of mining stabilization agreements was already defined under the original Mining Law, and the 2014 amendment did not modify that rule;[316] and (iv) SUNAT consistently treated mining stabilization agreements as limited to the investment project for which the agreement was entered into.[317]

180. The Tribunal's findings, thus, are impossible to reconcile with any conclusion that there was "reasonable doubt" regarding the correct application of the Mining Law or Regulations.

[312] *See supra* at paras. 48, 141.

[313] *See supra* at paras. 48, 141.

[314] *See supra* at para. 141.

[315] *See* Counter-Memorial on Partial Annulment at paras. 97-123, 897.

[316] *See* **AA-1**, *Freeport* Award, at para. 707. *See also* Counter-Memorial on Partial Annulment at para. 283.

[317] *See* **AA-1**, *Freeport* Award, at para. 716.

First, there could not have been a misinterpretation as required by the "reasonable doubt" test under Article 170, in light of the Tribunal's unequivocal conclusion that the Mining Law and its Regulations were clear. Second, there was no official clarification issued. Indeed, the Tribunal concluded that SUNAT had maintained a publicly consistent interpretation of the relevant provisions. Thus, the test under Article 170 of the Peruvian Tax Code was manifestly not satisfied as evidenced by the Tribunal's reasoning in the Award, and the Tribunal had no need to go any further.

181. Consequently, the alleged annullable errors that Claimant raises in these proceedings have no bearing on the Tribunal's reasoning or its conclusions in the Award; importantly, any finding of an annullable error would not have nor could have affected the outcome of the Award.[318] This is evident not only from the Tribunal's findings regarding the Mining Law, its Regulations, and the scope of the Stabilization Agreement, but also from the questions it posed to the parties' Peruvian tax-law experts at the hearing.

182. As noted above, the President of the Tribunal extensively questioned the experts on whether interest and penalties generally constitute taxation measures, thereby anticipating the Tribunal's conclusion on the definition of "taxation measures" under the TPA, including that interest and penalties could fall within that concept.[319]

183. Thus, even if the Committee were to find that one or more of the grounds for annulment advanced by Claimant were satisfied, the absence of any material impact of the alleged

[318] *See supra* at paras. 142-46.

[319] *See supra* at paras. 127-30, 144-46. *See also* **AA-8**, Transcr. Day 9 (President Hanefeld and Mr. Bravo) at 2689:2-13 ("PRESIDENT HANEFELD: My apologies. Now, I think you said they are not taxes, the Penalties and Interest, but, nevertheless, they qualify as Taxation Measures. Is my understanding correct?").

annullable errors on the Tribunal's decision would still justify the Committee, in the exercise of its discretion, upholding the Award.

184. In its Reply on Partial Annulment, Claimant further alleges that Perú seeks to abandon the Article 52 annulment framework altogether by arguing for discretion, asserting instead that "the standard for annulment is solely defined by each of the five Article 52 grounds."[320] Claimant contends that this is evidenced by Perú's argument that annulment is unwarranted due to the absence of an "egregious violation" of a fundamental principle—an allegedly additional and non-existent threshold.[321] Finally, Claimant maintains that, in any event, the Tribunal's purported dismissal of US $417 million in claims after affirming jurisdiction would itself be egregious.[322] Claimant's arguments are misleading and without merit.

185. Perú's reference in its Counter-Memorial on Partial Annulment to the absence of an "egregious" violation reflects the high bar built into Article 52 of the ICSID Convention, consistently recognized by *ad hoc* committees and commentators.[323] This does not abandon the Article 52 framework; it applies it as intended. An *ad hoc* committee's inherent discretion not to annul an award, even upon finding an annullable error, neither alters nor displaces Article 52—it operates squarely within its confines. To be clear, a committee's discretion is applied after it determines whether there is a ground for annulment; it is an inherent attribute of an annulment committee, aimed at ensuring that the purpose of annulment is achieved, rather than being applied mechanically, hyper-technically, or in a manner that leads to a futile outcome.[324]

[320] Reply on Partial Annulment at para. 94.

[321] *See* Reply on Partial Annulment at para. 94.

[322] *See* Reply on Partial Annulment at para. 94.

[323] *See* Counter-Memorial on Partial Annulment at paras. 279-81.

[324] *See* Counter-Memorial on Partial Annulment at para. 278.

186. Moreover, Claimant's argument assumes the very error it has the burden of proving. Claimant's assertion that dismissing US $417 million in claims is "undoubtedly egregious" presupposes that the Tribunal affirmed jurisdiction and then failed to decide all of Claimant's claims on the merits. The Award shows otherwise: the Tribunal rendered a jurisdictional determination; it did not omit to rule on the merits. Where no annullable error exists, the gravity of the alleged consequences is legally irrelevant. In any event, the Tribunal's rejection of part of the quantum sought by Claimant does not transform Claimant's dissatisfaction with the decision into a basis for annulment.

187. Finally, Claimant's assertion that the consequences of partial annulment are irrelevant is unsustainable.[325] Forcing Respondent into a futile yet costly arbitration, while imposing an undue and unjustified financial burden on Perú, are plainly relevant considerations for the Committee. As Perú explained, the Tribunal's unchallenged findings are *res judicata* and, thus, would bind any subsequent tribunal.[326] Because those findings confirm that the Mining Law and its Regulations were clear—and therefore would not support any waiver of penalties and interest—a renewed arbitration of Claimant's alleged "reasonable doubt" claims seeking the waiver of penalties and interest would inevitably reach the same result: the dismissal of Claimant's claims. Furthermore, this dispute has already spanned two decades, during which Claimant—leveraging its substantial resources—has repeatedly compelled Perú to defend the same issues before multiple fora. As noted above, the underlying arbitration was Claimant's sixth effort to challenge SUNAT's Tax and Royalty Assessments on the theory that the Stabilization Agreement covered the Concentrator, following unsuccessful proceedings before SUNAT, the Tax Tribunal,

[325] *See* Reply on Partial Annulment at para. 103.

[326] *See* Counter-Memorial on Partial Annulment at para. 285.

multiple administrative courts, and Perú's Supreme Court.[327] Hence, through these annulment proceedings, Claimant seeks to subject Perú to yet another costly proceeding, to the detriment of Peruvian taxpayers.

188. The Committee should not permit annulment to become a vehicle for endless re-litigation simply because Claimant disagrees with the Tribunal's conclusions. Allowing Claimant to do so would improperly expand the narrowly circumscribed role of annulment under the ICSID Convention—a core feature of the system that must be respected.

189. For the foregoing reasons, the Committee should exercise its discretion to uphold the Award, even if it were to find that one or more grounds for annulment have been established in this case.

VI. CLAIMANT SHOULD BE HELD LIABLE FOR ALL COSTS AND LEGAL FEES INCURRED IN THESE PROCEEDINGS

190. Claimant alleges that if it prevails in these annulment proceedings, the Committee should apply the "costs-follow-the-event" principle, awarding Claimant a full costs award, including reimbursement of the Centre's charges and its legal fees.[328] Respondent submits that if Claimant's application is dismissed, also consistent with said principle, the Committee should order Claimant to bear the full costs of the proceedings, including Perú's full legal fees and expenses together with interest.[329] However, if Claimant were to prevail on any ground for

[327] *See supra* at para. 27. *See also* **AA-1**, *Freeport* Award, at Annex A Respondent's Rejoinder on the Merits and Reply on Jurisdiction, at pp. 339-48 (PDF) (listing all of the individual instances in which Claimant sought to set aside SUNAT's assessments). The first instance court's ruling in the 2008 Royalty Assessment Case stands as the sole instance in which SMCV's legal challenges prevailed and that ruling was ultimately overturned.

[328] *See* Reply on Partial Annulment at paras. 109-10.

[329] *See* Counter-Memorial on Partial Annulment at para. 294.

annulment (it should not), Perú submits that Claimant should nonetheless bear Perú's legal costs in these proceedings.[330]

191. While this approach departs from the conventional costs-follow-the-event rule—inasmuch as Claimant would have succeeded on its Application—Respondent submits that the outcome it requests is justified in light of the particular circumstances of this case. ICSID annulment jurisprudence demonstrates that committees frequently decline to apply the costs-follow-the-event principle for applicants, even when the applicant is successful or partially successful. This has been observed in proceedings where, for example, committees have ordered that each party bear its own legal fees and that the costs of the annulment proceeding (*e.g.*, payments to ICSID) be shared equally between the parties.[331]

192. To illustrate, in *Carnegie Minerals v. Gambia*, the *ad hoc* committee ordered the parties to share the costs of the annulment process equally, with each party bearing its own legal fees, reflecting a clear departure from the costs-follow-the-event principle.[332] In particular, the committee found that the annulment was foreseeable and potentially avoidable, but Claimant chose not to take mitigating action and therefore, could not expect full reimbursement of its annulment costs.[333] In *Pey Casado v. Chile (I)*, after partially annulling the award, the committee decided

[330] *See* Counter-Memorial on Partial Annulment at para. 294.

[331] *See* **RALA-51**, *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Annulment, June 2, 2025, at para. 432; **RALA-40**, *Agility Public Warehousing Company K.S.C.P. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment, February 8, 2024, at para. 208; **RALA-52**, *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Annulment, July 7, 2020, at para. 187; **AALA-10**, *Pey Casado I* Decision on Annulment, at paras. 352, 357-58; **AALA-9**, *Fraport* Decision on Annulment, at paras. 282-86; **RALA-6**, *Soufraki v. UAE*, Decision on Annulment, at paras. 138-39; **RALA-53**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, at paras. 110-13.

[332] *See* **RALA-52**, *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Annulment, July 7, 2020, at para. 183.

[333] *See* **RALA-52**, *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Annulment, July 7, 2020, at para. 186 ("The Parties' exchanges and the Kalicki Decision indicate that the

that each party would bear its own litigation fees and the costs of the proceeding would be shared equally, citing the seriousness of Chile's annulment claims.[334] Likewise, in *MTD v. Chile,* the *ad hoc* committee decided that each party would assume their own legal fees and that the parties should split ICSID's costs equally, even where the application for annulment failed.[335]

193. In this case, even if Claimant were to prevail in its annulment application (it should not), it would be inappropriate to require Respondent to bear its own legal fees (let alone Claimant's), particularly where Respondent's role was limited to defending the Award, and any alleged annullable error—if one existed—would be attributable to the Tribunal rather than to Respondent. Moreover, these annulment proceedings were avoidable. As discussed in Section V above, Claimant chose not to pursue the available effective remedy under Article 49(2) of the ICSID Convention and, instead, unnecessarily initiated an annulment proceeding. Thus, in exercising its broad discretion over the allocation of costs and fees, the Committee should depart from the principle that costs-follow-the event and order Claimant to bear Perú's legal fees, even if Claimant prevails.

194. Claimant also argues that Respondent's own conduct in this proceeding allegedly supports an adverse costs award, because Respondent purportedly inflated costs by advancing

possibility of the case going through an annulment phase was anticipated by the Parties, and the Claimant had an opportunity to act to avoid the basis for an annulment claim by joining in the request for Ms. Kalicki to voluntarily resign, which she indicated she would have done. The Claimant had the perfect right to decline to join in the request for Ms. Kalicki's resignation, but having anticipated the possibility of an annulment request and not taking action that might have avoided that request, the Claimant cannot expect to be reimbursed for its full costs of an annulment process it might have avoided.").

[334] *See* **AALA-10**, *Pey Casado I* Decision on Annulment, at paras. 352, 355.

[335] *See* **RALA-53**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, at paras. 110-13.

irrelevant arguments and attempting to re-litigate the merits of the underlying arbitration.[336] The opposite is true in this proceeding.

195. *First*, Perú has not advanced irrelevant arguments nor has it attempted to re-litigate the merits of the underlying arbitration. Respondent devoted part of its Counter-Memorial on Partial Annulment to setting the record straight in light of Claimant's misleading and factually incorrect account of the dispute in its Memorial on Partial Annulment.[337] Accordingly, any additional costs incurred as a result of Respondent's efforts to address Claimant's misrepresentations and to clarify the Tribunal's findings are attributable to Claimant, not Respondent. Likewise, the arguments advanced by Perú are not outside of the legal framework of annulment proceedings, as Claimant alleges. As demonstrated in Sections IV and V above, Claimant mischaracterizes Respondent's position on the "serious" standard under Article 52(1)(d) of the ICSID Convention, as well as Respondent's argument concerning Claimant's abuse of process in these proceedings. Perú's position is fully consistent with, and firmly grounded in, ICSID's annulment framework.

196. *Second*, in stark contrast with Respondent's approach and conduct throughout these proceedings, Claimant put forward arguments in its Application and Memorial on Partial Annulment that it no longer pursues—and has effectively abandoned—as grounds for annulment in its Reply on Partial Annulment. In particular, Claimant no longer pursues the arguments set out in Section V of its Application and Section IV of its Memorial on Partial Annulment (*"The*

[336] *See* Reply on Partial Annulment at para. 111.

[337] *See* Counter-Memorial on Partial Annulment at Section II.

Freeport Tribunal's Other Errors").[338] Thus, it is Claimant, not Respondent, that has rendered these proceedings more inefficient and has unnecessarily inflated the costs.

197. Claimant further contends that the nature and gravity of the issues raised in Claimant's application, including serious procedural violations, further support awarding costs to Claimant.[339] This is incorrect.

198. The alleged issues raised by Claimant in its Application are not serious. Claimant's challenge is premised on the allegation that the Tribunal failed to decide an issue before it. That allegation is unfounded: as Perú has shown extensively in these proceedings, the Tribunal did rule on the issue, declining jurisdiction over Claimant's claim seeking the waiver of penalties and interest on Royalty Assessments. Even assuming, *arguendo*, that Claimant's allegation that the Tribunal found jurisdiction over Claimant's alternative claims but failed to decide them on the merits had any merit, the Tribunal would in any event have rejected Claimant's alternative Royalty Assessment claims had it addressed those arguments on the merits. Likewise, as Perú has demonstrated, Claimant was afforded an opportunity to comment on the legal reasoning underlying the Tribunal's conclusion that claims concerning penalties and interest on royalties constituted taxation measures under the TPA. Accordingly, Claimant's claims cannot be regarded as serious.

199. In any case, even assuming that the Committee considers the procedural violations Claimant alleges to be serious (it should not), it may still deny annulment and decline to award costs to Claimant. This was the approach adopted by the annulment committee in *Libananco*, on which Claimant relies in support of its argument that the alleged gravity of the issues raised by

[338] *See* Claimant's Application for Partial Annulment, September 16, 2024, at Section V, "THE FREEPORT TRIBUNAL'S OTHER ERRORS"; *see also* Memorial on Partial Annulment, Section IV, "THE FREEPORT TRIBUNAL'S OTHER ERRORS."

[339] *See* Reply on Partial Annulment at para. 112.

Claimant supports an award on costs.[340] In that case, the *ad hoc* committee considered the seriousness of the issues, but ultimately decided that each party should bear its own costs for legal representation and expenses, emphasizing that gravity alone is not determinative.[341]

200. Moreover, Claimant alleges that Respondent's request for an adverse costs order is improper, because, according to Claimant, Respondent re-argues the merits and speculates alternatives (Article 49(2), or what the Tribunal "would have" decided), which are irrelevant if Claimant were the prevailing party.[342] Claimant's position is without merit.

201. *First*, Perú has shown that Freeport's application is premised on an alleged "omission" that—if it existed at all—fell squarely within the scope of Article 49(2) of the ICSID Convention.[343] As explained above, annulment committees have held that where a party complains of an omitted decision, the appropriate remedy is a request for a supplementary decision, not annulment.[344] Freeport's deliberate choice not to pursue that remedy under Article 49(2), despite knowing the Tribunal's position on the underlying issues, is a procedural strategy, not a merits argument, and properly informs the Committee's costs analysis.

202. *Second*, Perú's observation that the Tribunal indeed decided on the substance of the issue related to the waiver of penalties and interest on Royalty Assessments—or, alternatively, that any supplementary decision would necessarily have resulted in dismissal—goes to the seriousness and procedural relevance of the alleged defect, not to a hypothetical re-litigation of the merits. As previously explained, even assuming *arguendo* that such an omission occurred, a supplemental

[340] *See* Reply on Partial Annulment at para. 112.

[341] *See* **AALA-21**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment, May 22, 2013, at para. 226.

[342] *See* Reply on Partial Annulment at para. 113.

[343] *See supra* at paras. 156-64.

[344] *See supra* at paras. 158-60.

decision would not have affected the Award's reasoning or outcome.[345] This underscores that Claimant's choice to pursue annulment, rather than to resolve the alleged concern through less extreme measures, constitutes an abuse of process, an element the annulment Committee should consider in allocating costs.

203. *Third*, Claimant's suggestion that costs must automatically follow the event if annulment is granted misstates the law. Annulment committees enjoy broad discretion in costs allocation and may take into account the specific circumstances of the case, like the parties' conduct and the necessity of the proceedings.[346] A prevailing party is not immune from an adverse or neutral costs order award if it has unnecessarily escalated the dispute or bypassed available, less extreme remedies.

204. For the reasons set out above, if Claimant's Application is dismissed, Respondent respectfully requests that the Committee order Claimant to bear the entirety of the costs of these proceedings, including Perú's full legal fees and expenses, together with interest. Moreover, even if Claimant were to succeed on any ground for annulment, the existence of particular circumstances in this case warrants that the Committee nonetheless order Claimant to bear Perú's legal fees incurred in these proceedings.

VII. RELIEF REQUESTED

205. The claims submitted by Claimant in its Memorial on Partial Annulment and in its Reply on Partial Annulment are unfounded and do not belong in an annulment proceeding.

[345] *See supra* at paras. 165-66.

[346] *See* Counter-Memorial on Partial Annulment at para. 287. *See also*, *e.g.*, **RALA-51**, *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Annulment, June 2, 2025, at para. 426; **RALA-46**, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, November 17, 2022, at paras. 328-29.

Claimant is attempting to reargue issues that have already been decided, with full reasoning, in accordance with due process, and within the Tribunal's authority.

206. Accordingly, the Republic of Perú respectfully requests that the *ad hoc* Committee reject Claimant's application for partial annulment in its entirety and order Claimant to bear all costs and fees related to this annulment proceeding, including ICSID's charges, the expenses and fees of the *ad hoc* Committee, and Perú's legal representation fees.

Respectfully submitted,

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APPENDIX A
List of Cases Cited by Respondent in Its Counter-Memorial on Partial Annulment on the Right to Be Heard (at paragraphs 225-230)

Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee[3]	**¶91** The real question is whether, by formulating its own theory and argument, the Tribunal goes beyond the "legal framework" established by the Claimant and Respondent.	**¶91** As for the Tribunal itself, when in the course of its deliberations it reached the provisional conclusion that the true legal basis for its decision could well be different from either of the parties' respective arguments, it was not, subject to what will be said below, in principle prohibited from choosing its own argument. Whether to reopen the proceeding before reaching a decision and allow the parties to put forward their views on the arbitrators' "new" thesis is rather a question of expedience. The real question is whether, by formulating its own theory and argument, the Tribunal goes beyond the "legal framework" established by the Claimant and Respondent. This would for example be the case if an arbitral tribunal rendered its decision on the basis of tort while the pleas of the parties were based on contract. Within the dispute's "legal framework", arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a "serious departure from a fundamental rule of procedure." Any other solution would expose arbitrators to having to do the work of the parties' counsel for them and would risk slowing down or even

[1] *See* Applicant's Reply on Annulment, December 12, 2025, at n. 156.

[2] Text highlighted in grey was quoted by Claimant in its Reply on Partial Annulment.

[3] **RALA-34**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, May 3, 1985 (Unofficial English Translation).

APPENDIX A
List of Cases Cited by Respondent in Its Counter-Memorial on Partial Annulment on the Right to Be Heard (at paragraphs 225-230)

Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
		paralyzing the arbitral solution to disputes.
Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award[4]	**¶66** accepting in principle that a serious departure from a fundamental rule of procedure would occur if the applicant "was not offered the opportunity to address the issue of the appropriate rule of interest."	**¶66** The Applicant submits that it was not offered the opportunity to address the issue of the appropriate rule of interest and thus it was deprived of its right to be heard. **¶67** The record shows, however, that Wena requested on various occasions, and in particular in the relief claimed in its memorials, an award of interest at an appropriate rate, from April 1, 1991 until the date of effective payment. The record also shows that the applicant was invited to reply to Wena's claims and arguments, thus including the matter of interest. **¶68** The question raised appears to be rather whether the Applicant's objection is pertinent in respect of the award of compound interest, which was not specifically claimed by Wena nor addressed by the Applicant and, to the Committee's knowledge, not discussed at the hearings before the Tribunal. **¶69** Both Parties took very broad and undetermined positions in respect of the fixing of interest, basically calling for the fixing of "appropriate" interest. Both Parties admit that the allocation of compound interest is, albeit not dominant, at least one of the methods followed by international tribunals. Therefore, both parties must have been aware

[4] **RALA-8**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award, February 5, 2002.

APPENDIX A
List of Cases Cited by Respondent in Its Counter-Memorial on Partial Annulment on the Right to Be Heard (at paragraphs 225-230)

Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
		of the possibility that the Tribunal, referring to international practice, might consider compound interest as "appropriate" in the particular case. **¶70** In the light of this, the Committee cannot accept the complaint that the Tribunal fixed interest by reference to a method not included in Wena's claim and on which the Applicant would have no opportunity to express its views.
Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I), ICSID Case No. ARB/97/3, Decision on Annulment (*Vivendi I*)[5]	**¶85** finding that there was no serious departure from a fundamental rule of procedure only because the "Tribunal's analysis of issues was clearly based on the materials presented by the parties and was in no sense *ultra petita*."	**¶84** Claimants contend the Tribunal's decision came unannounced, and that they had no opportunity to present arguments on the decision to dismiss their claim on the merits on grounds related to Article 16(4) of the Concession Contract. It may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d) of the ICSID Convention. In fact, the Tribunal had already determined that the questions of jurisdiction and merits were closely linked, and it had joined the two. Moreover, in its questioning and especially its request for post-hearing briefs, the Tribunal clearly indicated that it had concerns as to how to reconcile Article 8 of the BIT and Clause 16(4) of the Concession Contract.

[5] **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002.

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Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
		¶85[6] From the record, it is evident that the parties had a full and fair opportunity to be heard at every stage of the proceedings. They had ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing itself was meticulously conducted to enable each party to present its point of view. The Tribunal's analysis of issues was clearly based on the materials presented by the parties and was in no sense *ultra petita*. For these reasons, the Committee finds no departure at all from any fundamental rule of procedure, let alone a serious departure.
Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment (*Vivendi II)*[7]	**¶254-255** In fact, the committee found no denial of the right to be heard because the valuation approach adopted by the tribunal "was originally the method proposed by Respondent."	**¶80**[8] The Tribunal did not accept the valuation methods proposed by the parties. Instead it used a third method of its choice, the investment value of the concession, which, according to the Tribunal, seemed to offer the closest proxy of the compensation it wished to award. **¶254** First, the *ad hoc* Committee wishes to deal with the argument that the methodology and the details of the damage calculation were flawed, in which connection each of Article 52(1) (b), (d), and (e) were invoked by Respondent. **¶255** In the view of the ad hoc Committee, the 'amounts invested' approach

[6] Not cited by Respondent in its Counter-Memorial on Partial Annulment.

[7] **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010.

[8] Not cited by Respondent in its Counter-Memorial on Partial Annulment.

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Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
		adopted by the Tribunal was well within the margin of appreciation of the Tribunal. It was originally the method proposed by Respondent and reduced the claim for damages considerably. As to the final calculation, the Tribunal relied on the testimony of Mr. Régis Hahn supported by expert testimony which found that CAA's debt to Vivendi was US$75 million in 2005 (besides an equity investment of US$30 million). The Tribunal stated within its authority when it prefered that testimony to that of others. The expert evidence given was not inadequate and the reasons given were not insufficient. **¶256** In the matter of interest and its calculation, the *ad hoc* Committee considers that no *ultra petita* exists, even with regard to the issue of determining the starting date for the calculation of the interest due to the Claimants, since the allocation of interest, like the evaluation of damages, falls within the discretionary power of the Tribunal in the light of all relevant circumstances of the case. There is no indication whatever, that this discretion was abused. **¶257** Accordingly, the failure to express specific reasons in this respect cannot be considered a sufficient ground for annulment under Article 52(1)(e), as the reasons stated within the context of the Tribunal's approach to the evaluation of the damages to be compensated may be understood to cover also the issue of interest.

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Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I), ICSID Case No. ARB/97/3, Award II (*Vivendi II* Award)[9]		**¶8.1.5** During the course of the oral hearing, the Tribunal noted the absence in Claimants' submission of an alternative to the lost profits claim and the apparent reliance on only CAA's alleged losses. It also invited Claimants to direct it to the portions of the existing record that were relevant to possible alternative approaches to calculating damages (*eg* liquidation value, book value, replacement value or amounts invested) that had been noted by Respondent. Towards the end of Day 11, in response to a request from Claimants for clarification as to its queries, the Tribunal's President responded as follows: "*PRESIDENT ROWLEY:... if a claim is asserted by Vivendi for its wasted investment, it can only be asserted based on the evidence in these proceedings, and so we would need to have brought to our attention the evidence that is in these proceedings. That's what I mean. It was not an invitation to seek to introduce new evidence at this stage of the matter.* *MR PRICE: Thank you. You have clarified it*." **¶8.1.6** Despite this clarification, on 23 August 2006, after the conclusion of the hearing on the merits, Claimants sought to introduce new evidence to support alternative approaches to the calculation of damages. **¶8.1.7** Respondent objected to the introduction of such evidence by Claimants

[9] **RALA-59**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award II, August 20, 2007. Not cited by Respondent in its Counter-Memorial on Partial Annulment. *See* discussion at paras. 106-09 of Rejoinder on Partial Annulment.

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		at this stage of the proceeding. In Respondent's view, even if the Tribunal had sought further discussion from the parties as to the effects of the various methods of calculation on Claimants' damages claim, the record was clear that no new evidence was to be introduced. **¶8.1.8** Claimants responded by letter dated 1 September 2006: "to be sure", they conceded, "there are facts on the existing record that the Tribunal can use for that purpose". Nevertheless, Claimants requested that Tribunal exercise its discretion to accept further evidence to give the Tribunal the "full picture" relevant to alternative calculation methods. **¶8.1.9** For reasons elaborated in its letter to the parties dated 15 September 2006, attached hereto as Schedule A, the Tribunal declined to exercise its discretion to accept Claimants' new evidence. Accordingly, we have disregarded the fresh evidence Claimants provided in their 25 August 2006 Post-Hearing Brief as well as argumentation therein contained based on that fresh evidence. Claimants' arguments regarding compensation which were not based on fresh evidence were admitted. **¶8.2.9** Claimants' principal claim for compensation is based on the "fair market value" of the concession established by a lost profit analysis. Respondent did not seriously contest that fair market value could be an appropriate basis upon which to award damages for breach of the Treaty, but challenged Claimants' methodology and calculations.

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		¶8.2.11 On the facts before us, and having regard to the parties' approaches to damages, the Tribunal is of the view that it is appropriate to assess compensation, at least in part, based on the fair market value of the concession. **¶8.3.1** Claimants contend that a DCF analysis is recognised as the preferred approach to valuation in modern practice where projected cash flows are reasonably capable of determination and are not speculative. They say there was nothing speculative about the concession's ability to operate, to provide services, or to attract customers; this was not a start-up enterprise or a project yet to be constructed. The provision of water and sewage services in Tucumán was, and is today, a revenue generating going concern. They point to CAA's achievement of a 65% recovery rate on its first invoices as demonstrative of the reasonableness of the Concession Agreement's projected 89-90% collection rate. Other utilities in Tucumán were shown to have collection rates about 90% and Ms. Perrier testified as to the low economic risk of water services concessions. CGE's long and diverse global experience was cited as evidence that the 11.52% projected rate of return was conservative and likely to be achieved; why otherwise would CGE have agreed the terms of the concession. **¶8.3.2** Respondent argued strongly against the appropriateness of a DCF valuation for the Tucumán concession, contending, *inter alia*, that DiPOS was never a genuine going concern, there was no proven record of profitability and that Claimants' approach entirely ignores the

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		substantial risk associated with the privatisation by wrongly assuming the Concession Agreement's income stream to be a minimum, rather than a maximum. **¶8.3.12** As already noted, Claimants initially elected to rest their valuation case on lost profits. Until their closing argument and Post-Hearing Brief, Claimants did not advance or rely upon generally accepted alternative means of calculating fair market value, such as "book value" - the net value of an enterprise's assets, "investment value" - the amount actually invested prior to the injurious acts, "replacement value" - the amount necessary to replace the investment prior to the injurious acts, or "liquidation value" - the amount a willing buyer would pay a willing seller for the investment in a liquidation process. These alternative approaches were addressed at Days 10 and 11 of the hearing on the merits. In their Post-Hearing Brief, Claimants examined the alternative methods and pointed to the parts of the evidentiary record relevant to the determination of amounts invested. **¶8.3.14** Respondent's arguments in favour of "book" value are unacceptable for reasons explained at 8.3.7 above, and neither of the parties provided any evidence on "liquidation" or "replacement" value. **¶8.3.15** As to "investment value", Respondent conceded in the event of finding of liability, that: "*Alternatively, the Claimants may seek to be put in the position in which they would have been had they never agreed to enter into the Concession Agreement: the return to them of their investment in the Concession*."

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		¶8.3.16 As foreshadowed above, the evidence of what Claimants invested in the concession is incomplete - it not having been put forward initially by Claimants as an alternative to its lost profits analysis. Nevertheless, there is useful evidence on the record and it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science. **¶8.3.17** In ascertaining the amount of Claimants' investments the Tribunal accepts that CAA was initially capitalised in the amount of US$30 million. We also accept that subsequently, CGE/Vivendi were required to invest in the concession to cover its operational deficits. Vivendi had paid in, by way of loan to CAA, an additional US$21.5 million at the end of November 1997. Vivendi continued to underwrite CAA's ongoing losses thereafter and Mr. Hahn, CAA's Administrative and Financial Director since September 1997 and Vice Chairman at the time of the hearing, testified that CAA's accounts at the end of 2005 showed a debt owing from CAA to Vivendi of approximately US$75 million. He noted that Vivendi was continuing to finance CAA as of the date of the hearing, which indicated to us that CAA's debt to Vivendi at the date of the oral hearing almost certainly exceeded US$75 million. Neither Ms. Perrier's nor Mr. Hahn's testimony was contested or contradicted on these points.
Caratube International Oil Company LLP v. Republic of Kazakhstan (I), ICSID Case No. ARB/08/12, Decision on the	**¶94** "[T]ribunals do not violate the parties' right to be heard if they ground their decision on the legal reasoning not specifically advanced by	**¶90** Applicant identifies the right to be heard as a fundamental procedural rule, and submits that the Tribunal used in its Award legal reasoning which had never been argued by or disclosed to the parties. Applicant

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Annulment Application of Caratube International Oil Company LLP *(I)*[10]	the parties, provided that the tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal."	avers that by so doing the Tribunal violated its procedural rights. Respondent disagrees and argues that the parties' right to be heard does not prevent a tribunal from adopting its own reasoning or even raising new arguments. **¶91** What the parties are discussing is, in fact, the relationship between two legal principles: - the parties' right to be heard, and - the tribunal's right (or even duty – a tribunal confronted with inept pleadings cannot content itself with the less implausible of the parties' arguments) to apply the principle *iura novit curia*. **¶92** *Ad hoc* committees have a number of times been confronted with the issue whether tribunals can *sua sponte* raise legal arguments which had not been pleaded by the parties. Schreuer has summarized the findings by saying that committees "have uniformly rejected the idea that the tribunals in drafting their awards are restricted to the arguments presented by the parties". **¶93** But this conclusion is subject to an important *caveat*: a tribunal (and also a committee) is only free to adopt its own solution and reasoning without obligation to submit it to the parties beforehand, if it remains within the legal framework established by the parties. And *vice versa*: if a tribunal prefers to use a distinct legal framework, different from

[10] **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014.

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		that argued by the parties, it must grant the parties the opportunity to be heard. As the committee in *Klöckner I* held: "The real question is whether, by formulating its own theory and argument, the Tribunal goes beyond the "legal framework" established by the Claimant and Respondent. This would for example be the case if an arbitral tribunal rendered its decision on the basis of tort while the pleas of the parties were based on contract". **¶94** Consequently, tribunals do not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically advanced by the parties, provided that the tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal. **¶113**[11] Applicant also argues that the Tribunal seriously departed from a fundamental rule of procedure by depriving CIOC of its right to be heard, in violation of Article 52(1)(d) of the Convention. This is because the objection applied by the Tribunal was not raised by Respondent. **¶114**[12] The record shows that Claimant in its Memorial based the Tribunal's jurisdiction on the satisfaction of the foreign nationality test under

[11] Cited by Respondent in its Counter-Memorial on Partial Annulment at para. 234.

[12] Cited by Respondent in its Counter-Memorial on Partial Annulment at para. 234.

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		Article VI(8) of the BIT, while in its Counter-Memorial Respondent based its objections to jurisdiction exclusively on the requirement of a *bona fides* investment under Article 25 of the ICSID Convention. **¶115**[13] As Applicant sees it, the Tribunal did not merely restate unclear and ambiguous objections raised by Respondent, but rather relied on new legal provisions and arguments which had not been raised by Respondent in the proceedings. **¶116**[14] Such new legal provisions were not shared by the Tribunal during the proceedings and so Claimant was not heard on the objection ultimately applied by the Tribunal and was deprived of the opportunity to correct the misapplication of the law by providing the Tribunal with appropriate arguments. **¶177**[15] Since Article VI(8) of the BIT contains the agreement between the United States and Kazakhstan which is necessary to give effect to the nationality exception in Article 25(2)(b) of the Convention, there is a very close link between both provisions. Whilst it is true that the debate between the parties essentially concerned the issue whether the Tribunal had jurisdiction under Article 25 of the Convention, it is equally accurate that both parties also referred to the BIT.

[13] Cited by Respondent in its Counter-Memorial on Partial Annulment at para. 234.

[14] Cited by Respondent in its Counter-Memorial on Partial Annulment at para. 234.

[15] Not cited by Respondent in its Counter-Memorial on Partial Annulment.

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		¶178[16] The Committee thus finds that the basis of Claimant's claims was the existence of an investment protected under Article 25(2)(b) of the Convention in conjunction with Article VI(8) of the BIT. Although Respondent mainly relied on arguments derived from Article 25 of the Convention, it must have been clear to Claimant that the provisions of the Convention and the BIT were closely linked and in reality inseparable as far as the scope of protection of investments was concerned. Article 25(2)(b) of the Convention and Article VI(8) of the BIT were therefore both part of the legal framework on the basis of which the jurisdictional issue would be examined and decided by the Tribunal. **¶179**[17] It follows that the Tribunal's reasoning in the Award, which was mainly based on Article VI(8) of the BIT, did not involve any new element extraneous to the parties' debate in their submissions to the Tribunal. On the contrary, Claimant had every reason to expect that Article VI(8) of the BIT would be part of the relevant legal considerations in the case and Claimant must be considered to have had full opportunity to comment on the repercussions of Article VI(8) in its submissions to the Tribunal.
El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee	**¶284** finding no serious departure from a fundamental rule of procedure where Argentina had "ample opportunity to defend	**¶284** From the transcribed citations, the Committee concludes that during the arbitration proceedings the Parties did discuss whether **Argentina's** measures constituted a departure from the regulatory

[16] Cited by Respondent in its Counter-Memorial on Partial Annulment at para. 234.

[17] Cited by Respondent in its Counter-Memorial on Partial Annulment at para. 234.

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on the Application for Annulment of the Argentine Republic[18]	itself and counter all the arguments brought by the Claimant and its experts."	legal framework. The **Tribunal** analyzed each measure separately, but in various paragraphs of the **Award** it referred to the general effects on the legal framework to reach the conclusion expressed in paragraph 519 of the Award. It seems to the Committee that the **Tribunal** formed its opinion in the course of the written and oral submissions and discussions of the Parties during the proceedings, assisted by several expert opinions. **Argentina** was fully involved in these discussions, had ample opportunity to defend itself and counter all the arguments brought by the Claimant and its experts. The Committee has carefully studied the Parties' post-hearing submissions and confronted them with the submissions made during the original proceedings. It found that the substance of the problem which finally led to the **Tribunal's** reasoning and decision had been exposed: that the cumulative effect of a series of measures which might be inoffensive and legal one by one may alter the global situation and the legal framework in a way that the investor could not have legitimately expected. The **Tribunal** concluded from the debate that the combined measures caused an illegal violation of the FET standard even when any one of those measures, appraised individually, were legal. It is not for this Committee to determine if the **Tribunal's** reasoning is correct. In the process of determining whether the Tribunal disrespected a fundamental rule of procedure, the Committee has to appraise if the **Tribunal** did not allow the Respondent to present its argument that a group of legal measures, taken together, cannot amount

[18] **RALA-41**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, September 22, 2014.

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		to an illegal breach of the **BIT**. The Committee is convinced that **Argentina** was not prevented from developing this argument. The fact that the **Tribunal** used the term "creeping" with the intention to summarize its line of reasoning by the use of such expression does not change the Committee's mind. The term was a way for the tribunal to synthesize its reasoning, which did not add to the **Tribunal's** argumentation. It was based on material that was introduced into the proceedings and legal considerations that were discussed in substance. **¶285**[19] The **Tribunal** decided to enhance the expression of its considerations using, with respect to fair and equitable treatment, a concept typical of expropriation; it did not need to have recourse to that academic process in order to justify its reasoning but decided to do it that way. This procedure does not harm the Respondent at all, who defended vigorously throughout the arbitration proceedings, each of the measures it adopted and the effects of those actions on the overall legal environment in which the Claimant made its investment. No matter how it is looked at, the Tribunal's idea of the cumulative effects of the actions of the Respondent is simply a way to express the reasoning that led to its conclusions and, as such, cannot be a ground for annulment of the **Award**.
Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I), ICSID Case No. ARB/12/22, Decision on	**¶270** finding that a serious departure would occur if a tribunal decides an issue within briefing that "has not been extracted from what was proposed by the parties."	**¶218** Regarding the right to present one's case, this Committee understands and will therefore conduct the corresponding analysis based on this criterion, as others have done, that such right may be violated for any of the Parties if the Tribunal surprises any of them with issues that have

[19] Not cited by Respondent in its Counter-Memorial on Partial Annulment.

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the Application for Annulment[20]		not been invoked or anticipated in the proceedings. Likewise, the Committee understands that in order to determine issues that have been raised or anticipated during the proceedings, the Tribunal is at liberty to adopt any decision it **deems correct, provided that it** remains within the regulatory framework that has been defined by the parties. This Committee has decided to follow the line of reasoning put forward by the *ad hoc* committee in the case of *Caratube v. Kazakhstan,* which stated the following: *"[T]ribunals do not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically advanced by the parties, provided that the tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal."* **¶270**[21] With regard to the alleged impossibility of debating the thesis or theses adopted by the Tribunal in the Award, this Committee agrees with Venezuela that the ICSID Convention contains no provision requiring a tribunal to submit the Award, or a final draft of it, to the parties for comment. This contrasts with other dispute-resolution systems—generally those operating between States—in which such a procedural stage does exist. The Committee notes, however, that an exception to this rule may arise where the Tribunal introduces an issue that has not been extracted from what was proposed by the parties, thereby creating a need to give both parties an opportunity to comment

[20] **RALA-25**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision on the Application for Annulment, February 2, 2018.

[21] Not cited by Respondent in its Counter-Memorial on Partial Annulment.

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		on that issue. In the present case, however, there is no indication that any such situation arose in the arbitral proceedings that led to this annulment application.
Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Annulment[22]	**¶127** "a tribunal does not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically argued by the parties, insofar as the tribunal's reasoning can be fitted within the legal framework argued during the procedure."	**¶125** As to the first point, the Committee observes that Article 48(3) of the ICSID Convention states that "[t]he award shall deal with every question submitted to the tribunal, and shall state the reasons upon which it is based." This provision does not envisage that the Award shall address every argument, piece of evidence, or fact presented by the Parties. A Tribunal is therefore not obliged to give express consideration to every argument or issue raised by the Parties to guarantee their right to be heard. As concluded by the *Azurix* committee, "it is not a serious departure from a fundamental rule of procedure for a tribunal to decline to consider an issue that it considers to be irrelevant, merely because one of the parties considers it to be important." Nonetheless, the Committee considers that a failure to consider a question or a point raised by a Party that is critical to the Tribunal's decision may, in certain cases, amount to a serious departure from a fundamental rule of procedure. **¶127**[23] A similar position has been adopted by the *Klöckner I* and *Caratube I* committees, concluding that a tribunal does not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically argued by the parties, insofar as the tribunal's reasoning can be fitted within the legal framework argued during the procedure.

[22] **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125.

[23] Not cited by Respondent in its Counter-Memorial on Partial Annulment.

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		In case that the tribunal prefers to use a distinct legal framework, or to bring attention to other issues not raised by the parties, the tribunal shall give an opportunity to the parties to comment on such new legal framework. Likewise, a decision may be considered *ultra petita* when a tribunal decides on issues that were not pleaded by the parties.
Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35, Decision on Annulment[24]	**¶146** (cited, not quoted)	**¶144** The Parties do not dispute that the right to be heard belongs to the category of the fundamental rules of procedure. In accordance with the right to be heard, the parties shall be given the opportunity to present all the arguments and all the evidence that they deem relevant and to respond to arguments and evidence submitted by their opponent. In particular, each party must be given the opportunity to address every formal motion before the tribunal and every legal issue raised by the other party. The purpose of various provisions of the ICSID Arbitration Rules is to provide for and guarantee this right. **¶145** The implications of this right are, however, sometimes disputed. For instance, *ad hoc* committees have had to deal with the question of whether there was a violation of a party's right to be heard if the tribunal had based its decision on a theory that the parties had not fully discussed. **¶146** The *ad hoc* Committee in *Caratube* v. *Kazakhstan* stated that: [T]ribunals do not violate the parties' right to be heard if they ground their decision on the legal reasoning not specifically advanced by the

[24] **RALA-26**, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment, September 17, 2020.

APPENDIX A
List of Cases Cited by Respondent in Its Counter-Memorial on Partial Annulment on the Right to Be Heard (at paragraphs 225-230)

Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
		parties, provided that the Tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal. **¶147** That Committee also observed that "surprise [as far as the legal solution is concerned] does not give rise to a ground for annulment". In support of its view, it relied on the statement of the *ad hoc* Committee in *Vivendi* v. *Argentina (I)* that: It may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d) of the ICSID Convention. **¶148** This Committee considers this approach reasonable and well-grounded in international judicial practice.
Niko Resources(Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX), ICSID Case No. ARB/10/18, Decision on	**¶183** rejecting the applicants' argument that they were not afforded an "opportunity to 'present their clams or defenses . . .'" on the basis that there was no allegation that there were "new allegations or evidence that merited further submissions."	**¶77** The Parties discussed to what extent a tribunal may adopt its own solution and reasoning without providing the parties an opportunity to submit their observations beforehand. The Committee considers that the parties' right to be heard is not violated if the tribunal bases its decision on legal reasoning that was not specifically argued by the parties, as long as its reasoning can be aligned with the legal framework established by the parties. However, if the tribunal chooses a different legal framework, it shall give the parties an opportunity to comment. These views have also been expressed by other *ad hoc*

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Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
Annulment[25]		committees. **¶183**[26] The Applicants' assertion that "the last submission on the request for provisional measures before the Tribunal rendered its decision was filed by Niko (the party requesting the provisional measures), not by BAPEX and Petrobangla," does not show that the Tribunal failed to afford the Applicants an opportunity to "present their claims or defenses and to provide all relevant arguments and evidence to support them." The sequence of pleadings suggests that Niko's last submission of 13 July 2016 was made in response to BAPEX's and Petrobangla's submission of the day before. In any event, the Applicants do not claim that, in its last submission, Niko introduced new allegations or evidence that merited further submissions from them.
Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Annulment[27]	**¶80** "each party must have the opportunity to address every formal motion before the tribunal and every legal issue raised by the case"	**¶80** The parties agree that the right to be heard is a fundamental rule of procedure. The ICSID Arbitration Rules reflect this right throughout. The right to be heard affords the parties the opportunity to present all the arguments and all the evidence that they deem relevant and to respond to arguments and evidence submitted by their opponent. In particular, each party must have the opportunity to address every formal motion before the tribunal and every legal issue raised by the case. The principal human rights instruments also accept the right to present one's case as an essential element of a fair hearing.

[25] **RALA-16**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX)*, ICSID Case No. ARB/10/18, Decision on Annulment, October 12, 2023.

[26] Not cited by Respondent in its Counter-Memorial on Partial Annulment.

[27] **RALA-5**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015.

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List of Cases Cited by Respondent in Its Counter-Memorial on Partial Annulment on the Right to Be Heard (at paragraphs 225-230)

Annulment Committee Decision	Text cited/quoted by Claimant in its Reply[1]	Text cited/quoted by Respondent in its Counter-Memorial and complete quotes[2]
		¶82 The right to be heard refers to the opportunity given to the parties to present their position. It does not relate to the manner in which tribunals deal with the arguments and evidence presented to them. In particular, the fact that an award does not explicitly mention an argument or piece of evidence does not allow the conclusion that a tribunal has not listened to the argument or evidence in question. A refusal to listen, amounting to a violation of the right to be heard, can only exist where a tribunal has refused to allow the presentation of an argument or a piece of evidence. Therefore, absence in an award of a discussion of an argument or piece of evidence put forward by a party does not mean that a tribunal has violated the right to be heard.